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**
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.	**Case 16-E-0270**

COMMENTS OF THE CITY OF NEW YORK

July 22, 2016

Couch White, LLP
540 Broadway
Albany, NY 12207

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
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.	Case 16-E-0270

COMMENTS OF THE CITY OF NEW YORK

INTRODUCTORY STATEMENT

The City of New York ("City") and the State of New York share the common policies and common goals of promoting and expanding the use of energy efficiency, increasing reliance on renewable sources of electricity, and reducing carbon emissions. For this reason, the City has been a strong supporter of the New York Public Service Commission's ("Commission") Clean Energy Standard. At the same time, the City and Commission have jointly recognized the need to preserve our State's nuclear fleet for now even though it is not a renewable technology.

Achievement of the goals of the Clean Energy Standard will take time, and the Commission must exercise due care in this matter to ensure that implementation of the Clean Energy Standard does not jeopardize the reliability of the electric system or impose excessive and unjust costs on consumers. In particular, the Commission must ensure that the cost of electricity remains affordable for low income consumers. Indeed, the Commission Chair's comment at the Commission's last public session that the Commission should adhere to the principle of "do no harm" is equally applicable here.

Current market prices are presenting a challenge to the economic viability of some, but not all, of the State's nuclear fleet. Because the premature retirement of these zero carbon base-load energy sources will negate the positive environmental impacts sought to be achieved by the Clean Energy Standard, the City is not adverse to some fairly-determined out-of-market support to the facilities experiencing such challenges to maintain their operational status. The provision of this support must occur in a way that fairly allocates costs commensurate with direct benefits, contains cost controls to protect against ratepayers providing a financial windfall to the owner of the upstate nuclear fleet, and does not disincentivize customers who wish to go beyond the proposed targets for renewable energy penetration under the Clean Energy Standard.

The City strongly urges the Commission to modify the new Department of Public Service Staff ("Staff") Proposal on zero emissions credits ("ZECs")[1] to ensure that costs are fairly allocated across the State, limit the subsidies to only the amounts needed to keep the nuclear fleet in operation, and avoid erecting barriers or impediments to consumers who voluntarily wish to procure greater than 50 percent of their energy needs from renewable resources by 2030.

BACKGROUND

On April 8, 2016, Staff released a Cost Study associated with the Clean Energy Standard.[2] That Cost Study suggested that the gross program costs of Tier 3 would be between

---

[1] Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Staff's Responsive Proposal for Preserving Zero-Emissions Attributes (dated July 8, 2016) ("Staff Proposal").

[2] Case 15-E-0302, *supra*, Clean Energy Standard White Paper – Cost Study (dated April 8, 2016) ("Cost Study").

$59 million and $658 million for the seven-year period 2017 through 2023.[3] Although the City requested the supporting data and documentation for this cost estimate during the May 4, 2016 technical conference on the Cost Study, and although Senior Staff from the Department agreed to provide such information, over two months have elapsed and the information still has not been provided. Therefore, neither the City nor any other party has been able to understand or evaluate the basis of the cost estimate. Also during the May 4 technical conference, Staff explained that no ZEC-related costs were assumed for the period 2023 to 2030 because market revenues are forecast to exceed the nuclear plants' costs, eliminating the need for any subsidies.[4]

Subsequent to the technical conference, Constellation Energy Nuclear Group and its affiliates (collectively, "CENG") filed a bare-bones petition to essentially pre-qualify its nuclear plants for ZEC payments.[5] In its Petition, CENG did not state that is has any specific plans to retire any of its nuclear plants. Rather, it stated only that it must make a decision later this year to order nuclear fuel for its next round of refuelings. Moreover, as Staff is well-aware, CENG's nuclear plants are subject to financial hedging arrangements that have provided sufficient revenues to maintain operations over the short-term.[6] Although market prices have declined, CENG has acted prudently and not relied on spot market prices for revenue generation. In other words, none of its nuclear plants are losing money, and there is no present justification or need for providing out-of-market subsidies to CENG.

---

3 Cost Study, slide 84.

4 Case 15-E-0302, *supra*, Transcript from May 4, 2016 Technical Conference, pp. 35-36.

5 Case 16-E-0270, Petition of Constellation Energy Nuclear Group, *et al.* to Establish Facility Costs, Petition To Initiate A Proceeding To Establish The Facility Costs For The R.E. Ginna And Nine Mile Point Nuclear Power Plants (filed May 9, 2016).

6 Exelon's quarterly presentations on corporate earnings, available at http://www.exeloncorp.com/investor-relations/events-and-presentations, reveal the extent of the hedges for its New York nuclear assets (*i.e.*, the upstate nuclear plants).

Importantly, and notably, CENG has not complied with the Commission's long-standing procedure regarding generating facility retirements,[7] or otherwise issued any notice of intent to retire any of its nuclear plants in accordance with the tariff requirements of the New York Independent System Operator, Inc. ("NYISO").

Therefore, the Commission is confronted with a situation in which one nuclear plant operator is soliciting subsidies but has not justified the need for such subsidies in a manner that is transparent to any party in this proceeding. In response, Staff now proposes to give this company subsidies that are well in excess of Staff's initial ZEC-related cost estimates, which estimates determined to be the amounts necessary to maintain the operational status of the upstate nuclear plants.

COMMENTS

POINT I

THE COMMISSION SHOULD NOT CONSIDER THE STAFF PROPOSAL UNTIL IT UNDERSTANDS THE POTENTIAL IMPACTS OF THAT PROPOSAL

The Commission appropriately determined at the outset of this proceeding that it could not consider adoption of a Clean Energy Standard without first understanding its potential cost implications.[8] The Staff Proposal constitutes a material change in the way the ZECs are to be calculated, as compared to the proposal set forth in the Staff White Paper[9] and evaluated in the Cost Study.

---

7 Case 05-E-0889, Establishment of Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirement for Generation Unit Retirements (issued December 20, 2005) ("Retirement Notice Order").

8 Case 15-E-0302, *supra*, order Expanding Scope of Proceeding and Seeking Comments (issued January 21, 2016)

9 Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard (released January 25, 2016) ("White Paper").

Although the City has concerns with the Cost Study and the lack of supporting data, assumptions, and calculations, at least some analysis was performed of the initial proposal for the Clean Energy Standard and the Tier 3 ZECs. Here, the Staff Proposal contains a formula by which the ZEC payments would be calculated, but Staff offered no analysis or evaluation of the potential bill impacts of its proposal. That is, although it is possible to calculate the approximate total cost of the ZECs using the formula provided, Staff provided no information to translate the total cost to a cost per consumer or to a bill impact. Therefore, the Commission does not have the information needed to properly evaluate this new proposal, or compare it to the initial proposal or a no action alternative and determine whether the proposal is in the public interest.

Applying the formula provided in the Staff Proposal to the estimated number of tons of carbon emissions that are avoided yields a cost of about $1 billion over the next two years, and at least about $8 billion for the period 2017 through 2029. These estimates are massively greater than the projections in the Cost Study. To date, it does not appear that Staff has made any effort to assess the impact of its new proposal on New Yorkers.

As the Commission recognized at the outset, an evaluation of the impacts of the Clean Energy Standard, including Tier 3, is needed before it can make an informed decision. Accordingly, the City respectfully urges the Commission to remand this matter and direct Staff to supplement the Cost Study with a comprehensive analysis of its new proposal on electric bills and consumers.

POINT II

THE STAFF PROPOSAL IS NOT CONSISTENT WITH THE REQUIREMENTS OF THE PUBLIC SERVICE LAW

Public Service Law § 65(1) provides "[a]ll charges made or demanded any … electric corporation … for electricity or any service rendered or to be rendered, shall be just and reasonable." The requirement that electric rates be just and reasonable has been the guiding principle for the Commission since its inception more than 100 years ago.

The City does not dispute that using the cost of carbon could be a rational method of determining the value of the carbon-free production of electricity from nuclear plants. However, value and need are separate concepts, and the Commission has made clear that the ZEC component of the Clean Energy Standard is about the latter, not the former.

When the Commission expanded Case 15-E-0302 to consider an "expedited" program to provide support to the nuclear fleet, the Commission established that the ZEC payments should not be "more than the minimum amount of support necessary above existing revenue streams to cover the reasonable facility going-forward costs" inclusive of new capital costs, taxes, operating risks, and overheads but excluding sunk costs.[10] The Commission also established plans to seek recovery of the subsidies paid "if earnings levels during periods of support or for a reasonable period after periods of support are excessive, or for other purposes."[11] The Staff Proposal goes well beyond the Commission's express instructions and therefore must be rejected.

In 1996, the Commission decided to move to a competitive paradigm in New York and encouraged the regulated utilities to divest their generation, including their nuclear assets, to private companies to, in part, shield consumers from the obligation to pay for all of the costs of the generating facilities.[12] Not only would the Commission be deviating from its clear and unequivocal directive for the ZEC program, it would be departing without a proper rationale

---

[10] Case 15-E-0302, *supra*, Order Further Expanding Scope of Proceeding and Seeking Comments (issued February 24, 2016), Appendix p. 2.

[11] *Id.*

[12] Case 94-M-0952, Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion No. 96-12 (issued May 20, 1996).

from its decision in Opinion No. 96-12 that consumers no longer should bear the operating and other costs of the State's generating facilities, and that operational risks should be transferred to merchant entities.

The primary flaw of the Staff Proposal is its failure to establish any linkage between the value of carbon and the amount of the subsidy needed by CENG to maintain the operations of its present and future (*i.e.*, the acquisition of the Fitzpatrick Nuclear Station) New York nuclear plants. The City does not disagree that there is a societal benefit to maintaining the facilities. However, as stated by the Commission, the purpose of the ZEC concept is only to cover the operating and other costs that CENG cannot obtain from the wholesale markets, thereby avoiding the need for replacement generating facilities that presumably would have carbon emissions. The Commission did not institute the Clean Energy Standard proceeding, or the ZEC component in particular, to provide a means to given windfall profits to CENG.[13] Indeed, the clawback provision mandated by the Commission clearly was intended to prevent such an outcome.

The Commission instituted Case 16-E-0270 to evaluate CENG's actual costs and its need, if any, for out-of-market subsidies to maintain operations. At the June 1, 2016 procedural conference in that proceeding, the City and other parties raised objections to the presiding Administrative Law Judge that the matter was premature because it was not known whether the Commission would adopt the White Paper and the then-proposed Tier 3. Given the new Staff Proposal, the City's objections have proven to be valid. Going forward, the Commission should avoid instituting implementation-related proceedings before establishing underlying policies and unnecessarily straining parties' limited resources.

---

13 In fact, it is arguable that the Staff Proposal provides a larger profit to CENG than CENG would receive under traditional cost-of-service ratemaking. The Commission should not be rewarding merchant companies with excessive returns while simultaneously eliminating, or at least substantially minimizing, their business risks.

Although the issuance of the Staff Proposal has essentially mooted any further need for Case 16-E-0270, the information developed in that proceeding to date should be considered by the Commission in evaluating whether the Staff Proposal is consistent with the statutory just and reasonable standard. That is, the Commission should examine and compare CENG's revenue needs and the newly proposed level of ZEC subsidies.

The City is not privy to CENG's detailed cost information, but upon information and belief, CENG's needs do not approach the levels of subsidies contemplated by the new Staff Proposal. Indeed, given the information in the Cost Study (which presumably was based on some empirical information), the level of need is an order of magnitude or more less than the newly contemplated subsidy, both over the short-term and through 2030. The Commission has, or should have, access to the detailed information, and it has the ability to determine CENG's actual need.

Providing a subsidy to CENG for its upstate nuclear fleet could be consistent with the Commission's mandate under Public Service Law § 65(1) that rates be just and reasonable. As the City, the NYISO, and others have recognized, the nuclear plants lessen the carbon intensity of the State's electric system, help to minimize other types of air emissions, and support system reliability. In order to satisfy the statutory requirement, the subsidy may be bounded by the carbon value, but it should be limited to CENG's actual level of need.

Over time, the Staff Proposal contemplates that the level of subsidy would be adjusted if and as energy and capacity prices increase. Because the nuclear plants will continue to participate in the wholesale markets and receive market revenues, these adjustments are appropriate. However, the formulae and data provided in the Staff Proposal indicate that the subsidies could increase by approximately 70% over the next 12 years. The Commission needs to closely monitor the subsidy level, CENG's needs, and its market revenues over the duration of the 2017 to 2029 period to prevent CENG from receiving excessive and unjust profits paid for by captive ratepayers.

A corollary flaw in the Staff Proposal is the proposal to continue the subsidies past 2023. In the White Paper and Cost Study, Staff projected that no subsidies would be needed past 2023 because of expected increases in market prices. The Staff Proposal does not provide any explanation for its departure from its previous position. The two Staff positions cannot be reconciled. In the event the Commission adopts a ZEC program that extends beyond 2023, it is especially important that the monitoring recommended above occur. In addition to monitoring, the Commission should institute a mechanism to decrease or terminate the subsidies as market conditions dictate.

Electric rates in New York, and especially in New York City, are among the highest in the United States. New York continues to see a steady reduction in population and a steady departure of businesses to other states and countries where the cost of living and the cost of doing business are lower. The Commission should ensure due consideration is given to structure a program that does not exacerbate these deleterious migrations.

POINT III

THE STAFF PROPOSAL UNJUSTLY AND DISPROPORTIONATELY BURDENS NEW YORK CITY CONSUMERS

Staff asserts that its proposal is justified, in part, because of the employment and property tax benefits associated with continued operation of the nuclear plants. At the same time, the Staff Proposal allocates ZEC obligations and costs in a manner commensurate with energy usage, or essentially on a load share basis. In other words, more than 50 percent of the costs of the ZECs will be borne by downstate, predominantly New York City, consumers. There is an inherent unfairness and inequity in this approach.

Given the location of the upstate nuclear plants, New York City and its residents and businesses will not receive any of these benefits. No property tax revenues will inure to the City, no New York City consumers will secure continued employment, or new employment opportunities because of the ZEC payments, and no New York City companies will realize continued or new business as a result of the Staff Proposal. Moreover, New York City consumers are unable to directly benefit from the upstate nuclear plants' operations because of constraints on the New York State bulk power system. Those constraints limit the flow of carbon-free power to downstate load centers.

In the Cost Study, Staff did not acknowledge the need for new transmission to transmit power produced by upstate carbon-free and renewable resources to downstate load centers or include any costs for such transmission lines (other than a previously-proposed transmission project that is intended to minimize the UPNY-SENY constraint). The City previously raised this glaring omission as a significant shortcoming in the analysis and one which rendered suspect the Cost Study's conclusion about the impact of the Clean Energy Standard.

Recently, the NYISO submitted Supplemental Comments in the Clean Energy Standard proceeding echoing the City's concerns and discussing the need for new transmission to achieve the Clean Energy Standard goals.[14] As the operator of the State's bulk power system, the NYISO is uniquely qualified to opine on the transmission needs associated with the achievement of the Clean Energy Standard, including the interplay of the Clean Energy Standard with system reliability, installed capacity requirements, and installed reserve margins. Indeed, the City

---

14 Case 15-E-0302, *supra*, Supplemental Comments of the New York Independent System Operator, Inc. (dated July 8, 2016).

requested that the NYISO conduct a technical analysis on this topic to ensure that implementation of the Clean Energy Standard provides equitable benefits to all of New York's residents. The City urges the Commission to incorporate the NYISO's comments both into the design of the Clean Energy Standard and its implementation.

The Commission should consider the Staff Proposal in context with the rest of the Clean Energy Standard proposal, and it should comprehensively evaluate the costs of the ZEC proposal in context with the actual costs of the Clean Energy Standard, including transmission costs. It is imperative that the Commission, and the public, understand all of the potential cost implications of these proposals.

Further, in determining how the costs of the ZECs should be socialized across the State, the Commission should take into consideration how and where the benefits resulting from the ZECs will be realized. It is equally imperative that the Commission take steps to mitigate unwarranted cost impacts, and one such step would be to allocate ZEC costs commensurate with the allocation of ZEC benefits. Unless and until the Commission directs and authorizes the construction of new transmission to eliminate the existing bulk power system constraints and provide sufficient capacity to transmit upstate carbon-free and renewable power to downstate areas, the need for which is now clearly established, it would be unjust and unreasonable, and inconsistent with the Commission's statutory mandate, to allocate more than a small share of the ZEC costs to New York City consumers.

POINT IV

THE STAFF PROPOSAL DOES NOT INCLUDE EXCEPTIONS FOR CONSUMERS THAT EXCEED THE CLEAN ENERGY STANDARD REQUIREMENTS

In its earlier comments on the White Paper, the City raised a concern that the construct would serve as an impediment to consumers who seek to do more than the minimum requirements of the Clean Energy Standard. For example, a consumer who purchases 100 percent of its needs from a Tier 1 renewable resource should be excused from compliance with the Tier 3 purchase requirement. Because that consumer is doing far more than other consumers toward achievement of the 50 x 30 goals, it also should be excused from purchasing Tier 3 ZECs.

The Staff Proposal disregards this concern and likely will disincentive consumers from increasing their purchases from renewable resources. At present, the cost of power from renewable resources exceeds the cost from fossil-fueled and nuclear resources. Consumers who voluntarily decide to purchase more renewable power than the Clean Energy Standard calls for recognize that they will be paying more, but they presumably have factored those costs into their budgets. However, under the Staff Proposal, consumers who voluntarily do more than what the Clean Energy Standard requires and thereby accelerate achievement of the State's 80x50 goal will be faced with an even greater financial burden as they must also purchase ZECs. For some, or perhaps many, consumers, this additional cost will act to reduce the amount they would otherwise have spent on renewable power.

Inasmuch as the Tier 3 and the Staff Proposal are both intended as interim measures until such time as energy efficiency and renewable resources supplant the need for the nuclear fleet, the Staff Proposal may have the unintended consequence of hindering achievement of the overall goal. To prevent this outcome, the Commission should create an exception from the ZEC burdens for consumers that purchase a majority of their energy needs from renewable resources.

POINT V

THE STAFF PROPOSAL EXCEEDS THE COMMISSION'S LEGAL AUTHORITY

Under the Staff Proposal, the nuclear plant owners would have the opportunity to enter into contracts with the New York State Energy Research and Development Authority ("NYSERDA") to sell ZECs to NYSERDA. The Staff Proposal indicates that there would be financial consequences to the nuclear plant owners for failure to provide ZECs under those contracts, but no details regarding the financial consequences are provided and there is no discussion of the disbursement of any penalties paid. To this point, the City strongly recommends that any and all penalties paid be distributed 100 percent to consumers.

The Staff Proposal then provides that all load serving entities in the State would enter into contracts with NYSERDA to purchase ZECs from NYSERDA. However, the Staff Proposal is devoid of any discussion as to the Commission's statutory authority to mandate that load serving entities (which could include large consumers that directly acquire their own needs from the marketplace or third parties) enter into contracts with NYSERDA, and the City is not aware of any provision of the Public Service Law, or any other law, that gives the Commission such authority. Moreover, there does not appear to be any consideration of any secondary market for ZECs, as exists for renewable energy certificates, Regional Greenhouse Gas Initiative allowances, or other air emissions allowances. It may be that a program designed to provide for a secondary market could lower overall costs to the State's residents.

Before adopting the Staff Proposal, the Commission needs to demonstrate that it has the statutory authority to implement that proposal. As presented, it does not appear that the Commission can do so.

CONCLUSION

The State of New York and the City of New York have shared public policy goals of reducing greenhouse gas emissions. The Commission's adoption of a reasonable and properly developed Clean Energy Standard will be a critical step towards achievement of these shared goals.

The Staff Proposal is not consistent with the Commission's statutory mandate to ensure that electric rates are just and reasonable in as much as it does not make any attempt to align subsidies with actual need. Rather, the Staff Proposal appears to unduly burden consumers and potentially result in windfall profits to the owners of the State's nuclear power plants. Further, the Staff Proposal may have the effect of inhibiting achievement of the State's 80x50 goal, which the Clean Energy Standard is meant to support by putting excessive and unnecessary financial burdens on consumers. The total potential impacts – cost and otherwise – of the Staff Proposal are not known because they have not been properly studied. The inappropriate limitation of the comment period to 14 days prevents any meaningful assessment from being conducted, especially in light of the unavailability of supporting data and analysis.

Accordingly, the Commission should not adopt the Staff Proposal as presented. It should remand this matter to allow for a proper and comprehensive analysis of the issues and the development of a reasonable and rational proposal. In the event the Commission declines to provide interested parties a reasonable opportunity to consider this matter, it should, at a minimum, modify the proposal to reduce the size of the subsidy to the amount needed to preserve operations of the State's nuclear fleet.

Respectfully submitted,

/s/ Kevin M. Lang
Kevin M. Lang, Esq.
COUCH WHITE, LLP
Counsel for the City of New York
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222
Tel.: 518-426-4600
Fax: 518-426-0376
E-mail: klang@couchwhite.com

Dated: July 22, 2016
Albany, New York

/s/ Anthony J. Fiore
Anthony J. Fiore
New York City Office of Sustainability
Director – Energy Regulatory Affairs
253 Broadway, 7th Floor
New York, New York 10007
Tel.: 212-676-0756
E-mail: afiore@dep.nyc.gov

Dated: July 22, 2016
New York, New York