

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

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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.

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Case 16-E-0270

**CONSTELLATION ENERGY NUCLEAR GROUP, LLC's RESPONSE  
TO PARTIES' PETITIONS FOR REHEARING**

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Dated: November 14, 2016  
Albany, New York

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On August 1, 2016, the New York State Public Service Commission (the "Commission") adopted an ambitious plan to combat greenhouse gas emissions, promote new renewable resources, and avoid backsliding on the progress New York has achieved in these areas. The Commission's *Order Adopting a Clean Energy Standard* (the "Order" adopting the "CES") created a three-tiered strategy to meet the State's goal to ensure that by 2030, 50% of New York's electricity will be generated by renewable resources.<sup>1</sup>

Various parties (collectively, "Petitioners") have now filed petitions for rehearing alleging errors in Tier 3 of the Order concerning the Zero-Emissions Credit Requirement ("ZEC Program").<sup>2</sup> None identifies any genuine error of law or fact. The Order was the product of a

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<sup>1</sup> 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).

<sup>2</sup> See, e.g., Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Application for Rehearing of Castleton Commodities Int'l, LLC (Filed Aug. 31, 2016) ("Castleton" and the "Castleton Pet."); Case 15-E-0302, *supra*, Petition for Rehearing of Alliance for Green Energy *et al.* (Filed Aug. 31, 2016) ("AGREE" and the "AGREE Pet."); Case 15-E-0302, *supra*, Petition for Rehearing of Council on Intelligent Energy & Conservation Policy *et al.* (Filed Sept. 1, 2016) ("CIECP" and the

lengthy, deliberative, and transparent administrative process, and the Commission took care to ensure that the Order was within the scope of its authority, under both state and federal law. Accordingly, the Commission should deny the petitions and continue its efforts to promote clean generation resources.

### **APPLICABLE STANDARD**

Pursuant to Section 3.7 of the New York Code of Rules and Regulations (“NYCRR”), “rehearing 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.”<sup>3</sup> The rehearing petitioner bears the burden to establish that these requirements are met.<sup>4</sup> The petition must identify “a significant error in fact” or law, or significant new circumstances, “but for which the Commission would have reached a different conclusion.”<sup>5</sup> A petition fails to state a basis for rehearing when it “merely restate[s] ... the arguments the parties raised earlier ... and that [the Commission] rejected.”<sup>6</sup> As explained below, the petitions here fail to identify any error of law or fact or any new circumstances warranting a different determination.

### **ARGUMENT**

#### **1. The Order Is Within The Scope Of The Commission’s Statutory Authority.**

Castleton argues that the ZEC Program “exceeded the [Commission’s] scope of ...

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“CIECP Pet.”); Case 15-E-0302, *supra*, Petition for Rehearing of the Public Utility Law Project of New York (Filed Sept. 1, 2016) (“PULP” and the “PULP Pet.”). This Response addresses only the petitions that allege errors with respect to the ZEC Program.

<sup>3</sup> Case 14-M-0224: *Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs*, Order on Request for Reconsideration (Issued Oct. 13, 2016), at 8; 16 N.Y.C.R.R. § 3.7(b).

<sup>4</sup> See Case 11-E-0651, *et al.*: *Petition of Central Hudson Gas & Electric Corporation for Commission Approval to Defer Storm Restoration Expenses for the Rate Year Ended June 30, 2012*, Order Denying Rehearing (Issued Apr. 2, 2014), at 5.

<sup>5</sup> Case 07-W-1210: *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Birch Hill Water Supply Corporation*, Order Denying Petition for Rehearing (Issued July 29, 2008), at 3.

<sup>6</sup> Case 13-W-0303: *Proceeding on Motion of the Commission to Examine United Water New York, Inc.’s Development of a New Long-Term Water Supply Source*, Order Adopting Alternative Demand/Supply Strategies and Abandoning Haverstraw Project (Issued Dec. 18, 2015), at 24.

delegated authority” under *Boreali v Axelrod*,<sup>7</sup> because the Commission considered not just “the goal of providing the public with adequate utility services at just and reasonable rates,” but also “focused on environmental concerns.”<sup>8</sup> In so doing, Castleton says, the Commission “transgressed the ‘difficult-to-define line between administrative rulemaking and legislative policy-making.’”<sup>9</sup>

This argument fails because the Public Service Law (“PSL”) expressly delegates to the Commission the authority required to enact the ZEC Program. As the Order notes, the Commission promulgated the Order pursuant to several statutory sources of authority, including Public Service Law §§ 4(1), 5(1), 5(2), and 66(2).<sup>10</sup> Section 5(2) provides especially strong authority for the ZEC Program. It commands the Commission to “encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs ... for the performance of their public service responsibilities with economy, efficiency, and care for ... the preservation of environmental values and the conservation of natural resources.”<sup>11</sup> That is precisely what the ZEC Program does.

Indeed, the decision in *Multiple Intervenors v PSC*<sup>12</sup> forecloses Castleton’s argument that the Commission transgressed its authority. There, the challenger argued that the Commission, by providing for “incentive payments” aimed to promote “the conservation of natural resources,” had “adopted its own social policy vision without the benefit of any legislative direction.”<sup>13</sup> The Appellate Division, however, held that “[t]here could hardly be a more explicit mandate” than

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<sup>7</sup> *Boreali v Axelrod*, 71 NY2d 1, 11-14 (1987).

<sup>8</sup> Castleton Pet. at 3, 4, 7.

<sup>9</sup> *Id.* at 3 (quoting *Boreali*, 71 NY2d at 11-14).

<sup>10</sup> Order at 66-67.

<sup>11</sup> PSL § 5(2).

<sup>12</sup> 166 AD2d 140 (3d Dept 1991).

<sup>13</sup> *Id.* at 143 (quotation marks omitted).

§ 5(2).<sup>14</sup> Conservation of natural resources and preservation of environmental values have “become an avowed legislative policy embodied in the [Commission’s] enabling act.”<sup>15</sup> Accordingly, the challenger’s argument failed because “the Legislature and not the [Commission] has, thus, chosen the end to be accomplished.”<sup>16</sup> That reasoning applies here. In reality, Castleton’s *true* objection is to the precise methods the Commission used in carrying out its legislative mandate—for example, its “adoption of the Social Cost of Carbon.”<sup>17</sup> But as *Multiple Intervenors* holds, the legislature “has given the [the Commission] broad discretion to choose the means of achieving the legislative objective.”<sup>18</sup> There can be no legitimate dispute that the ZEC Program “bears a reasonable relationship” to § 5(2)’s mandate for “the preservation of environmental values and the conservation of natural resources.”<sup>19</sup> As a result, “the [Commission] determination withstands any objections based upon *Boreali*.”<sup>20</sup>

These principles apply with equal force to the similar arguments of Petitioners AGREE and CIECP, which contend the ZEC Program violates § 5(2) because they believe the ZEC Program will not further “the public interest” in preserving environmental values.<sup>21</sup> Likewise, they contend the ZEC Program violates the requirement in State Administrative Procedure Act (“SAPA”) § 202-A (1) to consider “objectives of applicable statutes” and “approaches ...

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 143-44 (quoting *Consolidated Edison Co. of N.Y. v Pub. Serv. Comm’n*, 47 NY2d 94, 103 [1979]).

<sup>16</sup> *Id.* at 144. It is telling that Castleton ignores the decision in *Multiple Intervenors*, which is on point, and instead relies on irrelevant decisions about different agencies and different facts. See Castleton Pet. 6-12 (citing, e.g., *New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 698 [2014] [authority of Department of Health and Mental Hygiene to promulgate rule limiting container size for sugary beverages]; *Ellicot Grp., LLC v N.Y. Exec. Dept. Off. Of Gen. Servs.*, 85 AD3d 48 [4th Dept 2011] [authority of Office of General Services to require payment of “prevailing wage” “regardless of whether the statutory requirements of the prevailing wage law applied”]).

<sup>17</sup> Castleton Pet. at 7.

<sup>18</sup> *Multiple Intervenors*, 166 AD2d at 144.

<sup>19</sup> See PSL § 5(2).

<sup>20</sup> *Multiple Intervenors*, 166 AD2d at 144.

<sup>21</sup> AGREE Pet. at 3-4; CIECP Pet. at 4-6.

designed to avoid undue deleterious economic effects or overly burdensome impacts.”<sup>22</sup> But again, these arguments reflect only Petitioners’ disagreement with the Commission’s choices. It is for the Commission, not Petitioners, to exercise its “broad discretion to select the means for achieving the Legislature’s goals.”<sup>23</sup> Contrary to Petitioners’ claims, the Commission exercised that discretion with a view toward both the statutory goals and available alternatives.<sup>24</sup>

## **2. The Order Complied With SAPA.**

Several Petitioners claim that the Order violated SAPA on the theory that Staff’s July 8, 2016 *Responsive Proposal for Preserving Zero-Emissions Attributes* (the “Responsive Proposal”) was a “substantial revision” requiring a “notice of revised rulemaking,” as well as an additional 30-day comment period, under SAPA § 202 (4-a) (a).<sup>25</sup> As described below, these arguments fail for two reasons. First, the “revised rulemaking” requirement applies only to *one type* of rule under SAPA, but the Commission promulgated the CES as the *other type* of rule. Second, in any event, the Responsive Proposal was not a “substantial revision” within the meaning of SAPA; rather, it was a “logical outgrowth” of the prior proposal.

### *a. Relevant Background.*

SAPA “establishes certain minimum procedures that an agency must follow when promulgating” rules.<sup>26</sup> That includes, for all rules, publishing a “notice of proposed rulemaking” in the New York State Register and providing an opportunity for public comment.<sup>27</sup> SAPA also imposes certain additional requirements, but their applicability differs as between two different types of rules:

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<sup>22</sup> AGREE Pet. at 1-3; CIECP Pet. at 2-4.

<sup>23</sup> *Energy Ass’n of N.Y. State v PSC*, 653 NYS2d 502, 512 (Sup Ct, Albany County 1996).

<sup>24</sup> *See, e.g.*, Order at 66-67, 126-27.

<sup>25</sup> AGREE Pet. at 5-6; CIECP Pet. at 7-8; PULP Pet. at 7-9.

<sup>26</sup> *Med. Soc. of State of N.Y., Inc. v Levin*, 185 Misc2d 536, 540 (Sup Ct, New York County 2000), *aff’d sub nom. Med. Soc’y of State of N.Y., Inc. v Levin*, 280 AD2d 309 (1st Dept 2001).

<sup>27</sup> SAPA § 202 (1).

- A subparagraph (a)(i) rule is “the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof.”<sup>28</sup>
- A subparagraph (a)(ii) rule is “the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.”<sup>29</sup>

This Commission has distinguished between “hard” rules under subparagraph (a)(i), which “are of ‘general applicability’ and are codified in the NYCRR” and “soft” rules under subparagraph (a)(ii), which “can be of ‘general or particular applicability’ and are not codified in the NYCRR.”<sup>30</sup>

In myriad ways, SAPA’s requirements distinguish between those two types of rules—for example, in what elements the agency’s notice of rulemaking must include,<sup>31</sup> whether the agency’s notice of adoption must include an assessment of the public comments received,<sup>32</sup> and whether the notice of rulemaking “expires” after a designated time.<sup>33</sup> And of particular relevance here, SAPA distinguishes between those two types of rules in whether SAPA requires a “notice of revised rulemaking” for certain “substantial revision[s].”<sup>34</sup>

b. *The Commission’s SAPA Compliance.*

Here, the Commission fully complied with the notice-and-comment obligation that SAPA imposes for all rules. On January 27, 2016, the Commission noticed the CES proceeding in the

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<sup>28</sup> SAPA § 102 (2) (a) (i).

<sup>29</sup> *Id.* § 102 (2) (a) (ii).

<sup>30</sup> Case 12-T-0502, *et al.*: *Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades*, Order Denying Rehearing (Issued Feb. 23, 2016), at 4-5.

<sup>31</sup> SAPA § 202 (7) (b) (i).

<sup>32</sup> *Id.* § 202 (5) (b).

<sup>33</sup> *Id.* § 202 (2) (a).

<sup>34</sup> *Id.* § 202 (4-a) (a).

*State Register*.<sup>35</sup> That notice—which came within days of the order expanding the proceeding’s scope to consider nuclear facilities and directing Staff to develop a white paper to address such facilities<sup>36</sup>—expressly described the Commission’s intent to “provide funding to support ... nuclear and other ... facilities that do not emit greenhouse gases or other pollutants while generating electricity.”<sup>37</sup> The Commission then provided opportunity for public comment.<sup>38</sup> In so doing, the Commission satisfied SAPA’s general notice-and-comment requirements.

Petitioners argue that the Commission violated SAPA because it did not issue a “notice of revised rulemaking,” and provide an additional 30-day comment period, after Staff’s July 8, 2016 Responsive Proposal.<sup>39</sup> But this argument fails at the threshold because this requirement does not apply. The Commission’s January 27 notice was express that “the proposed rule is within the definition contained in section 102(2)(a)(ii)” of SAPA.<sup>40</sup> Petitioners do not, and cannot, challenge the Commission’s decision to promulgate the CES pursuant to subparagraph (a) (ii). And SAPA is express that its revised rulemaking requirements *do not apply* to rules promulgated under subparagraph (a) (ii): it provides that “any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter” is “except[ed]” from the requirement to “submit a notice of revised rulemaking ... for any proposed rule which contains a substantial revision.”<sup>41</sup> The same is true of the requirement for a new comment

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<sup>35</sup> DEPT. OF STATE, *New York State Register*, VOL. XXXVIII, Issue 4, at 37 (“Register”).

<sup>36</sup> Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Expanding Scope of Proceeding and Seeking Comments (Jan. 21, 2016).

<sup>37</sup> Register at 37.

<sup>38</sup> *Id.*

<sup>39</sup> AGREE Pet. at 5-6; CIECP Pet. 7-8; PULP Pet. at 7-9.

<sup>40</sup> Register at 37.

<sup>41</sup> SAPA § 202 (4-a) (a) (“Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two 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.”) (emphasis added).

period.<sup>42</sup> The Commission plainly cannot have violated SAPA requirements that do not apply. To the contrary, the Commission went above and beyond what the law required—acting to “foster public input rather than inhibit it”—when it provided an opportunity to comment on the Revised Proposal (first, 10 days, extended to 14).<sup>43</sup>

Second, even if SAPA’s revised rulemaking requirements were not categorically inapplicable, no revised notice was needed here. Whether revised notice is required depends on whether the change is a “substantial revision” within the meaning of SAPA § 102 (9).<sup>44</sup> Courts have interpreted that subsection as turning on whether the revision is a “logical outgrowth” of the initial notice; if so, the change does not qualify as a “substantial revision,” and no new notice is required.<sup>45</sup> Here, the Commission properly concluded that the Responsive Proposal was a logical outgrowth, and not a substantial revision, because it was merely “an add-on process” aimed “to suggest conclusions from the many comments that were already received from the other parties and to give the parties an extra opportunity to comment.”<sup>46</sup> Indeed, the January 27, 2016 Register notice continues to describe the rules adopted by the Commission in the Order.<sup>47</sup> And when the original notice remains fully accurate, so that “re-notice would not be in any way different for the rules as promulgated,” re-notice is not required.<sup>48</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> 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 (Issued July 8, 2016); Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Extending Comment Deadline (Issued July 15, 2016) (“Extension Notice”), at 4.

<sup>44</sup> SAPA defines that phrase as “any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect.” SAPA § 102 (9).

<sup>45</sup> See *Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams*, 521 NYS2d 321, 326 (3d Dept 1987), *aff’d*, 72 NY2d 137 (1988); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v Jorling*, 577 NYS2d 346, 349 (Sup Ct, Albany County 1991).

<sup>46</sup> Extension Notice 4-5.

<sup>47</sup> See Register at 37 (rule “would provide funding to ... nuclear ... facilities that do not emit greenhouse gases or other pollutants while generating electricity”).

<sup>48</sup> *Jorling*, 577 NYS2d at 410.

Petitioners principally contend that revised notice was required because the Responsive Proposal used a “new formula for calculating” the ZEC price based on the social cost of carbon and adopted a “designation of ‘public necessity’ for certain nuclear units.”<sup>49</sup> But as the Commission has explained, the possibility of using the social cost of carbon “was proposed ... in comments,” and the “determinations of public necessity ... are not radically dissimilar to” what “was originally proposed”; indeed, to the extent that the changes arose in response to alleged infirmities raised in the comments, this “would appear to confirm the responsive nature of the proposal”—*i.e.*, that it was a “logical outgrowth.”<sup>50</sup> In the end, the Order did exactly what the Commission had said it would do from the start, by providing “funding to support ... nuclear and other ... facilities that do not emit greenhouse gases or other pollutants while generating electricity.”<sup>51</sup> No revised notice was required, and Petitioners had every opportunity to comment on the Responsive Proposal.<sup>52</sup>

### **3. The Order Complied With SEQRA.**

The State Environmental Quality Review Act (“SEQRA”) requires agencies to evaluate “reasonable alternatives to [an] action which would achieve the same or similar objectives.”<sup>53</sup> Petitioners AGREE and CIECP contend that the Commission violated SEQRA because the Generic Environmental Impact Statement (“GEIS”) failed to consider “replac[ing] closing nuclear reactors with energy efficiency or increased renewable energy.”<sup>54</sup>

This argument fails because, as both the GEIS and the Order explain, this alternative

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<sup>49</sup> AGREE Pet. at 6; CIECP Pet. at 7; PULP Pet. at 7.

<sup>50</sup> *Jorling*, 557 NYS2d at 349.

<sup>51</sup> Register at 37.

<sup>52</sup> Some Petitioners also claim that the Order violated SAPA § 207, which requires that certain rules “be re-reviewed at five-year intervals,” by providing a “term of twelve (12) years” for the ZEC Program “with no possibility for interim review.” AGREE Pet. at 6; CIECP Pet. at 8. This argument fails at the outset because this requirement does not apply to rules promulgated pursuant to SAPA § 102 (2) (a) (ii). See SAPA § 207 (5).

<sup>53</sup> *Webster Assocs. v Town of Webster*, 59 NY2d 220, 228 (1983).

<sup>54</sup> AGREE Pet. at 4-5; CIECP Pet. at 6-7.

would *not* have achieved the Commission’s goals. If nuclear generators retired, “fossil fuels ... would likely be the primary source of replacement power.”<sup>55</sup> That is because, while the Commission is aggressively promoting both energy efficiency and renewable resources, it would be “impossible to deploy th[e] magnitude of resources in the short-term” that would be required “to offset the 27.6 million MWh of zero-emissions nuclear power” that could be lost.<sup>56</sup> Courts have routinely affirmed that agencies can satisfy SEQRA by determining that purported alternatives cannot feasibly achieve their goals.<sup>57</sup>

#### **4. The Order Is Not Preempted By Federal Law.**

Castleton contends that the ZEC Program is preempted by the Federal Power Act (“FPA”) because it “increas[es] wholesale rates” by compelling payments “for power supplied in the wholesale market” that “LSE’s are mandated to purchase” from nuclear generation plants.<sup>58</sup>

This argument fails because it mischaracterizes how the ZEC Program works. ZECs are not based on “power supplied in the wholesale market”;<sup>59</sup> they are credits reflecting the *environmental attributes* associated with the *production* of energy using particular technology—a “credit for the zero-emissions attributes of one megawatt-hour of electricity production” by qualifying nuclear plants.<sup>60</sup> The ZEC Program does not condition participation on how a generator sells energy and capacity, or whether it does so at all. So when ZECs are sold and bought, the payments are not a “wholesale rate[.]”<sup>61</sup> They are separate payments for separate environmental attributes.

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<sup>55</sup> Case 15-E-0302, *supra*, Final Supplemental Environmental Impact Statement (Issued May 19, 2016), at 5-16.

<sup>56</sup> Order at 126-27.

<sup>57</sup> *See, e.g., King v Cty. of Saratoga Indus. Dev. Agency*, 208 AD2d 194, 198, 200-01 (3d Dept 1995); *Shellabarger v Onondaga Cty. Water Auth.*, 105 AD2d 1134, 1135 (4th Dept 1984).

<sup>58</sup> Castleton Pet. at 12, 16.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> Order, App. E, at 1.

<sup>61</sup> *Id.*

When Castleton’s mischaracterizations are set aside, it is clear that the Commission acted within its authority. The ZEC Program is modeled on the REC programs adopted by three dozen states, including New York, which likewise provide for the sale and purchase of credits associated with particular methods of electricity production, unbundled from any wholesale sale of energy or capacity.<sup>62</sup> Such programs fall comfortably within the Commission’s jurisdiction over the production of electricity, on the one hand, and its retail sale, on the other.<sup>63</sup> Indeed, FERC has expressly disclaimed jurisdiction over such transactions, holding that “an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within [FERC]’s jurisdiction under ... the FPA.”<sup>64</sup> Accordingly, the Commission was exactly right when it concluded that its jurisdiction over the ZEC Program is a “well established and settled” part of the “cooperative federalism’ structure of energy regulation.”<sup>65</sup>

Castleton fares no better with its alternative argument that the ZEC Program is preempted because it will supposedly “depress capacity prices” in the wholesale market, by leading nuclear generators to remain in the market when they otherwise would have retired. This argument fails because “FERC’s authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.”<sup>66</sup> Instead, when states “regulate within the domain Congress assigned to them,” then “even when their laws incidentally affect areas within FERC’s domain,” the FPA does not stand as an obstacle.<sup>67</sup> That rule is essential: “[O]therwise, the states might be left with no authority whatsoever to regulate power plants because every

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<sup>62</sup> Order at 9, 19, 68 n.51.

<sup>63</sup> 16 USC § 824 (b) (1) (affirming state jurisdiction “over facilities used for the generation of electric energy” and “any other sale” besides wholesale sales); see *FERC v Electric Power Supply Ass’n*, 136 S Ct 760 (2016) (“*EPSA*”).

<sup>64</sup> *WSPP Inc.*, 139 FERC ¶ 61,061, 61,426 (2012) *contra* *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012); *American Ref-Fuel Company*, 105 FERC ¶ 61,004 (2003); see also Order at 68 n.51.

<sup>65</sup> Order at 68 (quoting *EPSA*, 136 S Ct at 780).

<sup>66</sup> *PPL Energyplus, LLC v Solomon*, 766 F3d 241, 255 (3d Cir 2014), *cert denied*, 136 S Ct 1728 (2016).

<sup>67</sup> *Hughes v Talen Energy Marketing, LLC*, 136 S Ct 1288, 1298 (2016).

conceivable regulation would have some effect on” wholesale markets.<sup>68</sup> REC programs, the Regional Greenhouse Gas Initiative, tax credits, emission controls imposed on coal plants—all affect wholesale rates, and all would be invalid under Castleton’s theory. That is not the law.<sup>69</sup> Indeed, FERC has specifically designed its markets to “accommodat[e] the ability of states to pursue ... legitimate state policy objectives,” including clean energy and environmental protection.<sup>70</sup> The ZEC Program’s effects on wholesale markets thus do not trigger preemption.

##### **5. The Order Does Not Violate The Dormant Commerce Clause.**

Castleton contends the ZEC Program violates the dormant Commerce Clause because it “discriminates against ... zero emission electricity” produced out of state.<sup>71</sup>

This argument fails because Castleton again mischaracterizes the ZEC Program. The Program does not discriminate against out-of-state resources; rather, it is open to any facility without geographic limits. The Order is explicit: Any generator with “verifiable historic contribution ... to the clean energy resource mix consumed by retail consumers in New York State” could participate “*regardless of the location of the facility.*”<sup>72</sup> The fact that no out-of-state facilities currently satisfy the geographically-neutral criteria applied by the Commission for the first tranche of ZEC payments is irrelevant; out-of-state facilities are free to qualify for future tranches if they begin contributing to the clean energy mix serving New York consumers.<sup>73</sup>

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<sup>68</sup> *PPL Energyplus*, 766 F3d at 255.

<sup>69</sup> See *Connecticut Dep’t of Pub. Util. Control v FERC*, 569 F3d 477, 481 (DC Cir 2009) (states have right under FPA to “require retirement of existing generators, to [require] expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities,” even though “those choices affect the pool of bidders in the [wholesale capacity market], which in turn affects the market clearing price for capacity”).

<sup>70</sup> *New England States Comm. on Elec.*, 142 FERC ¶ 61,108, 61,488 (2013); see *Pac. Gas & Elec. Co.*, 123 FERC ¶ 61067, PP 33-34 (Apr. 21, 2008).

<sup>71</sup> Castleton Pet. at 19-20.

<sup>72</sup> Order at 50 (emphasis added).

<sup>73</sup> See, e.g., *Minnesota v Clover Leaf Creamery Co.*, 449 US 456, 473 (1981) (facially geographically neutral regulation did not violate dormant Commerce Clause even though the pulpwood industry it favored was predominantly in-state and the plastic resin industry it disfavored was entirely out-of-state); *Rocky Mountain*

Castleton also contends that the Commission had a discriminatory purpose—to engage in “simple economic protectionism.”<sup>74</sup> This assertion is not supported by the Order. The ZEC Program is a key part of the CES, a broader initiative to promote renewable resources and reduce greenhouse gas emissions.<sup>75</sup> The ZEC Program advances these goals by “preserving existing zero-emissions nuclear generation resources as a bridge to the clean energy future.”<sup>76</sup> The Order adopted the ZEC Program “to preserve the zero-emissions attribute benefits of the facilities to prevent backsliding in the state’s carbon reduction performance that likely could not be avoided in any other way.”<sup>77</sup>

Indeed, Castleton’s argument fails for the even more fundamental reason that the dormant Commerce Clause *does not apply* to the ZEC Program. In *Hughes v. Alexandria Scrap Corp.*,<sup>78</sup> the United States Supreme Court explained that the dormant Commerce Clause is inapplicable when the state enters “into the market as a purchaser, in effect, of a potential article of interstate commerce,” rather than as a regulator.<sup>79</sup> And that is all the ZEC Program does: NYSERDA purchases ZECs from generators, using state funds—thus providing a “bounty” aimed to “protect the State’s environment.”<sup>80</sup> The dormant Commerce Clause is thus inapplicable.

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*Farmers Union v Corey*, 730 F3d 1070, 1089 (9th Cir 2013) (“[A] regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally.”).

<sup>74</sup> Castleton Pet. at 19.

<sup>75</sup> Order at 1-6.

<sup>76</sup> *Id.* at 1.

<sup>77</sup> *Id.* at 145. Castleton gestures toward a dormant Commerce Clause challenge under *Pike v Bruce Church, Inc.*, 397 US 137 (1970), with its assertion that the ZEC Program “unduly burdens” interstate commerce in electricity, even if it is not discriminatory. Under *Pike*, non-discriminatory state action violates the dormant Commerce Clause only if “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 142. This argument fails, most obviously, because the Commission expressly and correctly found that the ZEC Program’s benefits are enormous—\$1.4 billion in carbon benefits alone, solely in the Program’s first two years. Order at 126. Castleton offers no plausible argument for how any burden on interstate commerce could be “clearly excessive,” *Pike*, 397 US at 142, measured against such massive benefits.

<sup>78</sup> 426 US 794 (1976).

<sup>79</sup> *Id.* at 808.

<sup>80</sup> *Id.* at 797, 809.

**6. The Commission Provided A Rational Basis For The Order, Which Is Supported By The Record.**

Petitioners' submissions are filled with overheated attacks on the wisdom of the Commission's choices—that the ZEC Program “represents a dramatic and abrupt departure from well-established regulatory structures and policy choices,”<sup>81</sup> that it “has no rational or reasonable policy basis,”<sup>82</sup> or that the ZEC Program suffers from a laundry list of “flagrant flaws,”<sup>83</sup> among others.<sup>84</sup> None of these hyperbolic claims, however, show error under the applicable standard of review. To pass muster, the Commission's regulation need only have “a rational basis and ... not [be] unreasonable, arbitrary or capricious.”<sup>85</sup> Indeed, the Commission's “exercise of its rule-making powers is accorded a high degree of ... deference, especially when [it] acts in the area of its particular expertise.”<sup>86</sup> Accordingly, the Petitioners “seeking to nullify ... a regulation [have] the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence.”<sup>87</sup>

Petitioners cannot sustain that burden. In the Order, the Commission thoroughly reviewed and discussed the comments it received from participants.<sup>88</sup> And after doing so, the Commission presented a rational—indeed, compelling—basis for the Order in general, and the ZEC Program in particular, supported by ample record evidence. As the Commission explained, “New York's upstate nuclear plants avoid the emission of over 15 million tons of carbon dioxide per year,” and therefore have played a critical role in limiting the State's greenhouse gas

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<sup>81</sup> Castleton Pet. at 22.

<sup>82</sup> CIECP Pet. at 15.

<sup>83</sup> *Id.*

<sup>84</sup> See AGREE Pet. at 7-11; CIECP Pet. at 9-15; Castleton Pet. at 21-26.

<sup>85</sup> *Consolation Nursing Home, Inc. v Comm'r of N.Y. State Dep't of Health*, 85 NY2d 326, 331 (1995).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Order at 45-65.

emissions.<sup>89</sup> But “[l]osing the carbon-free attributes of nuclear generation, before the development of new renewable resources between now and 2030, would undoubtedly result, based on current market conditions, in significantly increased air emissions due to heavier utilization of existing fossil-fueled plants or the construction of new gas plants.”<sup>90</sup> In support of this finding, the Commission pointed to recent experiences in Germany, where closure of its nuclear plants caused “a large increase in the use of coal, causing total carbon emissions to rise despite an aggressive increase in solar generation.”<sup>91</sup> To prevent this backsliding, the Commission found that “it is essential to keep these zero-emissions attributes available for New York consumers,”<sup>92</sup> and that the ZEC Program provided the appropriate mechanism to do so. This judgment is entitled to “a high degree of ... deference.”<sup>93</sup>

Petitioners are wrong to claim the Commission failed to consider alternatives.<sup>94</sup> The ZEC Program is one of many steps the Commission has taken toward ensuring that 50% of electricity consumed in New York by 2030 will be generated from renewable sources.<sup>95</sup> In particular, the Order sets forth a three-tiered approach to reaching that goal, of which the ZEC Program is just one part. But the Commission correctly concluded that, despite its vigorous efforts in promoting renewable resources and energy efficiency, neither could offset the zero-emissions attributes at risk of loss if New York’s nuclear generators retire or the backsliding on New York’s energy goals that would follow.<sup>96</sup>

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<sup>89</sup> *Id.* at 19.

<sup>90</sup> *Id.* at 128.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.* at 129.

<sup>93</sup> See *Consolation Nursing*, 85 NY2d at 331.

<sup>94</sup> AGREE Pet. at 4-5, 8-9; CIECP Pet. at 6-7, 10-12, 15-17.

<sup>95</sup> Order at 12-13.

<sup>96</sup> *Id.* at 129, 152.

Contrary to Petitioners' claims,<sup>97</sup> the decision to base ZEC prices on the social cost of carbon was well supported. The Commission considered various pricing mechanisms.<sup>98</sup> It reasonably concluded that pricing ZECs based on the social cost of carbon would account for the harm carbon emissions cause—and therefore the value added by the preservation of the zero-emissions attributes of the participating nuclear facilities.<sup>99</sup> The Commission also reasonably found that this measure was appropriate because it would capture a value not addressed by interstate markets for electricity and capacity.<sup>100</sup> And the Commission reasonably protected consumers by limiting participation to generators for which there exists a “public necessity to preserve ... zero-emissions environmental attributes” that, absent the Program, could be lost, and by establishing a cap on ZEC prices in subsequent years.<sup>101</sup>

Finally, contrary to Petitioners' claims,<sup>102</sup> the Commission fully considered the ZEC Program's costs. It conducted a detailed cost study,<sup>103</sup> and assessed the comments on that study.<sup>104</sup> It also assessed whether, considering those costs, the public interest weighed in favor of using the ZEC Program to retain the zero-emissions attributes of the eligible facilities. It rightly concluded that the ZEC Program furthers the public interest—and in particular, that the Program's benefits in carbon reduction alone exceed its costs by 50%, in just the Program's first two years.<sup>105</sup> This conclusion was rational and supported by the record.

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<sup>97</sup> AGREE Pet. at 10-11; CIECP Pet. at 13-14; Castleton Pet. at 22.

<sup>98</sup> See Order at 46-52 (describing original pricing proposal, comments in response, and Responsive Proposal).

<sup>99</sup> *Id.* at 133-35, 150.

<sup>100</sup> *Id.* at 133.

<sup>101</sup> *Id.* at 138-41.

<sup>102</sup> AGREE Pet. at 7-11; CIECP Pet. at 9-10, 13-16.

<sup>103</sup> See Case 15-E-0302, *supra*, Clean Energy Standard White Paper - Cost Study (Issued April 8, 2016).

<sup>104</sup> Order at 63-65.

<sup>105</sup> *Id.* at 126, 129.

## CONCLUSION

In light of the foregoing, the Commission should deny the petitions for rehearing.

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