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.

Yellow highlights portions Constellation/Exelon moves to strike, but PSC does not.

Blue highlights portions PSC moves to strike, but Constellation/Exelon does not.

Index No. 07242-16

PETITIONERS' MEMORANDUM OF LAW IN REPLY AND IN FURTHER SUPPORT OF THE AMENDED VERIFIED ARTICLE 78 PETITION

(30 minutes)

PETITIONER'S MEMORANDUM OF LAW IN REPLY AND FURTHER SUPPORT OF THE AMENDED VERIFIED PETITION AND COMPLAINT

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PRELIMINARY STATEMENT

The Public Service Commission ("PSC") started the Clean Energy Standard proceeding in 2015. Its chief purpose was to significantly increase the amount of renewable energy produced in New York State to meet the ambitious goals of a 50% renewable energy by 2030. Petitioners have been engaged throughout the duration of the process and fully support the State's Renewable Energy Vision and its effort to develop a Clean Energy future. Petitioners were surprised by the dramatic changes put forth by the PSC at the end of the process. The new proposal, which was adopted, changed the purpose of the Tier 3 from one of public benefit, to one to provide private profit. Petitioners assert that Tier 3 thwarts and frustrates the vision laid out by the State for the energy market of the 21st century. By the time the process ended, the public was left with no choice but to seek judicial redress. The Tier 3 Order locks New York into a scheme that cannot be altered.

This is a simple matter of an agency improperly promulgating a rule, and although we tried to be as succinct as possible, the many improprieties and legal violations require individual explanation to unravel the complicated issues of energy generation and pricing of the public subsidy being challenged. The case challenges the lawfulness of the PSC's Tier 3 Order that provides a $7.6 billion subsidy to four upstate nuclear generating reactors for a 12-year period, paid for by every New York retail electricity customer without exception. [1]

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[1] The PSC does not refute this number. DPS ZEC Calculations to the July 8 Response as Constellation/Exelon claims "Petitioners own invention." Constellation MOL at 25.

After years of well considered State actions, the resulting Reforming the Energy Vision and State Energy Plan necessitated the PSC to develop a Clean Energy Standard to transition the New York State electricity market. Then, on November 2, 2015, Entergy Corp. announced that it would retire the James A. FitzPatrick Nuclear Power Plant at the end of its current fuel cycle, substantially prior to the end of its operating license in 2034, due to economic unsustainability, and due to the increasing financial risks to maintain its aging fleet of industrial nuclear reactors. One month later, Governor Cuomo directed that the PSC take action to provide for continued operations of "upstate nuclear facilities" by creating a new standard "separate and distinct from the renewable energy goal."[2]

In response to the Governor's directive, without any express or implied legislative authority, and in violation of statute, the PSC promulgated Tier 3. At the time of Tier 3's consideration and enactment, the State Energy Plan, had *eliminated* nuclear energy from playing *any* role in addressing climate change due to its environmental problems and costs.

The continuation of Tier 3 hinged on Constellation/Exelon buying FitzPatrick and FitzPatrick's participant in the Tier 3 program. And the sale of FitzPatrick hinged on the Tier 3 being promulgated to guarantee "bonus revenues" to Constellation/Exelon. These FitzPatrick - "poison pill" - contingency provisions fly in

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[2] *See Parker Aff at Exhibit F and* R. 15-E-0302-80.

the face of the stated purpose of the Clean Energy Standard, proving that the actual purpose of Tier 3 is for private benefit, and was not necessitated by public interest.[3]

Even Respondents Constellation/Exelon agree with Petitioners that the Order provides a even greater bonus then they asked for, or had been contemplated. The company commented that cost of operations was the least costly way to keep the nuclear reactors operational and preserved the purported environmental benefit. (R. 0302-224-B at 11).

Yet the PSC abandoned its well-established "going forward" cost of operations valuation model, and instead concocted a first-in-the-nation public subsidy based on the Social Cost of Carbon. The Social Cost of Carbon was established to allow a comparison and evaluation of programs to determine how much money would be saved in the future by the avoiding carbon emissions, but was misapplied by the PSC when it was used to provide a payout of the money that could be saved by avoiding the emissions, a purpose never intended for the metric. The Social Cost of Carbon was promulgated to inform government policy. It was never intended to impose financial penalties on the public.

Despite this, the PSC based Tier 3 on its view of the Social Cost of Carbon and in doing so dramatically increased the price tag of the public nuclear subsidy, without providing any additional public benefit.

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[3] In their joint statement announcing the Fitzpatrick sale, Constellation and Entergy state, "The New York State's Public Service Commission's approval of the Clean Energy Standard (CES) was necessary to facilitate the [Fitzpatrick purchase] agreement." (See *Parker Aff.* at Exhibit W).

Tier 3 is also irrational because it is tied to the unsubstantiated idea that every megawatt of electricity currently being produced by nuclear reactors can only be replaced by fossil fuel generation – arbitrarily ignoring that new renewable sources and increase efficiency will come online and expand more rapidly, as a result of the Clean Energy Standard. The "bonus revenue" to pay for continued nuclear reactor operation generation in the New York State electricity market crowds out new renewables, and jeopardizes the purpose of the State Energy Plan and the Order, itself, because it discourages investment in, and transition to, a sustainable clean energy market-based economy for the 21st century.

Finally, when the PSC surprisingly revealed this new scheme, the public was only allowed fourteen (14) days in which to meaningfully consider and comment on the material changes which resulted in increased costs of between147% and 1,636%.

By abandoning the principal of parity between renewables and nuclear energy, the PSC put its thumb on the scale of the market, favoring aging nuclear reactors over increasing new renewable technologies, the actual stated purpose of the Clean Energy Standard. The Order provided that the Tier 3 subsidy is approximately $482.5 million per year, while Tier 1 subsidy is only approximately $80 million per year.[4]

Then in violation of the State Administrative Procedures Act due process statutory requirements, only eight (8) days after the close of public comment, the PSC adopted Tier 3 and violated the public's constitutionally protect due process rights of meaningful opportunity to comment and consideration. The PSC's rush to approve

[4] The subsidy for first two years of Tier 3 would be $965 million, an average of $482.5 million for a year. (R. 15-E-0302-299-B).

the Order by August 1, 2018, was based on the private business interests of Constellation/Exelon.

Petitioners and others filed timely Rehearing Petitions. All Rehearing Petitions were denied, except for one. Constellation/Exelon's petition was granted to remove the FitzPatrick contingency from the Order, as it had already served its purpose to close the FitzPatrick deal. The lack of procedural due process, consideration, and transparency is most egregious given the resulting size and duratin of the public subsidy. Tier 3 delivered the purchase of FitzPatrick for $110 million dollars in exchange for Constellation/Exelon receiving the entirety of the $7.6 billion subsidy - an over 700% return on investment. Constellation/Exelon, in exchange for $110 millions dollar investment in FitzPatrick, the New York Power Authority transferred the over $700 million dollar decommissioning trust fund to it, and and it relieves substantial "bonus revenue" from the subsidy for twelve (12) years.[5]

On March 28, 2018 Crain's Business reported that a former Constellation/Exelon executive during a conference presentation, confirmed the result of Tier 3.[6]

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[5] See PSC Proceeding 16-01676Order to Transfer Funds and Approval of Lightened Regulation,http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=51514 . *See Parker Aff* at "Exhibit W

[6] *See Parker Aff* at "Exhibit Y"

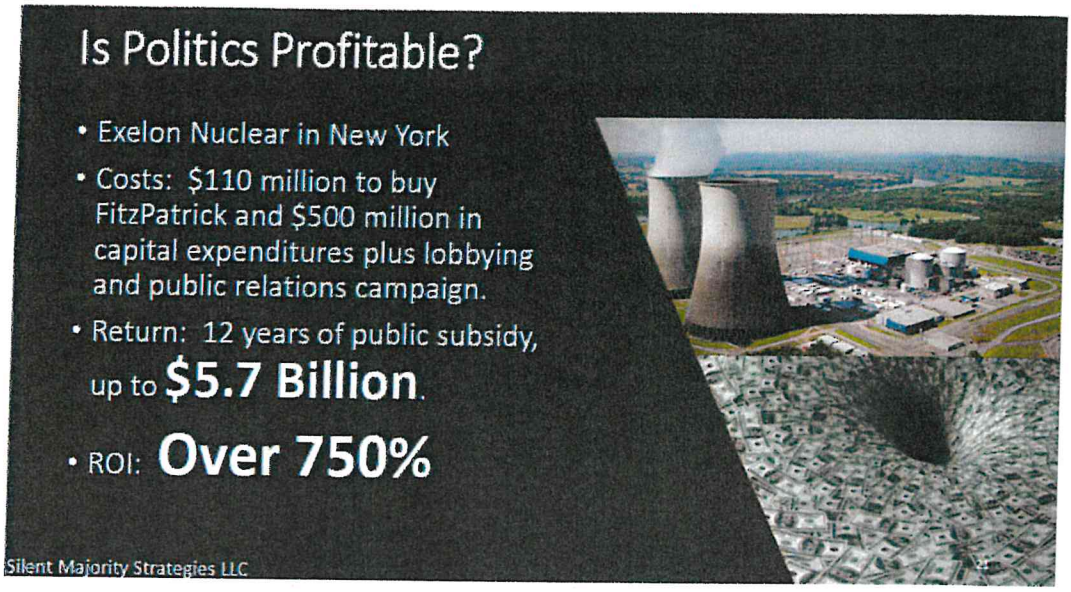

Figure 1 - Screen from Executive Presentation

Besides the significant difference in the value of funding between renewables and nuclear, Tier 3 also created a vast disparity in the way in which the funds are distributed. Tier 3 nuclear funds were approved in the Order and the Zero Emission Credit payments are automatic distributed for twelve (12) years. For renewables, however, a time consuming application and approvals process is required prior to distribution of any monies. This practice, in and of itself, delays renewable and undermines their implementation throughout the State.

To be clear, the Petitioners are not making a philosophical argument against nuclear power. Petitioners are also not challenging the PSC's fundamental powers over energy markets or producers. Petitioners recognize that the PSC has broad authority, however that power is not unlimited. Petitioners respectfully ask the Court to hold that the facts and circumstances of *this* case demonstrate that the PSC far

exceeded its authority, was arbitrary and capricious is a number of ways, and denied the public its due process rights when it promulgated Tier 3.

POINT I
PSC WAS WITHOUT AUTHORITY TO PROMULGATE TIER 3

The PSC had no legal authority to enact Tier 3. The statutory provisions relied on by the PSC do not provide any express or implied authority for Tier 3. Moreover, there is no basis for the PSC's argument that its actions were based upon "necessary implication" from its existing authority (PSC Memorandum of Law, dated March 30, 2018, hereinafter the "PSC MOL" at 44). Far from filling in interstitial gaps in legislative mandates, the PSC created Tier 3 on a clean slate and out of whole cloth, without any nexus to a specific delegated agency power. Tier 3 sprung to life solely as result of a letter from the Governor "directing" that the PSC take action regarding "upstate nuclear facilities" by creating a new standard "separate and distinct from the renewable energy goal."[7]. The PSC then shoehorned the Governor's directive into ongoing proceedings. (R 15-E-0302-80 at 2-3).

Tiers 1 and 2 of the Order supporting renewable energy are fully authorized and consistent with New York's Energy Law and the State Energy Plan. Tier 3 is not. In fact, the 2015 State Energy Plan, in effect at the time of Tier 3's consideration and enactment, had actually eliminated nuclear energy from playing any role in addressing climate change due to its *negative* environmental impacts. Even if the

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[7] Parker Aff. at Ex. F and https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf

Court finds that some implied authority exists, this Tier 3 Order exceeds the scope of any such power by unlawfully overstepping the "line between [lawful] administrative rulemaking and [unlawful] legislative policy making." *Boreali v. Axelrod*, 71 N.Y.2d 1, 11-14 (1987).

PSC misses the mark when it asserts that setting aside Tier 3 ZECs would jeopardize New York's Renewable Energy Credit ("REC") program. Contrary to the PSC's doomsday scenario, the attempt to link Tier 3 to the REC program is a red herring, and underscores the profound differences between the lawful REC program and the unlawful Tier 3 program. There is a legislative mandate to "accelerate development and use within the state of renewable energy sources" and to "foster, encourage and promote" "solar", "wind", and other "indigenous state energy resources." Energy Law §3-101(1) & §3-101(5). RECs are also promulgated pursuant to specific actions identified by the State Energy Planning Board in the State Energy Plan, which binds administrative agencies such as the PSC. See Energy Law §6-104(5)(b). Thus, any action setting aside Tier 3 nuclear ZECs in this case will have no legal relevance or impact to the PSC's authority with respect to REC programs.[8]

A. STATE ENERGY POLICY SET FORTH BY THE LEGISLATURE DOES NOT EVEN CONTEMPLATE A NUCLEAR FUTURE AND DOES NOT SUPPORT OR AUTHORIZE THE TIER 3 NUCLEAR SUBSIDY

New York's Legislature has set forth clear mandates for New York's energy

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[8] It should also be noted that Tiers 1 and 2 were not issued in violation of procedural due process because there were no "substantial revisions" to their terms after the initial published notices.

public policy. *See* Energy Law §§3-101 *et seq*. This Court need look no further than these provisions of state law to hold that Tier 3 flies in the face of these stated policies.

The Legislature declared that, "It shall be the energy policy of the state" to "obtain and maintain an adequate and continuous supply of *safe, dependable and economical energy for the people of the state and to accelerate development and use within the state of renewable energy sources*, all in order to promote the state's economic growth, to create employment within the state, to protect its environmental values and agricultural heritage, to husband its resources for future generations, and to promote the health and welfare of its people." Energy Law §3-101 (1) (emphasis added). It also sets forth the state policy to "foster, encourage and promote the prudent development and wise use of all *indigenous state energy resources.*" Energy Law §3-101 (5) (emphasis added). The extensive listing of these energy resources by the Legislature does not include nuclear energy, as nuclear energy fuel is not indigenous to New York because it is mined and processed out of state.[9] Tier 3 does not fall within any of these legislative parameters and policies.

1. Tier 3 is not Reasonably Consistent with the State Energy Plan as Required by Law.

The PSC Tier 3 nuclear subsidy program also violates the Legislature's

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[9] The listed resources are "on-shore oil and natural gas, off-shore oil and natural gas, natural gas from Devonian shale formations, small head hydro, wood, solar, wind, solid waste, energy from biomass, fuel cells and cogeneration." *Id.* There are four other state policies set forth in Energy Law §3-101 relating to construction and operation of new buildings, energy efficiency performance standards, transportation, and encouraging energy conservation, none of which concern nuclear.

directive that the agency's actions be "reasonably consistent" with the "policies and long-range energy planning objectives and strategies" contained in the most recent State Energy Plan– in this case the 2015 Plan. Energy Law §6-104(5)(b). This provision states:

> Any energy-related action or decision of a state agency, board, commission or authority shall be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the plan, including its most recent update; provided, however, that any such action or decision which is not reasonably consistent with the plan shall be deemed in compliance with this section, provided that such action or decision includes a finding that the relevant provisions of the plan are no longer reasonable or probable based on a material and substantial change in fact or circumstance, and a statement explaining the basis for this finding.[10]

The 2015 State Energy Plan, required by the Energy Law, was adopted by the legislatively created State Energy Planning Board – whose members come from various state agencies with different expertise and legal responsibilities.[11] As dictated by New York Energy Law §6-102(5) the Legislature's directive to the Energy Board is clear:

> The board shall in the consideration and development of policies, programs, and other actions, be guided by the goals of: improving

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[10] The PSC never claimed any exception to the State Energy Plan, or made the legally required findings to do so, because it incorrectly concluded that Tier 3 was consistent.

[11] Voting members of the State Energy Planning Board include, among others, the Chair of Public Service Commission; Commissioner of Environmental Conservation; Commissioner of Health; President and CEO of NYSERDA; President and CEO of Empire State Development, Commissioner of Labor, Commissioner of the Division of Homeland Security and Emergency Services, Commissioner of Transportation, the Secretary of State, as well appointees of the Governor, Assembly and Senate. Energy Law§6-102.

> the reliability of the state's energy systems; insulating consumers from volatility in market prices; reducing the overall cost of energy in the state; and minimizing public health and environmental impacts, in particular, environmental impacts related to climate change. Each energy plan shall also identify policies and programs designed to maximize cost-effective energy-efficiency and conservation activities to meet projected demand growth.

The 2015 State Energy Plan neither advances nuclear energy, nor recommends any role for nuclear energy whatsoever in meeting its stated goals.[12]

Quite the contrary, the 2015 State Energy Plan, which supersedes previous versions and applies in this case, no longer advances nuclear energy, as had the prior 2009 version of the plan (the "2009 SEP").[13] Most significantly for this case, the 2015 State Energy Plan *actually removed* the 2009 Plan's reference that nuclear "may play an integral role in the State's efforts to address climate change." (See 2009 SEP, Volume I at 63; https://energyplan.ny.gov/Plans/2009.aspx). The 2015 State Energy Plan even eliminated language in the 2009 SEP encouraging nuclear energy where "environmental conditions" favor its use. *Id.* at 64.[14]

Conversely, the 2015 State Energy Plan points to many "potential negative

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[12] *See* https://energyplan.ny.gov/Plans/2015.

[13] *See* https://energyplan.ny.gov/Plans/2009

[14] The 2009 SEP encouraged nuclear generation, stating:
"Going forward, nuclear power generation *should be encouraged* within New York where safety, security, and environmental conditions favor its deployment and operation, and retained where it can be demonstrated that the safety and security of its operation can be maintained and its adverse environmental impacts minimized." 2009 SEP at Vol. 1 at 64. (emphasis added)
As noted, neither this specific language nor any endorsement whatsoever of nuclear generation appears in the 2015 State Energy Plan. Even the 2009 SEP, which promoted nuclear energy, cautioned that it had "adverse environmental impacts" that would require mitigation. *Id.*

environmental impacts" of nuclear power, including radioactive emissions/discharges to air, surface water and groundwater; unscheduled releases of radioactive materials due to plant accidents; and issues with respect to the production, transportation, processing and disposal of the nuclear fuel cycle.[15] Thus, while the 2015 State Energy Plan recognizes that nuclear has "very low" greenhouse gas emissions (not "zero" emissions), it highlights these other adverse environmental impacts and, as discussed above, removed nuclear energy from playing a role in combating climate change. *Id.* at 33.

Further demonstrating the move away from nuclear energy, the State Energy Plan sets forth forty-three (43) separate initiatives to meet the plan's future goals, and these provisions make *no* mention of nuclear power. *See Id.* SEP Volume I at 68. The State Energy Plan is also required to include a section on greenhouse gas emissions, setting forth in Energy Law §6-104(2):

> (i) An inventory of greenhouse gas emissions, and strategies for facilitating and accelerating the use of low carbon energy sources and/or carbon mitigation measures;
> (j) Recommendations, as appropriate and desirable, for administrative and legislative actions to implement such policies, objectives and strategies;

The 2015 State Energy Plan includes a section on "Key Greenhouse Gas-Related Policies and Programs in New York," and it identifies specific actions and

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[15] *See 2015 SEP* Volume II, Technical Appendix, Impacts and Considerations, Climate Change and the Energy System at 33-35; https://energyplan.ny.gov/Plans/2015.

policies to address climate change and reduce greenhouse gas emissions.[16] Again, these provisions do ***not*** mention any role for nuclear power in addressing climate change or meeting the state's greenhouse gas reduction goals, much less recognize, recommend, or in any way embrace, or provide a basis for a public subsidy of billions of dollars for the nuclear industry. *Id.* at 28-29.

The State Planning Board, on which the PSC Chair sits, was aware that the Ginna nuclear reactor was in financial crisis during the 2015 SEP drafting process.[17] The 2015 State Energy Plan highlighted that FitzPatrick and Ginna were likely to close. The reality facing the nuclear industry in New York was well known and evident. If the State Energy Planning Board wanted to address the continuation of nuclear reactor operations they could have; instead, it dropped all support for nuclear found in the prior (2009) State Energy Plan.

B. THE PSC'S ADMINISTRATIVE POWER IS LIMITED.

It has long been held that the "determinations of the commission are valid only so far as it acts within the authority delegated to it by the Legislature." *McAneny v. New York C. R. Co.*, 238 N.Y.122, 130 (1924). The jurisdiction of the PSC is strictly limited by statute, and unless the Public Service Law grants the power of

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[16] 2015 SEP Volume II, Technical Appendix, Impacts and Considerations, Climate Change and the Energy System at 28-29; https://energyplan.ny.gov/Plans/2015

[17] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwi9nd6um6DfAhVlTd8KHeI2CisQFjABegQICBAC&url=http%3A%2F%2Fdocuments.dps.ny.gov%2Fpublic%2FCommon%2FViewDoc.aspx%3FDocRefId%3D%257BED57425F-6BB1-4D11-8F00-6F71261DA213%257D&usg=AOvVaw3tv7vJUM8nXWmCX2q4bUSv

regulation, the PSC is without jurisdiction. *Matter of National Merchandising Corp. v. Public Service Comm.*, 5 N.Y.2d 485 (1959); *Ceracche Television Corp. v. Pub. Serv. Comm'n*, 49 Misc. 2d 554, 556, 267 N.Y.S.2d 969, 972 (Sup. Ct. 1960).

The New York Constitution, Article III §1, clearly states that the legislative power of the State is vested in the Senate and Assembly.[18] "By virtue of this constitutional mandate, the Legislature may not delegate its lawmaking function to an administrative agency." *Boreali v. Axelrod*, 130 A.D.2d 107, 112, 518 N.Y.S.2d 440 (3d Dept. 1987), *aff'd,* 71 N.Y.2d 1 (1987). And, a branch of government may not "arrogate unto itself powers" residing wholly in the Legislature. *Under 21 v. City of New York*, 65 N.Y.2d 344, 356 (1985).

In *Ellicott Group, LLC v State of NY. Exec. Dept. Off of Gen. Servs.*, 85 A.D.3d 48 (4th Dept 2011), the court explained that the Office of General Services (OGS) violated the separation of power doctrine by attempting to "broaden" its authority to areas beyond that prescribed by the Legislature. In rejecting attempts to increase the circumstances where prevailing wage would be required, OGS had exceeded its authority because it had gone beyond the "parameters" set by the Legislature. As the court explained, even though OGS argued its actions were "in the public interest the attempt to expand the agency's power was invalid because this was

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[18] Fundamental to our system of government is the distribution of powers among the three coordinate branches--the executive, legislative and judicial branches NY Const, art III, §1; art IV §1; art VI). This tripartite system is designed to achieve a delicate balance preventing the excessive concentration of power in any one particular branch or person and to insure a representative form of government. *Boreali v. Axelrod,* 130 A.D.2d. *See also Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978).

an "area of the law that continue[d] to evolve, and it [was] the role of the Legislature to make any such changes, not the role of an administrative agency. See *Ellicott Group*, 85 A.D.3d at 53, 54.

Administrative action is limited to the task of "fill[ing] in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Nicholas v. Kahn*, 47 N.Y.2d 26, 31 (1979); *New York Coalition for Quality Assisted Living, Inc. v. Daines*, 24 Misc. 3d 1250(A), 901 N.Y.S.2d 900 (Albany Co. 2009). However well intentioned an agency may be, as a legislative creature its power is limited. "Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Boreali*, 71 N.Y.2d at 9.

1. The PSC's Legislatively Delegated Authority Does Not Support the PSC's Promulgation of Tier 3

The PSC does not – nor can it -- point to any express statutory provision that authorizes the agency to enact the Tier 3 nuclear subsidies. It does not refer to a provision that uses the word "nuclear' to support this Tier 3 nuclear subsidization program. In fact, the PSC concedes that nuclear reactors are under "a lightened regulatory regime, which… exempts them from Commission rate regulation." (PSC MOL at 36). Instead, the PSC points only to generalized statutory provisions to claim expansive power to promulgate this billion-dollar subsidy to compensate nuclear reactors for one purported environmental attribute.

The PSC cites to two provisions in New York State Public Service Law ("PSL") §5, "Jurisdiction, supervision, powers and duties of the public service

commission" as its claimed source of authority for Tier 3.

First, it cites to very general statutory language, which provides the PSC supervisory authority over the "manufacture, conveying, transportation, sale or distribution of…electricity…and to electric plants and to the persons or corporations owning, leasing or operating the same." *See* PSL §5(1)(b) *cite*d at PSC MOL at 44. Yet Tier 3 does not fall within the express language of this provision—it neither regulates the manufacture, conveyance, transportation, sale or distribution of electricity, nor does it regulate the electric plants themselves or their owners. Instead, Tier 3 is an order for electrical consumers to subsidize, through their electricity payments, a purported environmental benefit of nuclear reactors.

Second, the PSC cites PSL §5(2) as an alleged source of authority. (PSC MOL at 45). But, by its very terms, this provision to "encourage" is inapplicable because it states only that the PSC:

> **shall encourage all persons and corporations subject to its jurisdiction** to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources. PSL §5(2) (Emphasis added.)

This provision merely allows the PSC to "encourage" persons under its administrative jurisdiction (i.e., electric plants, utilities, and third parties owning them) to formulate *their own programs* taking into account the objectives stated in PSL §5(2). This power to "encourage" is far different than the *PSC itself* creating a *mandatory* multi-billion dollar nuclear subsidy paid for by all retail electricity consumers.

This unauthorized PSC action was created at the very expense of the values identified in PSL §5(2):

- "*economy*"- here, it is conceded that electrical consumers will be paying more each month, and such subsidies distort the electrical market ;

- "*efficiency*"- Tier 3 promotes the continued operation of commercially unviable and inefficient nuclear reactors and may undermine the advancement of renewable energy; and,

- "*public safety*" and "*environmental values*"- the 2015 State Energy Plan highlights the many "potential negative environmental impacts" of nuclear such as "permitted radioactive discharges to air, surface water or groundwater"; "unscheduled releases of radioactive materials"; and other adverse environmental impacts relating to "production, transportation, processing and disposal of radioactive wastes and nuclear fuel," all of which were ignored in Tier 3. (2015 SEP, Vol. II, Impacts & Considerations at 33-34, 74).

Next, the PSC cites to Public Service Law §66, "General powers of commission in respect to gas and electricity," which allows the PSC to:

> examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have **power to order such reasonable improvements** as will best promote the public interest, preserve the public health and protect those using such gas or electricity. (emphasis added) (PSC MOL at 45).

Here, the PSC's Tier 3 is promoting the status quo, which is only the continuation of current operations of nuclear reactors for 12 years, without any improvement.

Finally, the PSC cites to PSL §4, which grants the PSC "powers *necessary* or

proper to enable it to carry out" its statutory mandate.[19] (PSC MOL at 44). However, as Petitioners have established, this multibillion-dollar subsidy does not fall within any statutory mandate. The PSC seems to argue that this "necessary implication" provision somehow allows it to create something out of thin air, instead of filling in the gaps of clear statutory mandates that do exist. *Boreali,* 130 A.D. 2d at 112. The PSC argues that the Court should engage "in a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment." PSC MOL at 44, *quoting Consolidated Edison Co. v. PSC*, 47 N.Y.2d 94, 103 (1979). However, there is simply no pronounced legislative judgment to support Tier 3.

2. Respondents Cite Cases on Administrative Authority that are Inapposite

One look at the cases cited by the PSC demonstrates the fatal flaws in its claim of authority. The PSC cites three cases, none on point, to argue that the generalized enacting language, including the "necessary implication" provision, legally authorizes the PSC to create Tier 3. (PSC MOL at 44). In each of the cited cases, unlike here, there is a clear nexus to an express statutory mandate.

In *Consolidated Edison*, 47 N.Y.2d 94, 103 (1979), petitioners challenged a PSC order that prohibited advertising inserts in ratepayer bills that encouraged the

[19] This provision states: "There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter."

sale of electricity.[20] The Court of Appeals upheld the PSC's action because it already had express statutory authority to "fix and alter the format and *information requirements of bills utilized by public* and private . . . electric corporations... in levying charges for service." *Id.* (emphasis added). The Court, citing additional express legislative provisions, concluded that, "the Legislature has authorized the commission to regulate not only the format and informational content of the bill itself but the entire billing communication." *Id. at 103-04.* The Court also held that control of the billing procedure is "a process necessarily adjunct" to the express statutory delegation of "furnishing" utility service, and "thus fits neatly into the PSC's supervisory role." *Id.* at 104. This supervisory power, combined with the more specific billing content regulatory authority, provided ample justification for Commission oversight of billing envelope content. *Id.* at 104.

The PSC also relies on *Matter of Niagara Mohawk Power Corp v. PSC*, 69 N.Y.2d 365, 368-69 (1987) for the proposition that the PSC has all powers which are "required by necessary implication to enable [it] to fulfill its statutory mandate." There, petitioners challenged the PSC's authority to order an electricity supplier to refund ratepayer monies collected under a fuel adjustment clause, which the PSC determined had been imprudently incurred. The Court of Appeals ruled that, "The

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[20] The PSC failed to cite the subsequent history of this case, where the US Supreme Court struck down the bill insert provision on other grounds as a violation of the First and Fourteenth Amendment because it completely banned promotional advertising by the electrical utility. The correct cite is *Consol. Edison Co. of New York v. Pub. Serv. Comm'n*, 47 N.Y.2d 94, 104 (1979*), rev'd sub nom. Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530 (1980), and *rev'd sub nom. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, (1980).

power to order refunds of imprudent charges collected under fuel adjustment clauses may be implied from the Commission's general rate-making powers and from *its authority over fuel adjustment allowances." Niagara Mohawk,* 69 N.Y.2d at 366 (emphasis added).[21] The Court concluded that, even though there was no express 'refund' language in the statutes, based upon the existing statutory language for "fuel adjustment clauses" and for "just and reasonable rates," it could be implied that a refund "reasonably promotes . . . the pronounced legislative judgment." *Id.* at 372, *citing Con Ed, supra,* 47 N.Y.2d 94.

Finally, PSC relies upon *Matter of Multiple Intervenors v. PSC*, 166 A.D.2d 140, 144 (3d Dept 1991). This case does not support PSC's authority to create Tier 3 based upon its general enacting language – without relation to any express authority. *Multiple Intervenors*, unlike here, is a rate making case—the PSC has express ratemaking legislative authority, and broad discretion to set rates, with a requirement that the rate be "just and reasonable." PSL §66(12). Here, the PSC has made clear that Tier 3 is completely unrelated to its ratemaking authority; it concedes that nuclear reactors are under "a lightened regulatory regime which… exempts them from Commission rate regulation." (PSC MOL at 36).

Multiple Intervenors also exemplifies the proper application of PSL §5(2),

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[21] Specifically, the Legislature recognized the PSC's fuel adjustment authority "in 1974, when it added section 72-a to the Public Service Law requiring monthly reporting of fuel costs, and amended section 66 (12) to direct the Commission to review all filings for increases in the rate charged for fuel costs; again in 1977, when it added section 66 (12-a) to the Public Service Law; and in 1981 when it amended section 66 (12) once more to formalize the power of the Commission to order refunds of improper fuel adjustment charges." *Niagara Mohawk*, 69 N.Y.2d at 371.

which authorizes the PSC to encourage utilities to "carry out long-range programs... [for] the preservation of environmental values and the conservation of natural resources." In *Multiple Intervenors*, utilities subject to PSC jurisdiction applied for revised rates that incorporated costs of their energy conservation program. The Court held that the PSC properly allowed the utility rates to include recovery of actual expenditures of the conservation programs, as well as some of the resulting lost profits. The Court properly noted that the Legislature, in PSL §5(2), authorized the PSC to encourage utilities to enact programs to achieve the legislative objective of energy conservation. Thus, the PSC's approval of the "energy conservation programs... bears a reasonable relationship to the purpose of the enabling legislation." *Multiple Intervenors, at* 144. This case in no way supports the proposition that PSL §5(2) allows the PSC, on its own initiative, to create an environmental program that mandates billion dollar public subsidies for nuclear reactors to maintain current levels of energy production, not conservation.

Constellation/Exelon relies on two additional cases, which also offer no support for the PSC's claims regarding authority to promulgate Tier 3. In *N.Y. State Elec. & Gas Corp. v. Public Serv. Comm*, 308 A.D.2d 108 (3d Dept 2003), the Court ruled that the PSC did not exceed its authority when it compelled a utility to enter into a flex rate electric service contract with two commercial customers. The Court relied on PSC's general rate-making authority in PSL §66(b)(2) and PSL §72); its power "to designate or form classes of customers as appropriate for special rates" and to "authorize special economic incentive rates"; (PSL §66 (12-b) (a) (1) & (2)); and its authority to "authorize utility corporations to contract with existing or prospective

industrial and commercial customers" provided that the PSC "finds that such arrangements are in the best interest of the rate payers" and provide adequate compensation" (PSL §66 (12-b)(b)). Finally, in *Energy Association of N.Y. v. Pub. Serv. Comm.*, 169 Misc.2d 924, 929-931 (Sup Ct, Albany County 1996), the Court found the PSC had power to require regulated utilities to file plans on how they would restructure in a competitive market. In reaching its conclusion, the Court pointed to PSL §5(2) (encouraging utilities to file long range plans) together with PSL §66(10) (requiring utilities to provide answers to PSC questions for information), as well as the PSC's general enabling powers and power to carry out the purposes of the law.

All of the cases cited by Respondents are inapposite, and, in fact, show how glaringly deficient the alleged basis of authority is in this case. The PSC has no basis to support its expansive claim of authority to create, in a vacuum, the Tier 3 nuclear subsidies payable by all consumers. On these grounds alone, the Court should find that Tier 3 is *ultra vires*.

C. TIER 3 IS IMPROPER LEGISLATIVE POLICYMAKING: IT DOES NOT PASS THE *BOREALI* TEST

Assuming arguendo that some implied authority exists, Tier 3 exceeds the scope of any such power by unlawfully overstepping the "line between [lawful] administrative rulemaking and [unlawful] legislative policy making." *Boreali v. Axelrod*, 71 N.Y.2d 1, 11-14 (1987). Respondents fail even to acknowledge the seminal *Boreali* case, which sets forth the factors that are the "touchstone for determining whether agency rulemaking has exceeded the legislative fiat." *Matter of*

NYC C.L.A.S.H, Inc. v New York State Off of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 178 (2016).

In *Boreali,* the Court of Appeals struck down an administrative regulation that prohibited smoking in public places. In this longstanding precedent, the Court determined that, even where the Legislature had given a Public Health Council broad authority to promulgate regulations on matters concerning the public health, the Council had exceeded the scope of its authority when it "weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests." *Boreali*, 71 N.Y.2d at 6. "Such dramatic changes in public policy" even when "meritorious in terms of public health, are, the function of the Legislature, not an administrative agency." *Boreali,* 130 Ad.2d at 114.

Here, Petitioners are not challenging the wisdom of a program that could limit carbon emissions or the propriety of authorized government action to address climate change. Rather, like in *Boreali*, Petitioners are contending that the creation of Tier 3 "stretched" any authority beyond PSC's valid reach when it promulgated an order "embodying its own assessment of what public policy ought to be." *Id.* at 9.

The Court of Appeals set forth four factors for the Court to consider (i.e., the "*Boreali* factors") in determining whether an administrative agency has unlawfully overstepped into legislative policy making. The four *Boreali* factors are "whether:

1. the agency did more than balanc[e] costs and benefits according to pre-existing guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve

social problems;

2. the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;

3. the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and

4. the agency used special expertise or competence in the field to develop the challenged regulation"

The *Boreali* factors "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power" *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.,* 25 N.Y.3d 600 (2015). An agency cannot prevail on a legal challenge to a proposed regulation simply because a single *Boreali* factor has not been established. *New York Statewide Coalition,* 23 N.Y.3d at 697. Ultimately, "[a]ny *Boreali* analysis should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends'." *New York Statewide Coalition*, 23 N.Y.3d at 697, quoting *Boreali*, 71 N.Y.2d at 13.

1. The First *Boreali* Factor Demonstrates Tier 3 is Legislative Policy

The first *Boreali* factor focuses on whether the action is administrative (i.e., balancing costs and benefits according to pre-existing guidelines) or legislative policy making (i.e., making value judgments entailing difficult and complex choices.) *See New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene,* 23 N.Y.3d 681, 699, (2014). In promulgating Tier 3, the PSC made its own value judgments involving difficult and complex choices

among competing economic, social, political, environmental and public health interests, without any legislative guidance. Worse, as discussed, the PSC's choices actually contravened the value judgments set forth in the 2015 State Energy Plan concerning nuclear.

The PSC altered the function of the New York state economy by changing the electricity market in the entire state to protect four commercially unviable nuclear reactors. It did so at the economic expense of all electricity consumers in the state. Every consumer—rich or poor, small business or large, private sector or public—has to pay higher electric charges for 12 years. The PSC made a social policy judgment that low and moderate-income consumers would shoulder an uncapped and undiscounted burden in paying their share of the ratepayer subsidy. The PSC dramatically departed from state law, regulations, plans and policies, which promote renewable energy sources, instead creating subsidies for nuclear reactors to the detriment of market competition that could foster new and existing renewable energy sources.

In creating Tier 3, the PSC, created adopted a first-in-the-nation use of a "Social Cost of Carbon" to create a subsidy. For Tier 3, the PSC also made the myopic choice and cherry picked how they would define the social costs of nuclear, choosing only one purported environmental benefit (i.e., valuing carbon dioxide), to the exclusion of value judgments already made by the state. For example, the PSC ignored the other environmental costs that were clearly identified in that 2015 State Energy Plan. These negative impacts led to the state's decision to remove nuclear energy from any role in climate change—the total opposite of the PSC mandating

multibillions of dollars of public money for nuclear subsidies in Tier 3, much less a subsidy merited and justified by alleged environmental and social benefits.

The PSC also made political choices and compromises having nothing to do with the stated purpose of Tier 3. "[I]ndicators of political compromise," and actions "based on financial considerations of special or business interests" run afoul of *Boreali." See NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Pres.*, 125 A.D.3d 105, 109, (3d Dept. 2014), *aff'd*, 27 N.Y.3d 174, 51 N.E.3d 512 (2016). In this case, Tier 3 was borne *not* from a legislative directive but from a directive in a letter from the Governor. Despite the claims of the need for a Tier 3 program, it is explicitly tied to the purchase and continued operation of *one* nuclear reactor, FitzPatrick, or the Tier 3 program could terminate entirely. This termination condition ironically undercuts the stated rational of the PSC in support of Tier 3. State officials behind closed doors, sometimes working around the clock, indicated the desperate measures undertaken in negotiations to make a deal to keep FitzPatrick open.[22] The PSC also changed how the costs of the subsidy would be calculated during the proceeding, adopting a cost of carbon formula (instead of the original going forward cost of operations model) providing the single company

[22] *See* Parker Aff. at Ex. X. *Inside the hardball tactics to save FitzPatrick: NY threatened to seize the nuke plant, available at* www.syracuse.com/politics/index.ssf/2016/08nys_threat_to_seize_FitzPatrick_nuclear_plant_sparked_deal_to_save_615_jobs.

operating the nuclear reactors with many billions of additional dollars.[23]

Another example of the political nature of Tier 3 was exemplified by the lobbyists for the sole corporate beneficiary of Tier 3 who publicly exalted the results of their lobbying effort to realize a 750% return on investment for a single corporate interest.[24] Taken together, all these actions run afoul of this *Boreali* factor.

A memorandum prepared by the Assembly in support of its Legislative moratorium on implementing Tier 3 further underscores some of the competing interests and improper value judgments the PSC made in this case:

> While remaining mindful and supportive of the effort to meet the goal of generating 50% of the state's electricity from renewable resources by the year 2030, it would be counterproductive to spend billions of dollars to subsidize a nuclear industry that would compete with clean and renewable energy technologies, such as solar and wind. These nuclear power plants are old, unprofitable, and a danger to public health and safety. Moreover, the costs of providing this credit would be passed on to New York's already financially over-burdened ratepayers. Approximately $965 million is expected to be directed to the plants over the first two years alone.[25]

For these reasons, the first *Boreali* factor weighs in favor of Petitioners' claim that the PSC engaged in unlawful legislative policy-making.

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[23] Even Exelon argued in the administrative proceeding below that a cost of operations based subsidy was "the least costly way for customers to secure the [alleged] environmental attribute provided by existing nuclear plants." (R.0302-224-B at 11)

[24] *See* Parker Aff. Ex. Y *Does lobbying pay? Ex-Exelon exec highlights former employer as poster child.* https://www.chicagobusiness.com/article/20180328/NEWS11/180329876/ex-exelon-exec-michael-krancer-says-exelon-is-poster-child-for-lobbying

[25] New York State Assembly Memorandum in Support of Legislation, Bill Number A-5985A, (2017/2018) Bill Number A-5985A - https://www.nysenate.gov/legislation/bills/2017/a5985/amendment/original; S 4800 https://www.nysenate.gov/legislation/bills/2017/s4800/amendment/a

2. The PSC Created the Tier 3 Program on a "Clean Slate"; it did Not Merely Fill in Details of a Broad Legislative Policy

Tier 3 truly was written on a "clean slate." It represents a first-in-the nation attempt by a state or public utility commission for a ratepayer subsidy of the nuclear industry based on an application (or here, misapplication) of a "social cost" of (avoided) carbon emissions model. In Tier 3, the PSC created an entirely new program and policy that burdens all electricity consumers, based on an alleged social cost benefit of upstate nuclear reactors, which is not in any way grounded in state law or the 2015 State Energy Plan. Nowhere does the PSC even claim that Tier 3 is the type of "'interstitial' rulemaking that typifies administrative regulatory activity." *Boreali,* 71 N.Y.2d at 13. This action was at the direction of the Governor, *not* the Legislature.[26]

As in *Boreali*, this is not a case in which "the basic policy decisions underlying the [challenged] regulations have been made and articulated by the Legislature." *Boreali*, 23 N.Y.3d at 700. In fact, as already discussed, Tier 3's provisions are contrary to the directives in the State's Energy Law, Energy Planning Law and the 2015 State Energy Plan. In *Boreali,* the Court found that, even where the Public Health Commission had authority to protect public health, it wrote its antismoking regulation on a "clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" because it "did not merely fill in the details of broad legislation describing the over-all policies to be implemented." *See Boreali,* 71

[26] *See* Parker Aff. at Ex. F - https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf

NY.2d at 13; *See also New York Statewide Coal. of Hispanic Chambers of Commerce,* 23 N.Y.3d at 700. The PSC did the same here.

3. The Legislature Has Unsuccessfully Tried to Reach Agreement on the Issue, Which Indicates Tier 3 Is a Matter of Legislative Policy

The Court of Appeals has held that "inaction on the part of the State Legislature... in the face of plentiful opportunity to act if so desired...constitutes additional evidence" that the action "amounted to making new policy, rather than carrying out preexisting legislative policy. *Id.* at 700.[1]

In both the New York State Senate and Assembly during the CES proceeding, the creation of a state program benefitting nuclear reactors was the subject of proposed legislation. *See* Assembly Bill A09033 and Senate Bill 06476-A (2015-2016).[27] The proposed legislation has not been enacted, and would have taken a very different approach than Tier 3; among other provisions, it did not use the "Social Cost of Carbon" subsidy method concocted by the DPS and adopted by the PSC. NYSERDA, not the PSC, would have calculated an incentive amount based on the price of CO2 emission allowances set by competitive auctions under the regional Greenhouse Gas Initiative program, to which New York State is a party. Notably there is current pending legislation for a moratorium on implementing Tier 3 (A 5985/S 4800 (2017-2018)) and legislation prohibiting certain charges to residential ratepayers for the Tier 3 Zero Emission Credit Program. (A 8246 /S 661

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27 These bills can be found at: and https://nyassembly.gov/leg/?term=2015&bn=S06476

(2017/2018))[28]

As *Boreali* made clear, failures by the Legislature to arrive at an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own. Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult societal problems by making choices among competing ends. 71 N.Y.2d at 13.

The fact that these legislative bills were not enacted underscores the competing and difficult policy considerations at issue and demonstrates that "the matter is a policy consideration" for the Legislature to resolve.

4. The Social Cost of Carbon and ZEC Price Formula is Not the Product Of The Commission's Special Technical Expertise

Even if the PSC had authority to promulgate a nuclear subsidy, which it did not, *this* Tier 3 subsidy was far outside of the PSC's expertise. PSC's Tier 3 nuclear subsidy program has nothing to do with PSC ratemaking, or the reliability, distribution or supply of electricity in the State, which are areas clearly within the PSC's expertise. Here, the PSC did not create the Social Cost of Carbon ("SCC") metric, but rather seized on a Social Cost of Carbon ("SCC") model made by a working group of federal agencies created to help government decision makers

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[28] These proposed bills can be found at: A-5985A/S-4800 https://www.nysenate.gov/legislation/bills/2017/a5985/amendment/original; and A 8246/S66; and A-8246 https://www.nysenate.gov/legislation/bills/2017/a8246; S 661 https://www.nysenate.gov/legislation/bills/2017/S661

consider climate impacts in their regulatory analyses.[29] The SCC was not established or intended as a basis to value subsidization of corporate interests. In fact, this SCC concept had never been used as a basis for a subsidy anywhere in the country prior to the PSC's administrative action.

In *Boreali,* the Court acknowledged that a Public Heath Commission unquestionably possessed the authority to deal with matters affecting public health, and that it had thoroughly addressed the available scientific evidence pertaining to the dangers of environmental tobacco smoke, when it enacted its anti-smoking regulations. 71 N.Y.2d at 6. The Court nonetheless determined that the agency exceeded its authority because no special agency expertise was involved in the "*development of the... regulations challenged,*" which prohibited public smoking. *Id.* at 14 (emphasis added*)*. The same is true here.

Here the PSC's lack of expertise in the SCC went beyond it's misapplication of the concept, and is evidenced by other errors it when it used the SCC as a basis for the fabrication of the Tier 3 formula.

The PSC also improperly ignored the environmental implications of the environmental attribute it selected –as a matter of science there are carbon emissions emitted in New York during operation of the reactors while they are generating electricity and there are methane (C_4) and carbon-14 (^{14}C) greenhouse carbon gas emissions which are far more potent climate change accelerators than carbon dioxide.

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[29] https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html

Also CO2 emissions are emitted during the lifecycle of the nuclear energy fuel production and storage– from mining, to refining, to transport– that could not be accounted for within New York's boundaries because it is not an indigenous fuel in the state. Further, it ignored the other social and public health implications of Tier 3 to extend the life of reactors that would otherwise no longer operate because of commercial impracticality. These social and economic issues, including increased operational and public health associated with aging embrittled reactors; increased risk of costly radiological emergencies; and increased costs and risk associated with operational and long term nuclear fuel waste storage, as were noted in the various iterations of the State Energy Plan and by various State authorities.[30] Moreover, PSC's lack of expertise resulted in it ignoring the limitations in the federal model itself - the Social Cost of Carbon concept attempts to assess the *global impacts* of certain regulatory decisions, and thus, by design, cannot be limited *to assessing or valuing* environmental attributes in only one state – climate impacts are not constrained by political boundaries. Finally, the agency has never attempted to undertake such a massive ratepayer subsidy – based upon environmental attributes - for one industry in its history, and certainly where there was no legal or legislative directive to do so, as it did with Tier 3.

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[30] NYS agencies have consistently challenged the continuation of nuclear reactor operations due to environmental and public health and safety issues, increase risks and costs due to aging, and use of high-burn up fuel: Comments Submitted by the Attorneys General of the States of NY, Vermont, Conn. and Mass., Vermont Department of Public Service, and the Prairie Island Indian Community on the, In the Matter of: Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations, RIN 3150-AJ20; NRC-2012-0246, Dec 20, 2013 at 95-100; 108).

POINT II.
PROMULGATION OF TIER 3 WAS ARBITRARY AND CAPRICIOUS AND NOT RATIONALLY RELATED TO PSC'S STATED PURPOSE OF THE CLEAN ENERGY STANDARD.

A. LEGAL STANDARD OF REVIEW

1. The PSC Action Must Have a Rational Basis and Not Be Arbitrary or Capricious

It is well settled that an agency action must be set aside if it is arbitrary, capricious and/or without rational basis. In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious." *Ward v. City of Long Beach*, 20 N.Y. 3d 1042, 1043 (2013)(internal quotations and citation omitted). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" *Id.* See also, *Matter of Pell v. Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974).

2. An Agency Action Must be Reviewed Based on the Agency's Stated Rationale

An agency's action, if it is to be upheld, must be based on the same reason articulated in the order by the agency itself, judging "the propriety of [the] action solely [on] the grounds invoked by [that] agency." *Matter of Nat'l Fuel Gas Distrib. Corp. v. Public Serv. Comm'n,* 16 N.Y.3d 360, 368, 922 N.Y.S.2d 224, 947 N.E.2d 115 [2011], *quoting Matter of Scherbyn v. Wayne–Finger Lakes Bd. of Coop. Servs.*, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 573 N.E.2d 562 [1991]). "[A]n agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *Fed. Power Comm'n v. Texaco,* 417 U.S. 380, 397, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974).

B. TIER 3 IS ARBITRARY, CAPRICIOUS AND WITHOUT RATIONAL BASIS

The stated rationale for Tier 3 is to preserve the purported "carbon-free," "zero-emissions environmental attributes" of four (4) upstate nuclear reactors. In fact nuclear reactors are not "carbon free" or "zero-emissions" sources of electricity. Moreover, Tier 3 is contrary to evidence and based on the unsubstantiated claim that *all* electricity currently being generated from the reactors would be replaced by fossil fuel generated electricity if the nuclear reactors cease to operate. (R. 15-E-0302-352-A at 128).

In the words of Expert Cooper, the PSC Tier 3 fails on many levels:

> The analysis presented by the Staff is fundamentally flawed. Compared to independent analysis, it overestimates the cost of wind, fails to adjust the going forward contribution of new renewables, underestimates the potential contribution of efficiency, and ignores the contribution of important resources that are certain to play a major role in the long-term development of a clean, low carbon electricity sector.

Parker Aff at Ex T, *Cooper Aff.* sworn to on December 11, 2018 at ¶ 11.

In the words of Expert Cain

> The ZEC mechanism is an arbitrary subsidy to specific uneconomic businesses – specifically, nuclear power plants located in upstate New York – all fully- or majority-owned by a single company: Exelon Corporation. Imposing the costs of this arbitrary subsidy on ratepayers is unjust and unreasonable.

See Parker Aff at Ex. *S, Cain Aff.,* sworn to on December 12, 2018 at ¶ 7. Expert Cain further notes that

> The ZEC program subsidizes a narrowly defined group of uneconomic businesses, fully- or majority-owned by a single

> company, and applies an arbitrary mechanism to establish subsidy rates that do not properly correspond either to the value of the zero emission attribute produced by the nuclear plants, or to the actual cost of plant operation. As a consequence, imposing the large costs of the ZEC subsidy on ratepayers is unjust and unreasonable.

Cain Aff. at ¶ 18.

There are a plethora of individual reasons why PSC's Tier 3 action is arbitrary, capricious and without rationale, *any one of which is enough to support setting aside Tier 3*. Petitioners establish that PSC's action cannot withstand judicial scrutiny.

1. Tier 3 Improperly Requires Ratepayers to Pay Windfall Profits to Constellation/Exelon

The stated purpose of Tier 3 is to preserve purported "carbon free" attributes of nuclear energy generation. The continued operation of the four (4) nuclear reactors is claimed to be necessary under PSC's stated rationale for Tier 3. However, Tier 3 does far more than that. It unduly rewards nuclear operator with bonus of revenue over and above the cost of operations. The PSC provides no rational why reactors owners need or deserve these unjust and unreasonable bonus payments to stay operational.

The substantial bonus revenues provided to the operator of these nuclear reactors were not contemplated in the State Energy Plan, and are not a legitimate purpose. The PSC dubiously concocted this large monetary benefit for the nuclear operators without providing any additional benefit to the public. Tier 3 provides an enormous subsidy, totaling approximately $965 million over the first two years of the

ZEC program, and $7.6 billion through 2029.[31] The ZEC provides approximately 45% of bonus revenue ($17.48/$39.00 = 45%) on top of expected market revenues for the nuclear plants and possibly a substantially larger amount in subsequent years. (Cain Aff. at 22). In fact, "ZEC subsidy is far greater than is justified either by the claimed intent of supporting the CES goals or by the true costs of the nuclear plants." *Id.*

> Under normal operation, "Nine Mile Point already receives more than adequate market compensation to keep it from retiring for economic reasons. It is consequently a windfall gift to Exelon to provide substantial subsidies through ZEC payments."(*Id.* at 42)

2. PSC Wrongly Concluded that Only Fossil Fuels Would Replace the Nuclear Reactors

Despite the explicit recognition that the purpose of the Clean Energy Standard is to advance renewables, and setting of benchmark renewable energy increases within Tier 1 of the Order, the PSC without explanation or analysis, based Tier 3 on the unsubstantiated assumption that all the electricity produced from the four (4) subsidized nuclear reactors will be replaced only by fossil fuel generated electricity. Without providing data or analysis for its presumption, the PSC summarily concluded:

> losing the carbon-free attributes of nuclear generation, before the development of new renewable resources between now and 2030, would undoubtedly result, based on current market conditions, in significantly increased air emissions due to heavier utilization of existing fossil-fueled plants or the construction of new gas plants.

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[31] Calculations based on annual MWh cap on generation that can receive ZEC payments, assuming no modification to the 0.53846 tons/MWh emissions factor, and market prices not projected to exceed the applicable market baseline. (Cain Aff at 5)

(R. 0302-352-A at 133).

This fundamental presumption, a key underpinning of the Tier 3 subsidization program, makes no mention of the renewable benchmarks in the Order. There is simply no data or analysis in the Record to support the false dichotomy of the all nuclear or all fossil fuel scenario upon which Tier 3 is predicated.

The PSC seems to rely upon a proposition advanced by the Brattle Group that all nuclear generated electricity will be replaced by all fossil fuel generated electricity. The Brattle Group provides no analysis for reaching this conclusion, nor does anyone else. As Expert Cooper notes:

> The "dash to gas" is not an unavoidable or inevitable outcome. If the PSC does not put its thumb on the scale of competition, but allows all low carbon resources to compete to meet increasing levels of carbon reduction set by mandates on utilities, the lower cost alternatives would expand rapidly.

Cooper Aff. at ¶ 58. Notably, these low carbon sources are the "chief focus" of the Clean Energy Standard Order.

Inexplicably, the PSC wholly ignores the successful increase of renewables that Order touts. (R. 0302-352-A at 91.) The PSC's failure to address or even contemplate the increased new renewable energy production underscores the irrationality of finding that nuclear will only be replaced by fossil fuels during the 12-year term Tier 3 and not by any other cleaner form of energy. This finding by the PSC directly contradicts and is inconsistent with the purpose of the SEP to spur transition of the energy market to renewables and with Tier 1 provisions of the Clean Energy Standard Order, itself.

3. Tier 3 Ignores the Potential Impact of Increased Renewable Energy and Efficiency

The Clean Energy Standard Order identifies "aggressive pursuit of cost-effective energy efficiency" as a means for achieving the 50 by 30 goal. (R. 0302-352-A at 17), and that the

> Energy efficiency is a crucial and cost-effective means to achieve clean energy objectives. Study after study has shown that when deployed well, energy efficiency is the cheapest and most effective manner to reduce carbon emissions in the energy sector.

R.0302-352-A at 81-82. Energy efficiency is a large part of the State Energy Plan and a vital part of New York's energy future. This is a major focus of the State Energy Plan that has seven (7) of the State Energy Plan's initiatives pinned to a 23% increase in building energy efficiency.[32] The significant increase in efficiency results in a substantial decrease in emission of greenhouse gases. A significant increase in efficiency decreases the need for electricity *from all sources of generation*, including the amount need from nuclear generation. The PSC failed to quantify the amount increased efficiency lessens demand during the 12-year term of the program prior to adopting the Brattle Group's proposition that the current amount electricity produced by nuclear generation must be replaced by all fossil fuel generated electricity. This gross oversight of premising a $7.6 billion subsidy upon it, is irrational and capricious. The PSC's failure to provide a mechanism to allow for reduction in the

[32] These initiatives include: BuildSmart NY, NYSERDA Energy Efficiency Strategies, Utility Energy Efficiency Programs, Energy Efficiency Measures in Affordable Housing Developments, Combined Heat and Power, Building Codes, and Appliance and Product Standards, SEP Volume I at 77-82. SEP Volume I at 77-82, see https://energyplan.ny.gov/-/media/nysenergyplan/2015-state-energy-plan.pdf

amount of nuclear generation when no longer needed, violates its legal obligation to act reasonably and consistently with the State Energy Plan, and insure just and reasonable rates to public ratepayers.

The PSC offers no explanation for its failure to incorporate any mechanism to address increasing energy efficiency and reduce electrical generation needs in the State, even though the State Energy Plan, promotes energy efficiency as a low cost, high reward method of lowering greenhouse gas emissions and reducing the need for the centralized outdated electrical generators - nuclear and fossil fuels.

Despite the clear mandate of the Energy Law and the State Energy Plan, the PSC refused to fully consider and incorporate energy efficiency in Tier 3. Nonetheless, public comments in the underlying proceedings demonstrate the significant benefits of energy efficiency. For example, the detailed Synapse Study shows that electricity efficiency savings could provide an equivalent resource to nuclear generation at a much lower cost. The study evaluated the impact of New York adopting a three percent (3%) annual efficiency standard through 2030, finding that it would reduce electricity demand to the equivalent of the amount of electricity generated by the 4 nuclear reactors by 2030. (R.0302-145-B at ii). Expert Cooper notes that:

> If efficiency and renewables could compete for the subsidy dedicated to nuclear, the total consumer savings could be much larger because the total cost of the low carbon resources could be much lower.

Cooper Aff. at ¶ 21. He goes on to put efficiency into the context of the actual overall need for the four (4) nuclear reactors:

> Attachment MNC-15 highlights this effect of efficiency. First, it is important to note that the alternative approach, but shrinking demand and integrating it with supply, while shedding huge central station facilities reduces the size of the required system. The transformation to a system that dynamically matches supply and demand has a "transformation dividend" in the reduction of load of 10-20%. The Regulatory Analysis Project puts the number at 17%. It turns out NYSERDA arrived at exactly the same conclusion.

Cooper Aff. at ¶ 54. (emphasis added).

The PSC failure to incorporate or calibrate for the profound benefits of increasing efficiency is without rational basis and has resulted in an unjust and unreasonable subsidy for nuclear generation.

4. Tier 3 Does Not Account for New Renewable Sources of Energy

The chief purpose of CES is to increase renewable energy produced in New York. PSC concludes that: "the Cost Study indicates that 50 by 30 is reasonably achievable" and that "the 50% by 2030 goal is hereby adopted by the Commission as a foundational basis and essential component of the Clean Energy Standard." (R. 0302-352-A at 81, 83). The Order states, with respect to renewables, that based upon the speed of this activity and the choices of individual customers, the State may find itself in an enviable position of accelerated achievement of the 2030 target." (R. 0302-352-A at 91). Yet, as Expert Cain notes

> Even when sufficient renewable generation has been added in New York to fully replace the upstate nuclear plants, the ZEC program will still require New York ratepayers to subsidize the nuclear plants at ever-growing payment rates.

Cain Aff. at ¶ 10.

The benchmark in Tier 1 of the Order provides that the new renewable resources amount to 4.8% of New York's total electricity by 2021. The Order also requires adoption of "incrementally larger percentages for the years 2022 through 2030." (R. 0302-352-A at 19.) Yet, Tier 3 locks in the amount of electricity generated by nuclear reactors for the next 12-years, blocking rapid expansion of renewables, the stated purpose of the Clean Energy Standard. The twelve (12) year terms for keeping the nuclear reactors operational delays implementation of new energy technologies which is detrimental to renewables.

> The ZEC program fails to provide appropriate safeguards to minimize cost, such as periodic evaluations of whether the program is still needed, whether it is providing value commensurate with cost, and whether there are inadvertent effects of the program.

Cain Aff. at ¶14. *Expert* Cain notes that:

> The ZEC program should provide no more subsidy than the minimum necessary to achieve the zero-emission goals of the CES, but the program makes no effort to ensure that costs are minimized.

Cain Aff. at ¶ 48. The Clean Energy Standard Order mechanism that does exist provides that:

> Any adjustment will be minor, and will be based on predetermined values, not on an empirical assessment of any actual emissions reduction benefit of keeping the upstate nuclear plants in operation.

Cain Aff. at ¶ 27*(*emphasis added*)*.

It is irrational to keep nuclear reactors operating when the purpose of the Order is to have a surge in new renewable technologies that will replace, most, if not

all of the energy produced by the nuclear reactors. Electricity from new renewable sources such as solar and wind have the same or greater value in reducing greenhouse gases. Due to these new, lower cost and long lasting technologies nuclear reactors can be phased out without providing large public subsidies, while providing the same or greater greenhouse gas reduction benefits. Under the current scheme, as Expert Cain, notes that:

> What this means is that even in a scenario in which there is sufficient renewable generation to *fully replace* the output of the upstate nuclear plants, the Tier 3 subsidy to the nuclear plants would continue for another six years – and at a base Tier 3 payment rate that would continue to grow.

Cain Aff. at ¶ 26 (emphasis added). This demonstrates the unnecessary, arbitrary and irrational nature of Tier 3 subsidizing nuclear reactors.

New York's courts have rejected such arbitrary distinctions in the past. *E.g., Matter of Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL-CIO v. State of New York*, 229 AD.2d 286, 289-90 (3d Dept 1997) (improperly drew distinctions that were unrelated to agency's goal by improperly distinguishing between types of housing units); *Matter of Kelly v. Kaladjihan*, 155 Misc.2d 652, 657-58 (Sup Ct, NY County, 1992).

The PSC failure to calibrate and properly adjust Tier 3 for the increasing amount of renewable energy (required by Tier 1) with the need of the purported "environmental attributes" of the nuclear reactors, itself demonstrates a lack of rational nexus between the Order and the stated purpose of Tier 3. This internal inconsistency – between Tier 1 increasing renewables and Tier 3 not adjusting for

those increased renewables – demonstrates the irrationality of Tier 3. The nuclear reactors that Tier 3 subsidizes may no longer be necessary during the 12-year term of the Order.

a. Tier 3's 12 Year Term Puts the Goal of New Renewables at Risk.

Tier 3 undermines the explicit stated purpose of the CES to bring more renewable energy online. As the Order notes, the "*chief focus* of the CES initiative is on building new renewable resource power generation facilities." (R. 0302-352-A at 83) (emphasis added). There is a limit to the amount of electricity necessary for New York's market, and if nuclear energy is allowed to artificially exist and flood the market for 12 years, the need for and the investment in renewable energy during that timeframe will be reduced. Tier 3 may unleash market forces that undermine the establishment of these renewables by crowding them out. As Expert Cooper notes

> The dramatic impact of the inclusion of this huge block of "must run" nuclear power in the short-term supply function can be seen in Attachment MNC-4, which shows the very small market for renewables that results from forcing "must run" nuclear reactors into the stack. This severely restricted market will strangle the ability of non-hydro renewables to expand and is likely to drive the market clearing price down, as resources compete for a smaller market.

Cooper Aff. at ¶ 23. Expert Cain affirms that the Tier 3 "program commitment to subsidize all the upstate nuclear plants for a full twelve [12] years is likely to have a counter-productive effect on achieving the CES goals for the development of in-state renewables, because it will artificially maintain excess supply conditions that suppress market clearing prices for capacity and energy." *Cain Aff.* at ¶ 12.

It was irrational and arbitrary for the PSC to continue operations of all four (4) of the upstate nuclear reactors through the bonus revenue subsidy they created in Tier 3 without acknowledging and accounting for the damage and undermining this Tier would do in relation to the larger "chief focus" of bringing online new renewables as explicitly stated in Order.

b. The Stated Purpose for Tier 3 of Preventing "Backsliding" is Misapplied

A stated purpose of Tier 3 is to prevent "backsliding" on carbon emissions reductions previously achieved in New York State. Backsliding is a federal Clean Air Act concept that relates to whether states are meeting targets and guidelines for pollutants, such as carbon dioxide, based upon the amount of these substances being emitted into the air. The claim that Tier 3 will prevent backsliding is a false and deceptive use of this legal concept. The PSC presupposes that only more carbon intensive energy, such as the fossil fuel natural gas, would replace what nuclear reactors currently generate.

The PSC provides no mechanism, accounting or adjustment to reflect how increased efficiency and renewable energy production, even that resulting from the Order itself, reduces need for both nuclear energy and fossil fuel generation. Because Tier 3 does not assess or account for these new truly zero-emissions sources, there is no rational relation to the backsliding claim. Finally, Tier 3 does not adjust for how much "backsliding" is prevented or avoided by the new renewable sources (and efficiency gains) and also does not adjust the subsidy according to these improvements. Thus, the use of the terms preventing backsliding makes no sense and

is arbitrarily used to justify Tier 3.

5. The PSC's Use of the Social Cost of Carbon in the Tier 3 subsidy is Arbitrary, Capricious, Irrational and a Misuse of the Environmental Measurement

In determining the price of the Tier 3 subsidy, the PSC walked away from its original model based on the traditional "going forward" cost of operations. Instead the Order, developed a model based on the surprisingly new valuation theory known as the Social Cost of Carbon. This method to set a price for a public subsidy had never previously been used it was meant to be a cost-benefit comparative tool. Tier 3 payments are not "independent of the actual wholesale price for energy and capacity" as claimed." *Cain Aff.* at ¶ 8. Notably, the Social Cost of Carbon was never intended to value a nuclear subsidy.

The Social Cost of Carbon was developed by a federal Interagency Working Group to help government decision makers to assess global climate impacts in their regulatory analyses and decisions. "The 'Social Cost of Carbon' (SCC) is an estimate of the cost impact of damages associated with an incremental increase in carbon emissions in a given year."[33]

It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change. It looks at the impacts on

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[33] *Technical Support Document: - Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866*, Interagency Working Group on Social Cost of Carbon, United States Government, (February 2010) at 2, *available at* https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf.

cumulative global emissions of carbon dioxide. Technical Support Document: - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, (August 2016) at 2-3.[34]

The Social Cost of Carbon concept, however, does not look at all impacts of other carbon-based greenhouse emissions from nuclear reactors, including methane, CH_4. The Social Cost of Carbon is a "*global metric*" of impacts to the world's climate and certainly not limited to one state or one country. Despite the global scope of the pricing mechanism, the PSC attempts to limit its value of "zero emissions" credits to only the operation of nuclear reactors in New York, disregarding the nuclear fuel cycle and its related climate impacts that occur outside its boundaries.

In developing Tier 3, PSC in fact cherry picked the Social Cost of Carbon, and bypassed and ignored the Social Cost of Methane metric. If the purpose was to properly value purported carbon free "environmental attributes" of nuclear reactors it was irrational for the PSC not to also factor in the reactor's other carbon emission – of methane. In addition to the dubious ability of the Social Cost of Carbon to accurately value the purported "environmental attributes" of nuclear reactors, it results in a ZEC program that does not work. As Expert Cain notes:

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[34] Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide Interagency Working Group on Social Cost of Greenhouse Gases, United States Government https://www.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf

> There is consequently no necessary payment basis that justifies the ZEC rate. That is, if all the upstate nuclear plants were economically viable, there would be no ZEC program, regardless of whether the plants were being compensated appropriately for their alleged CO_2 emissions reduction attributes.

Cain Aff. at 32. Tier 3 is not "anchored to the value of the zero emission attribute for which it supposedly provides compensation." *Cain Aff.* at 28. In fact, *PSC* "created no mechanism to ensure that the ZEC payment rate is actually commensurate with the value of the zero emission attribute that is supposedly being compensated." *Cain Aff.* at 36.

Petitioners demonstrate that the PSC attempted to use the Social Cost of Carbon metric that the federal government was developing in ways far disparate from its intent. The result does not work. Without explanation, the PSC's selective valuation attempt ignores carbon emissions from the fuel cycles of nuclear energy, related to mining, fabrication, transportation, emergency planning, and safe storage, which primarily occur outside of New York state- even though it selected a metric meant to be global in scope. It also arbitrarily ignores all other negative environmental and cost impacts of nuclear energy generations, including thermal heat emissions into Lake Ontario, on-going radioactive emissions and leaks, as well as increased radioactive waste burden on New York State. Nuclear reactors have impacts far beyond the carbon emission from the actual operation of the facility, including all of the stages, mining, conversion and enrichment including vehicles,

machinery and electric motors, and its transportation to plant site.[35]

Regardless of whether the Social Cost of Carbon is acceptable to use as a single plug-in value in cost-benefit evaluations, one thing that is beyond any reasonable dispute is that it was never intended to represent the entire equation or to facilitate *the disregard of all other direct and material detrimental impacts and costs of a given industrial activity*. The PSC conflated consideration of one variable with the final calculus. The failure is profound, as Expert Cain notes, the use of the Social Cost of Carbon results in a valuation that is not anchored to the value of zero emission attributes and thus has no nexus to the stated purpose of Tier 3. Indeed, it is irrational to conclude it does.

6. Tier 3 Included Pre-Conditions that Belie the Stated Rationale for the Entire Nuclear Subsidy

The process undertaken by PSC to adopt the Clean Energy Standard Order demonstrates that it placed third party business interest ahead of the claimed public benefit. If conditions of a sale between private out-of-state corporations were not completed, then Tier 3 can just vanish.

a. The PSC Arbitrarily Conditioned Tier 3 on a Mandatory Requirement of Purchase of the FitzPatrick Reactor by September 1, 2018, or Tier 3 Could End

Tier 3 explicitly required that the privately owned FitzPatrick nuclear reactor be sold to a third private party.

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[35] See *Parker Aff.* Ex. U Dr. Marvin Resnikoff Declaration a ¶10.

> "The 12-year duration [of Tier 3] however will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018...If the sale and closing does not occur there will be no commitment or the program to continue."

(R. 0302-352-A at 148-149). If the sale did not occur by a date certain the program could end without further consideration. There is simply no rational nexus between the stated public benefit purpose of Tier 3 and the FitzPatrick contingency for the sole benefit of private corporations. The PSC's stated purpose of Tier 3 is to preserve the purported "carbon-free environmental attributes." Either these alleged attributes must be preserved, as PSC claims, or they need not.

There is no relationship between the sale of FitzPatrick and the claimed need to preserve the "environmental attributes" of the three (3) remaining reactors. The arbitrary nature of Tier 3 ending with this "poison-pill" provision if FitzPatrick is not purchased is self-evident. Indeed, this mandatory FitzPatrick "poison-pill" provision strongly suggests that Tier 3 was actually created and structured for private profit, an entirely different purpose then the public benefit claimed. The PSC's own press releases advertised that. "The New York State Public Service Commission's approval of the Clean Energy Standard (CES) was necessary to facilitate the agreement."[36]

b. PSC Removed the FitzPatrick Contingency after the Order was Promulgated

The Order was issued on August 1, 2016. On or before Sept 1, 2016

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[36] *See* Parker Aff at Ex. W at ¶58 *Exelon to Assume Ownership and Operation of Entergy's James A. FitzPatrick Nuclear Power Plant in Upstate New York*, Press Release, Exelon and Entergy, (August 9, 2016 at 1)

Petitioners and others timely filed sixteen (16) Rehearing Petitions.

On August 9, 2018 Constellation/Exelon entered into an agreement to purchase FitzPatrick for $110 million and for New York State Power Authority to transfer the $750 million decommissioning trust fund to Exelon.

On December 15, 2016 the PSC accepted and granted on only one (1) of the sixteen (16) filed Rehearing Petitions. The single Rehearing Petition submitted by Constellation/Exelon asked that the FitzPatrick contingency be removed since this provision of the Order had provided enough of a bonus payment to incentivize them to purchase FitzPatrick. It was wholly arbitrary for the PSC only to grant Constellation/Exelon's rehearing petition when fifteen (15) other Rehearing Petitions were timely submitted, ten (10) of them objected to the promulgation of Tier 3. The PSC granted Constellation/Exelon's rehearing Petition for the sole purpose of removing from Tier 3 the conditional terms related to the sale of FitzPatrick. Specifically, the Rehearing Order states that, "While previously that incentive was outweighed by the Commission's desire to induce a buyer to come forward . . . the condition has now outlived its usefulness and now may be detrimental. Accordingly, Exelon's request for rehearing is granted and its Petition to remove the condition is approved." (R.15-E-0302-426 at 32)

This kind of post-Order removal of a contingency after adoption of the Order, is evidence that the purpose of the Order was to facilitate the sale of FitzPatrick, and had nothing to do with alleged purported "environmental attributes" of the nuclear reactors.

c. Tier 3 is Tied to the Condition that all 4 Nuclear Reactors Must Participate or Tier 3 Would End

The condition that all four (4) nuclear reactors must participate in Tier 3, or it would end is akin to the FitzPatrick purchase contingency, similarly bearing no nexus to the stated public purpose of Tier 3, but instead added, for the sole benefit of Constellation/Exelon. Tier 3 includes the express requirement: "[t]he program and especially the caps on eligible production of ZECs is designed to preserve the zero-emissions attributes of all of the qualifying facilities and NYSERDA as the contract administrator shall ensure *that contracts for all of the facilities are in place before any of the contracts are allowed to become effective.*" (R. 0302-352-A at 148-149) (emphasis added). There is simply no rational nexus between the stated purpose and this provision that would effectively terminate Tier 3.

Expert Cain notes:

> Specific terms established by the CES with respect to the Nine Mile Point plant actually contradict the claimed Tier 3 program rationale. The CES Order states that the Nine Mile units qualify jointly as a single facility, but "[if] either unit permanently ceases producing zero emissions credits it will be treated as if the entire qualified Nine Mile Point facility has permanently ceased producing zero-emissions credits.

Cain Aff. at ¶ 44, citing Clean Energy Standard Order at fn 100). Expert Cain notes that:

> This makes no sense as part of a policy supposedly aimed at retaining zero emission nuclear generation that would otherwise retire for economic reasons. Say one of the Nine Mile units fails and cannot be brought back into operation. It makes no sense to eliminate ZEC payments for output from the remaining unit if it is true that the plant needs subsidies to remain economically viable.

> This provision would effectively force the retirement of the remaining unit, flying in the face of the alleged rationale of the entire program.

Cain Aff. at ¶ 44.

Expert Cain notes that this provision only makes sense if Nine Mile Unit 2 were actually economical to operate. This "poison pill" provision is consistent with keeping all of Nine Mile Point in operation, but it is only understandable if part of the facility is highly economic and *does not need* subsidies to stay in operation, demonstrating that the ZEC program is not least-cost.

Cain Aff. at 45 (emphasis in original).

The irrationality of these mandatory provisions that all four reactors must participate flies in the face of the PSC own claimed rationale for the subsidy program. If in fact there are purported "environmental attributes" of nuclear reactors worth the subsidy to keep them operational, then some of this claimed benefit would be provided for even if some of the reactors choose not to participate. This requirement reveals that the purpose of the program has nothing to do with the purported "environmental attributes" but rather intimates the improper purpose was for the private business interest and benefit of Constellation/Exelon. The very Order itself is evidence that Tier 3 is not related to its claimed purpose.

d. Tier 3 Creates a Public Necessity Requirement that PSC Arbitrarily Fails to Apply to Recipients of the Subsidy

Tier 3 creates a requirement regarding eligibility to receive the subsidies. The Order states that there must be "a public necessity to preserve the zero-emissions

attributes of a nuclear generating facility." (R. 0302-352-A at 129.) One of the five criteria that must be met is:

> (b) the degree to which energy, capacity and ancillary services revenues projected to be received by the facility are at a level that is insufficient to provide adequate compensation to preserve the zero-emission environmental values or attributes historically provided by the facility.

(R. 0302-352-A at 129.) Without providing information to support its conclusion or explanation how it determined public "necessity" the PSC concludes subsidy is needed for each of the four (4) nuclear reactors. The Order concludes that

> "The information demonstrates that the projected revenues fall well short of anticipated costs, which seriously jeopardizes the preservation of the zero-emissions attributes of these facilities."

(R. 0302-352-A at 131). In reaching this conclusion, PSC specifically notes

> In the Constellation Case that makes up a part of the record in these proceedings, the Commission, Staff, as well as other interested parties, have reviewed financial data from the Ginna and Nine Mile facilities.

(R. 0302-352-A at 130).

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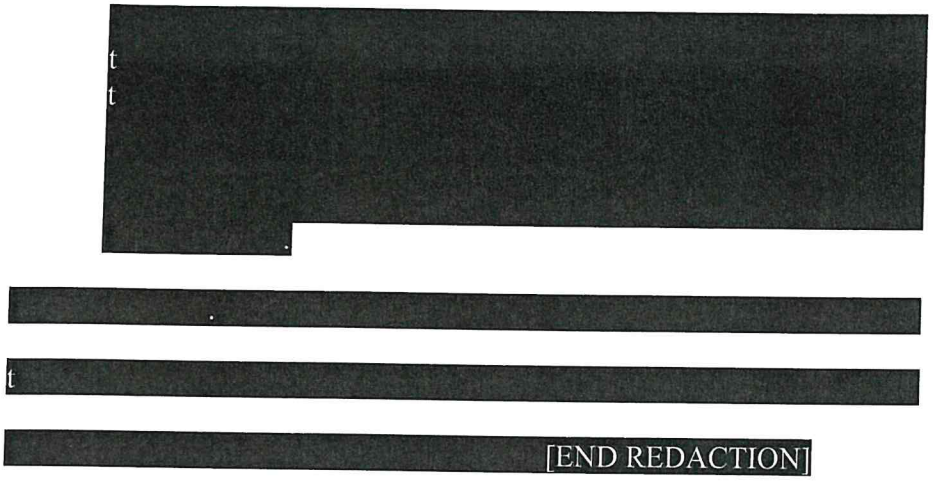

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e. **Tier 3 Does Not have a Rational Nexus to Preserving Economic Conditions and Jobs in New York State**

The PSC statutory authority does not extend to supporting jobs. Furthermore, despite the Governor's assertion that subsidy of old nuclear reactors would preserve jobs, there is no record evidence that Tier 3 scheme would maintain the level of regional or statewide jobs.

Petitioners submitted to PSC studies demonstrating that subsidizing aging reactors is far more likely to produce an overall decrease in jobs in the state than an increase. (R. 15-E-0302-5899 at 9) Additionally, public subsidization of aging reactors delays and disrupts growth in renewables and efficiency. Multiple studies have shown that "direct jobs added by replacing the reactors exceeds the number lost in early retirement," and "nuclear creates many fewer jobs than efficiency and solar and about the same number of jobs as wind." *Cooper Aff.* at 28.

Nuclear reactors are time limited industrial structures, and as such, jobs at nuclear reactors are also time limited and unsustainable. Even excluding

decommissioning jobs, there is no evidence of net loss of jobs resulting from the closing nuclear reactors. "There is no reason to delay capturing these benefits, or put them at risk by extending the life of reactors." Aff. at ¶ 64. The PSC could have probably taken the same $7.6 billion in public funding and vigorously spur creation of other jobs. It could have also given that money directly to affected workers and communities, if any.

The political claim all of the upstate reactors must continue to operate to save jobs is nothing more than a red herring, It would be like the government deciding in the early 1900's it had to save every blacksmith job, instead of supporting increasing numbers of automotive jobs in the nascent auto industry. While it may be true that the kinds of jobs may be different than the existing ones, that does not mean there will be less jobs. The need to save jobs justification for Tier 3 is unsupported by data and is not based in fact.

8. The PSC Arbitrarily Set Tier 3 to a 12-year Term

a. 12-year term is tied to the FitzPatrick Purchase Contingency

The Order bases the 12-year term of Tier 3 on the business interests of Constellation/Exelon, the identified prospective purchaser of FitzPatrick. The Order states:

> Just as it is unreasonable to expect an investor to make a long-lived capital investment without a revenue stream that is durable and certain, a purchaser will not invest in FitzPatrick without similar assurances. In the case of FitzPatrick, the magnitude of the risk taken on in the investment far exceeds refueling costs and capital improvements because a new owner must assume the risks of the ownership as part of the transaction.

(R. 0302-352-A at 148-149).[37]

The PSC provides no basis for why the entire program will terminate if it is not met, except for the unsubstantiated cries of financial hardship by multibillion dollar nuclear and gas giant Constellation/Exelon. The PSC's express requirement for FitzPatrick's purchase tethers the entire program to the whims of a purchaser contravening the stated purpose of the Clean Energy Standard.

9. PSC's Claims that Nuclear Reactors are "Zero Emissions," "Carbon Free," or "Zero-Carbon" are Contrary to Fact and Record Evidence

The Clean Energy Standard Order refers to the "carbon-free attributes" of nuclear generation and the "zero-emissions attributes of nuclear zero-carbon electric generating facilities," and also refers to the "carbon-free power from nuclear plants" and "carbon-free generation represented by ZECS." (R. 0302-352-A at 24, 50). In fact, these terms are used repeatedly and interchangeably throughout the Clean Energy Standard Order. The PSC's primary rationale for Tier 3 is its unsupported claim that nuclear reactors are "zero-carbon" sources of energy. This rationale represents a misstatement of a scientific fact. Every nuclear reactor, without exception, produces carbon emissions. The PSC's failure to understand the basic science of nuclear energy caused it to make a profound mistake of fact in labeling. *Matter of New York Foundling Hospital, Inc. v. Novello*, 47 A.D.3d 1004 (3d Dept 2008).

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[37] Nor is there discussion of the approximately $700+ million in decommissioning funds that the purchaser of FitzPatrick would benefit which substantially exceeds the purchase price. See *Parker Aff* at Ex. W

Even though the PSC does not have expertise in nuclear science or environmental pollutants, it cannot claim it was unaware of the basic science of nuclear energy and carbon emissions, as it received public comments and testimony providing irrefutable scientific proof that nuclear reactors produce and release a variety of carbon-based greenhouse gases, $^{14}CO_2$ (carbon dioxide) and $^{14}CH_4$ (methane). While the PSC acknowledged these comments, it did not respond to them, or justify its mistaken of fact. (R. 0302-352-A at 51).[38]

Petitioners submitted scientific reports from the International Atomic Energy Agency which apprised the PSC that from Boiling Water Reactors ("BWRs"), such as Ginna and Nine Mile 1 and 2, carbon is continuously produced, primarily as carbon dioxide ($^{14}C0_2$). Also carbon is emitted from Pressurized Water Reactors ("PWRs"), such as FitzPatrick, as, "mainly methane, with only a small fraction in the form of $^{14}C0_2$." (R.15-E-0320-5899 at 45).[39]

According to the EPA, methane is more than 25 times as potent as carbon dioxide at trapping heat in the atmosphere.[40] Ignoring this greenhouse gas when there is a valuation metric available undermines the state purpose of Tier 3 with respect to preserving "environmental attributes" because they cannot be calculated properly

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[38] Notably, the PSC relied on a Brattle Group Report in connection with Tier 3, which merely states, without any support that "Carbon free as it is used here [in the report] includes nuclear." (Report at 3, fn 4).

[39] (R-15-E-0302-5899 at 45): IAEA International Atomic Energy Agency, 2004 Technical Report Series No. 421 Management of Waste Containing Tritium and Carbon 14).

[40] (https://www.epa.gov/gmi/importance-methane).

Petitioners also submitted a 2010 EPRI[41] Technical Report: Estimation of Carbon-14 in Nuclear Power Plant Gaseous Effluents which provide scientific proof that *all four (4) upstate reactors emit carbon during operations within New York State*. (R. 15-E-0302-5899 at 146,178,184-85,191, 204-05, 219)[42] Official filings with the Nuclear Regulatory Commission by the owners of New York nuclear reactors identify the amount of carbon, C02, emissions released within New York State during nuclear reactor electricity generation.[43]

This scientific evidence has not been disputed by any party, and therefore is the law of this case. This mistake of fact, undermines the factual basis of Tier 3.

Furthermore, the 2015 State Energy Plan recognizes the scientific reality nuclear generation facilities are not zero emissions; but rather, they produce greenhouse gases in "low" amounts." "Nuclear power plant operation results in *very*

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[41] EPRI, is the Electric Power Research Institute, Inc. which is an American independent, nonprofit organization that conducts research and development related to the generation, delivery, and use of electricity to help address challenges in electricity, including reliability, efficiency, affordability, health, safety, and the environment. EPRI conducts research on nuclear cost-effective technologies, technical guidance, and knowledge transfer tools to help maximize the value of existing nuclear assets and inform the deployment of new nuclear technology for the nuclear industry and regulators.

[42] See *Parker Aff* at Ex U, *Dr. Marvin Resnikoff* Declaration dated 12/13/2018; EPRI Estimations of Carbon-14 in Nuclear Plant Gaseous Effluents Final Report, December 2010/1021106 R-15-E-0302-5899 at vi, Tables 3-14; 3-20, 4-12,4-13,4-27

[43] U.S. Nuclear Regulatory Commission, May 12, 2016 letter from Exelon Generation "Annual Radioactive Effluent Release Report and Annual Radiological Environmental Operating Report." Available online at https://adamswebsearch2.nrc.gov/webSearch2/main,isp?AccesionNumber=ML16145A506 and U.S. and U.S. Nuclear Regulatory Commission, April 28, 2014 letter from Entergy Nuclear NorthEast "2013 Annual Radioactive Effluent Release Report" Available online at https://adamswebsearch2.nrc.gov/webSearch2/main,isp?AccesionNumber=ML14127A085

low emissions of criteria pollutants, GHGs, and other non-criteria pollutants, but it has other potential negative environmental impacts." New York State Energy Plan, Volume II of Technical Appendix, Impacts and Considerations at 33.(emphasis added) The PSC does not provide any rationale as why it ignored the other potential negative environmental impacts recognized by the State Energy Plan. Nor does the PSC provides an explanation or factual basis for its arbitrary assertion that nuclear reactors are "zero-emissions" or "carbon free" sources of electricity. No rationale or evidence is provided to justify the PSC mistake of fact.

10. An Agency Action is Arbitrary and Capricious Where It Does Not Comply with Procedural Requirements

The judicial analysis on whether an agency acted in an arbitrary and capricious manner also extends to the process the agency used to take the administrative action. "An agency's failure to follow its own procedure or rules in rendering a decision is arbitrary and capricious." *D.F. v. Carrion*, 43 Misc.3d 746, 756, 986 N.Y.S.2d 769 (Sup.Ct., N.Y. County 2014) *citing Gilman v. New York State Div. of Housing and Community Renewal,* 99 N.Y.2d 144, 753 N.Y.S.2d 1, 782 N.E.2d 1137 (2002); *Brookford LLC v. NYS Division of Housing and Community Renewal,* 31 N.Y.3d 679 (2018). Thus, the question of whether the PSC complied with the provisions and requirements of the State Administrative Procedures Act are significant and profound in this case.

a. The PSC Claim that Nuclear Reactors are "Zero Emissions" Violates State Administrative Procedures Act §201 Rendering Tier 3 Arbitrary and Capricious

The PSC claim that nuclear energy is "zero-emissions" raises a basic question

of whether the statement is scientifically accurate. Zero is an absolute number and has an absolute meaning. Since nuclear reactors produce greenhouse gas emissions, the zero emissions claim is not true. The PSC claims of nuclear reactors being "zero-emissions" and "carbon-free" are mistakes of fact not supported by scientific evidence. Moreover, the PSC repeated use of the term "zero-emission" and "zero-emission credit" is an unlawful violation of SAPA §201[44]. This procedural provision requires that "rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meaning." The PSC may not improperly use words in ways that contradict their commonly understood meaning that are misleading and deceptive, which creates a misunderstanding by the public. The PSC's contention that nuclear energy has "beneficial environmental attributes" is akin to a promoting smoking as having "beneficial health attributes" to counteract obesity, and then mandating public subsidization of tobacco.

Respondents' claim that SAPA §201 is merely aspirational or guidance, rather than a statutory obligation. Respondents miss the point and importance of this obligation in New York State Law. In the late 1970's, New York became the first state in the nation to adopt the concept of the use of plain language in law. For example, the state's General Obligation Law requires consumer transactions and leases to be "[w]ritten in a clear and coherent manner using words with common and every day meanings" and provided penalties for violations. *See* N.Y. General

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[44] The Court must reject Respondents' claims that this issue is nor judicable as it is unsupported and made of whole cloth. *See* SAPA §205.

Obligation Law ("GOB"). §5-702(1), *et seq.* Similarly, SAPA §201 requires "each agency to strive to ensure that, to the maximum extent practical" it use these same "common and everyday meanings"– to ensure agencies use clear language in their rulemaking efforts "to facilitate both public comment and compliance with established rules and regulations by requiring agencies to use clear and understandable language in their promulgation and adoption."[45] It strains credulity to argue that such a provision is aspirational, particularly on the facts of this case, where PSC attempts to define "zero emissions" in a way that defies the common definitions of those two words, and is contradicted by nuclear physics. Thus, the PSC's patently false statements that nuclear reactors are "zero emission" and "carbon free" sources of electricity violates SAPA §201 and is irrational and contrary to the established rules of law and fact.

POINT III
THE PSC ACTED IMPROPERLY IN DENYING PUBLIC DUE PROCESS NOTICE AND COMMENT REQUIRED BY STATE ADMINISTRATIVE PROCEDURES ACT ("SAPA")

The PSC violated the State's Administrative Procedures Act ("SAPA") by adopting Tier 3 and without providing Petitioners their statutory due process rights to notice and comment. All parties concede that the PSC did not provide a 30-day public comment period for the July 8, 2018 Staff Responsive Proposal (the "Revised Proposal"), and that Tier 3 was adopted based on the Revised Proposal only 22 days later, on August 1, 2016. All parties also conceded that the PSC departed from the

[45] *See Parker Aff at* Exhibit R; Legislative History SAPA §201, Bill Jacket Senate Bill 6633-A, 1992, Executive Department Office of General Services (June 26, 1992)

going forward cost of operation approach set forth in the published SAPA notices, to instead use a new methodology introduced in the Revised Proposal to calculate the amount of the subsidy. This radical last-minute change completely untethered the subsidy from the amount of money necessary to keep the nuclear reactors operating and resulted in unjust and unreasonable profits of billions of dollars more than previously been noticed and considered. Most critically, the PSC did not transparently disclose the full cost Tier 3 would impose upon the public.

Contrary to Respondents arguments: 1) the Revised Proposal was a "substantial revision" of the Original Proposal; 2) Tier 3 was the type of rule that requires additional notice and comment when there are substantial revisions; and (3) Petitioners preserved their procedural argument. All of Respondents' arguments should be rejected by the Court.

Between January 27, 2016 and May 25, 2016, the PSC published five (5) notices in the State Registry[46] advising the public of the PSC's intention to adopt a Tier 3 nuclear subsidy and that its amount would be based on a cost of operations

[46] Notices Published in State Register attached hereto the *Parker Aff.* as Exhibit A-E:

A) 1/27/16 Clean Energy Standard (public comments due 45 days after publication of this notice);

B) 3/16/16 Proposed Zero-Emissions Credits Purchase Program Regarding Certain Nuclear Power Plants (public comments due 45 days after publication of this notice); C) 4/20/16A Clean Energy Standard – Tier 1 and Tier 2 (public comments due 45 days after publication of this notice);

D) 4/20/16 A Clean Energy Standard – Tier 3, N.Y.St.Reg. PSC-16-6-00005-P Volume XXXVIII, Issue 16, April 20, 2106 Rulemaking Activities PSC Proposed RuleMaking (public comments due 45 days after publication of this notice);

E) 5/25/16 Establishment of Compensation for Nuclear Facilities Relative to Zero-Emission Credit Program (public comments due 45 days after publication of this notice)

model. In the published notice on March 16, 2016, the PSC stated that "the level of support [under Tier 3] would be no more than the level otherwise required to encourage new renewable facilities [Tier 1]." *See* Ex. B. All of the published notices refer to the January 25, 2016 PSC "White Paper," (R. 15-E-0302-81-B, which was "supplemented" by the Staff "Cost Study" on April 8, 2016 (R. 15-E-0302-112-B-). (The White Paper and Cost Study are herein jointly referred to as the "Original Proposal.")

On July 8, one day before the end of the public comment period for the Original Proposal, the PSC staff posted the Revised Proposal —only on its website but not in the State Register. (R. 15-E-0302-299-B) The unpublished "notice" of the Revised Proposal gave no inkling that there were any changes to the Original Proposal, much less that there were substantial ones, and provided only ten (10) days for public comment.[47] This was a startling departure from PSC practice in this proceeding, because previously PSC had provided a forty-five (45) day comment period after each new proposal.

The unpublished request for comment gave no notice that the foundation of the new Tier 3 Revised Proposal was a first-in-the nation subsidy based on a Social Cost of Carbon concept, or that Tier 3's cost had ballooned from $59-658 million for the first 68 months to one billion dollars just for the first two years, or that the average monthly cost to all electricity consumers could increase by 147% and

[47] R. 15-E-0302-305; 15-E-0302-306; R 15-E-0302-309; R 15-E-0302-308, R. 15-E-0302-307; R. 15-E-0302-312; R. 15-E-0302-314; R. 15-E-0302-3015; R. 15-E-0302-6132; R. 15-E-0302-317 (42 organizations).

1,636%. (R. 15-E-0302-337 at 4).

The Revised Proposal included

> "dramatic changes to the [Tier 3] policy, including changes to the structure of the proposed nuclear tier, how nuclear subsidies would be calculated, how much they will cost, how costs and benefits are considered, which generators may be eligible") and would "have significant new impacts on ratepayers."

(R 15-E-0302-305 at 1-2) The Revised Proposal also included a "brand new 'public necessity' policy proposal." *Id.* at 2.

Petitioners and others who recognized the magnitude of the Tier 3 changes (despite the PSC's failure to provide proper notice of them) objected to the PSC's decision to provide only a 10-day comment period, because such a short comment period would deny them the ability to meaningfully consider and comment on the Revised Proposal. Some Petitioners demanded a minimum of 30 days to comment because the Revised Proposal constituted a substantial revision of the Original Proposal. *See* State Administrative Procedure Act ("SAPA") §102(9) and SAPA §202(4)(4-a).[48] Others requested the same 45-day comment period that the PSC had provided in prior notices.

The PSC denied all of the requests for a legally adequate and required comment period, and provided just four (4) more days for the public to comment.

The PSC's failure to follow SAPA requirements has significant legal

[48] For example, the City of New York R. 15-E-0302-309; Goshen Green Farms, CIECEP, PHASE, IPSEC R.15-E-0302-373-B.

consequences. Tier 3's enactment is null and void because of the failure of the PSC to provide the required 30-day statutory notice and comment period when it substantially revised Tier 3. *Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994).

A. THE REVISED PROPOSAL IS A SUBSTANTIAL REVISION OF THE ORIGINAL PROPOSAL

SAPA §102(9) provides that any "addition, or other change" that "materially alters" a rule's "purpose, meaning or effect" is a "substantial revision." SAPA was amended in 1990 to require an additional 30-day comment/review period after a "substantial revision" is made to a proposed rule. It also included a definition of "substantial revision"

> any addition, deletion or other change in the text of a rule proposed for adoption, *which materially alters its purpose, meaning or effect*, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect.

See SAPA §102(9) & SAPA §202(4)(4-a)(a), (emphasis added).

The Legislature amended SAPA §202(4) to require additional 30 days public comment period after substantial revision of a proposed rule to avoid the possibility "dangerous flaws could creep into the revised text just as readily as in an originally proposed text."[49] The statutory amendments ensured that substantial revisions would be subject to the same public comment and public scrutiny obligations as the original proposal. The Department of State emphasized that this amendment was necessary

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[49] See Parker Aff at Ex P: Bill Jacket 1989 Chapter 336, National Federal of Independent Business July 18, 1989)

because "some agencies have not published notices of revised rulemaking when they should have."[50]

Here, the Revised Proposal materially altered the purpose, meaning and effect of the Original Proposal in numerous ways, any one of which would constitute a substantial revision.

1. The Revised Proposal Materially Increased the Costs of Tier 3 From the Original Proposal

The Revised Proposal "materially altered" the "effect" of the Original Proposal because it substantially increased the total cost of the Tier 3 program both in payments to Constellation/Exelon, as well as the mandated subsidies payable by all electrical consumers. It also rejected the foundational premise of Tier 3, set forth in the published notices that Tier 3 would be promulgated in the "most cost-effective way" and be in parity with support for new renewables.

a. The Total Tier 3 Payments to Constellation/Exelon Substantially Increased in the Revised Proposal

The Revised Proposal materially altered the effect of Tier 3 by substantially increasing the total cost of the program. The subsidy in the Original Tier 3 Proposal was estimated to cost between *$59 million to $658 million for the first 68 months* of the program, while the Revised Proposal exponentially increased Tier 3 to *$965 million just for the first two years (24 months) of the program.* (R 15-E-0302-112-B at 84 and R. 15-E-0302-299-B at 2.) In other words, using basic arithmetic, the range

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[50] *See* Parker Aff at Ex Q: Bill Jacket 1990: Department of State July 24, 1990 at 10/17.

in the Original Proposal, based on the going-forward costs of operations results in an average cost of approximately $10.41 to $116.12 million per year. The Revised Proposal, based on a Social-Cost-of-Carbon model, results in an average cost of approximately $482.5 million per year for just the first two years alone.

One set of public comments, based upon a calculation of the numbers in the Revised Proposal, concluded that the monthly increase in the total cost of the revised Tier 3 was between 147% and 1,636%. The July 22, 2016 comments from Multiple Intervenors (R. 15-E-0302-337 at 4) demonstrates this proposed increase and states:

> [A]ccording to the Staff's own calculations, the nuclear related subsidies for just the first two years under the New Staff Proposal [the Revised Proposal] potential could cost customers between 147% and 1,636% more than the projected cost range of the subsides proposed in the Staff White Paper [the Original Proposal] for an initial period of five years and eight months.
>
> On a monthly basis, the potential cost of the New Staff Proposal [to electrical consumers] is more than quadruple the upper limit (and more than seven times the midpoint) of the estimated cost of the proposals advanced in the Staff White Paper {"the Original Proposal"].

Proposal	Projected Cost	Period Projected	Projected Monthly Customer Cost
Staff White Paper	$59 million to $658 million[51]	April 2017 through December 2022 (68 months)[52]	$9.68 million using high end of cost range; $5.27 million using midpoint of cost range[53]
New Staff Proposal	Up to $965 million[54]	April 2017 through March 2019 (24 months)[55]	Up to $40.21 million[56]

The tremendous increase for the first two years of Tier 3 clearly constitutes a substantial and material change in the scheme. The PSC never disclosed the cost estimates for the remaining 10 years of Tier 3, though it certainly could have. This was a gross failure of transparency and an abrogation of the PSC's duty to the public. During the truncated two-week comment period, it was left to the public to figure out and calculate the costs. Based on the limited and complex information provided by the PSC, including new definitions, new methodology, and a first-in-the nation complicated formula, a number of public commenters estimated that Tier 3's total cost ballooned to over $7 billion dollars.[57] The PSC does not dispute the $7+ billion

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[51] R 15-E-0302-112-B at 84.

[52] The Cost Study refers to the period examined as "to 2023" (id.), which Multiple Intervenors interprets as meaning April 2017 through December 2022.

[53] Calculated as follows: (a)$59 million to $658 million divided by 68 months=$860,000 to $9.67 million per month ; vs (b) $965 million divided by 2 = $482.50 million per month)

[54] R 15-E-0302-299 at 2.

[55] R 15-E-0302-299 at 2

[56] Calculated as follows: $965 million divided by 24 months.

[57] Petitioner NIRS found that the total cost would be approximately $7.6 billion dollars (R 15-E-0302-328 at 4) based on the pieces of data contained in the Revised Proposal, while public commenter NUCOR estimated the total cost to be $7.2 billion dollars (R- 15-E-0302-335-B at 2). *See Parker Aff* at Ex J. Tim Judson Affirmation 12/3/18.

dollar price tag of Tier 3 in the Revised Proposal. Only Exelon objects to this estimate claiming, self-servingly and contrary to law, that "any cost increases are beside the point." (Cons. MOL at 24). The need to alert the public to a material change in the impact (here, total costs) is precisely the point of SAPA's substantial revision language, which provides broader procedural due process of additional notice and comment. In addition to staggering cost, Tier 3 skews energy markets to protect nuclear reactors from competition.

b. The Costs to Electrical Consumers Changed Substantially

Based on the PSC's express language, the monthly impact to electrical customers substantially changed from "less than a 1% impact on electricity bills (or less than $1 per month for the typical residential customer)" in the Original Proposal's Cost Study (R 15-E-0302-112-B at 5) to "less than $2 per month in the first tranche" just for Tier 3 *alone*. *Cf.* (R. 15-E-0302-352A at128).

Participants to the proceeding clearly pointed out the unprecedented magnitude of the Revised Proposal. *Multiple Intervenors* noted out:

> "This may be the most expensive initiative ever undertaken by the Commission, and the New Revised Proposal, **issued only two weeks ago**, contains absolutely no analysis as to the magnitude of the resulting rate impacts on customers," and incredibly, there is **no discussion, analysis or justification proffered for such large increases** in what essentially would be binding financial commitments imposed on customers." (R. 15-E-0302-337 at 24-25) (emphasis added).

c. The Revised Proposal Substantially Changed Tier 3 from "the Most Cost Effective" Subsidy to One of the Most Expensive Subsidies in New York State History

During a technical conference workshop on March 9, 2016, the PSC Chair told the public that Tier 3 would be funded in "the most cost-effective [way] we can". (R. 2016-0302-116 at 151:12-13). On April 20, 2016 the published notice for the Cost Study notified the public of this Tier 3 cornerstone principle: "The Commission is considering the Cost Study as part of its analysis of the CES proposal in regard to how the CES could be designed and *implemented in the* **most cost-effective** way to meet its statutory obligations." See *Parker Aff.* at Exhibit E *(*emphasis added*)*.

Respondent Constellation/Exelon also acknowledged this important point during the proceedings, commenting that the cost of operations "pricing mechanism" in the Original Proposal "is the least costly way for customers to secure the environmental attribute provided by existing nuclear plants." (R. 15-E-0302-224-B at 10).

Yet, the Revised Proposal completely and suddenly changed this method of calculating the subsidy to use a Social Cost of Carbon metric, resulting in the cost of Tier 3 increasing materially and significantly—far from the "most cost-effective" directive of the Original Proposal and contrary to the statement of the PSC Chair.

All of these material changes constitute substantial revisions to the Original Proposal.

2. The Revised Proposal Materially Changed the Ratio of Subsidy Between Tier 1- Renewables and Tier 3-Nuclear

On February 24, 2016 in an Order Expanding the Scope of the Proceeding and Seeking Comments to include Tier 3, the PSC ordered that, "In no event shall such support [for Tier 3] be any more than the level otherwise required to encourage new renewable facilities. " (R 15-E-0302-80 at 2)

In the March 16, 2016 published notice for the Proposed Zero-Emissions Credits Purchase Program Regarding Certain Nuclear Power Plants (i.e., Tier 3), the PSC reiterated that "[t]he level of support [for Tier 3] would be no more than the level otherwise required to encourage new renewable facilities." See Exhibit B.

However, in the Revised Proposal, Tier 3's cost averages approximately $482.5 million per year, while Tier 1 renewables averages only approximately $80.02 million per year. [58] The PSC chose to abandon the parity between renewables and nuclear generation support that was promised in the Original Proposal. If somehow the announced parity between Tier 1 and Tier 3 referred to the REC vs. ZEC price, it would still be a substantial revision, because PSC abandoned that commitment since the PSC did not cap the ZEC price at the REC price for the year in which each tranche begins.

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[58] In the Original Proposal, the support provided to encourage new renewable facilities in Tier 1 funding was $453.44 million for 68 months (R. 15-E-0302-115-B at 5). This is an average cost of approximately $80.02 million dollars per year, and that cost remained unchanged in the Revised Proposal. The total investment in renewables, including maintenance of existing renewables in Tier 2 is $1,000,000 for 68 months, with average of $176,470 a year. In the Revised Proposal, the PSC disclosed that the cost of Tier 3 for only the first two years would be $965 million, which is an average of $482.5 million for a year. (R. 15-E-0302-299-B).

The material change in the effect of Tier 3 results in the PSC improperly favoring one competing electricity industry, nuclear, over another, renewables - when the stated purpose of New York's law and energy policy is to promote renewables and not nuclear. PSC made this material change to the purpose and effect of the Revised Proposal without notifying the public by published notification, or providing sufficient detail on the material change related to abandonment of parity between Tier 1 and Tier 3.

The change has resulted in an even greater disparity than anticipated, as the NYSERDA Clean Energy Standard Status Report for Calendar Year 2017 demonstrates -nuclear Zero Emission Credit payments were $367,567,000, and renewables credits payments were a mere $552,000.[59] This disparity is evidence that the nuclear energy has hijacked the lion's share of the Clean Energy Standard funding away from renewables and efficiency improvements.

3. The Revised Proposal Materially Changed the Tier 3 from a Cost of Operations to a Social Cost of Carbon Subsidy

The Original Proposal states twice that Tier 3 will "provide qualifying nuclear plants with support payments, reflective of their going forward costs of operation, to ensure they continue to operate." (15-E-0302-81-B at 30). Both the White Paper (15-E-0302-81-B-at 31) and the March 16, 2016 published notice also states that "[t]he price of the ZEC payments would be based on the *minimum amount of support necessary* above existing revenue streams to cover, among other things, the fuel and

[59] *See Parker Aff* at "Exhibit V": NYSERDA CES Financial Status Report for calendar year 2017, April 5, 2018)

operational costs of the facility ("going forward costs") as determined by the Commission after an examination of the books and records of the facility owner." *See* Exhibit B.

The Revised Proposal ignored what PSC told the public, materially changing the Tier 3 methodology to a vastly different scheme based on a Social Cost of Carbon concept that had *never been used to price any subsidy, anywhere in the nation.*

The PSC's dramatically changed course when it fabricated the Social Cost of Carbon formulaic approach. This approach does not provide for a reduction in subsidies for Tier 3, when the nuclear facilities no longer have a financial need. Under a cost of operations model, the Tier 3 subsidy could decrease as the financial need of the nuclear operators decrease. On the other hand, the fixed Social Cost of Carbon formula first created in the Revised Proposal without any relation to the financial needs of the nuclear operator.

4. Eligibility Requirements Changed from the Original Proposal.

In the Original Proposal, eligibility was based on a simple and straightforward plant-specific examination of the books and records to determine need, and thus, eligibility. The Revised Proposal changed the basis of eligibility by creating a new public "necessity test." The new test abandoned the requirement of PSC review of the books and the records of each specific facility to determine *actual* financial need, which materially altered the meaning of eligibility. In fact the Order ultimately made a summary determination of eligibility without basis in the record , with a total lack of transparency and absence of a review process in which parities could meaningfully

comment.

5. Revised Proposal is not a "Logical Outgrowth" of the Original Proposal

Respondents incorrectly argues that the revisions in the Revised Proposal were a "logical outgrowth" of the Original Proposal (Con at 20-21; PSC MOL at 40). The "logical outgrowth" test is a federal administrative law concept that has been applied in only a handful of cases in New York State courts, which makes sense because New York's legislature has expressly defined what constitutes a "substantial revision" in SAPA, which does not include a "logical outgrowth" test. *See* SAPA §102(9).

In any event, Tier 3 is not a "logical outgrowth" under the federal logical outgrowth standard. One of the few New York state cases that discusses the federal logical outgrowth test compares it to New York's substantial revision test and states that, "Any difference between the standard of review applied by this [state] court, which ask whether any changes were "material and substantial" and the standards utilized in the Federal cases cited by defendants [i.e., logical outgrowth] is merely semantic, not substantial." *Starburst Realty Corp. v New York*, 132 Misc.2d 878, 880 (Sup Ct, NY County 1986). The *Starburst* Court goes on to state that "more significantly" the federal cases ask, "whether 'the practical impact of the final rules is very similar to what it would have been if the proposed rules had gone into effect'" *Id.* at 533 (citations omitted):

> "Those [federal] cases variously ask whether "the notice would fairly apprise interested persons of the subjects and issues the agency was considering" whether interested parties were "able to comment meaningfully upon the agency's proposals" and, more

> significantly, whether "the practical impact of the final rules is very similar to what it would have been if the proposed rules had gone into effect" (supra, at p 533)(Emphasis added and citations omitted.)

Assuming arguendo that the concept did apply in this case, federal Courts have held that a revised proposed rule is not a "logical outgrowth" if it "deviates too sharply from the [original] proposal." *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137 (2nd Cir 2013). As discussed, the huge increases in costs and scope of Tier 3, the change in methodology that created a newly proposed Social Cost of Carbon based formula, with its abandonment of cost-of-operations standard, and reversal of parity between renewables and nuclear subsidies in Tier 3 were all sharp deviations from the Original Proposal. These material changes negate any argument that the Revised Proposal was a logical outgrowth of the Original Proposal.

Even under the "logical outgrowth" concept, a second notice and public comment period would have been required, because the changes in the Revised Proposal deviated sharply from the Original Proposal. *See Connecticut Light & Power Co. v. Nuclear Regulatory Comm.*, 673 F2d 525, 530 (D.C. Cir. 1982) , cert den 459 US 835 (1982); 673 F2d 525 *Spartan Radiocasting Co. v. Federal Communications Comm.*, 619 F2d 314, 321 (4th Cir. 1980);

The PSC attempts to justify its actions by contending that interested parties were invited to submit comments on the Original Proposal, and that a few comments mentioned the Social Cost of Carbon concept. One is a total misrepresentation of Petitioner NIRS comment where it totally objected to any nuclear subsidy, including one based on Social Cost of Carbon (See Ex. *Judson Aff*), and two comments are

from Respondent beneficiaries Constellation/Exelon and Entergy.

However, under the logical outgrowth test suggested comments cannot substitute for required notice by an agency. The federal Courts have held that an agency cannot "bootstrap notice" based on a suggestion contained in a comment. In *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985). There, the Court held:

> "Neither can we properly attribute notice to the other appellants on the basis of an assumption that they would have monitored the submission of comments. As a general rule, [an agency] must **itself** provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The [Administrative Procedure Act] does not require comments to be entered on a public docket. Thus, notice necessarily must come -- if at all -- from the agency." AFL-CIO at 340 (quoting Small Refiner, 705 F.2d at 549 (emphasis in original).

The PSC argues that its boilerplate language "may adopt, reject, or modify, in whole or in part, the relief proposed" alerts interest parties that "the precise contours of the proposals might change (PSC MOL at 21). This boilerplate language does not relieve the agency of its obligation to re-notice when those changes are substantial revisions that require re-notice. Nor can the PSC otherwise override Petitioners' right to due process in this administrative proceeding.

The cases upon which Respondents rely to claim that the Revised Proposal and Order were a "logical outgrowth" offer no support.

Both the PSC and Exelon cite *Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams,* 131 A.D.2d 205, 212 (3d Dept 1987), *aff'd* 72 N.Y.2d 137 (1988). There, the DEC sought to adopt *existing* water quality guidelines as official regulations, to specify the methodologies to be used in calculating ambient

water quality standards for each of the regulated substances, and to adopt an appendix that would contain the actual standards. DEC, responding to requests from affected businesses, made available background "fact sheets" for the regulated substances, which contained the scientific data supporting DEC's proposed numerical water quality standards.

The Court found no violation of SAPA, noting that Petitioners had access to every fact sheet for at least 30 days before the close of the comment period, and thus had a meaningful opportunity to comment. *Id.* at 212. The Court also found that the "revisions contained in the fact sheets appear to be "logical outgrowths" of the original proposals. In particular, the DEC withdrew any proposed toxic substance that varied by a factor of plus or minus 20% from the original proposed standard ." *Id.* at 212. The Court held that, "[t]o the extent, if any, that the fact sheet changes rendered DEC's original notice incomplete or misleading, DEC's withdrawal of substances outside the 20% change margins eliminated the possibility of substantial prejudice; consequently, re-notice was unnecessary." *Id.*

Here, Petitioners had only 14 days to comment, not 30 days, and the changes were far in excess of 20% - the unpublished changes in methodology increased the costs of Tier 3 between 147% and 1,636% over the projected cost range of the subsidies in the Original Proposal. Comparing an update to existing fact sheets where the public was provided with over 30 day comment period, with the creation of a first in the nation multi-billion dollar subsidy to one corporation based on a new formula, where an only fourteen (14) days of public comment period was allowed strains credulity.

Moreover, in this case, PSC did not provide the underlying data. The New York City Office of Sustainability pointed out that the Revised Proposal contains "no analysis or evaluation of the potential bill impacts of its proposal." Neither the public nor the PSC had "the information needed to properly evaluate this new proposal, or compare it to the initial proposal . . . and determine whether the proposal is in the public interest." (R. 15-E-0302-338)[60].

Respondent Constellation/Exelon also cites *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Jorling*, 152 Misc. 2d 405, 409–10, 577 N.Y.S.2d 346 (Sup. Ct. 1991), *aff'd,* 181 A.D.2d 83, 585 N.Y.S.2d 596 (1992). In that case, DEC promulgated regulations limiting exhaust emissions from motor vehicles to effectuate California standards. There, the Court ruled it "should consider whether the notice of proposed rule making already published for the initial proposed regulations would require any changes to cover the revisions" and determined, on the facts of that case, that the notice would not have required changes. In this case, the notice of the Original Proposal specifically stated that it the amount of nuclear subsidies would be based on a "cost of operations" model and "the level of support [under Tier 3] would be no more than the level otherwise required to encourage new renewable facilities [Tier 1]." *See* Exhibit B). The Revised Proposal changed the methodology from this cost of operations model to the PSC's newly created Social Cost of Carbon formula, dramatically increasing the cost of Tier 3, and rendering it far more costly, and

[60] Other commenters also questioned the lack of underlying data in the Revised Proposal R 15-E-0302-328; R 15-E-0302-337; R 15-E-0302-320.

providing more support than the support than given renewables (Tier 1). The published notice for the Original Proposal, therefore, did not fairly apprise Petitioners of these substantial changes in methodology and effect.

6. Without any Notice in the Original Proposal or the Revised Proposal the Order Made the Entire Tier 3 Program Contingent on the Sale of FitzPatrick

The Order adopted included a contingency requiring the sale of FitzPatrick between third parities, (R. 15-E-0302- 352-A at 143) even though neither the published notices nor the Revised Proposal even mention such a transaction. This significant inclusion materially changed the purpose of the program from being one to promote clean energy, to one to facilitate a multi-million dollar private sale by Entergy to Constellation/Exelon.

7. The Public Comment Period Was Illegally Truncated Due to Demands by Constellation/Exelon

The PSC tried to justify its truncated comment period based on Constellation/Exelon's purported deadline to place nuclear fuel orders, (R. 15-E-0302-352-B at 122; *see also*, R. 15-E-0302-318, 16-E-0270-34 at 3). Yet, this Appellate Division has rejected the notion that such deadlines could serve as basis to deny statutory procedural protections:

[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for dispensing with the statute's notice and comment provisions (*see, United States Steel Corp. v Environmental Protection Agency*, 649 F.2d 572, 575; *State of New Jersey, Dept. of Envtl. Protection v United States Envtl. Protection Agency*, 626 F.2d 1038, 1042; *United States Steel*

Corp. v United States Environmental Protection Agency, 595 F.2d 207, 213). For these reasons we cannot accept respondent's contention that the deadlines imposed by the Federal court justified this noncompliance with the State Administrative Procedure Act." *Home Care Assn. v Dowling*, 218 A.D.2d 126, 129 (3d Dept 1996)

If deadlines imposed by another Court do not provide a basis to dispense with notice and comments provisions, certainly the demands of a single beneficiary, Constellation/Exelon, cannot justify violating due process rule-making procedures.

The question of whether the public comment period was sufficient to allow for meaningful comment period on Tier 3 was answered by many participants as the proceeding was occurring. These participants made it clear that the limited fourteen (14) day comment period did not provide enough time for them to adequately review and meaningfully comment on the Revised Proposal - which did not even provide sufficient underlying data. For example the City of New York City wrote:

> "The total potential impacts – cost and otherwise – of the Revised Proposal are not known because they have not been properly studied. The inappropriate limitation of the comment period to 14 days prevents any meaningful assessment from being conducted, especially in light of the unavailability of supporting data and analysis."

(R. 15-E-0302-338 at 15) (emphasis added)

In addition to the required 30 days notice and public comment period, the PSC was also required to wait 30 days after the close of the comment period to issuance of the Order - here after the close of the already truncated comment period, the PSC improperly waited only 8 days to promulgate the Order.

B. TIER 3 IS AN ACTION THAT FALLS WITHIN SAPA §102(2)(A)(I), NOT SAPA §102(2)(A)(II)

The description of the agency's action has particular relevance to the procedures for its enactment and the procedural rights of the public during those proceedings. In this case, the essential question is what type of rulemaking is Tier 3? Is it a SAPA §102(2)(a)(i) (hereinafter referred to as a "**Type (i) Rule**") or a SAPA §102(2)(a)(ii) (hereinafter referred to as a "**Type (ii) Rule**") rulemaking, or both? The correct answer has significant implication for the process used to issue Tier 3 because a Type (i) Rule requires re-notice upon substantial revision while a Type (ii) does not.

Petitioners will demonstrate that Tier 3 is a Type (i) Rule, which requires re-notice because of the substantial revisions to the Original Proposal. As will be discussed, Tier 3 is a Type (i) Rule pursuant to the plain language of SAPA §102.2(a)(i), which defines a Type (i) Rule as

> (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof

Here, Tier 3 is a Type (i) Rule because it is an agency statement of policy of general applicability that purports to implement law. It also prescribes a fee charged by or paid to any agency.

The Courts have considered and decided whether an action is statutory

rulemaking, but not whether an action is a Type (i) or Type (ii) Rule[61] In this case, in an effort to justify the failure of the PSC to give the required 30-days notice of the "substantial revision" of Tier 3, Respondents claim that the PSC's Tier 3 action is a Type (ii) Rule – not the type of rulemaking that requires an additional comment and review period when there are substantial revisions to the proposed rule. Astonishingly, Respondents also argue that if Tier 3 is both a Type (i) and Type (ii) Rule that that *least* due process is all that is required. They are wrong.

1. The PSC Label for Tier 3 is not Determinative

The PSC argues that Tier 3 is a Type (ii) Rule, because the PSC says so. It points to *no* case law in support of its conclusion. Constellation/Exelon points to the PSC's own declaration that Tier 3 was promulgated as a Type (ii) Rule. (Con MOL at 18-19).

In determining what type of rule an agency has promulgated, it is what the agency does that matters and not what the agency labels it's action. *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 169–70 (2d Cir. 2013) ("the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact" citing *Lewis–Motav. Sec'y of Labor*, 469 F.2d 478, 481–82 (2d Cir.1972) As the United States Supreme Court opined, "This makes sense because an agency may mislabel something because it is driven primarily by a desire to skirt notice-and-comment provisions." *Perez v.*

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[61] Litigation generally concerns exceptions to the rulemaking provisions of SAPA §102.2 (b), none of which apply here.

Mortgage Bankers Ass'n, 135 S.Ct. 1199 (2015). Thus, in this case, the Court should rely properly on its own judgment to determine what kind of rule the Revised Proposal actually is for Tier 3.

2. Tier 3 is a Type (i) Rule

Tier 3 falls within the plain language of Type (i) Rule, which is defined as:

> the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension and repeal thereof. SAPA §102.2(i)[62].

a. Tier 3 is an Agency Statement of General Applicability That Implements Law

Tier 3 is an Agency Statement

Tier 3 is the PSC's *statement* of policy that nuclear energy subsidies shall be payable by all electrical consumers, in accordance with a newly created fixed administrative formula based on the stated premise that nuclear generation is "zero-emissions" and "carbon free".[63] (PSC MOL at 22). Statements of policy have been found by the Court of Appeals to fall within the ambit of Type (i) Rule. See *Schwartfigure v. Hartnett,* 83 N.Y.2d 296, 301 (1994). *Cordero v. Corbisiero*, 80 N.Y.2d 771 (1992).

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[62] Only one case, *Boundless Energy NE, LLC v. PSC,* 57 Misc. 3d 610, Sup Ct. Albany County 2017 is cited by Respondents in an attempt to support their argument that Tier 3 is a Type (ii) Rule. Recognizing the dearth of case law in this area, the *Boundless* Court set forth the most basic rule of statutory construction that a court should look at the "plain text of the statute" to render its decision. *Id.* at 615.

[63] As set forth herein, these statements are contrary to New York State's Energy Plan.

Respondents' assertions that Type (i) rules are limited to "hard" rules[64] that are ultimately codified has no support in case law, or in statutory language.

Tier 3 is a Rule of General Applicability

Tier 3 is a rule "*of general applicability*" because it is "a fixed, general principle applied without regard to the facts and circumstances of the individual case." See *Cordero.* Tier 3 requires every retail electrical consumer in New York State, without exception, to pay a monthly surcharge for 12 years based on a fixed administrative formula. Tier 3 requires "all consumers to participate." (R. 0302-352-A at 149) Tier 3 "applies to all ratepayers" (PSC MOL at 22) without exception, including towns, schools, small businesses, farms and individuals, and those who already pay higher prices for 100% renewable energy.

Moreover, the Tier 3 ZEC formula is fixed in advance; applies across the board for all upstate nuclear reactors in the program; and does not change based on the individual circumstance or needs of these reactors. While the going forward "cost of operations" formula in the Original Proposal would have set a formula based on the individual circumstances of each nuclear reactor, the Social Cost of Carbon based formula in the Revised Proposal sets out one single formula that applies to all reactors.

The Court of Appeals has held that a "rigid, numerical policy which applied invariably across-the-board . . . without regard to individualized circumstances or

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[64] Respondents also refer to Type (ii) rules "soft" rules without any explanation, reference or rationale.

mitigating factors" is a Type (i) Rule. *Schwartfigure v. Hartnett,* 83 N.Y.2d 296, 301 (1994). In *Schwartfigure*, the Court of Appeals held that a policy of the Unemployment Insurance Appeal Board was a Type (i) Rule. There, the Agency had adopted a policy that future unemployment benefits would be offset by 50% to recoup any past overpayments made by the agency to a recipient. While the amount of money recipients would repay according to the 50% set-off policy could differ (based on the amount owed), the formula itself applied across the board to all recipients, and thus rendered the action a Type (i) Rule. *Id.* at 301-302. *See also Car Barn Flats Residents' Ass'n v. New York State Div. of Hous. & Cmty. Renewal*, 184 Misc. 2d 826, 830–32, 708 N.Y.S.2d 556, 559–60 (Sup. Ct., New York Co 2000)(fixed formula changes in rent calculations based on federal schedules "invariably applied across-the-board to all" and thus constituted a SAPA Type (i) Rule).

Here, the Tier 3 formula is more complicated than the 50% set-off rule in *Schwartfigure*, or the federal schedules in *Car Barn Flats*. Nonetheless, Tier 3 is a fixed formula—the formula itself does not change—and it applies across the board without regard to the individual facts and circumstances of the specific nuclear reactor or specific electrical consumers who are forced to pay the subsidy based on the fixed formula. The adjustments made to the Tier 3 during each tranche are made generically and the ZEC price for each facility remains equal. As in *Schwartfigure*, the amount that an electrical consumer must pay could differ (here, based on the amount of kWhs used by the customer) but the subsidy is always be based on the

same exact numeric formula.[65]

Tier 3 is a fixed principle and formula of "general applicability."

PSC Claims that Tier 3 Implements Law.

The PSC explicitly claims that it is purporting to "*implement*" Public Service Laws §§4, 5(1)(b) and 2(12) and 66(2) and 66(5) (PSC MOL at 3-4, 44-47).[66]

b. Tier 3 Includes a Fee that is Charged by and Paid to an Agency

The Order establishes that the price charged "per ZEC would be the price established administratively by the Commission for the purchase of zero emissions attributes, plus NYSERDA's incremental administrative costs *and fees associated with the ZEC program and ZEC revenues*. (Emphasis added.)(R. 15-E-0302- 352-A at 51-52).

2. Tier 3 is Void for Failure to Provide SAPA Re-Notice

In sum, this Court should find that Tier 3 meets the definition of a Type (i) Rule, which requires a re-noticed 30-day comment period where, as here substantial

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[65] The formula itself is fixed: The first factor, the SCC component, is predetermined and numerically fixed for each tranche of Tier 3 (R. 15-E-0302-352-B at 131); the second component, the baseline RGGI, is a predetermined fixed numerical amount ($10.41 short ton) that is unchanged throughout Tier 3 (R. 15-E-0302-352-B at 135); the third and last component of the formula is the predetermined difference between a specific published forecast and $39 (R. 15-E-0302-352-B at 138. While there is a "one time update" to the $39 half way through the Tier 3, that change too is predetermined to be a fixed methodology. R. 15-E-0302-352-B at141 and Appendix E.

[66] As set forth in Point I above, Petitioners do not believe the PSC had authority under the provisions of the Public Service Law, or from any other source, to administratively create and implement Tier 3. This argument is included in the event the Court determines that the provisions of Public Service Law §4, §5(1)(b) and (2) and §66(5) allow the PSC to enact this Tier 3.

revisions to the previously noticed proposed rule were made. All parties agree there was no re-notice or 30-day comment for Revised Proposal. This failure to provide the 30-day notice and comment after the substantial revision of the Original Proposal renders Tier 3 void. *Schwartfigure, supra,* 83 N.Y.2d at 296–97.

3. If Tier 3 is both a Type (i) and Type (ii), then a minimum 30 Days Notice and Comment is Required by SAPA

a. Respondents have not established that Tier 3 is a Type (ii) Rule

The PSC claims Tier 3 is a Type (ii) Rule, but it provides neither case law, reasoned basis, evidence nor explanation for such a legal conclusion. PSC and Constellation/Exelon claim Tier 3 is a "prescription for future facilities or services" and a practice "bearing on rates." (PSC MOL at 33). Yet incongruously, Respondents claim that Tier 3 is not ratemaking. (PSC MOL at 33).

Constellation/Exelon cites to only one case, *Boundless Energy* to support its claim that Tier 3 falls within the scope of Type (ii) but it is inapposite and unpersuasive. *Boundless Energy NE, LLC v. PSC,* 57 Misc. 3d 610, Sup Ct. Albany County 2017. In *Boundless*, the Court was *never* asked to analyze, and did not discuss, the differences between a Type (i) Rule and a Type (ii) Rule. Rather, the Court determined whether an order relating to the need for additional new transmission lines in one segment of the state was a Type (ii) Rule (i.e., a "prescription for future facilities or services") or not a rule at all. In *Boundless,* the Court determined that an administrative order to provide additional electrical capacity in the future by constructing one new 'upstate-to-downstate' transmission corridor, and inviting specific applicants to submit proposals for this future transmission bore

"directly on the approval of or prescription for future facilities and services" that brought the PSC's activity within the ambit of Type (ii) rulemaking. (*Id.*) In this case, by contrast, the Tier 3 rule provides only for continued operation of long-existing facilities currently operating.

b. If Tier 3 Falls Within Both Type (i) and Type (ii) Rules the Broadest Due Process is Required

Even if this Court finds that Tier 3 could fall within Type (ii) Petitioners have established that it also falls with Type (i). Respondent PSC argues that if Tier 3 is both a Type (i) Rule and (ii) Rule, then the PSC is "free to choose either one." (PSC MOL at 33, fn 16). Constellation/Exelon attempts to convince the Court that if the proposed rule is both a Type (i) and (ii) Rule that the least, not the broadest, procedural due process is all that is required. (Con MOL at 20, fn 9).

Respondents provide no reason or logic as to why an action, which falls within two regulatory categories, should be subjected only to the procedures of the narrower one, which provides less due process. Respondents seem to ignore Petitioners constitutional right to due process.

It is well settled that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time *Matter of Kaur v NY State Urban Dev. Corp.*, 15 NY3d 235, 260 [2010],

> "tailored, in light of the decision to be made, to the capabilities and circumstances of those who are to be heard, to insure they are given a meaningful opportunity to present their case. Mathews v.

> Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18)"Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n, 53 Misc. 3d 641, 651–52, 37 N.Y.S.3d 178, 186–87 (N.Y. Sup. Ct. 2016), aff'd, 152 A.D.3d 1122, 56 N.Y.S.3d 485 (N.Y. App. Div. 2017), leave to appeal granted, No. 2018-100, 2018 WL 1473660 (N.Y. Mar. 27, 2018), and aff'd sub nom. Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of State, 152 A.D.3d 1133, 59 N.Y.S.3d 590; (N.Y. App. Div. 2017), leave to appeal granted, No. 2018-99, 2018 WL 1473675 (N.Y. Mar. 27, 2018).

Thus, if any a portion of Tier 3 falls within in a SAPA Type (i) rule then the broader procedural due process required for Type (i) rules must be followed.

4. Petitioners Preserved Their Procedural Argument

Constellation/Exelon argues that this Court is barred from adjudicating whether the PSC complied with SAPA's due process requirements, claiming that Petitioners did not challenge the PSC's "announcement" that the proceeding was a Type (ii) proceeding. (Cons, MOL at 17). Constellation/Exelon ignores the Rehearing Petition submitted Petitioners IPSEC, PHASE and Goshen Green on August 31, which specifics that SAPA §202(1)(a) requires agencies to publish proposed rules in the State Register and to provide the public with at least 45 days to comment. (R. 15-E-0302-373-B at 7) Also Constellation/Exelon ignores a myriad of other individuals and groups, that during the course of the administrative proceeding specific substantive and procedural argument that— the *PSC failed to provide the additional comment period that was necessary under SAPA.*[67] This argument--that the additional

[67] The issue of improper notice and inadequate time for public comments, and the request for a proper statutory time to comment (Requested 30 day additional comment period): R. 15-E-0302-309 and R. 15-E-0302-373-B; (Requested 45 days additional comment period); R. 15-E-0302-305; R15-E-0302-306; R 15-E-0302-309; R 15-E-0302-308, R. 15-E-0302-

comment period was necessary due to substantial revision(s)--can *only* be raised in connection with a Type (i) Rule, and not a Type (ii) Rule. The lack of proper notice was raised below--at the earliest point that it became relevant-- when a substantial revision was made to the Original Proposal.[68]. Thus, this last gasp attempt by Constellation/Exelon to have this Court ignore the PSC's due process violations must be rejected.

POINT IV
PETITIONERS HAVE STANDING TO BRING THIS ACTION

Quite properly, the Constellation/Exelon Respondents do ***not*** raise the argument that Petitioners lack standing to bring their claims in this hybrid declaratory judgment/Article 78 proceeding.[69] All Petitioners have established standing in this case, but it is sufficient for only *one* Petitioner to have standing in order for this action to proceed. *See Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 813 (2003) (where one petitioner has standing, it is not necessary to address challenges regarding the standing of the remaining petitioners).

The PSC's "logic" on the question of standing would completely insulate the PSC's action from judicial scrutiny. Such a result would be untenable. Following the

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307; R. 15-E-0302-312; R. 15-E-0302-314; R. 15-E-0302-3015; R. 15-E-0302-6132; R. 15-E-0302-317 (42 organizations)

[68] The substantial revisions made to Original Proposal squarely places Tier 3 within the definition of Type (i) Rule as it changed the subsidy from one being based on variable pricing of the pubic auction marketplace, to one that is administratively set.

[69] This Court previously dismissed only the fourth cause of action (SEQRA) holding that economic harm cannot serve as a basis for claims under SEQRA. *Clearwater et. al v. Public Service Commission et al.*, Index No. 7242-16, (Sup Ct Albany Co. July 18, 2018).

PSC's argument to its extreme, retail electricity consumers who suffer injury-in-fact by being forced to pay nuclear subsidies for twelve years would be unable to challenge the PSC's action, even where, as here, it is *ultra vires,* issued without following required statutory due process, and irrational, arbitrary and capricious. Courts have not allowed such a result, particularly where, as here, the issue is of "appreciable public significance" and there would be "no other avenue for an aggrieved individual or entity to challenge" the action. *Woodburn v. Vill. of Owego*, 151 A.D.3d 1216, 1218, 57 N.Y.S.3d 537, 538 (3d Dept 2017).

Stated another way, the Courts find standing where, "the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny." *Id.*; *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975). *See also, Ass'n for a Better Long Island, Inc. v. New York State Dep't of Envtl. Conservation,* 23 N.Y.3d 1, 6–7 (2014) (standing rules "should not be heavy-handed" and should not be applied "in an overly restrictive manner where the result would be to completely shield a particular action from judicial review").

This concept is so important that the Court of Appeals has held that citizen-taxpayers need not even demonstrate any "injury-in-fact to acquire standing" in connection with a claim that the Governor acted *ultra vires*, and exceeded the Executive branch's grant of authority. *Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801, 813-14 (2003) (finding standing in action challenging Governor's agreements with Indian tribes to permit casino gaming on Indian

reservations).[70] Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme. *Id.* at 814.

Here, Petitioners similarly claim that the PSC Tier 3 action is *ultra vires*, and that the PSC exceeded the scope of its delegated constitutional authority and unlawfully overstepped into the legislative domain. This case is even clearer than *Saratoga County* because, as discussed below, the Petitioners have established "injury in fact" sufficient to confer standing for each individual and organizational Petitioner.

A. PETITIONERS HAVE ALLEGED INJURY-IN-FACT

In Point I of its argument, the PSC claims that Petitioners have no standing because they have purportedly failed to allege a "cognizable injury". The PSC is wrong.

First, Petitioners establish that they have been denied the statutory process that is due to them when the PSC enacted Tier 3, which itself is a cognizable injury.[71] The Court of Appeals has found "injuries" to confer standing, where, as here, Petitioners allege a violation of procedural statutes depriving them of an adequate opportunity to review, assess, and comment:

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[70] Petitioners in *Saratoga County* included organizations, legislators and citizen-taxpayers and the State "contested standing as to all of them." Because the Court of Appeals concluded that the citizen-taxpayers had standing, it ruled, "it is not necessary to address the State's challenge as to the other plaintiffs." 100 N.Y.2d at 813.

[71] *See* Amended Petition ¶¶ 5, 6, 68, 72, 82, 83-99.

> Petitioners further allege that the violation of these procedural statutes deprived them of an adequate "airing" of the relevant issues and impacts of the proposed amendments, as well as an accurate assessment of the projected costs involved. The asserted statutory provisions set forth certain procedural steps to be followed when promulgating rules or regulations. The alleged violations, including the deprivation of an opportunity to be heard, constitute injuries to petitioners within the zone of interests sought to be protected by the statutes. Most significantly, to deny petitioners standing in this case would have the effect of insulating these amendments from timely procedural challenge—a result that is contrary to the public interest.

Ass'n for a Better Long Island, Inc, 23 N.Y.3d at 8

The PSC concedes that SAPA §202(8) provides for judicial review "to contest a rule on the grounds of noncompliance with the procedural requirements" of SAPA. PSC MOL at 41; *See also* Petition ¶ 80. Those who are denied the time or ability to adequately consider, analyze, and comment on a proposed rule due to a SAPA violation are in fact injured, particularly where, like here, the PSC's action negatively impacts them and/or their members. *See e.g. Matter of Schwartfigure v. Hartnett,* 83 N.Y.2d 296, 301 (1994) (finding standing to challenge noncompliance with SAPA where promulgated policy directly applies to Petitioner).

Second, Petitioners establish an out-of-pocket "injury in fact" as a result of the unlawful subsidies—Clearwater and Goshen Green, as individual Petitioners, and the members of each organizational Petitioner - have alleged they are injured because they are forced to pay unlawful nuclear subsidies for 12 years as a result of the PSC's Tier 3 Order. The PSC concedes that the Tier 3 subsidy creates a monthly surcharge that all retail electrical consumers, like Petitioners and/or their members, must pay (R. 15-E-0302-352-A at 20; PSC MOL at 17).

Instead of focusing on this dispositive "injury in fact," the PSC argues a long outdated "legal interest derived from common or statutory law" test (PSC MOL at 21). Even the 1991 case cited by PSC for this proposition, *Society Plastics,* recognizes this

> legal interest" argument is long obsolete: "Once a "legal interests" test requiring a litigant to allege injury to a legal interest derived from common or statutory law (see, e.g., Tennessee Power Co. v Tennessee Val. Auth., 306 US 118, 137-138), "injury in fact" has become the touchstone during recent decades (*Data Processing Serv. Orgs. v Camp*, 397 US 150, 152-153; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9, supra).

Society of Plastics Indus.v. County of Suffolk, 77 NY2d 761, 772 (1991). As early as 1975, the Court of Appeals stated, the "approach, known as the 'legal interest' test has recently been disavowed because it focuses on the issues to be litigated rather than on the party bringing suit." *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9 (1975). In abandoning the "legal interests" test, the *Dairylea* Court held that the influence of administrative law on daily life "necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action." *Id.* at 10–11.

As stated by the *Dairylea* Court, "[o]nly where there is a clear legislative intent negating review or lack of injury will standing be denied." *Id.* at 10 *citations omitted.*[72] The PSC did not argue, because it cannot, that the legislature has precluded

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[72] In *Dairylea*, the court found standing to challenge the commissioner's action, even though the Petitioner could not challenge based on procedural due process grounds (because there were no required notice provisions) and it did not have a "specific statutory right to challenge" (since the applicable "section 258—d refers solely to applicants and licensees," which did not encompass the Petitioner. 38 N.Y.2d at 10.

Petitioners from bringing any of their claims. Even the PSC acknowledges that the Legislature has expressly authorized judicial review of some of Petitioners' claims, including violations of SAPA's rulemaking procedures: "A proceeding may be commenced to contest a rule on the grounds of non-compliance with the procedural requirements of this section." SAPA §202(8) (PSC MOL at 41).

The Court of Appeals has declared that the "fundamental tenet of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had." *Dairylea,* 38 N.Y. 2d .[73]

1. Goshen Green Farms Established Standing

Goshen Green Farms has standing because it "is an electricity ratepayer in New York State", which under Tier 3 of the Order, "will be forced to pay ...to subsidize nuclear energy in the State" (Petition ¶ 20). The PSC does not dispute this fact, which alone establishes injury. Goshen Green goes on to further allege, "As a small agri-business, increased energy costs negatively impact Green Farms' ability to operate its farm" (Amended Petition ¶ 20). Additionally, the Petition alleges that, "Green Farms submitted written comments in the Commission proceedings that led to the Orders objecting to the inclusion of the Tier 3 nuclear bailout" and its petition for rehearing was denied (Amended Petition ¶ 20). These facts confer individual standing on Goshen Green Farm based on alleged injury-in-fact. The Court need not even

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[73] Petitioners would satisfy the "legal interests" test even though it is no longer required. Petitioners, who are required to pay the Tier 3 subsidy, have an interest in ensuring that the PSC's Tier 3 subsidies are not *ultra vires,* and are enacted in compliance with statutory procedures, as well as in a rational manner.

address the standing of the remaining Petitioners, where one of the Petitioners has established standing. *Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d at 813. See also *New York Coalition for Quality Assisted Living v. Novello, 24 Misc.3d 1211*(A), 890 N.Y.S.2d 369 (Albany Co. 2007).

2. Clearwater Established Standing

Clearwater is an "electricity ratepayer" that "will be forced to pay additional monies to subsidize aging and unsafe nuclear plants" as a result of the PSC's unlawful Tier 3 action (Petition ¶ 19). The PSC does not dispute this fact (PSC MOL at 24). Clearwater states, "Our organization and our members are electricity ratepayers directly affected by the proceeding and the Order that are the subject of the Amended Petition." *Affidavit of David Conover, Interim Executive Director of Clearwater, sworn to on January 11, 2017* (the "Clearwater Conover Aff." at ¶ 5).

3. The PSC Ignores the Clearly Alleged injury-in-fact.

It is beyond dispute that Petitioners are forced to pay the unlawful Tier 3 subsidies to support nuclear reactors, even though some have specifically chosen to support *only* renewable energy, and voluntarily pay a premium to obtain their electricity only from renewable sources (PSC MOL at 21-22).[74]

Petitioners seek to have the Tier 3 of the Order annulled; they are *not* asking

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[74] For example, Goshen Green Farms alleges that it "purchases only solar and wind energy, and opposes being forced to pay a surcharge for dangerous, toxic and emission-spewing nuclear energy" (Petition ¶20). And Clearwater has alleged that, "many of its members proactively contract to purchase 100% renewable energy through energy supply companies at a higher cost than members of the general public who do not contract for renewable energy" (Amended Petition ¶ 19).

for an "exemption" from Tier 3 subsidies based on this additional injury, as the PSC argues (PSC MOL at 22.) [75]

Finally, PSC attempts to create a new standing requirement requiring that Petitioners show that the injury "will cause financial hardship" (PSC MOL at 23). The PSC cites to no case law in support of this financial hardship standing requirement. Indeed there are none. In fact, Goshen Green Farms has alleged negative financial impact to its small agri-business (Amended Petition ¶ 20). Clearwater's increased electric cost causes financial impact because as a not-for-profit corporation, every dollar matters. *See Aff. Parker* Exhibit K: *Affidavit of Gregory A. Williams*, sworn to on 12/10/18 at ¶ 4. *See also* Amended Petition ¶ 19 (Tier 3 subsidy is "burdensome to economically challenged and distressed members of Clearwater.")

4. NIRS is a "Party" to the Underlying Proceeding and thus has Standing

Petitioner NIRS is "a party to the regulatory proceeding that is the subject of this litigation, Case 15-E-0302, and participated in and provided extensive comments in the underlying proceeding, including filing a petition for rehearing with the Public Service Commission" (Amended Petition ¶ 22) NIRS signed a Protection Agreement in order in the underlying proceeding that allowed it to view confidential financial information from Respondent Exelon (R. 16-E-0270-13). The PSC has acknowledged that NIRS is a party and included NIRS on its "Party List" in the underlying

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[75] In fact, the case cited by the PSC actually supports Petitioners' standing to have its claims resolved by this Court. In *Kessler v. Hevesi*, 45 A.D.3d 474, 475, 846 N.Y.S.2d 56 (1st Dept. 2007), the Court ***decided the case on its merits*** when it ruled that an expansion of a landline telephone surcharge to wireless telephone users was not a constitutional "taking."

administrative proceeding. *See Aff. Parker* at Exhibit N: Party List at # 69

The Third Department has held that being an interested party in the challenged proceeding confers Article 78 standing:

Notably, the PSC found petitioner to be an interested party during the course of the administrative proceeding, mandating that it receive all notifications for change, revised tariff filings and any other document pertaining to Con Ed's efforts. Thus, petitioner, having been deemed a party to the underlying administrative proceeding, will also be considered an aggrieved party for these [standing] purposes. (citations omitted). *Keyspan Energy Servs. v. PSC,* 295 A.D.2d 859, 861, 744 N.Y.S.2d 245, (3d Dept. 2002). Accordingly, NIRS has standing to bring this action.

B. THE ORGANIZATIONAL PETITIONERS HAVE ORGANIZATIONAL STANDING

The PSC incorrectly argues that even if the organizational Petitioners "have shown an injury-in-fact, they are not the proper entities to prosecute this case" (PSC MOL, Point II at 23-24.) [76] The PSC, citing *Dental Soc. of State v. Carey,* 61 N.Y.2d 330, 333–34 (1984), states that an "organizational litigant must be one whose interests are germane to the relief it seeks in the litigation" and claims that the organizational Petitioners do not meet this requirement. The PSC is wrong.

1. PHASE has Organizational Standing

The PSC mischaracterizes the organizational purpose of Petitioner PHASE as

[76] Goshen Green Farms is not an organizational Petitioner and has established individual standing, as discussed above

being limited to Indian Point (PSC MOL at 26-27). PHASE's Certificate of Incorporation states that its purpose is "to advocate for the development and use of sustainable energy, in an effort to promote health and safety" and the "organization's public objective will be to advocate for the enforcement of rules, laws and regulations to promote health and safety for the benefit of the public." *See* Parker Aff. at "Exhibit L" Affidavit of Michel Lee, sworn to on December 12/12/18, 2018 at ¶4. To fit its narrow interpretation of the law, the PSC claims PHASE cannot engage in advocacy regarding upstate nuclear reactors. This argument is nonsensical.

The underlying Clean Energy Standard proceeding purportedly advances the State Energy Plan and sustainable/renewable sources of energy. This lawsuit challenges Tier 3 of the Order, which provides significant ratepayer subsidies that take away financial resources for sustainable energy/renewable sources. It also challenges the PSC's utter disregard of New York's laws and regulations-- both substantively and procedurally-- when doing so. These are clearly germane to PHASE's stated purpose of "advocating" for "sustainable energy" in "an effort to promote health and safety," as well advocating for the proper enforcement of "rules, laws and regulations" relating thereto. *See* Lee Aff. ¶ 5.

Respondents also misrepresent the record when they claim that PHASE did not refer to the upstate nuclear reactors in its submissions in this case and below (PSC MOL at 27). To the contrary, PHASE specifically argued against the PSC's total lack of transparency when it included the upstate reactors, FitzPatrick, Ginna, and Nine Mile Point, in the Tier 3 program, as well as the irrationality of Tier 3's "public necessity" standard used for inclusion of these reactors. (See Lee Aff. ¶ 7; 1/11/17

Elie/Lee Aff. ¶ 26). PHASE also referred to "FitzPatrick" and "the upstate nuclear power plants" in connection with arguments relating to improper subsidization of upstate reactors (Lee Aff. ¶ 7; 3/27/17 Lee Aff, ¶¶ 12-13), as well as to issues relating to nuclear power generally, not just limited to Indian Point. (Lee Aff. ¶ 7; See Amended Petition: *Shapiro Aff*, 1/11/17 *Elie/Lee Aff.* ¶¶ 27, 32).

In fact, PHASE's July 22, 2016 comments below do not even mention Indian Point, but rather oppose the distribution of public funds to prop up nuclear generation in the state; argue that "nuclear power is extremely ill-suited to combating climate change"; point out the false choice of nuclear vs. fossil fuel; emphasize the negative health and safety impacts of nuclear; and provide an appendix of materials pointing out the risks associated with nuclear energy, while advocating for sustainable resources and support. ("Ex. L" *Lee Aff.* ¶ 9).

This is not a case where an organization is participating in a lawsuit out of the blue; rather, PHASE actively participated in the underlying challenged proceedings in this matter and filed comments jointly with "party" Council on Intelligent Energy and Environmental Policy (CIECP) ("Ex L" Lee Aff. ¶ 8; see 4/22/2016, 5/13/2016 and 7/22/2106 joint comments at R. 15-E-0302-165; R. 15-E-0302-220, R. 15-E-0302-348-A, respectively). This participation is part of PHASE's local and national efforts that relate to nuclear issues. *Id.* Some of the many examples of PHASE's participation in matters relating to nuclear issues include:

- October 5, 2015 submission to the National Environmental Justice Advisory Council regarding the urgent need to incorporate environmental justice principles into nuclear regulatory schemes, given its impact to EJ communities, as well as other vulnerable groups

like women and children.

- July 25, 2016 submission to the United States Environmental Protection Agency ("USEPA") (Docket No. EPA-HQ-OAR-2007-0268; FRL-9947-55-OW) opposing "drastic relaxation" of Radioactive Protective Action Guides, particularly as they relate to nuclear site releases."

- July 31, 2106 comments to the United States Department of Energy concerning "consent-based Siting" of radioactive nuclear waste and spent fuel.

- May 15, 2018 submission to the Nuclear Regulatory Commission (Docket ID NRC-2018-0026) concerning its "Very Low Level Waste Scoping Study", vehemently opposing any action that would facilitate entry of any radioactive waste into landfills or other waste stream that is not properly safeguarded from the environment and under secure regulatory control for the full duration of the longevity of its radioactivity.

- PHASE's August 13, 2018 submission to the USEPA (Docket No. EPA-HQ-OA-2018-0107-0001 regarding the proposed change to its cost-benefit consideration model, and averring that the rule change would circumscribe agency consideration of benefit to human health and the environment, impose an overly rigid formulaic methodology, and "inure to the detriment of U.S. industry" as "many industrial actors in modern economies do not narrowly focus on one specific product, and substances used and developed span an array of applications."

- PHASE's August 16, 2018 submission to the USEPA (Docket No. EPA-HQ-OA-2018-0259-0001) regarding its proposed "Strengthening Transparency in Regulatory Science" rule, and arguing the rule would "sow chaos in government and research domains" and "open a portal into troves of personal confidential information," including the records of individuals associated with military activity and critical infrastructure. *See Lee Aff.* ¶6.

For all of these reasons, this lawsuit is germane to the interests of PHASE,

whose members are New York electrical retail consumers.[77]

2. IPSEC has Organizational Standing

The PSC is also wrong to narrow IPSEC's purpose only to Indian Point (PSC MOL at 26). In addition to Indian Point, IPSEC's mission emphasizes, "a positive reframing around increased energy capacity and renewable energy."[78] (See Parker *Aff.* "Exhibit M" *Affidavit of Marilyn Elie*, sworn to on December 13, 2018 at ¶ 6). While named for its initial focus on Indian Point, this active organization has expanded its focus to national and international nuclear and sustainable energy issues (*Id.* ¶ 3).

Since 2013, partly in response to the Fukushima disaster, IPSEC has transitioned to focus on nuclear issues including nuclear waste, as well as public policy advocacy promoting the creation of clean energy jobs and the modernization of transmission and energy infrastructure. IPSEC's activities and submissions to government agencies reflect this broader purpose. For example,

IPSEC was a cosponsor of the "Medical and Ecological Consequences of the Fukushima Nuclear Accident" conference (New York Academy of Medicine, New York City, March 11-12, 2013) and the "Fukushima and Nuclear Waste Management" forum (Goddard Riverside Community Center, New York City, Mar

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[77] PHASE established the injury requirement of organizational standing in that, "Most of the individual New York members of ... PHASE are electricity ratepayers," which the PSC does not contest (Petition ¶ 24).

[78] For example, IPSEC's mission statement included in a 2015 annual report: "Our primary commitments are to prevent Indian Point re-licensing in 2015, to pass the Health & Safety Resolution in every government, municipality and social organization in the region, and to emphasize a positive reframing around increased energy capacity and renewable energy."

10, 2017). IPSEC submitted December 19, 2013 comments to the US Nuclear Regulatory Commission (Docket ID No. NRC-2012-0246) objecting to the methodology, assumptions and core conclusions advanced by the NRC in its September 2013 Waste Confidence Generic Environmental Impact Statement Draft Report.

IPSEC submitted May 27, 2014 comments to NYSERDA regarding the 2014 Draft State Energy Plan advocating state support for rapid development of renewables, elimination of energy waste and deployment of efficiency technologies, and opposing use of state "money and power to promote nuclear power" and including comments on the financial, environmental and health risks not only of Indian Point but "NY's other nuclear plants."

IPSEC submitted October 13, 2015 comments to FEMA that relate to FEMA emergency planning criteria generally with respect to nuclear reactors.

IPSEC submitted October 5, 2016 comments to the National Environmental Justice Advisory Council regarding the urgent need to incorporate environmental justice principles into nuclear regulatory schemes, given its impact to EJ communities, as well as other vulnerable groups like women and children.

IPSEC and the Council on Intelligent Energy & Environmental Policy ("CIECP") submitted November 3, 2015 comments to the Science Advisory Board Radiation Advisory Committee for the USEPA noting that "at numerous uranium mining and milling, nuclear waste, and reactor sites, accidental releases have occurred repeatedly and continue to seep into the environment" and urging regulatory

consideration of "the *total* burden and the impact upon vulnerable persons that are the factors relevant to public health."

Again, this is not a case where IPSEC is participating in a lawsuit out of the blue. IPSEC actively participated in the underlying challenged proceedings and filed comments jointly with "party" CIECP. (R 15-E-0302-7155 and R 15-E-0302-348-A).

For all of these reasons, this lawsuit is germane to the interests of IPSEC, whose members are New York electrical retail consumers. [79]

3. NIRS has Organizational Standing

NIRS is a "party" in the underlying proceeding, was actively engaged in the issue of Tier 3 subsidies, and therefore has standing in this case. *Keyspan Energy Servs. v. PSC*, 295 A.D.2d at 861. Therefore, the Court need not even reach the issue of NIRS' organizational standing.

NIRS has also established organizational standing. It is comprised of over 4,000 people in New York State who are forced to pay the unlawful Tier 3 nuclear subsidy. (Amended Petition ¶ 22; *Judson Aff.* at ¶¶ 5, 8).

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

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[79] IPSEC established the injury requirement of organizational standing in that, "Most of the individual New York members of IPSEC...are electricity ratepayers" which the PSC does not contest (Amended Petition ¶ 24).

nuclear power, radioactive waste, radiation, and sustainable energy issues since 1978." (*See* "Ex. J" *Judson Aff.*" at ¶12).

Despite this clarity of mission, the PSC dismisses NIRS with an unsupportable narrow interpretation of organizational standing, stating, "As a national group which unconditionally opposes all nuclear energy, NIRS' organizational mission is not specific to FitzPatrick, Ginna, Nine Mile, or Indian Point" and "[a]s such, it cannot claim a particularized injury-in-fact" (PSC MOL at 29). This argument is specious.[80]

First, Tier 3, which allows the otherwise failing upstate nuclear reactors to continue operating, is clearly germane to the interests of an organization that 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. Indeed, the fact that NIRS was included as a "party" by the PSC in the underlying action, and formally participated therein, demonstrates that the subject of this case accords with the purposes of NIRS.

Second, contrary to the PSC's assertion, an organization need only allege that one or more of its members suffers injury, not that *it* has suffered injury. *Dental Soc. of State v. Carey, supra*, 61 N.Y.2d at 333–34 (1984). NIRS has done just that-- it alleges that the unlawful Tier 3 subsidy imposes "direct financial costs" on its "over

[80] Similarly and equally specious are the PSC's allegations that NIRS needs an office in the state for standing and that ratepayer protection must be germane to its corporate purpose.

4000" 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" (Amended Petition at ¶ 22; *see* "Ex. J" *Judson Aff.* at ¶ 13).

4. Clearwater has Organizational Standing

As discussed above, Clearwater has individual standing based on its status as a retail electrical consumer that is suffering direct injury by being forced to pay the improper Tier 3 subsidies. ("Ex. K" Williams Aff. at ¶ 3).[81] Thus, there is no need for the Court to undertake any further analysis on Clearwater's standing. In any event, Clearwater also has organizational standing.

First, most of Clearwater's members are also New York State electricity consumers who are directly injured because they are also forced to pay the Tier 3 subsidies (Amended Petition ¶ 19; see also *Shapiro Aff.* Clearwater Conover at ¶ 5 and "Ex. K" *Williams Aff.* at ¶ 6). The PSC does not dispute this. These members are located statewide, including numerous ones in the upstate nuclear reactor region. (See e.g., (See Amended Petition *Aff. Shapiro*, Affidavits of Jeff Debes, sworn to 3/22/17 and Affidavit of Andra Leimanis, sworn to on March 22, 2017, ¶ 13).

Second, contrary to the PSC's claim, Clearwater's interest is not limited to "the Indian Point nuclear facility and its impact on the Hudson River Valley" (PSC

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[81] Clearwater has paid $2,644.09 for 15,812 KWH of electricity used at the Beacon office from October 2017 through September 2018, and $3,088.92 for 24,300 KWH fortwo six-month seasons in 2017 and 2018 for its homeport in Kingston, totaling the equivalent of $5,733.01 for 40,112 KWH per year. "Ex. K" *Williams Aff.*at ¶ 3.

MOL at 24). Clearwater has historically participated in and commented on wide-ranging environmental matters well beyond the Hudson Valley (Ex. K: Clearwater Williams Aff. ¶ 7). Examples of these expansive efforts include:

- Advocacy for the original Federal Clean Water Act, enacted in 1972
- Endangered Species case involving bald eagles
- Opposition to hydrofracking throughout New York State
- Advocacy for environmental justice throughout New York State
- Promotion of Green Cities program throughout New York State
- Participation in the development of the Mid-Hudson Regional Sustainability Plan (*Id.)*

Participation in this case and its underlying proceedings is also part of Clearwater's promotion of renewable and solar energy throughout New York State and its efforts to decommission nuclear power plants. (*Id.* at ¶ 8) Clearwater is a founding organization of Unity for Clean Energy (U4CE), a monthly coalition of groups working to promote the rapid transition to a renewable energy economy. *Id.* Clearwater designated "Promoting Climate Solutions" as the theme for its annual festival, the Great Hudson River Revival, in 2017 and 2018, and has taken a national leadership role in promoting the safe decommissioning of nuclear power plants, including organizing trainings and conferences for interested citizens, elected officials and first responders. *Id.* The issues raised by Clearwater in the underlying case are far broader than Indian Point, including comments about the Tier 3 subsidy generally, as well as references to "upstate reactors" and FitzPatrick, Ginna and Nine Mile Point specifically. (R. 15-E-0302-9400).

Finally, Clearwater's mission statement specifically includes the language to "protect and restore other great waterways" in addition to the Hudson River. The upstate nuclear reactors are located on Lake Ontario, one of the Great Lakes of North America that continues to be compromised by pollution from the four beneficiary nuclear reactors of Tier 3. [82]

For these reasons, Clearwater also has established organizational standing, in addition to its individual standing.

CONCLUSION

Petitioners have provided ample evidence and reasons to support their challenges to Tier 3. Any of these are sufficient for the Court to declare Tier 3 null and void. Taken together, PSC's Tier 3 provides billions in "bonus revenue" to aging nuclear reactors to the detriment of the renewable goals necessary to achieve the State Energy Plan.

For all the reasons set forth above Tier 3 of the Clean Energy Standard was arbitrarily and capriciously promulgated without authority and in violation of lawful procedure.

WHEREFORE, Petitioners respectfully demand judgment, as follows:

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[82] Of all the Great Lakes, Lake Ontario is the furthest downstream, and is considered the most compromised by pollution. *See "Lake Ontario" available at* https://www.epa.gov/greatlakes/lake-ontario last visited on October 16, 2018; See also "Great Lakes Environmental Assessment and Mapping Project (GLEAM): Phase II, available at http://graham.umich.edu/activity/33677, *last visited* on October 16, 2018; Aff. of Joe Heath. The lake is a source of drinking water, contains endangered species.

(1) Therefore, Petitioners respectfully ask the Court to vacate, annul and rescind the Tier 3 portion of the Commission's August 1, 2016 Order.

(2) We request this Court to declare the Tier 3 to be arbitrary and capricious, and in violation of the New York State Administrative Procedures Act, as set forth herein.

(3) We request this Court to order all references in the Orders of nuclear energy production being "zero-emissions" and "carbon-free" be struck to correct the mistake of fact.

(4) We request the Court to declare Tier 3 of the Commission Orders to be null and void, because the PSC denied Petitioners their due process rights under the New York State and United States Constitution.

(5) Awarding Petitioners the costs, fee and disbursements of this action and attorney's fees; and

(6) granting such other and further relief as this Court deems just and proper.

Dated: December 15, 2015
Nanuet, New York

ROCKLAND ENVIRONMENTAL GROUP, LLC

By: _____

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