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
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.	CASE 16-E-0270

PETITION FOR REHEARING OF THE PUBLIC UTILITY LAW PROJECT OF NEW YORK

Dated: August 31, 2016

Public Utility Law Project of New York
90 S. Swan St. – Suite 401
Albany, New York 12210
(917) 512-5334

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I. Introduction

Pursuant to Section 22 of the Public Service Law and 16 NYCRR Section 3.7, the Public Utility Law Project of New York ("PULP" or the "Project") respectfully seeks reconsideration of the Order Adopting a Clean Energy Standard, issued and effective on August 1, 2016 by the Public Service Commission of New York ("PSC" or "Commission").[1] While the Project concurs with and supports the State of New York's ("State's") goal of lowered carbon emissions[2] and a greater presence of renewable energy generation in the State's generation fleet,[3] PULP believes the Commission did not "provide an opportunity to be heard in a meaningful manner at a meaningful time" on the Department of Public Service Staff ("DPS Staff") Responsive Proposal setting forth the manner in which the value of the Zero Emission Credits ("ZECs") would be calculated, and that the procedural due process failure[4] triggered by the lack of proper notice under the State's Administrative Procedure Act ("SAPA") requires a reconsideration of the August 1 Order.

II. Background

On July 8, 2016, the Department of Public Service ("DPS") Staff issued a proposal putting forth various conclusions about the potential costs of the Commission's proposed ZECs

[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 ("CES Case"); 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 ("Ginna & Nine Mile Case"), Order Adopting a Clean Energy Standard, issued and effective August 1, 2016 ("August 1 Order").
[2] See, Executive Order No. 24 (2009) [9 N.Y.C.R.R. 7.24; continued, Executive Order No. 2 (2011) 9 N.Y.C.R.R. 8.2], which together concern the State of New York's goal by the year 2050 of reducing current greenhouse gas emissions from all sources within the State 80% below levels emitted in the year 1990.
[3] See, The Energy to Lead, 2015 New York State Energy Plan, p.112.
[4] See, Mathews v Eldrige, 424 US 319 [1976]

in Tier 3 of the Clean Energy Standard.[5] Staff's Responsive Proposal used the Social Cost of Carbon ("SCC") to derive potential costs for the ZEC proposal in a manner that implied that the ratepayer impact of such a mechanism might be as much as $6 billion to $8 billion over the twelve years of the proposal.[6]

Previously, however, on April 8, the DPS Staff released a white paper that indicated the cost of Tier 3 would not exceed $658 million between 2017 and 2023.[7] The cost study for Tier 3 in the April 8 White Paper was "analyzed based on low and high assumptions of the cost of generation of nuclear power and future energy prices."[8]

Despite the substantial change in the projected cost of the Tier 3 credits, and the material change in the manner in which such credits were calculated, parties to the proceeding were only given six business days to comment on the Staff Responsive Proposal.[9] After relatively unanimous opposition by the parties to the truncated response period,[10] several of whom argued that the changes necessitated a new State Administrative Procedure Act ("SAPA") notice and a comment period of forty-five days, the Secretary extended the comment period to ten business days,[11] reasoning:

(1) that due to the tight timeline necessary to be adhered to if one or more of the nuclear plants were to be kept in service,[12] "care must be taken to not implement procedures that

[5] Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Staff's Responsive Proposal for Preserving Zero-Emissions Attributes (dated July 8, 2016) ("Responsive Proposal").
[6] Id. at p. 6 et seq.
[7] Case 15-E-0302, supra, Clean Energy Standard White Paper – Cost Study (dated April 8, 2016), at p. 84 ("Cost Study").
[8] Id.
[9] See, Notice Soliciting Additional Comments, issued July 8, Case 15-E-0302 CASE 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard.
[10] See, Notice Extending Comment Deadline, issued July 15, 2016, Case 15-E-0302 CASE 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard.
[11] Id.
[12] Id. at pp. 3-4.

would defeat potential important Commission objectives or options in addressing the significant policy questions that must be decided;"[13] and

(2) that "the concerns that characterize[d] Staff's Responsive Proposal as a dramatic departure from what has already been under consideration in these proceedings [were] significantly overstated," and "the issuance of Staff's Responsive Proposal and the notice soliciting additional comments [was] in fact an add-on process as part of the continuing consideration of issues in these proceedings and [did] not trigger a legal requirement for a notice of revised rulemaking under SAPA."[14]

PULP believes the Secretary's conclusion that a notice of a revised rulemaking was not required is in error.

III. State Administrative Procedure Act

The legislative intent of the State's Administrative Procedure Act ("SAPA") was "to provide the people with simple, uniform administrative procedures."[15] It was further found by the Legislature that the public interest was promoted by administrative agencies meeting "the requirements imposed by the administrative procedure act."[16]

Article 2 of SAPA relates to the rulemaking process engaged in by state agencies, and section 202 applies to the procedure to be followed by the agency proposing a rule.[17] Section 202 requires that before the adoption of a rule, "an agency shall submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule."[18] The presumption embedded in section 202 is that unless there is a specific statutory exemption, the notice of a proposed

[13] Id. at p. 5.
[14] Id. at pp. 4-5.
[15] See, section 100 of the State Administrative Procedure Act ("SAPA").
[16] Id.
[17] See, Article 2 of SAPA generally, and section 202(1)(a) specifically.
[18] See, section 202(1)(a) of SAPA.

rulemaking must be at least forty-five days prior to the adoption of the rule, or no less than five days after the final public hearing required to be held before adoption.[19]

The forty-five-day notice period is supplemented by the requirement that a notice must contain the text of the proposed rule, or point to a web site where the full text of the rule is posted if it is longer than 2,000 words.[20] Additionally, for those instances where the agency's provision of process has led to a need to change the proposed rule from its originally proposed language, the agency must post a notice of revised rulemaking with the thirty-day deadline.[21]

Nowhere in SAPA however is there authorization for "add-on" rules or rules resulting from the "logical outgrowth" of the process since the issuance of a prior notice that did not cover the changes contemplated after substantial change to the proposed rule.

IV. Discussion

The legal grounds for the receipt of a rehearing/reconsideration from the Commission are limited to circumstances where the Commission committed an error of law or fact, or where new circumstances have arisen that warrant a different determination.[22] Petitions for rehearing must furthermore "specifically explain and support each alleged error …"[23]

In the case at hand, the Commission provided notice at many stages of this multi-year proceeding. However, it did not provide notice that Staff's Responsive Proposal, responding to the comments filed by Entergy and Constellation energy in response to the DPS Staff white paper, would be the basis for a rule making vastly different from that contemplated in its previous notices. While the Secretary has termed this an "add-on process … [that] does not

[19] See, section 202(1)(a)-(1)(a)(ii) of SAPA.
[20] See, section 202(1)(f)(v) SAPA.
[21] See, section 202(4-a) SAPA.
[22] See, 16 NYCRR sec. 3.7(b).
[23] Id.

trigger a legal requirement for a notice of revised rulemaking under SAPA," the new proposal for funding the Tier 3 ZECs was a substantial revision as defined by sec. 102(9) of SAPA, and was a substantial and meaningful departure from the DPS Staff white paper that had been put out for comment on the previous method of subsidy.

Among other substantial revisions, the Responsive Proposal included a new formula for calculating the cost of nuclear subsidies – shifting from cost of service, which is the normal approach to determining an out-of-market facility's revenue requirements, to social cost of carbon – in conjunction with creating a new concept of "public necessity" that was unmentioned in the Staff White Paper. Further, this document created a new term for the length of the ZEC subsidy that was almost twice as long as that proposed in the Staff White Paper.[24] The net result was that the subsidy for the ZECs was almost twelve times as large as originally proposed.

While one could argue any of those changes were sufficient to trigger a need for a new notice, certainly the sum of all of those changes should at least have triggered a need for a notice of revised rule making with its thirty-day period. Instead, parties were only allowed ten business days to comment upon a very expensive subsidy, and a significant change to state policy including a change – the new eligibility criteria to potentially allow Indian Point into the ZEC subsidy – that arguably is contrary to the State Energy Plan and the initial properly noticed discussion about ZECs in the DPS Staff white paper.

It is inarguable that this truncated comment period combined with the substantial and meaningful changes should have received a new SAPA notice rather than being treated like an "add-on." That question has been argued recently in the case of RESA v. NYPSC,[25] and no such

[24] It is also unknown and uncommented upon due to the brevity of the period for party comment, what effect the ZEC subsidy will have upon the State's low-income affordability program.
[25] See, National Energy Marketers Assn. v New York State Pub. Serv. Commn., 2016 N.Y. Misc. LEXIS 2739, *1, 2016 NY Slip Op 26233, 1.

principle has been found by a New York court to allow a SAPA notice to cover "add-ons" or "logical outgrowths" of the rule specified in the initial notice. It did not receive such notice, thus violating SAPA.

As noted above therefore, PULP respectfully requests the Commission to reconsider its August 1, 2016 Clean Energy Standard because of the failure to comply with SAPA with regard to the ZEC subsidy.

Respectfully submitted,

/s/

Richard Berkley
Executive Director
Public Utility Law Project of New York
90 S. Swan St. – Suite 401
Albany, NY 12210
rberkley@utilityproject.org
917.512.5334