

November 14, 2016

**VIA ELECTRONIC FILING**

Hon. Kathleen H. Burgess  
Secretary  
New York Public Service Commission  
Empire State Plaza, Agency Building 3  
Albany, New York 12223-1350

Re: Case 15-E-0302: Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard

Response of the Energy Entities to Rehearing Requests on the August 1, 2016 NYPSC Order Implementing the CES Program

Dear Secretary Burgess:

In accordance with the September 7, 2016 notice in the above-referenced proceeding, enclosed is the Response of the Energy Entities to Rehearing Requests on the August 1, 2016 NYPSC Order Implementing the CES Program.

A copy of this Response has been served via-email contemporaneously on the parties to this proceeding.

Respectfully submitted,

GREENBERG TRAUIG, LLP



Doreen Unis Saia

DUS/aaw  
Enclosure  
cc: Active Parties in Case 15-E-0302 (via e-mail)  
ALB 1974368v1



a proposed framework for the CES program for review and comment by the parties to the CES Proceeding.<sup>2</sup>

Following the issuance of numerous notices seeking comments on all aspects of the program which included three notices in the New York State Register in accordance with the State Administrative Procedures Act (“SAPA”), a significant number of technical conferences and public statement hearings and the submission of hundreds of public comments and pleadings,<sup>3</sup> the NYPSC issued the CES Program Order on August 1, 2016.<sup>4</sup> Based on the full and extensive record before it, the NYPSC, *inter alia*, approved two separate programs, the Renewable Energy Standard (“RES”) program and the Zero Emissions Credit (“ZEC”) program, to procure the zero-emission attributes produced by the subset of New York generators that qualify for, and elect to participate in, these programs. As reflected in the CES Program Order, the two programs were collectively designed with the goal of utilizing New York’s generating fleet to prevent backsliding on New York’s carbon emission gains to date and to achieve the State’s 40% carbon emission reduction target in 2030.<sup>5</sup>

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<sup>2</sup> See NYPSC Case 15-E-0302, *supra*, “Staff White Paper on Clean Energy Standard” (dated January 25, 2016) (hereinafter, “White Paper”).

<sup>3</sup> Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC (“ENF”), and Entergy Nuclear Operations, Inc., have participated jointly in this proceeding as the Entergy Entities. The Entergy Entities participated on the panel at the Nuclear Energy Technical Conference Workshop and submitted multiple sets of comments in this proceeding. (See, e.g., NYPSC Case 15-E-0302, *supra*, “Initial Comments of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC, and Entergy Nuclear Operations, Inc., concerning DPS Staff’s White Paper on Clean Energy Standard” (dated April 22, 2016) (hereinafter, “Entergy Entities Initial White Paper Comments”); “Reply Comments of the Entergy Entities Concerning DPS Staff’s White Paper on Clean Energy Standard”) (dated May 13, 2016) (hereinafter, “Entergy Entities Reply Comments”); “Comments of the Entergy Entities on DPS Staff’s CES Tier 3 Responsive Proposal” (dated July 22, 2016).) The Entergy Entities previously have chronicled the extensive record of this proceeding in their submissions in the CES Proceeding and, in the name of administrative efficiency, incorporate their comments by reference herein.

<sup>4</sup> See NYPSC Case 15-E-0302, *supra*, “Order Adopting a Clean Energy Standard” (issued and effective August 1, 2016) (hereinafter, “CES Program Order”).

<sup>5</sup> *Id.* at 12, 20.

Notwithstanding the fulsome collaborative process that preceded issuance of the CES Program Order and the extensive record upon which it is based, rehearing requests have been filed challenging, *inter alia*, the adequacy of notice to the parties, the underlying basis for the NYPSC actions and the overall structure of the program to maintain current carbon emission gains and secure further reductions. In accordance with the September CES Notice,<sup>6</sup> the Entergy Entities hereby submit this response to certain rehearing requests demonstrating that the arguments raised therein lack any basis in law or fact, and thus, the CES Program Order should be upheld.<sup>7</sup>

## I. BACKGROUND

In its January CES Order initiating the development of the CES program, the NYPSC specified that the issues DPS Staff should address in its White Paper included the best practices of clean energy programs regionally and nationally and “the methods to determine the nature of the obligation of the mandate.”<sup>8</sup> The NYPSC further established its expectation from the outset of the CES Proceeding that the CES program parameters ultimately proposed by DPS Staff to the NYPSC for its consideration in June would be informed by both DPS Staff’s development of the White Paper and its analysis of the comments submitted by stakeholders.<sup>9</sup>

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<sup>6</sup> See NYPSC Case 15-E-0302, *supra*, “Notice with respect to Requests for Rehearing and Reconsideration” (issued September 7, 2016) (hereinafter, “September CES Notice”) (extending response period to account for the potential applicability of SAPA requirements).

<sup>7</sup> The Entergy Entities respond herein to a limited subset of the challenges filed concerning the CES Program Order. The Entergy Entities have also reviewed the response to rehearing requests being filed contemporaneously in this proceeding by the Independent Power Producers of New York, Inc. and support the positions set forth therein. The silence of the Entergy Entities with respect to the remaining rehearing requests does not signify, and should not be interpreted as, acquiescence in, or concurrence with, the positions advanced therein.

<sup>8</sup> See January CES Order at 6-7.

<sup>9</sup> *Id.* at 7. Among its other duties, DPS Staff plays an advisory role to the Commissioners. Prior to NYPSC sessions, DPS Staff is charged with developing memoranda for the commissioners summarizing the proceedings on the session agendas and providing recommendations for action. The NYPSC Commissioners routinely reference DPS Staff memoranda during NYPSC sessions when discussing matters on the regular agenda.

DPS Staff began its work in the CES Proceeding by issuing the CES White Paper which it subsequently augmented with its issuance of the CES DSGEIS and the CES Cost Study.<sup>10</sup> Notices were issued seeking comments on all of these documents, including SAPA notices published in the New York State Register on three separate occasions.<sup>11</sup> A series of technical conferences were held to provide further information and give the parties an opportunity to make additional inquiries.<sup>12</sup> A substantial number of public hearings were also convened throughout the State to provide the general public with another mechanism to provide feedback on the CES program. In response to requests from parties to the proceeding, the NYPSC Secretary issued notices extending the due dates for the submission of both initial and reply comments on the White Paper to provide parties with additional time to consider the issues and put forth their positions.<sup>13</sup>

The parties to the CES Proceeding submitted over 75 sets of comments to address the DPS Staff White Paper with a substantial number of additional comments submitted by parties on the CES DSGEIS and the CES Cost Study.<sup>14</sup> In these comments, parties raised concerns with

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<sup>10</sup> See NYPSC Case 15-E-0302, *supra*, “Draft Supplemental Environmental Impact Statement” (dated February 23, 2016) (hereinafter, “CES DSGEIS”); NYPSC Case 15-E-0302, *supra*, “Clean Energy Standard White Paper – Cost Study” (dated April 8, 2016) (hereinafter, “CES Cost Study”).

<sup>11</sup> See New York State Register, Notice of Proposed Rulemaking, I.D. No. PSC-04-16-00008-P (issued January 27, 2016) (hereinafter, “January CES Notice”); New York State Register, Notice of Proposed Rulemaking, I.D. No. PSC-11-16-00008-P (issued March 16, 2016); New York State Register, Notice of Proposed Rulemaking, I.D. No. PSC-16-16-00005-P (issued April 20, 2016); New York State Register, Notice of Proposed Rulemaking, I.D. No. PSC-16-00006-P (issued April 20, 2016) (collectively referred to herein as “CES SAPA Notices”).

<sup>12</sup> One of the technical conferences focused on considerations specific to nuclear facilities and their production of zero-emission attributes.

<sup>13</sup> See NYPSC Case 15-E-0302, *supra*, “Notice Extending Reply Comment Period” (dated April 29, 2016); NYPSC Case 15-E-0302, *supra*, “Notice Extending Comment Period” (dated March 8, 2016).

<sup>14</sup> In its comments throughout the CES Proceeding, the Entergy Entities established that the NYPSC was engaged in an important initiative that was long overdue to provide value for clean energy service but the NYPSC’s efforts would come too late to reverse ENF’s decision to retire the James A. FitzPatrick facility (“FitzPatrick Facility”) which was announced in its notice of intent to retire the facility filed with the NYPSC on November 2, 2015. (See, e.g., NYPSC Case 15-E-0302, Nuclear Energy Technical Conference Workshop – Transcript (dated March 9, 2016) at 26, 72-73; Entergy Entities Initial White Paper Comments at n.39.) On August 22, 2016, ENF

certain program parameters proposed by DPS Staff and offered a number of alternative designs for the structure and composition of the RES and ZEC programs. Critical to the NYPSC's consideration of a procedural issue raised on rehearing, the concept of using the U.S. Environmental Protection Agency's ("EPA") Social Cost of Carbon ("SCC") as the basis to value zero-emission attributes and the need for durability were both proposed as components of the ZEC Program in the very first round of comments filed in this proceeding in mid-April.<sup>15</sup>

While under no directive to do so, DPS Staff subsequently elected to issue its Responsive Proposal addressing the ZEC program aspects of the proposed CES program.<sup>16</sup> In its Responsive Proposal, DPS Staff specified that enhancements to its initial White Paper proposal were being made "[a]fter consideration of the many comments that have been received on [the ZEC program]."<sup>17</sup> The NYPSC Secretary issued a notice advising the parties to the proceeding that additional comments could be submitted on the Responsive Proposal.<sup>18</sup> When parties to the proceeding requested an extension, the NYPSC Secretary provided additional time for the parties to submit comments on the Responsive Proposal.<sup>19</sup> More than 25 filings were submitted to address the Responsive Proposal, including comments on the proposed SCC and durability aspects of the ZEC Program.

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and Exelon Generation Company, LLC ("ExGen") filed an application under New York Public Service Law Section 70 to transfer ownership of the FitzPatrick Facility from ENF to ExGen. Shortly thereafter, ENF submitted a status report in the FitzPatrick retirement proceeding notifying the parties to that proceeding that ENF was moving forward with two parallel paths to either sell the FitzPatrick Facility or retire it in the event that the sale did not occur.

<sup>15</sup> See, e.g., NYPSC Case 15-E-0302, *supra*, "Initial Comments of Institute for Policy Integrity, New York University School of Law" (dated April 22, 2016) (hereinafter, "IPI Initial White Paper Comments"); see also NYPSC Case 15-E-0302, *supra*, "Comments of Constellation Energy Nuclear Group, LLC Concerning Staff White Paper on Clean Energy Standard" (dated April 22, 2016) (hereinafter "CENG Initial White Paper Comments").

<sup>16</sup> See NYPSC Case 15-E-0302, *supra*, "Staff's Responsive Proposal for Preserving Zero-Emissions Attributes" (dated July 8, 2016) (hereinafter, "Responsive Proposal").

<sup>17</sup> *Id.* at 1.

<sup>18</sup> See NYPSC Case 15-E-0302, *supra*, "Notice Soliciting Additional Comments" (dated July 8, 2016).

<sup>19</sup> See NYPSC Case 15-E-0302, *supra*, "Notice Extending Comment Deadline" (dated July 15, 2016) (hereinafter, "July CES Notice") (balancing the need to maintain a schedule to allow for expeditious action against providing parties an additional opportunity to comment based on proposed program refinements).

The nature of the issues and the specific circumstances before the NYPSC (i.e., the failure to value clean energy service in New York) made NYPSC action in the near term critical. On August 1, 2016, the NYPSC addressed the CES Proceeding during its Commission session and subsequently issued the CES Program Order. While the NYPSC adopted many of DPS Staff's recommendations, the CES Program Order also included modifications based on the record evidence in the proceeding.

Beginning on August 23, 2016 and continuing through August 31, 2016, rehearing and/or reconsideration requests were filed raising both procedural and substantive challenges to the CES Program Order. Stating that the possible grant of rehearing or reconsideration could constitute a rule amendment under SAPA, the NYPSC Secretary set a response due date of November 14, 2016 in the September CES Notice to align with the filing of a SAPA notice in the State Register and the associated 45-day comment period.<sup>20</sup>

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<sup>20</sup> See September CES Notice at 3; *see also* New York State Register, Notice of Proposed Rulemaking, I.D. Nos. PSC 39-16-00012-P through PSC-39-16-00027-P (dated September 28, 2016).

## II. RESPONSE OF THE ENERGY ENTITIES TO REHEARING REQUESTS

The grounds to seek rehearing of NYPSC orders are limited. Pursuant to Section 3.7(b) of the NYPSC's Rules and Regulations, the proponent must demonstrate that the NYPSC "...committed an error of law or fact or that new circumstances warrant a different determination."<sup>21</sup> No such showing has been made concerning the CES Program Order, and thus, it should be upheld.

### A. DPS STAFF'S ISSUANCE OF ITS RESPONSIVE PROPOSAL DID NOT TRIGGER ADDITIONAL PROCEDURAL REQUIREMENTS UNDER SAPA

In its rehearing request, the Alliance for Green Energy and Nuclear Information and Resource Service (hereinafter, collectively, "AGREE") characterize the Responsive Proposal as a "brand new" policy proposal that constituted a new rulemaking and required a 45-day comment period under SAPA.<sup>22</sup> Alternatively, AGREE asserts that DPS Staff's Responsive Proposal constituted "at the very least" a revised rulemaking under SAPA which entitled the public to an additional 30-day comment period. For its part, the Public Utility Law Project ("PULP") asserts that the "sum of all those changes" in the Responsive Proposal were so substantial as to rise to the level of a new rulemaking but at least triggered the need for a notice of revised rulemaking

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<sup>21</sup> See New York Public Service Commission Rules and Regulations, Title 16, Section 3.7 (West 2011).

<sup>22</sup> See NYPSC Case 15-E-0302, *supra*, "Petition for Rehearing of Alliance for Green Energy and Nuclear Information and Resource Service" (dated August 31, 2016) (hereinafter "AGREE Rehearing Request") at 5-7. The Council on Intelligent Energy & Conservation Policy, *et al.* also filed a rehearing request which tracked almost verbatim the arguments made in the AGREE Rehearing Request on this point. (See Case 15-E-0302, *supra*, "Petition for Rehearing of Council on Intelligent Energy & Conservation Policy; Promotion Health and Sustainable Energy; Physicians for Social Responsibility, New York; Sierra Club – Lower Hudson Valley Group; Rockland Sierra Club; Indian Point Safe Energy Coalition; Goshen Green Farms, LLC, Ellen Jaffe, New York State Assemblymember [sic] District 97; and Andrew Stewart, Orangetown Supervisor" (dated August 31, 2016) (hereinafter "CIECP Rehearing Request") at 7-8.) Given the commonality of these two pleadings, the Energy Entities address them collectively herein.

with its 30-day comment period.<sup>23</sup> Contrary to these procedural challenges, neither SAPA Section 102 nor SAPA Section 202 requires the NYPSC to have issued an additional notice in the New York State Register, and thus, the parties to the CES Proceeding were not entitled to either an additional 30-day or 45-day comment period to address DPS Staff’s Responsive Proposal.

SAPA Section 202(4-a) enumerates the requirements that apply to notices of revised rulemakings. Determinative of the procedural issue raised by AGREE and PULP, this provision expressly exempts “any rule defined in [SAPA § 102(2)(a)(ii)]” from the procedural requirements for revised rulemakings.<sup>24</sup> SAPA Section 102(2)(a)(ii) includes any rule relating to “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>25</sup> The CES SAPA Notices expressly identified the CES Proceeding as a rulemaking under SAPA Section 102(2)(a)(ii).<sup>26</sup> Because such rulemakings are exempt from the applicability of SAPA Section 202(4-a), no notice of revised rulemaking was required at any stage of the CES Proceeding as a matter of law.

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<sup>23</sup> See NYPSC Case 15-E-0302, *supra*, “Petition for Rehearing of the Public Utility Law Project of New York” (dated August 31, 2016) (hereinafter “PULP Rehearing Request”) at 5-8.

<sup>24</sup> See N.Y. State Admin. Procedures Act § 202 (McKinney 2016).

<sup>25</sup> See N.Y. State Admin. Procedures Act § 102 (McKinney 2016).

<sup>26</sup> See, e.g., January SAPA Notice (specifying, “Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii)”); *see also* July CES Notice at 4 (noting that, as reflected in the NYPSC’s SAPA notices, the CES Proceeding was a rulemaking that fell within the carve-out defined in SAPA Section 202(4-a) and therefore did not require a notice of revised rulemaking to address modifications thereto).

In an effort to circumvent the reach of the express exemption set forth in SAPA Section 202(4-a), PULP and AGREE posit that DPS Staff’s Responsive Proposal was a “substantial revision,” as defined by SAPA § 102(9) which amounted to a “brand new policy proposal” (AGREE) or a “new proposal for funding the Tier 3 ZECs” (PULP) requiring notice of a new rulemaking with the associated 45-day comment period provided under SAPA Section 202(1)(a).<sup>27</sup> The express language of SAPA Section 202(4-a), however, belies this argument. SAPA Section 202(4-a) provides any proposed rule -- not otherwise exempted --that “contains a *substantial revision*” must file a revised rulemaking.<sup>28</sup> No other provision of the State Administrative Procedures Act — including, importantly SAPA Section 102(9) cited by AGREE and PULP — dictates that an entirely new notice of proposed rulemaking must be issued once a proposal contains a certain degree of changed content. Thus, the existence of a “substantial revision” does not trigger the requirement to issue a notice of a proposed rulemaking nor does it otherwise negate the applicability of SAPA Section 202(4-a)’s carve-out provision.

In any event, as the NYPSC Secretary correctly ruled in her July CES Notice, DPS Staff’s Responsive Proposal was not comprised of “newly-proposed idea[s],” as PULP and AGREE suggest.<sup>29</sup> To the contrary, while much focus is placed in the rehearing requests on DPS Staff’s proposal to use the EPA’s social cost of carbon in the ZEC calculation, comments suggesting the adoption of this alternative began to be made as early as the initial comments on DPS Staff’s White Paper back in mid-April. Specifically, in its Initial White Paper Comments, the Institute for Policy Integrity, a non-partisan think tank housed at the New York University School of Law established the “first-best public policy tool” is to internalize the cost of carbon

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<sup>27</sup> See AGREE Rehearing Request at 5-6; see also CEICP Rehearing Request at 7-8.

<sup>28</sup> SAPA § 202-(4-a) (emphasis added).

<sup>29</sup> See July CES Notice at 4.

and specifically identified the SCC as “the best available estimate of the marginal external damage of carbon emissions.”<sup>30</sup> From its rehearing request, it is evident that PULP was well aware of an SCC-based structure for the ZEC Program.<sup>31</sup> All parties were on notice from the outset of the CES Proceeding that party comments could form the basis for DPS Staff recommendations.<sup>32</sup> Parties in the CES Proceeding had ample opportunity to respond to this proposal, *inter alia*, in reply comments; most chose not to do so.<sup>33</sup>

Likewise, AGREE’s assertion that adopting a 12-year period for the ZEC Program constituted a new proposal is equally without merit. In light of comments made during the Nuclear Technical Conference Workshop, Constellation Energy Nuclear Group (“CENG”) proposed 12-year ZEC contracts in its initial White Paper comments to address the request made by customers for nuclear owners to commit to ongoing operations.<sup>34</sup> Thus, once again, parties to this proceeding were on notice as early as mid-April that durability could be a component of the ZEC Program.

In the normal course of collaborative NYPSC proceedings to address public policy programs, technical conferences and stakeholder meetings are held and parties are asked to submit comments on proposed programs. If DPS Staff were somehow barred from enhancing proposals presented to the NYPSC based on comments received or faced the Hobson’s Choice of triggering an endless loop of SAPA notices if program enhancements were to be advanced, DPS

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<sup>30</sup> See IPI Initial White Paper Comments at 3.

<sup>31</sup> See PULP Rehearing Request at 6-7.

<sup>32</sup> See January CES Order at 7.

<sup>33</sup> CENG supported using the EPA’s cost of carbon in its reply White Paper comments which provided the parties to this proceeding with another opportunity to focus on this option. (See NYPSC Case 15-E-0302, *supra*, “Reply Comments of Constellation Energy Nuclear Group, LLC Concerning Staff White Paper on Clean Energy Standard” (dated May 13, 2016) at 13-14.)

<sup>34</sup> See CENG Initial White Paper Comments at 8 (noting that NYSERDA procurement under 12-year contracts “would give facility owners and customers needed certainty that the program will continue until 2029”).

Staff's role as an advisor to the NYPSC would be immeasurably hampered. Likewise, if the NYPSC were prevented from taking stakeholder comments into consideration, it could not act in the public interest as mandated by the New York Public Service Law. In either event, SAPA notices which are designed to give the public an opportunity to provide comments -- and due process itself -- would be rendered entirely meaningless.

Based upon the broad array of comments submitted by parties representing diverse interests, DPS Staff determined that refinements to certain aspects of its proposed ZEC program were warranted. DPS Staff thus developed and elected to issue its Responsive Proposal. As the NYPSC Secretary correctly determined in her July CES Notice, the "spirit of Staff's Responsive Proposal is clearly to suggest conclusions from the many comments that were already received" and the enhancements set forth in DPS Staff's Responsive Proposal serve "to confirm the responsive nature of the [Staff's Responsive Proposal]."<sup>35</sup> In response to requests for an extension, the NYPSC Secretary took into account the need for expeditious action in the proceeding but still went beyond any notice requirements under SAPA by providing parties a two-week period to comment on the Responsive Proposal.

Based on the entirety of the record, which included a substantial number of comments on the Responsive Proposal, the NYPSC implemented the RES Program and the ZEC Program.<sup>36</sup>

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<sup>35</sup> See July CES Notice at 4-5 (finding Responsive Proposal gave parties "an extra opportunity to comment with knowledge of Staff's more current inclinations, Staff having considered all the substantial input that was received").

<sup>36</sup> At the end of this part of its rehearing request, AGREE points to the fact that the NYPSC "took only a mere five (5) business days after the public comment period closed to approve the [CES Program] Order..." (See AGREE Rehearing Request at 7.) This, too, is a red herring. While the NYPSC may have taken action in the CES proceeding in a more expeditious manner than has occurred with respect to some other public policy initiatives before it in the past, there can be no question that it did so based upon an extensive record developed over a seven-month period. Likewise, at the end of its rehearing request, PULP references the Albany County Supreme Court's recent decision involving a different PSC program. (See PULP Rehearing Request at 7-8, citing *NEMA v. NYPSC*, No. 868-16) However, unlike the *NEMA* case, the genesis for enhancements contained in the Responsive Proposal was embodied in party comments for months.

Because there are no procedural infirmities with their implementation, these programs must be permitted to stand.

**B. AGREE’S CLAIMS THAT THE ZEC PROGRAM CAN BE SUPPLANTED BY ADDITIONAL RENEWABLE ENERGY AND ENERGY EFFICIENCY BEYOND THE AGGRESSIVE INCREMENTAL LEVELS CALLED FOR IN THE CES PROGRAM ORDER ARE BELIED BY THE RECORD EVIDENCE IN THE CES PROCEEDING**

In its rehearing request, AGREE repeats the position it advocated throughout the CES Proceeding that there is “...ample evidence that replacement of nuclear energy in New York State with renewable energy and energy efficiency is feasible, available and cost effective.”<sup>37</sup> AGREE further claims, “In the PSC’s rush to approve the [CES Program] Order the [NY]PSC did not consider whether old, unsustainable nuclear energy or new sustainable renewable energy technologies and systems...would be most beneficial for the public good and be most effective and efficient to meet the state’s greenhouse gas reduction goal contemplated by the REV.”<sup>38</sup> Thus, AGREE concludes that the ZEC Program aspects of the CES Program Order must be retracted because they “...result[] in a waste of public funds without rational reason and factual basis.”<sup>39</sup> However, the extensive record compiled in the CES Proceeding on this very point amply refutes this position, and thus, AGREE’s request must be rejected.

In its White Paper, DPS Staff established two critical points. First, achieving the State’s target of having 50% of the energy consumed by New York customers come from renewable facilities by 2030 requires the generation of 33,700 GWh of incremental renewable energy which

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<sup>37</sup> See AGREE Rehearing Request at 2.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.* CIECP again echoes essentially verbatim in its rehearing request many of the same assertions made by AGREE on this specific point.

are levels that have never before been reached by existing public policy programs.<sup>40</sup> Second, there are dispositive facts concerning nuclear operations in New York including: (i) nuclear energy produces approximately 30% of New York’s energy annually; (ii) it is the State’s largest zero-emission source; and (iii) nuclear operations avoid 26 million tons of carbon emissions each year.<sup>41</sup>

As the Entergy Entities established in their Reply Comments on the White Paper, AGREE stood alone in its assertions that achieving the identified 33,700 GWh of incremental renewable energy to hit the 50% target is not, in and of itself, an aggressive undertaking and that vast amounts of additional renewable energy and energy efficiency could easily and cheaply be procured – a sentiment it repeats in its rehearing request.<sup>42</sup> In stark contrast, many other parties, including other environmental organizations, consumers and the owners and the independent operators of the transmission system: (i) concurred with DPS Staff’s assessment that the 50x30 mandate is “ambitious;” (ii) highlighted the fact that just the 33,700 GWh level identified in the White Paper was likely to require a substantial build-out of transmission; and (iii) raised concerns that these much higher levels of renewable resources could lead to operational issues.<sup>43</sup> For that reason, many parties representing diverse interests recognized the system benefits provided by nuclear generation and supported the development of the ZEC Program to provide eligible nuclear facilities with the opportunity to elect to participate in the program and secure value for their zero-emission attributes.

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<sup>40</sup> See White Paper at 7.

<sup>41</sup> *Id.* at 27-29. It bears note that the figures produced by DPS Staff included operation of all of the State’s nuclear facilities.

<sup>42</sup> See Entergy Entities Reply White Paper Comments at 12-13.

<sup>43</sup> See, e.g., NYPSC Case 15-E-0302, *supra*, “Multiple Intervenors’ Initial Comments on White Paper” (dated April 22, 2016) at 32; NYPSC Case 15-E-0302, *supra*, “Comments of the New York Independent System Operator, Inc.” (dated April 22, 2016) at 1; NYPSC Case 15-E-0302, *supra*, “Comments of the Indicated Joint Utilities on the Department of Public Service Staff White Paper on Clean Energy Standard” (dated April 22, 2016) at 2.

Based on the record evidence, the NYPSC determined in the CES Program Order that both programs must be adopted, finding, “The independent renewable resource and ZEC obligations that together make up the CES each contribute uniquely to serving the long-term goal of achieving a largely decarbonized energy system by the middle of the century.”<sup>44</sup> Directly addressing AGREE’s position, the NYPSC established that its RES program was already pursuing new renewable resources “at an ambitious pace” and substantial additional renewable development was both unlikely and cost prohibitive.<sup>45</sup> The NYPSC further determined that the presumption that energy efficiency measures could offset the 27.6 million MWh of zero-emission nuclear power in a timely manner was “simply unrealistic.”<sup>46</sup> Thus, the NYPSC adopted the ZEC Program, applied the public necessity criteria proposed by DPS Staff and designated four Upstate nuclear units as eligible to participate in the first tranche of the program, finding “...there is a public necessity to provide ZEC payments to the FitzPatrick, Ginna and Nine Mile Point facilities.”<sup>47</sup>

The NYPSC’s determinations concerning the implementation of the ZEC Program have a clear and well-documented factual basis reflected in the record evidence. AGREE neither refutes that factual basis nor identifies any new facts or circumstances that warrant a different conclusion. Thus, its rehearing request concerning the ZEC Program must be denied.

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<sup>44</sup> See CES Program Order at 20.

<sup>45</sup> *Id.* at 126-27.

<sup>46</sup> *Id.* at 126.

<sup>47</sup> *Id.* at 128-29 (further determining that the ZEC Program was designed to provide value to eligible facilities that elected to participate therein to maintain the zero-emission attributes of these facilities “...because there are insufficient zero-emission alternatives available to replace them any time soon” and their retention would also help to maintain fuel diversity and fuel security).

### III. CONCLUSION

For the foregoing reasons, the rehearing requests challenging the CES Program Order should be denied and the CES Program Order should be upheld.

Dated: November 14, 2016  
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Respectfully submitted,

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