

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

Case 15-E-0302

Proceeding on Motion of the Commission to
Consider a Clean Energy Fund

Case 14-M-0094

**CONSTELLATION ENERGY NUCLEAR GROUP, LLC'S AND
EXELON GENERATION COMPANY, LLC'S LIMITED COMMENTS ON PROPOSED
AGREEMENT FOR THE SALE OF ZERO-EMISSIONS ENERGY CERTIFICATES**

INTRODUCTION

On August 1, 2016, the New York State Public Service Commission (the “Commission”) issued an *Order Adopting a Clean Energy Standard* (the “CES Order”) in this proceeding.¹ The Clean Energy Standard (“CES”) includes a Zero-Emissions Credit (“ZEC”) Requirement Program that provides revenues to eligible nuclear facilities for their zero-carbon environmental attributes. As part of the implementation of the ZEC Requirement Program, the CES Order requires the New York State Energy Research and Development Authority (“NYSERDA”) to offer long-term contracts for the purchase of ZECs from the James A. FitzPatrick Nuclear Power Plant, the R.E. Ginna Nuclear Power Plant, and the Nine Mile Point Nuclear Station (collectively, the “ZEC Sellers”) in accordance with terms specified in the CES Order (the “ZEC Sellers’ Agreements”).² The CES Order also requires that each New York load serving entity (“LSE”) must purchase through a contract with NYSERDA, “an amount of [ZECs] representing

¹ 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 (Aug. 1, 2016) (the “CES Order”).

² CES Order at 156.

that LSEs [sic] proportional share of ZECs purchased annually by NYSERDA pursuant to the Zero-Emissions Credit Requirement.”³

On August 25, 2016, as directed by the CES Order, NYSERDA filed a petition proposing the amount of an adder to cover its costs and fees for administering Tier 1 of the Renewable Energy Standard (“RES”) as established by the CES Order and a sales and payment schedule (the “August 25th Petition”).⁴ In the August 25th Petition, NYSERDA also included proposals regarding: (i) the ZEC Requirement Program’s administrative adder; (ii) the ZEC sales and payment schedule (including certain related proposals regarding NYSERDA’s administration of the ZEC Program); and (iii) the mechanism by which the distribution utilities will provide security for the payments that will be owed to REC and ZEC generators.

On September 15, 2016, NYSERDA supplemented the August 25th Petition with a proposed Agreement for the Sale of Zero-Emissions Energy Certificates (the “Proposed ZEC Sales Agreement”) pursuant to which LSEs will purchase ZECs from NYSERDA.

Constellation Energy Nuclear Group, LLC and Exelon Generation Company, LLC (together, the “Commenters”) hereby submit these limited comments on the Proposed ZEC Sales Agreement. Specifically, Commenters respectfully request that the Commission direct NYSERDA to modify the Proposed ZEC Sales Agreement to provide that the ZEC Sellers may have the status and exercise the rights and remedies of third-party beneficiaries to the final ZEC Sales Agreement between NYSERDA and LSEs.

³ *Id.*

⁴ *Id.* at 108-109.

DISCUSSION

The ZEC Sellers are third-party beneficiaries of the Proposed ZEC Sales Agreement.

As described in the CES Order, revenues from the sale of the ZECs are critically important to maintaining the viability of the ZEC Sellers' facilities and their zero-emissions environmental attributes.⁵ The reliability of the payment stream that will flow from NYSERDA to the ZEC Sellers will depend, at least in part, on the monies flowing from the LSEs to NYSERDA under the Proposed ZEC Sales Agreements; the dependability of this payment stream over the full 12-year term of the ZEC Sellers' Agreements is particularly important given the sizeable refueling and capital costs the ZEC Sellers will incur to continue operating their respective nuclear facilities.

The New York Court of Appeals has recognized that a "third party may be the beneficiary of a public as well as a private contract."⁶ A third-party beneficiary relationship is established where (1) there is a "valid and binding contract between other parties," (2) "the contract was intended for [the third-party's] benefit," and (3) the benefit to the third-party is "sufficiently immediate," rather than incidental, "to indicate the assumption by the contracting parties of a duty to compensate [the third-party] if the benefit is lost."⁷

Here, with respect to the first prong of the test, consistent with the requirements of the CES Order, NYSERDA and the LSEs will be entering into valid and binding contracts (*i.e.*, the Proposed ZEC Sales Agreement).⁸

With respect to the second prong, the language of the ZEC Sales Agreement -- the central purpose of which is to enable the LSEs to satisfy their obligation to purchase ZECs generated by

⁵ See *id.* at 125-126.

⁶ *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 413, 336 (1983).

⁷ *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011) (internal quotations and citation omitted).

⁸ CES Order at 156.

the ZEC Sellers – demonstrates that it is intended for the ZEC Sellers’ benefit. In determining whether a party is an intended beneficiary, courts examine whether “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”⁹ Here, in accordance with the CES Order, the ZEC Sellers ultimately will receive, indeed are the only recipients of, the performance memorialized in the agreement between NYSERDA and the LSEs.

With respect to the third prong, the benefit to the ZEC Sellers is immediate and cannot be said to be incidental because the only purpose of the ZEC Sales Agreement is to provide funds for NYSERDA to satisfy its commitment to purchase ZECs from the ZEC Sellers. Furthermore, courts consider “whether manifestation of the intention of the promisor and promisee is ‘sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable.’”¹⁰ Here, the ZEC program was established to compensate nuclear generators for zero-carbon emissions as a bridge to achieving the State’s greenhouse gas emissions goals. ZEC Sellers have made clear throughout this proceeding and others that the ZEC program would be critically important to preserving their nuclear facilities.¹¹ ZEC Sellers intend to operate their nuclear facilities through 2030 in reliance on NYSERDA’s and the LSEs’ commitments under the ZEC program.¹²

⁹ *Fourth Ocean Putnam v Interstate Wrecking Co.*, 66 NY2d 38 (1985) (quoting Restatement [Second] of Contracts § 302[a]).

¹⁰ *Id.*

¹¹ 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*, CENG Response to a Request for an Extension of Time (Filed July 1, 2016); 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*, CENG Response to Request for an Extension (Filed June 13, 2016); Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Comments of the Entergy Entities (Filed July 22, 2016), at 5-6.

¹² See e.g., *Fishbein v Mirana*, 670 F Supp 2d 264, 274 (SDNY 2009) (holding that Plaintiffs adequately alleged that Plaintiff UMMF was a third-party beneficiary to the challenged collective bargaining agreement (“CBA”), in part, because the CBA provided that a portion of the contributions made thereunder would be “unconditionally and

Accordingly, it is appropriate for the proposed ZEC Sales Agreement to be modified to include language permitting ZEC Sellers to exercise the rights and remedies of third-party beneficiaries to the ZEC Sales Agreements, such that ZEC Sellers will have the ability to enforce those contracts in the event that NYSERDA does not. In order to memorialize this change, Commenters suggest that the Commission direct NYSERDA to make the following modification to the language in Section 7.11 of the Proposed ZEC Sales Agreement:

7.11 ~~No~~ Third Party Beneficiaries. The Parties agree that each of the ZEC Sellers shall be a third-party beneficiary to this Agreement and shall have all of the rights and remedies in law or in equity associated with such status. Notwithstanding the foregoing and except with respect to ZEC Sellers, nothing ~~Nothing~~ herein is intended to or should be construed to create any rights of any kind whatsoever in third persons not parties to this Agreement.

In addition, Commenters suggest a conforming change to the third Recital of the Agreement as follows:

WHEREAS, NYSERDA has entered into contracts for the purchase of ZECs from the James A. FitzPatrick Nuclear Power Plant, the R.E. Ginna Nuclear Power Plant and the Nine Mile Point Nuclear Station (collectively, the “ZEC Sellers”) ~~FitzPatrick, Ginna and Nine Mile Point generating facilities;~~

irrevocably allocated and paid to Plaintiff UMMF,” which satisfied the “sufficiently immediate” prong of the third-party beneficiary test).

CONCLUSION

For the foregoing reasons, the Commenters respectfully request that the Commission direct NYSERDA to modify the Proposed ZEC Sales Agreement to include a provision specifying that the ZEC Sellers are third-party beneficiaries of NYSERDA's contractual arrangement with the LSEs and that ZEC Sellers may exercise the rights and remedies that such status affords.

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