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**STATE OF NEW YORK
BEFORE THE
PUBLIC SERVICE COMMISSION**

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

Case No. 15-E-0302

**COMMENTS OF
AMERICAN PETROLEUM INSTITUTE**

Pursuant to 16 N.Y.C.R.R. § 3.7(c) and the New York Public Service Commission's ("PSC") September 7, 2016 notice¹ issued in the above-referenced proceeding, American Petroleum Institute ("API") hereby submits comments in support of Castleton Commodities International LLC's ("Castleton") application for rehearing of the PSC's August 1, 2016 order adopting a Clean Energy Standard.² Castleton argues that the Zero-Emissions Credit program subsidizing selected nuclear generating facilities ("ZEC Program") instituted in the August 1 Order will improperly trespass on the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction over New York's wholesale electric power markets.³ API supports Castleton's request for rehearing.

¹ *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, Notice With Respect To Request For Rehearing And Reconsideration, Case 15-E-0302, et al. (Sept. 7, 2016) ("September 7 Notice").

² *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, Order Adopting a Clean Energy Standard, Case 15-E-0302, et al. (Aug. 1, 2016) ("August 1 Order").

³ *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, "Application For Rehearing Of Castleton Commodities International LLC" at 12-21, Case 15-E-0302, et al. (Aug. 31, 2016) ("Castleton Rehearing").

I. BACKGROUND

The ZEC Program will provide financial credits, or ZECs, to selected nuclear generators. In order to qualify for these credits, nuclear facilities must demonstrate “public necessity,” which includes showing that revenues the facility receives by participating in the New York Independent System Operator (“NYISO”) wholesale markets are insufficient for the facility to continue operating.⁴

Qualifying nuclear facilities are deemed to generate a ZEC for each MWh of electricity produced.⁵ The ZEC value is set administratively by the PSC and is designed to make payments to the extent the nuclear unit’s market revenues are lower than a specified threshold.⁶ The New York State Energy Research and Development Authority (“NYSERDA”) will purchase ZECs from the qualifying nuclear units at the administratively set price under a multi-year contract.⁷ New York’s load serving entities (“LSEs”) must then purchase from NYSEDA a quantity of ZECs proportionate to the percentage of New York’s load the LSE serves.⁸ The LSE’s associated costs will be recovered from ratepayers.⁹

Castleton applied for rehearing of the August 1 Order based, in part, on the ZEC Program intruding onto FERC’s exclusive jurisdiction over wholesale electric markets.¹⁰ Castleton argues

⁴ August 1 Order at 124-26. The Indian Point facility was excluded from receiving ZECs because it did not demonstrate inadequate compensation. *Id.* at n.85.

⁵ *Id.* at 131.

⁶ *Id.*

⁷ *Id.* at 19-20, 144-45.

⁸ *Id.* at 20.

⁹ *Id.*

¹⁰ Castleton Rehearing at 12-19.

that the ZEC Program is preempted because ZECs provide qualifying nuclear generators an administrative premium above the wholesale market price, effectively setting the wholesale price and interfering with the FERC-regulated NYISO markets.¹¹

II. COMMENTS

API shares Castleton's concerns and supports its request for rehearing. The Supreme Court recently addressed a program implemented by the State of Maryland and found it was preempted by FERC's jurisdiction because it required payments that were conditioned on generators participating in the wholesale markets and guaranteed them a different rate than the wholesale market clearing price.¹² The ZEC Program has similar attributes. The ZEC Program is only available to nuclear generators that participate in the wholesale NYISO markets and demonstrate that such FERC-authorized payments for energy and capacity are insufficient for their continued operation.¹³ It then requires qualifying nuclear facilities to generate a certain number of ZECs, which can only be generated by producing a MWh of electricity.¹⁴ In order to generate the electricity necessary to meet this obligation, the ZEC Program effectively requires the qualifying nuclear generators to participate and clear in the FERC-regulated NYISO markets. These generators are then guaranteed a payment that is based on, and distinct from, the NYISO market clearing price. Indeed, the ZEC value is directly pegged to forecasts of the competitive

¹¹ *Id.* at 15-19.

¹² *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

¹³ August 1 Order at 124-26.

¹⁴ Qualifying nuclear generators will enter into contracts with NYSERDA under which the facility will have an obligation to produce energy to create ZECs and to sell them to NYSERDA. August 1 Order at 144-45, Appendix E at 3. Generators will be subject to financial consequences for failure to meet these obligations. *Id.*

wholesale market prices.¹⁵ Thus, like the Maryland program, the ZEC Program goes beyond acceptable state action and is preempted by FERC's jurisdiction over the NYISO wholesale electric market.¹⁶

The August 1 Order attempts to characterize ZECs, like renewable energy credits ("RECs"), as valuing only nuclear generation's emission-free, environmental attributes.¹⁷ But ZECs are fundamentally different than RECs. While RECs are premised on a renewable generator producing specific amounts of energy, they are not dependent, as are the ZECs, on the generator having failed to obtain sufficient revenues from the NYISO markets to permit their continued operation.¹⁸ And unlike RECs, which are traded and valued based on supply and demand, ZECs have no intrinsic value. Their value is tied directly to the NYISO market price and set administratively by the PSC such that when the nuclear generators are projected to receive greater NYISO revenues they are deemed to require a lower subsidy and the ZEC value is adjusted down.¹⁹

¹⁵ Castleton Rehearing at 15; August 1 Order at 138-41.

¹⁶ The Supreme Court said that state programs "untethered to a generator's wholesale market participation" that do not condition payment of funds on capacity clearing the auction could be acceptable, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. at 1299, but as described herein and in the Castleton Rehearing, the ZEC Program is directly tied to the generators' participation in the NYISO market.

¹⁷ August 1 Order at 119 ("Staff characterized the proposed payments as only setting an appropriate and fair value of the environmental attribute independent of the actual wholesale prices for energy and capacity in the NYISO administered markets."); *id.* at 132-33 (the proposal "does not establish wholesale energy or capacity prices, it only establishes pricing for attributed completely outside of the wholesale commodity markets administered by NYISO."); *id.* at 139 ("As a deliberate intention, no part of the formula establishes energy or capacity prices or revenues.")

¹⁸ *Id.* at 125-26. See also *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, Order Further Expanding Scope of Proceeding And Seeking Comments at 5, Case 15-E-0302, et al. (Feb. 24, 2016) (ZEC Program was intended to provide financial support to "certain nuclear power plants that can demonstrate the lack of financial viability absent additional financial support.").

¹⁹ *Id.* at 119, 138-41.

API is committed to competitive markets and believes that such markets produce the most economically and socially beneficial outcomes. The NYISO wholesale markets can provide price signals to incent the most reliable and efficient resource mix for New York.²⁰ By subsidizing nuclear generators that would otherwise be uneconomic in a competitive market, the ZEC Program directly interferes with these market signals, potentially deterring or harming more efficient generators. The PSC should instead allow the market to incent the most efficient and competitive resource mix for the state.

III. CONCLUSION

API stands ready to support PSC policies that are consistent with the promotion of truly competitive markets for electricity. For the reasons discussed herein, API supports Castleton's request for rehearing of the August 1 Order.

Respectfully submitted,



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²⁰ See generally NYISO Markets New York's Marketplace for Wholesale Electricity at 2, available at: http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Other_Reports/Other_Reports/NYISO%20Markets%20-%20New%20Yorks%20Marketplace%20for%20Wholesale%20Electricity.pdf