

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.

COMMENTS OF INDICATED SUPPLIERS IN
OPPOSITION TO STAFF'S RESPONSIVE PROPOSAL
FOR PRESERVING ZERO-EMISSIONS ATTRIBUTES

Dated: July 22, 2016

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On July 8, 2016, the Staff of the Department of Public Service (“Staff”) filed a proposal with the New York Public Service Commission (“Commission”), in the above-captioned case, to provide billions of dollars of subsidies under 12-year contracts with potentially four uneconomic nuclear generation facilities in New York to retain their zero-emissions attributes and other environmental and economic benefits.¹ Pursuant to the Secretary’s notices soliciting comments and extending the comment deadline, Astoria Energy LLC, Astoria Energy II LLC, Calpine Corporation, Mercuria Energy America, Inc., Direct Energy Services, LLC, BP Energy Company, Shell Energy North America, Sithe/Independence Power Partners, LP, US Power Generating Company LLC, Cogen Technologies Linden Venture, L.P., Roseton Generating LLC and CCI Rensselaer LLC, and Selkirk Cogen Partners L.P. (the “Indicated Suppliers”) hereby comment in opposition to the Responsive Proposal.²

I. DESCRIPTION OF INDICATED SUPPLIERS AND EXECUTIVE SUMMARY

¹ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Department of Public Service Staff, Responsive Proposal for Preserving Zero-Emissions Attributes (July 8, 2016) (“Responsive Proposal”).

² Case 15-E-0302, *supra*, Notice Soliciting Additional Comments (July 8, 2016); Case 15-E-0302, *supra*, Notice Extending Comment Deadline (July 15, 2016) (“Extension Notice”).

1. Astoria Energy LLC and Astoria Energy II LLC

Astoria Energy LLC and Astoria Energy II LLC are privately held wholesale power generation companies. Each company owns and operates a natural gas (primary fuel) and ULSD (secondary fuel) combine cycle power plant, with a nominal summer/winter rating of 550/630 megawatts (“MW”). The plants are located in the New York Independent System Operation (“NYISO”) Zone J (“NYC”) power market, and the companies produce, on a combined basis, approximately 13% of the electricity consumed in NYC.

2. Calpine Corporation

Calpine Corporation (“Calpine”) is a Delaware corporation engaged, through various subsidiaries, in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale and retail marketing of electricity in the United States and Canada. Calpine subsidiaries own several generating facilities in New York, are active in the NYISO’s wholesale power markets, and serve retail customers through a PSC approved energy service company (“ESCO”) in New York.

3. Mercuria Energy America

Mercuria Energy America, Inc. (MEA) is an independent energy marketing and trading company wholly-owned by Mercuria Energy Company, LLC. MEA and Mercuria Energy Company, LLC are indirect, wholly-owned subsidiaries of Mercuria Energy Group Holding Limited, the parent holding company of an international group of companies principally engaged in the sourcing, trading, marketing, shipping and/or logistics relative to energy products. MEA is a power marketer authorized by the Federal Energy Regulatory Commission (“FERC”) to make sales of energy, capacity and ancillary services at market-based rates in all seven FERC-regulated RTO/ISOs, including NYISO.

4. Direct Energy Services, LLC

Direct Energy Services, LLC, (“Direct Energy”) is wholly-owned by Centrica plc, a global fortune 500 company and one of the world’s leading integrated energy companies. Direct Energy is one of the largest retail suppliers in the United States and is a load serving entity and market participant in MISO, PJM, NYISO and ISO-NE. Direct Energy, as one of the largest electricity retailers and load serving entities in the country, and the consumers of electricity that it represents, bear a significant portion of the costs of NYISO’s wholesale markets and associated functions.

5. BP Energy Company

BP Energy Company (“BPEC”), a Delaware Corporation, is a leading marketing and trading company in North America in natural gas, natural gas liquids and power. BPEC’s customers include retail energy providers and energy service companies within NYISO. BPEC is also a shipper on interstate natural gas pipelines transporting natural gas to the State of New York and BPEC’s customers include natural gas-fired power generators within the NYISO.

6. Shell Energy North America (US), L.P.

Shell Energy North America (US), L.P. (Shell Energy), is a Delaware limited partnership and an indirect subsidiary of Royal Dutch Shell plc. Shell Energy is an electricity and natural gas marketing and trading company that actively participates in energy markets throughout the country, including supplying energy from renewable resources and participating in renewable energy credit markets.

7. Sithe/Independence Power Partners, LP

Sithe/Independence Power Partners, LP (“Sithe/Independence”) is the owner and operator of a 1,060 MW cogeneration facility located in Oswego, New York, and an indirect subsidiary of

Dynegy Inc. Dynegy Inc.'s subsidiaries produce and sell electric energy, capacity and ancillary services in key U.S. Markets.

8. US Power Generating Company LLC

US Power Generating Company LLC, is a wholly owned subsidiary of Eastern Generation LLC, and is the owner and operator of 52, primarily gas fired, generating units in New York City.

9. Cogen Technologies Linden Venture, L.P.

Cogen Technologies Linden Venture, L.P. ("CTLV") owns a natural gas-fired combined cycle cogeneration facility in Linden, New Jersey, which sells approximately 777 MW into the NYISO Zone J market via a 1.6 mile 345 kV underwater cable directly connected to Consolidated Edison's Goethals Station on Staten Island. This underground connection to Zone J allows CTLV to be considered an "in-city" capacity resource. CTLV began operations in 1992 and currently sells up to 645 MW of capacity and energy to Consolidated Edison under a PPA.

10. Roseton Generating LLC and CCI Rensselaer LLC

Roseton Generating LLC is the owner and operator of the Roseton electricity generation facility, a 1,242MW natural gas and fuel oil-fired generation facility located in Newburgh, New York. Roseton Generating is recognized as a capacity resource by the NYISO.

CCI Rensselaer LLC is the owner and operator of the Rensselaer electricity generation facility, an 80MW combined cycle natural gas-fired generation facility located near Albany, New York. CCI Rensselaer is recognized as a capacity resource by the NYISO.

11. Selkirk Cogen Partners

Selkirk Cogen Partners L.P. is a limited partnership that owns Selkirk Cogen. Selkirk Cogen is a natural gas-fired combined cycle cogeneration facility located in Selkirk, NY with a net winter capacity of 432 MW and a net summer capacity of 346 MW.

Executive Summary

The Indicated Suppliers are not opposed to the State's efforts to reduce carbon dioxide ("carbon") emissions so long as they do not undermine the competitive electricity markets, do not violate state and federal law and provided that they encourage reductions in carbon emissions from all fuel-type resources fairly and efficiently. The Commission should reject the Responsive Proposal because its implementation would violate the following fundamental principles.

First, the Responsive Proposal will significantly harm the NYISO wholesale competitive electricity market by artificially suppressing installed capacity ("ICAP") prices thereby disincenting development of new capacity. According to Staff, the suppression of energy and capacity prices is a substantial benefit that supports its proposal to retain the uneconomic nuclear facilities in the electricity markets with zero emission credits ("ZECs").

Second, the Commission is preempted by the Federal Power Act ("FPA") under the Supremacy Clause of the U.S. Constitution³ from approving the Responsive Proposal because it interferes with the FERC's exclusive jurisdiction under the FPA to set rates for the wholesale sale of energy and capacity. The proposal also conflicts with FERC's policy that the NYISO's ICAP auctions be the tool to incent the construction of new resources and maintenance of existing resources in order to satisfy the demand for electricity in New York. It is difficult to understand why Staff would issue a proposal that runs headlong into the jurisdictional boundary

³ U.S. Const. art. VI, cl. 2.

recently established by the Supreme Court of the United States in *Hughes v. Talen Energy Marketing, LLC* (“*Hughes*”).⁴ If the Commission adopts this proposal, it will create tremendous regulatory uncertainty for all market participants including, specifically, the status of the nuclear facilities.

Third, the Responsive Proposal is discriminatory because it rewards uneconomic nuclear facilities for their carbon emissions reductions benefits based on the social cost of carbon but does not similarly reward any other resources for providing the same benefits. The Commission should not provide preferential payments to keep uneconomic nuclear generation facilities on line that are failing financially in order to meet its environmental and other policy goals. Instead, the Commission should pursue a market-based approach that would incorporate the cost of carbon into wholesale energy prices to provide the necessary price signals to encourage resources of all fuel types to compete fairly to ensure the most efficient investments are made to achieve the State’s carbon emission reduction goals and meet the demand for electricity.

II. BACKGROUND

The Commission initiated this case on June 1, 2015 to consider a report filed by the New York State Energy Research and Development Authority (“*NYSERDA*”) that examined several options to serve as the model for the continued development and procurement of large-scale renewable (“*LSR*”) energy resources.⁵ On December 2, 2015, the Governor directed Staff to design and enact a Clean Energy Standard (“*CES*”) mandating that 50% of all electricity used in

⁴ *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016).

⁵ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Instituting Proceeding, Soliciting Comments and Providing for Technical Conference (June 1, 2015).

the State be generated from renewable energy resources by 2030 (“50 by 30 mandate”) as identified in the 2015 State Energy Plan (“SEP”).⁶ The Governor stated that, “New York will set the right example in establishing a Clean Energy Standard to cost effectively and efficiently achieve our environmental objective of reducing carbon emissions 40% by 2030.”⁷ The Governor specifically instructed Staff to design the CES “to ensure emissions free sources of electricity remain operational” because “elimination of upstate nuclear facilities, operating under valid federal licenses, would eviscerate the emissions reductions achieved through the State’s renewable energy programs, diminish fuel diversity, increase price volatility, and financially harm host communities.”⁸

On January 21, 2016, the Commission expanded the scope of the LSR proceeding to include the CES and ordered Staff to develop a White Paper in which it would propose a CES program for comment and the Commission’s consideration.⁹ In its White Paper, which Staff filed in this case on January 26, 2016, Staff made a variety of recommendations to achieve the 50 by 30 mandate, a 40% reduction in greenhouse gas emissions from 1990 levels by 2030, and 600 trillion Btu in energy efficiency gains by 2040.¹⁰ Staff stated that these goals will assist the State in achieving its longer-term goal of decreasing carbon emissions from all sources within the State by 80% below 1990 levels by 2050.

⁶ Letter from Governor Andrew Cuomo to Audrey Zibelman, CEO (December 2, 2015) (“Governor’s December Letter”), available at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ Case 15-E-0302, *In the Matter of the Implementation of a Large Scale Renewable Program*, Order Expanding Scope of Proceeding and Seeking Comments (January 21, 2016).

¹⁰ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Staff White Paper on Clean Energy Standard (January 26, 2016) (“White Paper”).

Pursuant to the Governor’s request, Staff proposed measures to subsidize the continued operation of uneconomic upstate nuclear generation facilities.¹¹ Staff proposed that the Commission require load serving entities (“LSEs”) to acquire ZECs from certain nuclear facilities that are “operating pursuant to a fully renewed license by the [Nuclear Regulatory Commission] until 2029 or beyond” and that face financial difficulties to recognize their value as a source of zero-emission electric generation, “something which is not adequately captured in the energy market today.”¹² Staff proposed that its ZEC requirement begin on April 1, 2017, which Staff stated is the approximate date that the Reliability Support Services Agreement for the Ginna nuclear facility will expire and the owner of the FitzPatrick nuclear facility announced it will deactivate the facility. Staff proposed that the price of ZECs “be administratively set by the Commission and should be updated every year based upon the difference between the anticipated operating costs of the units and forecasted wholesale prices.”¹³ Staff stated that “[i]n this manner the Commission will be only setting an appropriate and fair value of the environmental attribute and will be acting independent of the actual wholesale prices for energy and capacity in the NYISO administrative market.”¹⁴

Staff’s Responsive Proposal

Staff stated that it drafted its Responsive Proposal after considering the numerous comments it received on its proposed ZEC requirement.¹⁵ Staff proposed that nuclear facilities

¹¹ *Id.* at 2.

¹² *Id.* at 30.

¹³ *Id.* at 32.

¹⁴ *Id.* at 32-33.

¹⁵ Responsive Proposal at 1.

be subsidized “when there is a public necessity to encourage the preservation of their zero-emission environmental values or attributes for the benefit of the electric system, its customers and the environment.”¹⁶ Staff claimed that the benefits of paying subsidies to retain nuclear facilities will “far exceed the costs.”¹⁷ Staff calculated that total subsidies during the first two years of the program will be approximately \$965 million, yet it claimed a net benefit of \$4 billion. Staff claimed a \$5 billion benefit in the form of avoided higher energy supply costs and carbon emissions and the retention of significant property taxes and high-paying jobs.¹⁸

Staff proposed that the Commission determine, at the inception of the program, whether a public necessity to subsidize a nuclear facility exists on a plant-specific basis considering the following: 1) the facility’s historic contribution to the clean energy resource mix consumed by the State’s retail consumers; 2) the degree to which wholesale electricity market revenues projected to be earned by the facility are below the level needed to preserve the zero-emissions attributes historically provided by the plant; 3) the costs and benefits of such a subsidy in relation to other clean energy alternatives; 4) ratepayer impacts; and 5) “the public interest.”¹⁹ Staff anticipated that the Commission would find a public necessity for subsidies for the Fitzpatrick, Ginna and Nine Mile nuclear facilities at this time.²⁰ Staff proposed that nuclear units located in

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.* Nowhere in the documents referenced by Staff regarding the savings associated with retaining the nuclear facilities was there any reference to the jobs and taxes that would be lost as a result of other, otherwise economic generators being prematurely retired because of retaining the nuclear units.

¹⁹ *Id.* at 3.

²⁰ *Id.* As indicated in the Extension Notice, the owner of the Nine Mile units announced last week that it is in discussions with the owner of the FitzPatrick facility to acquire the facility and operate it if the Commission approves, and the facility receives subsidies under, the Responsive Proposal. Extension Notice at 3, see also, Exclusive: Exelon would save FitzPatrick nuclear plant if state OKs subsidies, Tim Knauss, The Post-Standard (July 12, 2016), available at:

the same NYISO Zone and that share costs at the same site are treated as a single facility in the Commission’s public necessity determination, and, therefore, it recommended that Nine Mile Units 1 & 2 be treated as a single facility.²¹

Staff proposed that NYSERDA would enter into a 12-year contract (April 2017 to March 2029) to acquire ZECs from each nuclear facility for which the NYPSC determines a public necessity exists to retain with subsidies.²² Staff proposed that LSEs be required to purchase ZECs from NYSERDA in an amount based on the ratio of their load to the entire load in the State.²³ Staff proposed that the Commission administratively set the contract price of the ZECs at the U.S. Interagency Working Group’s projected average social cost of carbon over each of six, two-year tranches through 2029, as adjusted for inflation,²⁴ less a fixed baseline portion of the social cost of carbon already captured in the market revenues received by the facility due to the Regional Greenhouse Gas Initiative (“RGGI”) program (the “RGGI offset”).²⁵ Specifically, for the first two-year tranche of the contract, Staff calculated a ZEC price of \$17.48/MWh.²⁶ For each of the subsequent five two-year tranches, Staff proposed that the ZEC price be reduced to the extent that average forecasted energy prices in Zone A and capacity prices in the Rest of

http://www.syracuse.com/news/index.ssf/2016/07/source_exelon_would_save_fitzpatrick_nuclear_plant_if_state_ok_s_subsidies.html

²¹ Responsive Proposal at 3.

²² *Id.* at 2.

²³ *Id.* at 8.

²⁴ Staff indicated the SCC ranges from \$41.40/nominal/short ton in 2017 to \$66.74/nominal/short ton in 2029. *Id.* at 10.

²⁵ Staff proposed to calculate the RGGI offset based on the forecasted average of the RGGI prices embedded in the NYISO’s Congestion Assessment and Resource Integration Study Phase 1 report for April 2017 through March 2019. Based on this calculation, Staff proposed that the RGGI offset be fixed at a nominal \$10.41/short ton through the 12 year term of the contract. *Id.* at 6.

²⁶ *Id.* at 4.

State ICAP region during each tranche exceed the forecasted energy and capacity prices during the first tranche, which Staff calculates at \$39/MWh.²⁷ Staff stated that “these components measure only the change in forecasts over time; they do not establish energy or capacity prices.”²⁸

III. THE RESPONSIVE PROPOSAL WILL SIGNIFICANTLY HARM THE COMPETITIVE WHOLESALE ELECTRICITY MARKET.

Staff’s Responsive Proposal is a blatant exercise of buyer-side market power that will severely harm the competitive electricity market in NYISO. The exercise of buyer-side market power occurs when a net buyer or its agent “invests in capacity and then offers that capacity into the auction at a reduced price.”²⁹ While the net buyer pays an above-market price for the capacity, the reduction in ICAP market clearing prices resulting from the participation of the ICAP in the market allows the net buyer to meet its ICAP needs from the market at a distorted price that is much lower than the cost of its investment. FERC ruled that, while buyer-side market power strategies:

reduce capacity costs in the short-run, by producing a capacity surplus, these strategies harm other suppliers and, of even greater concern, are deleterious to the market in the long-run. Ultimately, this strategy will prove more costly as existing generators become unable to recover their costs and therefore choose to exit the market, thus tightening capacity and raising costs. Similarly, new

²⁷ *Id.* at 5-6. Staff stated that “[t]he \$39/MWh baseline figure approximates a recent period average of the forecasts of Intercontinental Exchange (ICE) of the NYISO Zone A energy prices projected by ICE for the period April 2017 through March 2019 combined with the per MWh equivalent of a recent period average of the forecasts of New York Mercantile Exchange (NYMEX) NYISO Rest of State Capacity Calendar Month Futures projected by NYMEX for the period April 2017 through March 2018.” *Id.* at 6.

²⁸ *Id.*

²⁹ *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 20 (2013).

merchant generators will be reluctant to enter a market in which their expected prices are susceptible to such reduction.³⁰

To mitigate buyer-side market power, the NYISO's tariff includes measures, which apply in the zone G-J and New York City localities, that impose an offer floor on the ICAP offers of new entrants set at the lower of 75% of the net cost of new entry ("CONE") of the relevant peaking unit that is used to establish the relevant ICAP Demand Curve or the new entrant's actual net CONE for the specific unit unless the NYISO determines that the new entrant would be economic, and, thus, exempt from mitigation. Proposals to apply offer floor mitigation to existing uneconomic resources retained in the market with out-of-market subsidies in the New York Control Area ("NYCA") are pending at FERC.

The Independent Power Producers of New York, Inc. ("IPPNY") filed a complaint against the NYISO requesting that FERC order the NYISO to modify its tariff to require that uneconomic existing, or repowered resources that are retained with out-of-market payments be excluded from the ICAP market or be offered into the spot market capacity auctions at bid levels no lower than the resources' going-forward costs.³¹ IPPNY's complaint demonstrated that the adverse impact of retaining uneconomic resources on other suppliers and the market is the same whether a net buyer or its agent subsidizes new capacity that would not have entered the market but for the subsidies or existing capacity that would have exited the market but for the subsidies. While FERC denied IPPNY's request to require the NYISO to modify its tariff, FERC found that

³⁰ *Id.* at P 21.

³¹ *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL13-62-000, Complaint Requesting Fast Track Processing of the Independent Power Producers of New York, Inc. (May 10, 2013). IPPNY filed an amended complaint on March 25, 2014. Docket No. EL13-62-000, supra, Motion to Amend, and Amendment to, Complaint of the Independent Power Producers of New York, Inc. (March 25, 2014).

IPPNY had “raise[d] potential issues of artificial price suppression”³² and, therefore, directed the NYISO:

to establish a stakeholder process to consider (1) whether there are circumstances that warrant the adoption of buyer-side mitigation rules in the rest-of-state; and (2) whether resources under repowering agreements similar to Dunkirk’s have the characteristics of new rather than existing resources, triggering a buyer-side market power evaluation because of their potential to suppress prices in the capacity market and what mitigation measures need to be in place to address such concerns. We will require NYISO to submit a report to the Commission within 90 days of the date of this order regarding NYISO’s analysis of these issues and the outcome of such stakeholder discussion³³

The NYISO subsequently recommended to FERC in a December 16, 2015 filing that measures are needed to address the incentive to suppress capacity prices in the NYCA through the payment of subsidies to existing generators that would otherwise retire.³⁴ The NYISO proposed that it screen for existing generators that may be uneconomic to reveal whether they may be receiving subsidies to remain in service and refer to the Commission uneconomic generators that may be retained to suppress capacity prices.³⁵ Both IPPNY and the NYISO’s Independent Market Monitoring Unit agreed with the NYISO that incentives exist to retain uneconomic resources to suppress prices in the NYCA but requested that FERC order the

³² *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC P 61214 at P 69 (2015).

³³ *Id.* at P 71.

³⁴ *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL13-62-002, Response to Information Request (December 16, 2015), at 3.

³⁵ *Id.*

NYISO to implement measures that would impose offer floor mitigation on generators that would have likely retired but for out-of-market payments.³⁶

As discussed above, Staff's Responsive Proposal will provide out-of-market payments to Fitzpatrick, Ginna and Nine Mile Units 1 and 2, which together comprise 3,458 MW of capacity in the NYCA. A core element of Staff's ZEC pricing proposal is the presumption that the nuclear facilities will earn energy and capacity revenues from the NYISO markets during the 12-year term of the ZEC contracts, because the proposed pricing formula decreases the ZEC price to the extent projected average energy and capacity revenues in subsequent years exceed the average energy and capacity prices of \$39/MWh during the first two years of the ZEC contract. Thus, the implicit presumption is that the subsidized nuclear facilities will offer their capacity in the NYISO's ICAP auction as price takers at below-cost offers, to ensure their offers clear because they must rely on the sum of the energy market revenues, ICAP revenues and the subsidies to cover their costs to continue operating.³⁷

Such below-cost offers will severely depress energy and capacity prices in the NYCA. Staff's Responsive Proposal is a textbook example of the exercise of buyer-sider market power because it would retain uneconomic nuclear facilities in the competitive market with out-of-market ZEC payments for the express purpose of artificially suppressing energy and capacity

³⁶ *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL13-62-002, Protest of Independent Power Producers of New York, Inc. (January 19, 2016) at 5-6; *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, EL13-62-002, Comments of the New York ISO's Market Monitoring Unit (January 11, 2016) at 6.

³⁷ Staff stated that its ZEC pricing approach "makes sense for the upstate Fitzpatrick, Ginna and Nine Mile facilities in the aggregate because it yields a result that Staff would expect to be similar to the average pay-as-bid price for these facilities that would result from a competitively bid solicitation conducted in the manner that is currently done for Renewable Energy Credits (RECs), assuming these facilities did not have market power." Responsive Proposal at 5. The average pay-as-bid price in the REC auctions is intended to reflect the difference between a developer's revenue requirement and its anticipated market revenues.

prices. Staff stated in its Responsive Proposal that a key benefit of subsidizing the uneconomic nuclear facilities is the “avoidance of higher energy supply costs.”³⁸ Staff referred to a report by The Brattle Group, issued in 2015, which found the Upstate nuclear facilities (Ginna, Nine Mile and FitzPatrick) at risk of retiring “provide direct economic benefits of approximately \$1.7 billion per year.”³⁹ The Brattle Report stated that, absent the Upstate nuclear facilities, “average electricity prices in New York would increase by about \$10/MWh on a wholesale basis. New York consumers will spend over \$1.7 billion more annually on electricity absent the Upstate nuclear plants. Between 2015 and 2024 they will spend almost \$15 billion more on a present value basis.”⁴⁰ Staff stated that the \$965 million cost of the ZEC payments will be more than offset by the \$1.7 billion (plus the \$3.3 billion in carbon reduction emissions and other economic benefits) that consumers will save by retaining the uneconomic nuclear facilities in the market.

As Staff’s Responsive Proposal is a clear exercise of buyer-side market power, the Commission should reject it to avoid the severe harm that it will cause to NYISO’s competitive wholesale electricity markets. If the Commission decides to adopt the Responsive Proposal despite its significant flaws, the State’s electricity consumers face the very real risk that FERC will impose offer floor mitigation on the uneconomic nuclear facilities that will be retained with the ZEC out-of-market subsidies. It is very likely that some or all of these facilities’ offers

³⁸ *Id.* at 1.

³⁹ *Id.*

⁴⁰ The Brattle Group, New York’s Upstate Nuclear Power Plants’ Contribution to the State Economy (December 2015), at 8. The Brattle Group stated that its “analysis shows the impact that the Upstate nuclear plants have on the all-in average NYISO electricity price, including both energy and capacity components.” *Id.*

would not clear in the ICAP market if they become subject to an offer floor. This would diminish the level of “economic benefits” that the Brattle Group estimated, and upon which Staff relies, but, more importantly, it would eliminate a key source of revenues that the nuclear facilities will require in order to cover their costs if Staff’s proposal is implemented. The State would likely need to provide significant incremental subsidies to the nuclear facilities in order to avoid their closure, potential costs that would likely override any of Staff’s purported benefits of retaining the nuclear facilities.

IV. THE COMMISSION IS PREEMPTED BY THE FEDERAL POWER ACT UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FROM APPROVING THE RESPONSIVE PROPOSAL.

Staff’s proposed ZEC pricing approach is preempted by the FPA under the Supremacy Clause of the U.S. Constitution⁴¹ because it adjusts the wholesale rate that nuclear facilities receive in the market, and it interferes with the ICAP auction’s price signals by artificially decreasing the clearing prices and commensurately reducing the revenues received by all other generators. In *Hughes*, the U.S. Supreme Court held that state contracts mandated by Maryland, under which out-of-market payments are made to generators that vary inversely with wholesale ICAP prices, are preempted by the FPA because they adjust wholesale rates that are subject to FERC’s exclusive jurisdiction.

The FPA grants FERC exclusive jurisdiction over “rates and charges ... received ... for or in connection with” interstate wholesale sales.⁴² A state law is preempted where “Congress has

⁴¹ The Supremacy Clause makes the laws of the United States “the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, cl. 2.

⁴² 16 U.S.C § 824d(a).

legislated comprehensively to occupy an entire field of regulation,”⁴³ as well as “where, under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁴ The Supreme Court found that FERC “approved the PJM capacity auction as the sole rate-setting mechanism for sales of capacity to PJM, and has deemed the clearing price per se just and reasonable.”⁴⁵ The Supreme Court ruled that Maryland’s program, which requires a generator to participate in the PJM capacity auction, but pays the generator a rate different than the capacity auction clearing price, “sets an interstate wholesale rate, contravening the FPA’s division of authority between state and federal regulators.”⁴⁶

Commission action on the Responsive Proposal is preempted by the FPA because the Responsive Proposal requires that certain nuclear generation facilities’ revenues earned from the NYISO’s energy and capacity markets be effectively fixed at \$39/MWh if energy and capacity prices exceed this amount. As discussed above, when forecasted plant revenues from energy and capacity sales are projected to exceed a baseline of \$39 per MWh, the ZEC subsidy is reduced by the amount of the excess. Staff’s proposal that the administrative ZEC rate be updated based on biannual forecasts, rather than varying instantly with market prices, does not save its proposal from being preempted by the FPA because, importantly, the rate is still “tethered” to nuclear facilities’ participation in wholesale energy and capacity markets and the prices those markets produce. As noted above, Staff’s ZEC pricing proposal is premised on the nuclear facilities

⁴³ *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 509 (1989).

⁴⁴ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

⁴⁵ 136 S. Ct. 1288, 1297.

⁴⁶ *Id.*

participating in the NYISO's energy and capacity markets, thus tying ZEC compensation to the generators' participation in the wholesale energy market.⁴⁷

Faced with the U.S. Supreme Court's decision in *Hughes*, it appears that Staff designed its Responsive Proposal in an attempt to avoid a court decision invalidating the subsidies provided to the nuclear facilities. Staff claimed that its ZEC pricing components "do not establish energy or capacity prices."⁴⁸ As discussed above, Staff acknowledged that a core purpose of the Responsive Proposal is to provide out-of-market payments to the nuclear facilities that are uneconomic to ensure that capacity remains available on the system until 2029 to avoid higher energy supply costs. Thus, the Responsive Proposal clearly falls within an area over which FERC has exclusive jurisdiction, and thus, Commission action on the Responsive Proposal is preempted under the Supremacy Clause.

The Supreme Court also ruled that Maryland's attempt to encourage new generation in the state did not prevent its program from being preempted by the FPA. The Supreme Court ruled that "[s]tates may regulate within their assigned domain even when their laws incidentally affect areas within FERC's domain. But they may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here."⁴⁹ For the same reason, Staff's proposal to use ZECs to bolster the wholesale market compensation to be received by existing, uneconomic nuclear facilities to

⁴⁷ As the Supreme Court explained in *Hughes*, states may take action to encourage new or clean generation provided that those actions are "untethered to a generator's wholesale market participation." *Id* at pg. 15, quoting Brief for Respondents at 40.

⁴⁸ Responsive Proposal at 6.

⁴⁹ 136 S. Ct. 1288, 1290-91 (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)).

encourage them to remain in the NYISO administered markets for environmental and economic reasons does not save it from being preempted⁵⁰

The Responsive Proposal is also preempted by the FPA because it conflicts with FERC's policy that the NYISO's capacity market provide the necessary price signals to encourage maintenance of existing, and development of new, facilities to meet reliability needs. Conflict preemption applies "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵¹ The lower Fourth Circuit Court of Appeals court, that was affirmed by the Supreme Court in *Hughes* with respect to its holding that the Maryland program was field preempted, held that the Maryland program was also conflict preempted because its "initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC."⁵² The Fourth Circuit held that Maryland's program "has the potential to seriously distort the PJM auction's price signals," undermining the incentive structure FERC approved for new generation.⁵³

Like the Maryland program, the Commission's retention of the otherwise uneconomic nuclear facilities in the market for 12 years by providing subsidies under a mechanism that adjusts the wholesale revenues that the nuclear facilities receive will

⁵⁰ Staff's proposed ZEC's bear a striking similarity to the contract for differences that the Supreme Court found unacceptable in *Hughes*. They have a strike price of \$39/MWh against which ZEC values, and accordingly payments, are settled based on a periodic forecast of wholesale market prices for energy and capacity. This mechanism is embedded into a bilateral agreement with NYSERDA that has a 12-year term. In fact, such an agreement may be considered a swap subject to the rules of the Commodity Futures Trading Commission.

⁵¹ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

⁵² *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (2014).

⁵³ *Id.* at 479.

reduce both the clearing price in the NYISO's ICAP auction and the revenues received by other generators for a substantial duration. The NYISO's ICAP auction would no longer be able to serve its purpose of encouraging the most efficient entry and exit decisions. But for the artificial price suppression, prospective new generators that may have been economic may forego entry, and existing generators that may have been economic may prematurely retire.

V. STAFF'S RESPONSIVE PROPOSAL IS DISCRIMINATORY AND AN INEFFICIENT TOOL TO MEET THE STATE'S CLEAN ENERGY GOALS.

Staff's proposal to pay nuclear facilities for their zero emissions attributes based on the social cost of carbon without offering this level of compensation to other resources that provide similar benefits is discriminatory. Staff's Responsive Proposal, if adopted by the Commission, would likely require NYSERDA, and ultimately the State's electricity consumers, to provide subsidies to Fitzpatrick, Ginna and Nine Mile Units 1 and 2 at a ZEC price that, as Staff demonstrated in its Responsive Proposal, is more than four times the price of carbon that is assumed to be reflected in wholesale energy prices through RGGI in 2017. Unless the RGGI emissions allowance cap is substantially reduced to increase RGGI auction prices to the level of the social cost of carbon, which Staff does not anticipate in its Responsive Proposal, all other resources in New York that provide carbon emissions reductions benefits will receive less than one fourth of the price that the uneconomic nuclear facilities receive for providing the same benefits.

The Governor directed the Commission to “set the right example in establishing a [CES]” to “cost effectively and efficiently” reduce carbon by 40% by 2030.⁵⁴ Staff’s Responsive Proposal does not set the right example because it is neither cost effective nor efficient. Competition, rather than administratively-designed mechanisms that favor particular technologies and projects, would ensure the most efficient solutions to reduce carbon emissions. Staff did not cite to any evidence demonstrating that the subsidies paid to the nuclear facilities over the next 12 years are the least costly manner to meet the State’s carbon reduction goals. Staff disregarded the strong possibility that other resources could provide carbon emissions reduction benefits at a much lower cost if provided the opportunity to compete for incentives. For example, a repowering of an old, inefficient unit with new, efficient technology could achieve carbon emissions reductions at a price per ton of carbon much lower than the price that the nuclear facilities will be paid under Staff’s Responsive Proposal.

Staff’s estimate of \$5 billion of economic and environmental benefits associated with carbon reductions, supply cost savings and property tax benefits is unavailing because it made no effort to examine whether other solutions could have the same or even greater economic and environmental benefits. The nuclear facilities will continue to receive the subsidies for 12 years, tying up scarce resources and obstructing the development of other solutions that could be deployed at a lower cost.

Staff’s proposal is also deeply troubling for New York’s competitive retail supply program. Retail competition has been in effect in New York for more than a decade, with retail competition bringing customers lower prices and the freedom to choose energy

⁵⁴ Governor’s December Letter.

suppliers. However, if implemented as proposed, the ZEC program will saddle consumers with costs that could exceed \$7 billion over the 12-year plan, with cost recovery beginning as early as April 2017. Such hasty enactment does not permit retail suppliers to include this cost into their forward prices, nor does it recognize that many retail customers currently have retail supply contracts with competitive suppliers that do not include this inequitable cost adder. Based on these infirmities, in addition to being discriminatory, anticompetitive and jurisdictionally unsound, the ZEC proposal could also jeopardize New York's competitive retail supply program.

The competitive market is signaling that the nuclear facilities should be retired. If the market was allowed to function, almost 3,500 MW of nuclear facilities would likely exit the market, significantly raising energy and capacity prices, which would spur the development of new clean resources and upgrades to existing facilities to meet the State's carbon emission reduction goals in the most efficient manner. In addition to carbon emissions reductions benefits, all of this development would have economic benefits such as generating property taxes and jobs. The sooner the State moves toward a competitive market-based approach that incorporates the value of carbon in energy prices, the sooner it will realize its clean energy goals.⁵⁵ Executing contracts to subsidize the nuclear facilities for 12 years unnecessarily delays

⁵⁵ Staff's Responsive Proposal is premised on the social cost of carbon being valued at approximately \$40/ton. The social cost of carbon is highly dependent upon the assumed discount rate, which would typically be based on the cost of capital as that is the cost of investing. Staff's social cost of carbon is consistent with a 3% average real discount rate. However, Staff's CES Cost Study assumed a 5.5% real cost of capital. At a real discount rate of 5%, which is below the cost of capital Staff assumed, the social cost of carbon is slightly above \$10/ton (2007\$). At this assumed social cost of carbon, the level of subsidies paid to the nuclear facilities would be very small and not likely adequate to retain them in the market. Internalizing carbon costs into the wholesale market price of energy would enable the market to determine the costs to meet the State's goal of reducing emissions 40% below 1990 levels rather than administratively determining out-of-market payments based on controversial and uncertain estimates of the social cost of carbon.

this outcome, harms the remaining generating sources in the State and the communities that host those sources, and will potentially discourage other renewable new-entry into the market.

VI. CONCLUSION

For the foregoing reasons, the Commission should reject Staff's Responsive Proposal.

Respectfully submitted,

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