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Richard A. Drom

August 23, 2016

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza, Agency Building 3
Albany, NY 12223-1350

Re: CASE 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard.

CASE 16-E-0270 - Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants.

Dear Secretary Burgess:

Pursuant to Section 3.7 of the New York State Public Service Commission's ("Commission") Rules of Procedure, Ampersand Hydro, LLC hereby files a "Petition for Rehearing of Ampersand Hydro, LLC" of the Commission's order issued on August 1, 2016 in the above-referenced cases.

Respectfully submitted,

/s/Richard A. Drom

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cc: Active parties (via e-mail)

**NEW YORK STATE
PUBLIC SERVICE COMMISSION**

CASE 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard.

CASE 16-E-0270 - Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants.

**PETITION FOR REHEARING
OF
AMPERSAND HYDRO, LLC**

I. INTRODUCTION

Pursuant to Section 3.7 of the New York State Public Service Commission’s (“Commission”) Rules and Regulations, Ampersand Hydro, LLC (“Ampersand”) hereby petitions for rehearing of the Commission’s order issued on August 1, 2016 in the above-captioned cases (the “CES Order”).¹ In the CES Order, the Commission, among other things: (1) adopted the State Energy Plan (“SEP”) goal that 50% of New York’s electricity is to be generated by renewable sources by 2030 as part of a strategy to reduce statewide greenhouse gas emissions by 40% by 2030²; (2) established a mechanism and a price for zero-emissions attributes of qualifying nuclear electric generating facilities by establishing Zero Emission Credit (“ZECs”) procedures³; and (3) rejected proposals from parties that would have permitted other

¹ Case 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard; and Case 16-E-0270 - Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants, *Order Adopting a Clean Energy Standard* (issued August 1, 2016).

² CES Order, p 7.

³ CES Order, p 24.

zero-emission generation facilities (*e.g.*, small hydro facilities⁴) to receive such ZEC benefits.⁵

With this Petition, Ampersand respectfully requests that the Commission issue an order on rehearing which mandates that small hydro facilities be provided compensation for ZECs in the same way as the CES Order presently does for qualifying nuclear generation facilities, and that the order on rehearing implement the specific requirements enumerated below.

II. BACKGROUND

The Commission issued the CES Order in recognition that “New York has adopted strongly proactive policies to combat climate change and modernize the electric system to improve the efficiency, affordability, resiliency, and sustainability of the system.”⁶ One of the concerns raised in the CES Order was that if existing nuclear generation facilities were no longer available to produce electricity, this “would undoubtedly result in significantly increased air emissions due to heavier reliance on existing fossil-fueled plants or the construction of new gas plants to replace the supplanted energy.”⁷ The CES Order reviewed many approaches to achieving the SEP objectives and focused on solutions that would result in nuclear generation facilities remaining available to produce electricity.

III. THE CES ORDER

The CES Order concluded, in part, that nuclear generation facilities should be entitled to receive ZECs to enhance their financial viability.

The Order establishes a mechanism and a price for zero-emissions attributes of nuclear zero-carbon electric generating facilities where public necessity to encourage the

⁴ The CES Order implicitly defines “small hydro facilities” as run-of-river hydroelectric facilities of 5 MW or less. CES Order, p 117.

⁵ See, CES Order, p 55 (“Many commenters argued that any program designed to value emission attributes would be more cost efficient and fair if it was technology neutral”).

⁶ CES Order, p 8.

⁷ CES Order, p 24.

continued creation of the attributes is demonstrated. NYSERDA will offer qualifying nuclear facilities a multi-year contract for the purchase of ZECs. For facilities that demonstrate public necessity and are awarded contracts prior to April 1, 2017, the contract period will run from April 1, 2017 through March 31, 2029. The ZEC price for these contracts will be \$17.48 per MWh for the first two-year tranche designated Tranche 1. The ZEC price would be adjusted every two years . . .⁸

It has been estimated that the 12-year subsidy of nuclear power plants that is proposed in the CES Order “could exceed \$7 billion over the 12-year plan, with cost recovery beginning as early as April 2017.”⁹ The CES Order determined that only nuclear-powered generation resources were entitled to qualify to receive ZECs, despite evidence that other resources, such as small hydro generators, produce zero emissions.

The CES Order explicitly recognized that an important generation resource with zero emissions, small hydro generation resources, may be not able to survive in the competitive wholesale energy market in New York and therefore might be forced to retire.¹⁰ Significantly, however, the CES Order failed to provide any discussion of why generation resources that no party challenges are zero-emission, renewable resources should be denied ZECs. Instead, the CES Order merely deferred any action in favor or additional studies, as follows:

Staff is directed to develop and recommend for Commission consideration as part of an implementation plan whether there should be changes to the maintenance program to align support with zero-emissions facilities.¹¹

⁸ CES Order, pp. 19-20.

⁹ See, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7A832957-8899-418B-BCCC-43EFF39A4B62}> at page 22.

¹⁰ See, CES Order, pp. 17-18 (“For those resources such as small hydro that may retire without additional support for their environmental benefits, Tier 2 as adopted in this Order will consist of a maintenance program as existed under the RPS.”)

¹¹ CES Order, p 18.

The CES Order provides no credible, record evidence in support of this decision to deny small hydro generation facilities the same ZEC credits as are provided to qualifying nuclear generation facilities.

IV. ARGUMENT

While judicial review of Commission actions is not unlimited, standards exist which the Commission must meet in carrying out its determinations.¹² There must be substantial evidence in the record to support the Commission's determinations and those determinations may not be arbitrary, capricious or an abuse of discretion.¹³ In addition, Section 3.7(b) of the Commission's Rules of Procedure¹⁴ expressly permits rehearing "on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination."

As described below, the Commission committed errors of law in the CES Order by: (1) arbitrarily and capriciously failing to develop an implementation plan that permits small hydro generation resources to also be treated as a zero-emission facility; and (2) unjustly and unreasonably discriminating in providing nuclear generation facilities a significant competitive advantage over competing generation resources, including small hydro generation.

A. The CES Order is Arbitrary and Capricious Unless It Develops An Implementation Plan That Permits Small Hydro Generation Resources To Be Treated As Zero-Emission Facilities.

The CES Order contained no record evidence that small hydro generation facilities were not renewable resources or that small hydro generation facilities were not "zero-emission"

¹² Public Service Law § 128.

¹³ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ...; or, unsupported by substantial evidence." See, 5 U.S.C. §706.

¹⁴ See, Title 16 of NYCRR, Chapter I, Subchapter A, Part 3, "Procedures Applicable to All Proceedings".

facilities, in part, because no such evidence exists. On the contrary, the CES Order contains significant record evidence supporting small hydro generation as qualifying as being renewable resources.¹⁵ Ampersand Hydro, for example, submitted testimony that “most small hydropower facilities would fall into Tier 2b and suggested a Social Benefits Adder of four cents per kWh for these facilities.”¹⁶

Although the CES Order acknowledged the precarious “at-risk” position of zero-emission facilities such as small hydro¹⁷, the CES Order erred by failing to develop a rational and reasonable implementation plan that would enable all renewable and zero-emission resources, including small hydro generation facilities, to economically survive.

In other words, the CES Order erred by arbitrarily and capriciously failing to justify providing significant economic support for one type of renewable and zero-emission generating facility (*i.e.*, nuclear generation), while denying comparable support to small hydro generation facilities, even though the CES Order recognized that “the clean energy attributes of certain small hydroelectric facilities in the Tier 2b category would be at risk because the facilities might fail financially and retire for the lack of sufficient overall revenues.”¹⁸

B. The CES Order Is Unjustly Discriminatory If It Provides Nuclear Powered Generation A Significant Competitive Advantage Over Other Forms of Generation That Are Zero-Emissions Facilities.

¹⁵ *See, e.g.*, (“Many comments submitted by representatives of industries argue for the eligibility of their particular products, including waste-to-energy, biomass, biogas, and hydroelectricity.”) CES Order, p 30-31, 34.

¹⁶ CES Order, p 34.

¹⁷ CES Order, p 2 (distribution customers have an obligation “to continue to financially support the maintenance of certain existing at-risk small hydro, wind and biomass generation attributes”); CES Order, p 115 (“Concern was also expressed that even with the low level of New York payments proposed by Staff under Tier 2b, the clean energy attributes of certain small hydroelectric facilities in the Tier 2b category would be at risk because the facilities might fail financially and retire for the lack of sufficient overall revenues.”).

¹⁸ CES Order, p 115.

The CES Order recognizes that the Commission must promote a competitive wholesale energy market consistent with Federal Energy Regulatory Commission requirements.¹⁹ The CES Order also explicitly recognized that states may not interfere with FERC's authority over wholesale electricity markets:

States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates. States may encourage production of new or clean generation through measures "untethered" to a generator's wholesale market participation.²⁰

The CES Order errs, however, by giving preferential treatment to only one type of zero-emission generation resources, nuclear generation. This unreasonable and discriminatory preference provides a competitive advantage to nuclear power over competing sources of generation. Moreover, several parties filed record evidence with the Commission identifying this unreasonable discrimination and requested that the Commission address this issue.²¹

The unexplained preference in the CES Order for one type of renewable and zero-emission generation resource over other competing resources with similar characteristics is contrary to New York laws. An unexplained sharp departure from the Commission's prior orders supporting a competitive electricity market is *per se* arbitrary and capricious under New York administrative law.

¹⁹ CES Order, p 9 ("The federally-designed wholesale markets operated by the New York Independent System Operator (NYISO) pursuant to tariffs approved by the Federal Energy Regulatory Commission (FERC) are by law fuel-neutral and do not value resources based upon their environmental attributes or their ability to offer a fuel diversity hedge.").

²⁰ CES Order, p 69, citations omitted.

²¹ *See, e.g.*, CES Order, p 55 ("Ampersand Hydro, LLC and others argue that the program contradicts the rest of the CES proposal as well as the REV framework."); CES Order, p 60 ("Ampersand Hydro raises the concern that if other non-emitting resources do not receive similar or greater value for their attributes, it would amount to an unconstitutional taking of the property of those facilities."); CES Order, pp. 64-65 ("Brookfield and LIHI argue that carbon benefits of Tier 2b procurements should have been counted, and that low-impact hydro benefits are understated.").

For example, in *Matter of Charles A Field Delivery Service, Inc.*, the Court of Appeals held that when an agency determines to change prior policies, it must clearly set forth its rationale for doing so.

Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made²²

V. PROPOSAL

Ampersand proposes that the CES Order be modified to address the errors of law identified above by treating small hydro generation facilities as qualifying for ZECs due to their unchallenged environmental characteristics as clean, renewable and zero-emission sources of electricity. The CES Order should be amended to provide that: (1) NYSERDA will offer qualifying small hydro facilities a multi-year contract for the purchase of ZECs; (2) the contract period will run from April 1, 2017 through March 31, 2029 for small hydro facilities that are awarded contracts from NYSERDA prior to April 1, 2017; (3) the ZEC price for these contracts initially will be \$17.48 per MWh for the first two-year tranche designated Tranche 1; (4) the ZEC price would be adjusted every two years for Tranches 2 through 6 in accordance with the formula articulated in the CES Order, which is based on the social cost of carbon; and (5) small hydro facilities subsequently demonstrating public necessity will be offered contracts at a ZEC price calculated by the formula established by the CES Order.

²² *Matter of Charles A Field Delivery Service, Inc.*, 66 N.Y.2d 516, 520 (1985) (citing, *inter alia*, *Matter of Howard Johnson Co. v. State Tax Comm'n*, 65 N.Y.2d 726, 727 (1985); *Matter of N.Y. Tel. Co. v. Pub. Serv. Comm'n*, 62 N.Y.2d 57, 62 (1984)).

VI. RELIEF REQUESTED

Ampersand respectfully requests that the Commission issue an order on rehearing that mandates that small hydro facilities be provided compensation for ZECs in the same way as the CES Order presently does for qualifying nuclear generation facilities.

VII. CONCLUSION

For the reasons discussed above, the Commission should grant Ampersand's Petition for Rehearing of the April Order and grant the relief requested.

Respectfully submitted,

/s/Richard A. Drom

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CERTIFICATE OF SERVICE

I, Richard A. Drom, hereby certify that on this day I served the “Petition for Rehearing of Ampersand Hydro, LLC” on all parties in CASE 15-E-0302 via electronic mail pursuant to Rule 3.2(b)(2) of the Commission’s Rules and Regulations.

s/Richard A. Drom

Richard A. Drom

August 23, 2016