

July 13, 2016

677 BROADWAY, SUITE 1101  
ALBANY, NY 12207  
(518) 427-9700

**STEVEN D. WILSON**

DIRECT: (518) 701-2746  
FAX: (518) 427-0235  
SWILSON@HARRISBEACH.COM

**VIA ELECTRONIC FILING**

Hon. Kathleen H. Burgess  
Secretary  
NYS Public Service Commission  
3 Empire State Plaza  
Albany, NY 12223

**RE: Case 15-E-0302: Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard – Response to Request for Extension**

Dear Secretary Burgess:

Constellation Energy Nuclear Group LLC (“CENG”)<sup>1</sup> respectfully submits this response to the Alliance for a Green Economy’s (“AGREE”) July 11, 2016 request for an extension of the deadline to file comments on Department of Public Service Staff’s (“DPS Staff”) *Responsive Proposal for Preserving Zero-Emissions Attributes* (the “Staff Proposal”).<sup>2</sup> Comments on the Staff Proposal currently are due July 18, 2016.<sup>3</sup> CENG objects to AGREE’s request for extension of at least 45 days to comment on the Staff Proposal and AGREE’s and other intervenors’ suggestion that the Public Service Commission (the “Commission”) has not provided ample due process to all parties in this proceeding.

As explained in CENG’s June 13, 2016 response to an extension request in the related facility cost proceeding,<sup>4</sup> time is of the essence for Commission adoption of a Clean Energy Standard (“CES”) program. CENG must make critical business decisions by September 2016, regarding the future of its nuclear electric generating facilities, Nine Mile Point and R.E. Ginna, and those decisions cannot be made in reliance on a CES proposal that is merely proposed. That is, a decision to invest tens of millions of dollars in units that have been and are losing money cannot be justified on the mere hope that the CES proceeding will ultimately result in contracts that will justify the investment. Accordingly, if the CES is to help prevent the premature

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<sup>1</sup> CENG is the upstream owner of the R.E. Ginna Nuclear Power Plant (“R.E. Ginna”) and the Nine Mile Station Nuclear Plant (“Nine Mile”) (together, the “Nuclear Generators”).

<sup>2</sup> Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Request for Extension of Time (Filed July 11, 2016); Letters in support of AGREE’s request were filed by Nucor Steel Auburn, Inc., Multiple Intervenors, the City of New York, Citizens for Local Power, and Environmental Advocates of New York.

<sup>3</sup> See Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Soliciting Additional Comments (July 8, 2016).

<sup>4</sup> 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*, Response to Request for an Extension (Filed June 14, 2016) (the “June 13 Letter”).

retirement of existing nuclear facilities such as R.E. Ginna and Nine Mile, the extension of the comment deadline cannot lead to a delay in the issuance of a final order in the CES proceeding.

As CENG explained in the June 13 Letter, Nine Mile Unit 1 is scheduled to commence a refueling outage during March 2017. The refueling process typically requires a lead time of nine months to a year for the prefabrication (essentially the engineering work) and the fabrication or making of the fuel. Prefabrication includes the preparation of reload and safety analyses that will determine the number of bundles of fuel and the level of enrichment needed for the fuel to meet the individual specifications of the unit. Once engineering is complete, the vendor begins to fabricate the fuel by sintering (similar to baking) uranium powder into ceramic pellets. The pellets are then loaded into 12 foot long rods. These rods are assembled into fuel bundles, which ultimately will be installed in the unit. The bundles and pellets are made to the unit's specifications as determined by the prefabrication work. Once the fabrication of the fuel is completed, the fuel is delivered to the unit a few weeks in advance of the start of the refueling outage.

Nine Mile Unit 1 has not yet ordered fuel, even though refueling would need to take place in March 2017. CENG and the Nuclear Generators need the certainty of the Commission's Order approving the CES, and the Commission's approval of the Nuclear Generators' subsidies under the program *before* CENG makes a decision regarding the investment of approximately \$55 million that will be necessary to refuel Nine Mile Unit 1. Although as noted above, the prefabrication and fabrication processes generally take nine months to a year to complete, the processes can be compressed into six months with additional expense. Thus, for Nine Mile Unit 1, CENG will need to determine whether to order the fuel no later than the end of September 2016.

Additionally, under the Joint Proposal that the Commission approved in the R.E. Ginna Reliability Support Services Agreement ("RSSA") proceeding, R.E. Ginna Nuclear Power Plant, LLC ("GNPP"), must file a notice of its intent to continue commercial operations with the Commission by September 30, 2016, if it does not intend to retire at the expiration of the RSSA term.<sup>5</sup> Under the terms of the RSSA, the continued operation of R.E. Ginna after the expiration of the RSSA term would trigger an obligation for GNPP to incur substantial capital recovery balance costs. Thus, GNPP must make the critical decision whether to continue operations no later than the end of September 2016.<sup>6</sup>

In order for CENG to make the investment and commitment necessary to keep Nine Mile Unit 1 and R.E. Ginna in operation, it needs the certainty provided by a Commission order approving the CES *and* a signed contract procuring zero emission credits from the Nuclear Generators. CENG cannot make substantial investments on the mere possibility that the program ultimately adopted by the Commission is sufficient to justify the substantial investments and

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<sup>5</sup> Case 14-E-0270: *Petition Requesting Initiation of a Proceeding to Examine a Proposal for Continued Operation of the R.E. Ginna Nuclear Power Plant, LLC*, Joint Proposal (Filed October 21, 2015), at Section 4.1.3.7.

<sup>6</sup> Ginna also faces a near-term decision on refueling. Ginna's next refueling outage is scheduled to commence during April 2017 so it must decide whether to make the approximately \$45 million investment in fuel in October 2016.

commitments required to enable continued operation of CENG's Nuclear Generators. Thus, CENG will need a contract in hand by September 2016. To allow for sufficient time between an order and finalizing a contract for the zero-emission attributes of the CENG assets, CENG and the State will need an order from the Commission by August 1, 2016. In sum, time is of the essence.

In addition, as recently reported, Exelon Corporation is in discussions with Entergy Corporation to purchase the James A. Fitzpatrick Nuclear Power Plant ("Fitzpatrick") located in Scriba, New York.<sup>7</sup> Entergy had announced in November 2015 that it planned to close and decommission the FitzPatrick facility, later adding that it planned to cease facility operations in January 2017. The transaction is contingent on the final terms and timing of the CES/ZEC program. Exelon understands that Fitzpatrick must also soon make near-term investment decisions, including a refueling determination similar to CENG's Nuclear Generators. Accordingly, if there is any hope of saving Fitzpatrick, then the Commission must act quickly to issue a final order in this proceeding.

In addition to the practical considerations in support of denying AGREE's request, the Commission has complied in all respects with the State Administrative Procedure Act ("SAPA") and provided all parties with ample due process in consideration of the CES program. The CES proceeding was properly noticed in the NYS Register on January 27, 2016.<sup>8</sup> In addition, the parties to this proceeding and the public have been afforded numerous opportunities to submit comments. In addition to the 45-day comment period following publication of notice of the CES proceeding in the NYS Register, parties were also given almost three months to provide comments on the DPS Staff White Paper and thereafter three additional weeks to submit reply comments. Over 60 parties filed initial comments on the DPS Staff White Paper. The Parties were also given two months to comment on the Staff Cost Study and one month to comment on the Draft Generic Supplemental Environmental Impact Statement. In addition, 13 public statement hearings were held throughout the State. Accordingly, the Commission has an ample record upon which to base its decision.

Release of the Staff Proposal for comment was also unnecessary as the Commission has the requisite authority, in this notice and comment proceeding, to adopt a CES program containing the same requirements. In its comments on the White Paper, CENG proposed that a ZEC price could be set based on the social cost of carbon. The fact that the Commission is allowing parties an additional opportunity to comment on the Staff Proposal does not trigger any additional requirements under SAPA.

Moreover, a notice of revised rulemaking is not required under SAPA. The notice of the CES proceeding prepared by the Commission and published in the *NYS Register* on January 27,

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<sup>7</sup> See EXELON SAYS NEW YORK RULES COULD PRESERVE PLANTS, OPEN DOOR FOR HUNDREDS OF MILLIONS IN INVESTMENT, Business Wire (July 13, 2016), available at [HTTP://WWW.BUSINESSWIRE.COM/NEWS/HOME/20160713005660/EN/EXELON-YORK-RULES-PRESERVE-PLANTS-OPEN-DOOR](http://www.businesswire.com/news/home/20160713005660/EN/EXELON-YORK-RULES-PRESERVE-PLANTS-OPEN-DOOR).

<sup>8</sup> NYS Register, VOL. XXXVIII, Issue 4, p. 37.

2016, states that “*the proposed rule is within the definition contained in section 102(2)(a)(ii) of [SAPA].*”<sup>9</sup> SAPA provides that “[*e*]xcept with respect to any rule defined in [§ 102 (2)(a)(ii)] of this chapter, prior to the adoption of a rule, an agency shall submit a notice of revised rulemaking to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision.”<sup>10</sup> Accordingly, the CES rulemaking proceeding fits within the exception in SAPA § 202 (4-a) and a notice of revised rulemaking is not required.

In light of the foregoing, CENG respectfully requests that the Commission deny AGREE’s request for extension and preserve a schedule that allows for a decision on the CES program no later than August 1, 2016.

Thank you for your continuing attention to this proceeding.

Respectfully submitted,

*/s/ Steven D. Wilson*

Steven D. Wilson

cc: Active Parties

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<sup>9</sup> NYS Register, VOL. XXXVIII, Issue 4, p. 37.

<sup>10</sup> SAPA § 202 (4-a) (emphasis added).