

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission
to Implement a Large-Scale Renewable
Program and a Clean Energy Standard

Case 15-E-0302

**CONSTELLATION ENERGY NUCLEAR GROUP, LLC'S AND
EXELON GENERATION COMPANY, LLC'S PETITION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, LIMITED REHEARING**

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I. INTRODUCTION

On August 1, 2016, the New York State Public Service Commission (the “Commission”) issued an *Order Adopting a Clean Energy Standard* (the “CES Order”) in this proceeding. In adopting a Clean Energy Standard (“CES”) consisting of a Renewable Energy Standard and a Zero-Emissions Credit (“ZEC”) Requirement Program, the CES Order recognizes the clean energy benefits provided by zero-emissions nuclear resources.¹ Constellation Energy Nuclear Group, LLC (“CENG”)² and Exelon Generation Company, LLC (individually, “ExGen” and together with CENG, the “Petitioners”)³ respectfully submit this petition for clarification or, in the alternative, limited rehearing of a discrete portion of the CES Order. For the reasons set forth below, the Petitioners respectfully request that the Commission clarify or determine upon rehearing no later than its November 17th session, with an order issued no later than November 18th, that the condition relating to the purchase of the FitzPatrick Facility set forth in the body of the CES Order and in Paragraph 6 of Appendix E of the CES Order (the “FitzPatrick Purchase

¹ Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (Issued Aug. 1, 2016).

² CENG is the upstream owner of R.E. Ginna Nuclear Power Plant (the “R.E. Ginna Facility”) and Nine Mile Point Nuclear Station (the “Nine Mile Point Facility”).

³ ExGen executed an asset purchase sale agreement with Entergy Nuclear FitzPatrick, LLC (“Entergy FitzPatrick”) on August 8, 2016, for the James A. FitzPatrick Nuclear Power Plant (the “FitzPatrick Facility”) and related assets.

Condition”) applies only to a ZEC contract for the FitzPatrick Facility and not to any ZEC contracts for the R.E. Ginna Facility or the Nine Mile Point Facility.

II. BACKGROUND AND SUMMARY

In the CES Order, the Commission adopted “a Clean Energy Standard consisting of a Renewable Energy Standard and a Zero-Emissions Credit Requirement Program.”⁴ In connection with the ZEC Requirement Program, Appendix E, paragraph 6, of the CES Order states:

*“For the three facilities for which an initial determination of facility-specific public necessity has been made upon inception of the program, the 12-year duration will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018, the date six months before the commencement of the period of Tranche 2. If the sale and closing does not occur, there will be no commitment for the program to continue beyond Tranche 1 and the Commission will have six months before the otherwise-planned commencement of Tranche 2 to determine a future course of action, if any.”*⁵

Similarly, the body of the CES Order provides that:

*“Given the continuing significant long-lived investments required for all of the units, a long-term contract providing certain terms is warranted. The long duration also has the considerable benefit of ensuring that the zero-emissions attributes will be preserved for a considerable period of time to give the RES program an opportunity to provide new renewable resources on a scale necessary to prevent backsliding on carbon emissions. The 12-year duration however will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018, the date six months before the commencement of the period of Tranche 2. If the sale and closing does not occur, there will be no commitment for the program to continue.”*⁶

This portion of the CES Order, which is referred to herein as the FitzPatrick Purchase Condition, is unclear as to whether the 12-year duration of the R.E. Ginna Facility’s, the Nine Mile Point Facility’s, *and* the FitzPatrick Facility’s respective ZEC contracts are conditioned on the sale of

⁴ CES Order, at 154.

⁵ *Id.* at Appendix E, ¶ 6 (emphasis added).

⁶ *Id.* at 143-44 (emphasis added).

the FitzPatrick Facility by September 1, 2018, *or* whether the 12-year duration language applies only to the FitzPatrick Facility's ZEC contract.

Accordingly, Petitioners respectfully request that the Commission clarify that the CES Order does not condition the duration of the R.E. Ginna Facility's and the Nine Mile Point Facility's respective ZEC contracts on the sale of the FitzPatrick Facility. In the alternative, Petitioners respectfully request that the Commission grant limited rehearing and modify the CES Order to specify that the FitzPatrick Purchase Condition only applies to the FitzPatrick Facility.

III. ARGUMENT

THE COMMISSION SHOULD CLARIFY OR DETERMINE UPON LIMITED REHEARING THAT THE DURATION OF THE R.E. GINNA FACILITY'S AND THE NINE MILE POINT FACILITY'S RESPECTIVE ZEC CONTRACTS BEYOND TRANCHE 1 IS NOT CONDITIONED ON THE SALE OF THE FITZPATRICK FACILITY

In light of the Commission's lengthy discussion in the CES Order lauding the environmental benefits of nuclear generation serving customers in New York, the Commission could not have intended to put at risk the ZEC contracts for the R.E. Ginna and Nine Mile Point Facilities. The Commission determined in the CES Order that retaining the zero-emissions attributes of the three upstate nuclear facilities is in the overall public interest.⁷ In support, the Commission noted that the loss of these emission-free attributes would result in significantly increased air emissions due to heavier utilization of existing and new fossil-fueled plants.⁸ The Commission further observed that such increased emissions would complicate the State's compliance with likely federal carbon standards and would result in dangerously higher reliance

⁷ *Id.* at 128.

⁸ *Id.*

on natural gas, thereby radically reducing the State’s fuel diversity and making consumers more vulnerable to natural gas and concomitant electric price spikes.⁹

Further, the Commission is well aware of the R.E. Ginna and Nine Mile Point Facilities’ distressed financial situations, imminent operational decisions and time constraints. As CENG previously advised the Commission, its decision regarding the investment of approximately \$55 million to refuel Nine Mile Point Unit 1 is already overdue if the facility is to be kept in service at the end of the current fuel cycle, and it must make a final decision whether to order fuel no later than the end of September 2016. Additionally, R.E. Ginna Nuclear Power Plant, LLC must file a notice of its intent to continue the R.E. Ginna Facility’s commercial operation with the Commission by September 30, 2016. Indeed, the Commission recognized in the CES Order that “certainty as to the availability and level of maintenance support may be critical to the decision of plant operators to order fuel and commence future cycles, and that these practical operational considerations create urgency that it is likely desirable to put an expedited maintenance support system in place.”¹⁰ Any interpretation that the FitzPatrick Purchase Condition was intended to condition the R.E. Ginna Facility’s and the Nine Mile Point Facility’s ZEC contract duration beyond Tranche 1 on the sale of the FitzPatrick Facility is inconsistent with the Commission’s ultimate determination and underlying rationale in the CES Order that retaining the three upstate nuclear facilities is in the public interest. Further, conditioning the duration of ZEC contracts for the R.E. Ginna and Nine Mile Point Facilities beyond Tranche 1 on the sale of the FitzPatrick Facility would not provide CENG with the certainty it needs to justify making costly, long-term investment decisions for the R.E. Ginna and Nine Mile Point Facilities.

⁹ *Id.*

¹⁰ *Id.* at 120.

It is more likely that the Commission intended to limit the FitzPatrick Purchase Condition to the FitzPatrick Facility to protect Entergy Corp. (“Entergy”) in the event that the sale of the FitzPatrick Facility is terminated for reasons beyond Entergy’s control, after Entergy has signed a contract with the New York State Energy Research and Development Authority (“NYSERDA”) for the sale of ZECs. As discussed in detail below and recognized in the CES Order, Entergy would have retired FitzPatrick, but for its sale to Exelon. Thus, the Commission may have been placing limitations on the scope of the NYSERDA contract as applied to the FitzPatrick Facility pending its sale. The alternative interpretation – applying the FitzPatrick Purchase Condition to the R.E. Ginna and Nine Mile Point Facilities – does more than protect Entergy; it also jeopardizes R.E. Ginna and Nine Mile Point’s long-term viability.

For these reasons, the Petitioners respectfully request that the Commission clarify the CES Order – consistent with the Commission’s adoption of a ZEC Requirement program, underlying rationale, and understanding of CENG’s imminent operational decisions and time constraints – by making the following changes to Appendix E, paragraph 6:

For ~~the three facilities~~ the FitzPatrick Facility for which an initial determination of facility specific public necessity has been made upon inception of the program, the 12-year duration will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018, the date six months before the commencement of the period of Tranche 2. If the sale and closing does not occur, there will be no commitment for the program for the FitzPatrick Facility to continue beyond Tranche 1 and the Commission will have six months before the otherwise-planned commencement of Tranche 2 to determine a future course of action, if any.

The Petitioners respectfully request that the Commission further clarify the CES order by making the following changes to certain language on pages 143-144:

Given the continuing significant long-lived investments required for all of the units, a long-term contract providing certain terms is warranted. The long duration also has the considerable benefit of ensuring that the zero-emissions attributes will be preserved for a considerable period of time to give the RES

program an opportunity to provide new renewable resources on a scale necessary to prevent backsliding on carbon emissions. The 12-year duration for the FitzPatrick Facility however will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018, the date six months before the commencement of the period of Tranche 2. If the sale and closing does not occur, there will be no commitment for the program for the FitzPatrick Facility to continue beyond Tranche 1 and the Commission will have six months before the otherwise-planned commencement of Tranche 2 to determine a future course of action, if any.

To the extent that the Commission intended to apply the FitzPatrick Purchase Condition to the R.E. Ginna and Nine Mile Point Facilities' ZEC contracts — despite the absence of any rationale for that interpretation — ExGen respectfully requests limited rehearing of the CES Order.

First, as discussed above, requiring a buyer to close on the purchase of the FitzPatrick Facility as a precondition to a full term ZEC contract for the R.E. Ginna and Nine Mile Point Facilities could cause significant harm to the State's policy objectives if the condition led to the facilities' closure. Any decisions on whether to continue to invest in the long-term operation of the R.E. Ginna and Nine Mile Point Facilities will be based in large part on the durability of the ZEC contracts, and the Commission should not weaken the incentive to preserve these nuclear facilities' zero-emission attributes. As has been well documented, operation of the R.E. Ginna and Nine Mile Point Facilities prevents substantial emissions of CO₂, SO₂, and NO_x compared to the alternative of natural gas and coal-fired generation. Average annual CO₂ emissions would be approximately 10 million tons higher absent the generation from these facilities.¹¹ With respect to New York's carbon reduction goals, Governor Andrew M. Cuomo stated that New York "cannot lose ground in the fight to reduce carbon pollution through the unnecessary retirement of

¹¹ See Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, CENG Comments on White Paper (Filed Apr. 22, 2016), Exhibit A, Brattle Report – New York's Upstate Nuclear Power Plant's Contribution to the State Economy, at 11 (finding that R.E. Ginna, Nine Mile Point and FitzPatrick prevent almost 16 million tons of CO₂, SO₂ and NO_x per year as compared to alternative natural gas and coal-fired generation).

safely operating nuclear power plants in Upstate New York.”¹² According to Department of Public Service Staff, “[t]he closure of the upstate New York nuclear plants would have a large negative impact on the State’s ability to meet its carbon reduction goal. If the upstate New York power plants were to close in the near term, New York would have to procure more of its electricity from fossil fuel generating plants, primarily those burning natural gas, resulting in significant increases in carbon dioxide (CO₂), nitrogen oxide and other air pollutants.”¹³ Continued operation of the R.E. Ginna and Nine Mile Point Facilities will assist the State in maintaining its carbon reductions secured to date and achieving its 40 percent reduction in carbon emissions end state by 2030, thereby furthering the State’s environmental initiatives.

Second, although ExGen is in a unique position to own and operate the FitzPatrick Facility, neither ExGen nor Entergy control individually or collectively the FitzPatrick Facility’s destiny. As evidenced by the Public Service Law (“PSL”) § 70 petition filed contemporaneously with this pleading, ExGen and Entergy FitzPatrick have reached a commercial agreement that will allow for the FitzPatrick Facility’s long-term commercial operation. This proposed transaction is subject to several pre-conditions to close, including timely regulatory approvals from the Department of Justice, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission. Certainly this Commission does not want to make the long term viability of the R.E. Ginna and Nine Mile Point Facilities or the environmental health of the State subject to regulatory outcomes in three other jurisdictions.

¹² <https://www.governor.ny.gov/news/governor-cuomo-directs-department-public-service-begin-process-enact-clean-energy-standard>.

¹³ See Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard (Issued Jan. 25, 2016), at 29 (footnotes omitted). “For CO₂ alone, this would mean over 15.5 million metric tons of additional emissions each year.” *Id.*

Third, since the Commission issued its CES Order, circumstances have changed that warrant granting rehearing.¹⁴ In its November 2, 2015 Notice of Intent to Retire the FitzPatrick Facility,¹⁵ Entergy FitzPatrick stated that “[l]ow commodity prices, combined with the plant’s distance from key load centers and market structure design flaws, including the failure of markets to compensate FitzPatrick for the generation of clean energy, have rendered the facility uneconomic for now and the foreseeable future.”¹⁶ In comments during the course of this proceeding, Entergy reiterated that the CES would come too late to align with Entergy’s overall business needs¹⁷ and that as a result, it intended to retire the FitzPatrick Facility at the end of its current fuel cycle in January 2017.¹⁸ However, a week after the CES was issued, ExGen and Entergy FitzPatrick executed an asset purchase agreement (“APA”) under which ExGen will purchase the FitzPatrick Facility and related assets assuming certain conditions precedent are satisfied. Once the deal closes, ExGen will continue to operate the FitzPatrick Facility. Pursuant to the APA filed with the PSL § 70 petition, ExGen and Entergy FitzPatrick are obligated to “use . . . Commercially Reasonable Efforts . . . to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper, or advisable to consummate and make effective the Transaction [for the transfer of the Fitzpatrick Facility] . . . in an expeditious manner.” Thus, ExGen has stepped forward to purchase a facility, which its current owner has determined is no

¹⁴ “[R]ehearing may be sought only on the grounds that the commission committed an error of law or fact or that new circumstances warrant a different determination.” 16 NYCRR § 3.7 (b).

¹⁵ Case 15-E-0640: *Petition of Entergy Nuclear FitzPatrick, LLC to Retire the James A. FitzPatrick Nuclear Generating Facility*, Notice of Intent to Retire (Filed Nov. 2, 2015).

¹⁶ *Id.*

¹⁷ Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Initial Comments of the Entergy Entities (Filed Apr. 22, 2016), at 12 n 39 (“During the nuclear technical conference in this proceeding, an Entergy representative, Mr. T. Michael Twomey, confirmed that, with the limited time remaining before the [FitzPatrick Facility] would be retired, ‘it’s too late for this program to affect FitzPatrick’ . . .”).

¹⁸ See ENTERGY ANNOUNCES DATE WHEN FITZPATRICK NUCLEAR PLANT WILL CLOSE, http://www.syracuse.com/news/index.ssf/2016/02/entergy_announces_date_when_fitzpatrick_nuclear_plant_will_close.html.

longer viable, at significant expense and risk to ExGen. This is a new set of circumstances that warrants rehearing.

In addition, the CES already includes provisions that protect New York customers and provide ExGen with a strong incentive to close the transaction and preserve the zero-emission attributes of the FitzPatrick Facility. If the transaction does not close, and the FitzPatrick Facility is retired, ExGen will not only sacrifice the opportunity to enter into a 12-year ZEC agreement for the sale of 7 terawatt hours (“TWh”) of annual generation attributable to the FitzPatrick Facility, but it will also forgo ZEC sales for an additional 2.2 TWh of annual generation for the R.E. Ginna and Nine Mile Point Facilities.¹⁹ That is because, in the CES Order, the Commission determined that, should any of the three facilities initially qualified (FitzPatrick, R.E. Ginna, and Nine Mile Point) permanently cease producing zero-emissions attributes for any reason whatsoever, the overall cap of 27 TWh will be reduced by one-third for each facility that permanently ceases producing zero-emissions attributes (*i.e.*, 9.2 TWh per facility).²⁰ According to the Commission, “[t]hese requirements will act both as an incentive to the facility owners to keep all of the plants operating, and to ensure that the continuing program keeps the original balance between ratepayer and generator interests.”²¹

In sum, it is in the public interest and warranted by the changed circumstances discussed herein to clarify or determine upon limited rehearing that the FitzPatrick Purchase Condition does not apply to the ZEC contracts for the R.E. Ginna and the Nine Mile Point Facilities.

¹⁹ See CES Order, Appendix E, ¶ 9.

²⁰ *Id.*

²¹ *Id.*

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission clarify or determine upon limited rehearing no later than its November 17th session, with an order to be issued no later than November 18th, that the FitzPatrick Purchase Condition in the CES Order applies only to the FitzPatrick Facility's ZEC contract and not to the R.E. Ginna Facility's and Nine Mile Point Facility's respective ZEC contracts.

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