

REVISED 11-14  
STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

VIA ELECTRONIC SUBMISSION

Hon. Kathleen H. Burgess, Secretary  
New York Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

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CASE 15-E-0302

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

CASE 16-E-0270

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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In Support of the Petitions for Reconsideration or Rehearing  
Submitted by Multiple Parties

November 14, 2016



Noble Environmental Power, LLC (“Noble”), through certain of its affiliate companies, owns and operates six wind energy projects located in New York State (collectively, the “Noble Projects”). The Noble Projects generate 612 MW of electricity which is supplied to the New York Independent System Operator (“NYISO”) markets for capacity, energy and ancillary services. Each of the Noble Projects is also party to a 10-year contract (“NYSERDA Contract”) with the New York State Energy Research and Development Authority (“NYSERDA”) for the sale of approximately 95% of its renewable energy attributes, as generated. Two of the Noble Projects are in Western New York (Wyoming County), equidistant between the Province of Ontario and the Commonwealth of Pennsylvania and the remaining four Projects are in the North Country (Clinton and Franklin Counties) near the Vermont and Quebec borders. Noble is the largest wind generator in New York, directly employs approximately 40 persons and makes significant contributions to state, regional and local

economies, with over \$100 million in taxes and land royalty payments made<sup>1</sup> since commercial operations began in 2008-2009.



As an early mover in the development of New York wind resources, Noble supports the efforts of the New York Public Service Commission (the “Commission”) to develop and implement an ambitious Clean Energy Standard (“CES”) for New York. We were also pleased that both NYSERDA, in its June 2015 Large-Scale Renewable Energy Development report (the “NYSERDA LSR Report”)<sup>2</sup> and the Department of Public Service Staff in its January 25, 2016 whitepaper on CES (the “Staff Whitepaper”)<sup>3</sup> recognized that (i) a generator’s ability to produce electricity without carbon emissions is a valuable attribute, distinct from its energy products and (ii) many existing non-emitting resources (“Existing Resources”) were likely to have multiple regional options for disposing of these environmental attributes, each of which would be an

<sup>1</sup> Noble’s payments to landholders are calculated, in part, with reference to revenues received by the Noble Projects under the NYSERDA Contracts. When the NYSERDA Contracts expire, in 2018-2019, these payments to landholders are expected to be reduced as a consequence of the decreased revenue stream.

<sup>2</sup> *Large-Scale Renewable Energy Development in New York, Options and Assessment*. June 1, 2015, prepared by New York State Research and Development Authority, Albany, NY (NYSERDA Report 15-12). See Chapter 1, Sections 1.9 and Chapter 9.

<sup>3</sup> *Staff Whitepaper on Clean Energy Standard*, Case No. 15-E-0302. January 25, 2016, New York Department of Public Service. See P. 15 *et seq.*

exclusive disposition, eliminating the ability for New York State to “count” these attributes towards its CES goals. The Staff Whitepaper stated that there were good reasons to include Existing Resources in CES and recommended that load serving entities (“LSEs”) should be required to procure renewable energy credits (“RECs”) from several “tiers” of clean energy resources, including those which were operational before January 1, 2015, but have alternative, out-of-state demand for the RECs they produce (referred to as “Tier 2A” resources).<sup>4</sup>

However, disappointingly, in the Order Adopting a Clean Energy Standard (the “August Order”),<sup>5</sup> the Commission chose not to adopt the Staff Whitepaper recommendation, stating,

The facilities that Staff proposes to classify under Tier 2a have all likely already recovered all or most of their initial capital costs and only need to obtain market revenues sufficient to fund their comparatively low, going-forward operation and maintenance costs. These are primarily wind generation facilities that have no fuel costs unlike other large scale electric generation facilities and should be profitable even under today's lower market prices for energy and capacity. While it may be possible that some of these facilities will sell their clean energy attributes into other states, given vintage and delivery requirements in other states it remains merely hypothetical that there will be a mass flight of these resources. Therefore, at this time, there is no imminent risk of losing the emission attributes associated with these facilities permanently and no concomitant need to provide them with additional New York consumer support for those emission attributes. In the event that significant out-of-state sales occur to the detriment of the RES program, the Commission will reconsider the need to compete for these resources in one of the triennial reviews prior to 2030. The Tier 2a concept is not adopted.<sup>6</sup>

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<sup>4</sup> *Id.*, at P. 22.

<sup>5</sup> Order Adopting a Clean Energy Standard, Case No. 15-E-0302 and Case No. 16-E-0270. New York Public Service Commission. Issued and Effective August 1, 2016. See P. 115 for the discussion of Tier 2 resources.

<sup>6</sup> *Id.*, at P. 116.

For the reasons set forth below, Noble understands the concerns expressed by the many parties which have questioned this conclusion and petitioned the Commission for reconsideration or rehearing of the issue, including Brookfield Renewables Energy Group<sup>7</sup>, ReEnergy Holdings LLC<sup>8</sup>, H.Q. Energy Services (U.S.) Inc.<sup>9</sup>, Alliance for Clean Energy New York<sup>10</sup>, and Ampersand Hydro LLC<sup>11</sup>. We also note that the Institute for Policy Integrity has submitted comments<sup>12</sup> on the August Order which point out similar concerns with the Commission’s decision on Existing Resources.

Specifically, Noble believes it is inconsistent with the New York State Public Service Law and the principles of electric regulation long practiced by this Commission, not to pay the established value per MWh for attributes created by producing electricity without carbon emissions (“Non-emitting Power Attributes”) to all power generators which produce them, without undue discrimination or preference. Upon rehearing or reconsideration, the Commission should revise the August Order to provide payment to Existing Resources for Non-emitting Power Attributes either (i) in the amount per MWh of the “Zero Emissions Credits” authorized to be paid to existing nuclear resources which were calculated on the basis of the federal “social cost of carbon” (the “ZEC Price”)<sup>13</sup> or (ii) in an amount per MWh calculated with reference to the CES REC price recently announced by NYSERDA for its 2017 compliance period, less the NYSERDA administrative fee (the “CES Price”)<sup>14</sup>, each of which formulations put a reasonable and justifiable value on

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<sup>7</sup> Petition for Reconsideration or, in the Alternative, Limited Rehearing, Case No. 15-E-0302. Brookfield Renewable Energy Group, August 31, 2016.

<sup>8</sup> Petition for Rehearing, Case No. 15-E-0302. ReEnergy Holdings LLC, August 31, 2016.

<sup>9</sup> Petition for Rehearing, Case No. 15-E-0302 and Case No. 16-E-0270. H.Q. Energy Services (U.S.) Inc., August 30, 2016

<sup>10</sup> Petition for Rehearing or Clarification of the Order of August 1, 2016 Adopting a Clean Energy Standard, Case No. 15-E-0302. Alliance for Clean Energy New York, August 31, 2016

<sup>11</sup> Petition for Rehearing, Case No. 15-E-0302 and Case No. 16-E-0270. Ampersand Hydro LLC, August 23, 2016.

<sup>12</sup> Party Comments on New York State Department of Public Service, Petitions for Rehearing on Clean Energy Standard, Case No. 15-E-0302. Institute for Policy Integrity, October 31, 2016.

<sup>13</sup> See, August Order at PP. 129, *et seq.*

<sup>14</sup> Filing Regarding Renewable Energy Standard, 2017 Compliance Period. NYSERDA, Case No. 15-E-0302, November 1, 2016.

generation of Non-emitting Power Attributes. The term of such payments should provide parity with new resources.<sup>15</sup> It would be unjustly discriminatory and unduly preferential not to pay Existing Resources for the same products procured from other resources.

I. Principle of Non-Discrimination

Section 66 of the Public Service Law<sup>16</sup> provides that the Commission shall adjust (whether higher or lower) any rates, charges, acts or regulations of any person under the Commission's supervision to the extent they are unjust, unreasonable, unjustly discriminatory or unduly preferential. The August Order errs in differentiating between Non-emitting Power Attributes supplied by (i) Existing Resources and new resources and (ii) nuclear resources and other resources which can supply Non-emitting Power Attributes.

A. Existing Resources and New Resources

Fundamentally, a MWh of Non-emitting Power Attributes from a new resource is indistinguishable from a MWh of Non-emitting Power Attributes from an Existing Resource – each provides New Yorkers with electric power and no carbon emissions. The Commission has arbitrarily and capriciously failed to reflect this undisputed fact in its treatment of Existing Resources other than to erroneously conclude, based on no evidence in the record, that Existing Resources, which have no material costs of generation, should supply Non-emitting Power Attributes without cost, as a windfall to parties who have not paid for them. Although the Commission has not explained its rationale for discriminating between new resources supplying Non-emitting Power Attributes and Existing Resources, in past circumstances, the Commission has provided justification for discrimination between asset classes for a variety of reasons, some of which might underlie its determination in the August Order. However, none of these justifications enunciate a reasoned rationale

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<sup>15</sup> In the Clean Energy Standard Phase I Implementation Plan Proposal, the DPS Staff provided a formula to determine the term for purchases of RECs from 2015-2016 vintage projects which could serve as a model for providing Existing Resource contract extensions. Case No.15-E-0302, October 31, 2016. See P. 13.

<sup>16</sup> New York Public Service Law §66(5)

for discrimination between Non-emitting Power Attributes produced by new resources and Existing Resources, in this case.

1. No Market Power Rationale. Historically, New York State has mitigated market power of generators through procurement of new resources, thereby creating additional competitive supply. However, with respect to CES, fear of market power exercised by Existing Resources is unwarranted. The Existing Resources, alone cannot generate the level of Non-emitting Power Attributes that DPS Staff has calculated is required to reach the CES “50% by 2030” goal<sup>17</sup> and therefore cannot exercise market power by withholding generated Non-emitting Power Attributes for a better price. Whether the Commission chooses to compensate Existing Resources at the ZEC Price or the CES Price, the payments will have been administratively-set, based on an analysis of the value of emissions-free electric power, with no resource in a position to exercise market power and receive a higher price for its Non-emitting Power Attributes.
2. No “Windfall” Rationale. Existing Resources have not been paid for RECs generated after expiration of their NYSERDA Contracts. Unlike bundled PPAs for purchase of all energy attributes, including capacity, electricity, and ancillary services as well as renewable attributes which are priced to reflect the cost of new entry, the NYSERDA Contracts were not intended to compensate Existing Resources for anything other than the Non-emitting Power Attributes generated during the 10-year term.<sup>18</sup> Both the ZEC Price and the current CES Price purport to reflect the value of, and preference for, Non-emitting Power Attributes by New York ratepayers and each is significantly greater than the NYSERDA Contract price realized by the Noble Projects. No evidence has been

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<sup>17</sup> Staff Whitepaper at P.9.

<sup>18</sup> Since 2014, the term of NYSERDA Contracts has been 20 years.

presented to the Commission that some portion of the price paid under the NYSERDA Contracts were intended to compensate for post-Contract Non-emitting Power Attributes. As no liquid market has developed for purchase and sale of Non-emitting Power Attributes from Existing Resources, there is no reasonable certainty that these Non-emitting Power Attributes can reliably be sold at all following expiration of the NYSERDA Contracts. NYSERDA has acknowledged as much, stating in the NYSERDA LSR Report, "...under these [NYSERDA Contracts] New York has no residual post-contract rights to... [Non-emitting Power] Attributes. It is *inevitable* that in the absence of a New York policy stimulating demand that creates sufficient value for... [Existing Resource] RECs, the energy and RECs from some or all of these resources are likely to leave the market."<sup>19</sup> To make it clear, any reasonable regional price is likely to be attractive to Existing Resources without NYSERDA Contracts. In the event no such alternative is available, it is New York State, not the Existing Resources, which will receive an unbargained-for windfall.

3. The Avoided Cost Calculation Methodology May Result in Higher Pricing for Existing Resources. The Commission has suggested that it may consider at a later date extending the current maintenance program for early vintage (pre-2003) renewables and pay 2003-2014 vintage renewables their "going forward" costs established on audit. Noble assumes this is what the Commission had in mind when it suggested that wind farms have already recovered their initial capital costs and have only low, going-forward operation and maintenance costs when they run. This assumption is wrong. The Noble Projects, which Noble believes are similar to other project-financed renewables, seek to recover both

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<sup>19</sup> LSR Report at P. 29 (emphasis added).

capital costs and fixed operating costs over their useful lives.<sup>20</sup> As stated above, monetization of Non-emitting Power Attributes is certainly one source of recovery, especially in the low-priced power markets prevailing today. Were the Commission to attempt to determine appropriate avoided cost payments for Existing Resources (as it has proposed for certain “maintenance tier” generators), it might find that Existing Resources which no longer receive federal production tax credits (“PTCs”) or whose right to receive PTCs is ending in the near-term, have a need for a *higher* avoided cost payment than its newer competitors. In any event, New York has already established two values for Non-emitting Power Attributes (see below); it should not attempt to create a different price for each Existing Resource for the same product.

4. Limited “New Technology” Incentive. The Projects reached commercial operation in 2008 and 2009, making them between 7 and 8 years old, not even midway through their expected life cycles. The Noble Projects are well-sited, given New York’s wind resource levels with average contractual availability generally exceeding 98%. It is unreasonable to assume that improved technology over the next several years will provide vastly different capacity factors or significantly cheaper production of Non-emitting Power Attributes.
5. New Infrastructure Jobs vs. Existing Employees. The Commission was clear in the August Order that it based its decisions on the value of Non-emitting Power Attributes for the health and welfare of New Yorkers, but it is possible that part of the rationale for favoring new resources over Existing Resources is a desire to provide infrastructure construction jobs. However, the Noble Projects employ New Yorkers in *long-term* clean economy jobs and

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<sup>20</sup> This is a common practice for market generation resources. For example, the periodic calculation of “Net CONE” by NYISO is based on this principle.

indirectly create additional jobs through their ongoing use of outside vendors for a variety of repair and maintenance work – it would be unfortunate to affect these New Yorkers to provide short-term construction jobs to others.

Pursuant to the August Order, it would be logical to assume that, wittingly or otherwise, the Commission would be in favor of the Noble Projects' dismantling the existing wind turbines and selling their respective sites to new generators which could re-erect similar turbines to sell the same Non-emitting Power Attributes to NYSERDA for a new 20-year term. Such an outcome is surely unjust, unreasonable, discriminatory and unduly preferential.

B. Existing Renewables and Existing Nuclear. The August Order made several findings regarding the historical value of the three nuclear plants (collectively, the “Nuclear Facilities”) which are intended to generate “zero-emissions credits” or “ZECs” which all LSEs are required to purchase under the August Order:

- the Nuclear Facilities had historically made a “significant verifiable contribution to New York State’s clean energy resource mix as consumed by New Yorkers”<sup>21</sup>;
- statements from the Nuclear Facility owners together with review of several (but not all) of the Nuclear Facilities’ books and records by DPS Staff, was a sufficient showing that the Nuclear Facilities would shut down operations absent Commission action;
- a cost-benefit analysis performed by the Commission comparing the cost of ZECs to the value of Non-emitting Power Attributes from the Nuclear Facilities determined that “the marginal cost of additional increments of renewable resources

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<sup>21</sup> August Order at P. 125

is expected to always be significantly higher than ZEC prices”<sup>22</sup>; and

- without the Non-emitting Power Attributes from the Nuclear Facilities it was unrealistic to expect to meet the CES goals.

Noble believes that each of these findings is applicable to the Noble Projects as well, which have generated Non-emitting Power Attributes since coming on line in 2008-09. Noble is also at risk of having insufficient revenues to permit it to continue operating and must make near-term decisions regarding whether it will continue to operate, and if so, how it will dispose of its Non-emitting Power Attributes. Because the administrative ZEC Price is less than the recently announced NYSEDA CES Price for 2017, ZEC-like payments to the Noble Projects would also be expected to be less than payments to a new resource. Finally, the Commission has accepted the DPS Staff CES calculations to meet the “50% by 2030” goal. Those calculations assume that the Noble Projects will be on-line, generating Non-emitting Power Attributes. Failure to retain the Noble Projects and the other Existing Resources puts the State’s ability to meet its goals in serious jeopardy.

Noble understands that there are significant distinctions between the Projects and the Nuclear Facilities<sup>23</sup>. However, as contributors to a CES goal, each contributes in exactly the same way on a MWh basis. Noble agrees with the analysis made by the Institute for Policy Integrity in their recent comments. As the Institute points out, underpinning the August Order is the concept that the prices which generators receive in New York power markets do not fully internalize the externalities caused by greenhouse gas emissions and therefore, state subsidies “are required to achieve economic efficiency”.<sup>24</sup> However,

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<sup>22</sup> Id., at P. 127

<sup>23</sup> Not all of which are favorable to the Nuclear Facilities. For example, each of the Nuclear Facilities was built decades ago under cost of service ratemaking and has been fully paid for by New York ratepayers. The Nuclear Facilities were sold to unregulated entities with the explicit assumption that no further ratepayer subsidies would be forthcoming. Many parties to the Commission’s proceeding have also pointed out that although the Nuclear Facilities produce Non-emitting Power Attributes, their operations are not uniformly environmentally benign.

<sup>24</sup> Institute for Policy Integrity Comments at P. 3.

according to the Institute, “such subsidies should *uniformly* apply to *all resources*. This approach would ensure that the same zero-emissions attribute provided by different resources is valued commensurately, that the relative values of different resources are not distorted by artificial differences in subsidies for the same attribute, and that the economically efficient market outcome can be achieved without artificially picking winners in advance.”<sup>25</sup>

II. New York Has Already Established Two Values For Non-Emitting Power Attributes Which Should Be Applied To All Similarly-Situated Generation Resources.

A. Social Cost of Carbon. In administratively determining the price of ZECs<sup>26</sup>, the Commission chose to utilize the federally-determined monetized value of the benefit that a non-emitting resource provides by avoiding the carbon emissions that an alternative, fossil-fueled generator would emit. In doing so, the Commission moves away from consideration of the “avoided cost” of losing any particular plant and establishes an independent value for all Non-emitting Power Attributes. There is no just and reasonable basis for compensating one provider of Non-emitting Power Attributes over all others.

B. NYSERDA 2017 CES Price. On November 1, 2016, NYSERDA released the details of its 2017 compliance period REC sale to LSEs in which it stated that the 2017 Tier 1 REC Price will be \$21.16/MWh (with an alternative compliance payment of \$23.28/MWh). As stated above, Non-emitting Power Attributes generated by the Noble Projects (like all Existing Resources which became commercial in the period from 2003 through 2014), do not generate RECs which can be purchased by LSEs through the NYSERDA program, which is for “new” resources, only.<sup>27</sup> Despite the fact that the CES Price does not reflect Non-emitting Power Attributes generated by Existing Resources, the NYSERDA announcement nonetheless expresses its view of the value of

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<sup>25</sup> *Id.*, (italics in original.)

<sup>26</sup> ZEC are priced at \$17.48/MWh, escalating over the 12-year term of the program, with a “claw-back” in the event that capacity and energy market prices exceed a cap.

<sup>27</sup> Inexplicitly, “new” units also include generators which began commercial operations in 2015 and 2016, even though they are not “induced” to enter the New York market by the CES Program any more than the Noble Projects were.

electricity produced without carbon emissions. Indeed, since the NYSERDA price remains in effect for a 20-year period without escalation, the ZEC Price, with escalation, and the NYSERDA CES Price, are quite similar.

Since New York has determined two reasonably similar long-term prices for Non-emitting Power Attributes, it is arbitrary and capricious and not the result of reasoned decision-making for the Commission to withhold that price from some Existing Resources. Indeed, the Noble Projects are particularly short-changed under the Commission's new approach, because they were only paid for 10 years (rather than the current 20-year term) for 95% of their Non-emitting Power Attributes on the theory a voluntary market for REC trading would develop which would provide an outlet to sell the remaining 5% of Non-emitting Power Attributes during the initial 10-year term and all their Non-emitting Power Attributes thereafter. No robust market for Existing Resources has developed and, under the August Order, development will be further slowed.<sup>28</sup>

### III. Alternative REC Buyers.

As many of the parties have mentioned, there are numerous buyers of Non-emitting Power Attributes generated by New York resources, primarily in New England. The Noble Projects already have experience in selling the 5% of their Non-emitting Power Attributes not covered by the NYSERDA Contracts into these alternative markets. The Noble Projects understand that such prices will remain variable for the foreseeable future, but when no alternative is being offered through the CES, the Noble Projects will have no choice but to explore other options. With the expiration of PTCs and the NYSERDA Contracts and persistently low market prices for energy, the Noble Projects could also determine to mothball their units until market conditions improve or even permanently shutter them.

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<sup>28</sup> A robust voluntary market is challenged because the primary REC buyers, New York LSEs, must fulfill their RPS requirements with the RECs generated by new resources.

This is the heart of the matter. The Commission believes it has no need to provide the same benefits to Existing Resources as it does to the Nuclear Facilities, 2015-16 vintage renewables and new-build units, even though the contribution the Existing Resources make to achieving the CES goal is identical and such contribution has not yet been paid for. The Commission believes it can take this discriminatory and unduly preferential action because the Existing Resources have “steel-in-the ground” and have no choice but to supply Non-emitting Power Attributes to the State, without charge. That the Commission may recognize its mistake only *after* Existing Resources have forfeited significant value will not be lost on the sponsors of new projects considering the regulatory risks of doing business in New York.

#### IV. Noble’s Proposal.

If the Commission agrees to reconsider or rehear the issues raised by the petitioning parties, Noble suggests that the simplest, most defensible CES program change to remedy the discriminatory effects of the program on the Noble Projects would be to extend the NYSERDA Contracts with the Noble Projects at the 2017 CES Price, but for a period reduced by the term of the existing NYSERDA Contracts. This would provide parity for the Noble Projects with new resources being planned today and compensate them for the failure of a predictable and liquid voluntary market to develop. The Noble Projects will have been paid a lesser amount for their first 10 years of operation, representing a cost savings for New York ratepayers relative to new resources which will receive a higher price for a longer term. The State would have an opportunity to contract with additional new resources in 10 years when these extended Existing Resource contracts would roll off in the 2028-29 timeframe.

Once again, we reiterate that the Noble Projects have not been paid for Non-emitting Power Attributes that they will generate after 2018-19. It is just, reasonable, non-discriminatory and non-preferential for the Noble Projects to be paid the same price for producing electricity without releasing carbon

emissions in New York State as is paid to any other resource with Non-emitting Power Attributes.

Noble is grateful for the Commission's consideration of these comments and the requests of the petitioning parties.

Respectfully Submitted,

Noble Environmental Power, LLC  
(on behalf of itself and the Noble Projects)

By: */s/Kay McCall*

Kay McCall  
President and CEO