

**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

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits comments on “Staff’s Responsive Proposal for Preserving Zero-Emissions Attributes” [hereinafter “ZEC White Paper”], dated July 8, 2016, pursuant to the Notice Soliciting Additional Comments dated July 8, 2016, and the Notice Extending Comment Deadline dated July 15, 2016, in the above-referenced proceeding. NEM submits these comments to raise the following issues: 1) the ZEC White Paper, like the CES White Paper proposal on nuclear generation and Zero Emissions Credits, is outside of the scope of the renewable energy proceeding and raises issues appropriately dealt with at the wholesale level; 2) stakeholders were not provided with adequate notice and an opportunity for comment on the ZEC White Paper as required under SAPA; 3) the proposed purchasing and pricing mechanism under which LSEs will be required to purchase ZECs will have an adverse impact on ESCOs.

¹ National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

I. Summary of ZEC White Paper

The ZEC White Paper proposes, "to subsidize zero-emissions attributes from Zero Carbon Electric Generating Facilities when there is a public necessity to encourage their preservation. Payments for zero-emissions attributes would be based upon the U.S. Interagency Working Group's (USIWG) projected social cost of carbon (SCC)." Staff estimates that implementation of this methodology would cost \$965 million during the first two years of the program, compared to Staff's projected \$5 billion benefits to be realized over the same period. Staff's proposal is intended to be in effect for a twelve-year period. The ZEC White Paper proposes that the Commission will make a determination of "public necessity" on a plant-specific basis. Staff projects that a, "public necessity for subsidies," will exist for the Fitzpatrick, Ginna and Nine Mile facilities but not at Indian Point.

The ZEC White Paper proposes that Zero Emissions Credits (ZEC) contracts would be administered in six two-year tranches, commencing on April 1, 2017, and running through March 31, 2029. Nuclear facilities would contract with NYSERDA to purchase ZECs. The ZEC price would be administratively determined by the Commission. For the first two-year tranche of April 1, 2017, to March 31, 2019, Staff's formula yields a ZEC price of \$17.48 per MWh.

Each Load Serving Entity (LSE) would be required to purchase, "an amount of ZECs per year of the total amount of ZECs purchased by NYSERDA in proportion to the electric energy load served by the Load Serving Entity in relation to the total electric energy load served by all load serving entities in the New York Control Area. The ZECs obligation is separate from any obligation on Load Serving Entities to encourage generation utilizing renewable resources." Each LSE would enter into a contractual agreement with NYSERDA to purchase ZECs during a program year based

on load forecasts and subject to a balancing reconciliation. NYSERDA will charge the ZEC price plus an adder for incremental administrative costs and fees. Staff proposes that program costs be recovered from ratepayers through commodity charges on customer bills. Utilities would charge their commodity customers on a volumetric basis. ZECs would only be tradeable in the balancing process between NYSERDA and LSEs. LSEs and self-supply customers may propose to the Commission to meet ZEC obligations through combined energy and/or capacity and ZEC contracts with nuclear facilities if the contracts do not, "unfairly shift ZECs costs onto other ratepayers."

II. The ZEC White Paper is Outside of the Scope of the Renewable Energy Proceeding and Raises Issues Appropriately Dealt With at the Wholesale Level

In NEM's April 22nd comments in this proceeding on Staff's January 25th CES White Paper, NEM argued that the issue of nuclear generation facilities and a Zero Emissions Credit was outside of the scope of this renewable energy proceeding, and was an issue that should appropriately be dealt with at the wholesale level. NEM continues to maintain this position for the reasons previously stated. Indeed, the ZEC White Paper only makes this more evident. The support payments for nuclear generation, in the form of ZECs, will be made outside of the NYISO's least cost dispatch model and have extremely disruptive impacts on the market. Past efforts by the legislature and the Commission to force investments in technology and to administratively determine prices have historically turned out to be extremely costly for New York State's electric customers. The 6 Cent Law that New York State implemented under PURPA in the 1980s plagued New York utilities and ratepayers for nearly 20 years.² Moreover, the U.S. Supreme Court's recent Hughes v. Talen

² In 1978, in response to skyrocketing fuel costs, interest rates and large plant construction, Congress passed the Public Utility Regulatory Policy Act (PURPA). The purpose of PURPA was to encourage electric energy conservation, increased energy efficiency, and equitable retail rates. PURPA required the electric utilities to purchase energy and capacity from "qualifying facilities," co-generators and independent power producers (IPPs). At the state level, New York enacted PSL Section 66-c in 1980, which required the state electric utilities to purchase electricity from alternate energy production facilities, co-generation facilities and small hydro facilities under rates and at terms

Energy Marketing, LLC³ decision appears to invalidate the exact type of state regulatory intervention in wholesale markets that is contemplated here.

III. Stakeholders Were Not Provided with Adequate Notice and an Opportunity for Comment on the ZEC White Paper as Required Under SAPA

The Staff ZEC White Paper was issued on Friday afternoon on July 8th, with a Notice requesting comments be filed a mere ten days later on July 18th. Numerous stakeholders requested an extension of the filing date. The Commission only granted a meager extension of the filing date to July 22nd. The justification cited by the Commission for this rush to judgment is the need to consider the matter at its August 1st agenda meeting. NEM agrees with the parties that argued that the Commission failed to provide adequate notice and opportunity for comment on the ZEC White Paper as required under the State Administrative Procedures Act. Two business weeks is a wholly inadequate amount of time for parties to review, evaluate and comment on a proposal that is projected to result in billions of dollars in costs and with a newly-created methodology for calculating ZEC prices. It is also an inadequate amount of time to contemplate the myriad implementation and compliance issues for load serving entities, particularly ESCOs, that will be required to purchase ZECs as a part of the cost of doing business and serving customers in the State.

and conditions deemed just and reasonable by the Commission. The following year, Section 66-c was amended to institute a six cent per kilowatt hour floor on the purchase price paid by the electric utilities. One of the many factors contributing to high electric prices in New York in the 1980s-90s was the cost of purchased power from IPPs. Many of the long-term contracts entered into in the late 1980s were based on energy price forecasts that were too high. This was due to reductions in demand for electricity caused by the economic slowdown and a lower-than-forecasted price of oil. Utilities ended up paying more for independent power than if they had generated the energy themselves or purchased the power on the spot market. The failure of this legislative mandate to predict and accurately forecast economically rational rates for competitive generation caused significant harm to New York energy consumers and utilities. The six cent floor purchase price for the electric utilities was repealed in 1992 by then Governor Cuomo.

³ Hughes v. Talen Energy Marketing, LLC, No. 14-614 (April 19, 2016).

IV. The Proposed Purchasing and Pricing Mechanism Under Which LSEs Will Purchase ZECs Will Have an Adverse Impact on ESCOs

Under the ZEC White Paper proposal, LSEs, including ESCOs, would enter into a contractual agreement with NYSERDA to purchase ZECs during a program year based on load forecasts and subject to a balancing reconciliation. The ZEC price will be established administratively by the Commission, and under the ZEC White Paper's proposed methodology, would result in a ZEC price for the first two-year tranche of April 1, 2017, to March 31, 2019, of \$17.48 per MWh. NEM is very concerned about the adverse impact this ZEC purchasing and pricing mechanism will have on ESCOs. The on-going uncertainty of the size of an ESCO's customer base coupled with the uncertainty of ZEC pricing may result in ESCOs being unable to recover their compliance costs. The ZEC White Paper does not appear to contemplate any mechanism under which ESCOs would be able to mitigate these costs and risks. The ZEC White Paper appears to be operating under the false assumption that ESCOs have the same ability to recover their costs as utilities do, against their captive ratepayers.

In addition, per a Commission Staff email of June 2, 2016, to all ESCOs, "any ESCO currently using sales agreements that have any terms within the body of the agreement that effect the price of commodity (such as language that allows for pass-through of certain costs) must disclose such costs or potential costs in the customer disclosure statement." Staff stated that, "If costs that are not included in the disclosure statement are imposed on a customer, we will insist that the customer be rerated." Staff cited UBP Section 5.B.4.b. as the basis for this interpretation. The increased costs of ESCO compliance with the newly-created ZEC regulatory requirement would likely need to be recovered under "regulatory change," "change in law," or other similar contractual provisions. NEM is concerned that, notwithstanding Staff's furnishing of its email interpretation

of pass-through cost information to be included in the Customer Disclosure Statement, that the industry has not had adequate opportunity to review and comment on this interpretation, nor to incorporate such interpretation (assuming it were to be formally adopted by the Commission) into these Statements. Accordingly, ESCOs face a significant risk that these newly-created regulatory ZEC costs may not be recoverable. The Commission must allow ESCOs to recover these newly-created ZEC compliance costs in “regulatory change,” “change in law” or other similar contractual provisions.

V. Conclusion

NEM respectfully submits these comments on the Staff ZEC White Paper and urges the Commission to adopt the recommendations set forth herein.

Sincerely,

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