



540 Broadway, P.O. Box 22222, Albany, New York 12201-2222 • (518) 426-4600

July 22, 2016

VIA ELECTRONIC FILING

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

Re: Case 16-E-0270 – Proceeding on 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

Dear Secretary Burgess:

Multiple Intervenor hereby files the attached Initial Comments of Multiple Intervenor in Response to Constellation Petition in the above-referenced proceeding. Copies of the attached Comments are being served herewith on the active parties in this proceeding.

Respectfully submitted,

COUCH WHITE, LLP

Michael B. Mager

Michael B. Mager
Counsel to Multiple Intervenor

MBM/dap
Attachment

cc: ALJ Dakin Lecakes (via E-Mail; w/Attachment)
Active Parties (via E-Mail; w/Attachment)

S:\DATA\Client19 17201-17600\17448\Corres\Burgess CP 7-22-16.docx

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on 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
MULTIPLE INTERVENORS
ON
CONSTELLATION PETITION**

Dated: July 22, 2016

**MULTIPLE INTERVENORS
540 BROADWAY, P.O. BOX 22222
ALBANY, NEW YORK 12201-2222
(518) 320-3409**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
ARGUMENT	7
POINT I	
CONSTELLATION’S PETITION IS PREMATURE	7
POINT II	
CUSTOMERS SHOULD NOT BE FORCED TO SUBSIDIZE A NUCLEAR GENERATION FACILITY THAT HAS NO DEMONSTRABLE PLAN TO DEACTIVATE	10
POINT III	
THE COMMISSION SHOULD REFRAIN FROM MANDATING LONG- TERM CONTRACTS TO IMPLEMENT SUBSIDIES OF SELECTED UPSTATE NUCLEAR GENERATION FACILITIES	16
POINT IV	
ANY NUCLEAR-RELATED SUBSIDIES IMPLEMENTED AS PART OF A CES SHOULD BE CALCULATED ON A FACILITY-SPECIFIC BASIS	18
POINT V	
ANY NUCLEAR-RELATED SUBSIDIES IMPLEMENTED AS PART OF A CES SHOULD BE CALCULATED IN A MANNER THAT MINIMIZES COSTS TO CUSTOMERS.....	20
POINT VI	
THE COMMISSION SHOULD ALLOW THE FUTURE SUBMISSION OF SUPPLEMENTAL COMMENTS IF CONSTELLATION’S PROJECTED OPERATING COSTS HEREINAFTER ARE DEEMED RELEVANT UNDER ANY CES THAT MAY BE ADOPTED.....	23
CONCLUSION.....	25

PRELIMINARY STATEMENT

In response to the Notice Seeking Comments and two Notices Extending Comment Deadline, issued by the New York State Public Service Commission (“Commission”) on May 18, June 17 and July 8, 2016, respectively, Multiple Intervenors, an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Initial Comments in Case 16-E-0270.¹ For the reasons set forth herein, Multiple Intervenors urges the Commission to resolve the issues raised in this proceeding in accordance with these Initial Comments.

This proceeding has its genesis in Case 15-E-0302, which initially was instituted to examine issues pertaining to the procurement of large-scale renewable (“LSR”) resources.² On December 2, 2015, while that proceeding was pending, Governor Andrew M. Cuomo sent a letter to Commission Chair Audrey Zibelman directing the New York State Department of Public Service (“DPS”) commence a proceeding to implement a Clean Energy Standard (“CES”).³ In response to that letter, the Commission issued an order expanding the scope of Case 15-E-0302 to

¹ Case 16-E-0270, *Proceeding on 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*.

² See Case 15-E-0302, *et al., In the Matter of the Implementation of a Large-Scale Renewable Program*, Notice Instituting Proceeding, Soliciting Comments and Providing for Technical Conference (issued June 1, 2015).

³ Letter from Governor Andrew M. Cuomo to Commission Chair Audrey Zibelman (dated December 2, 2015), available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf.

include, and solicit comments upon, a proposed CES.⁴ Specifically, the CES envisioned by Governor Cuomo and the Commission calls for: (a) the subsidization of new and existing renewable resources by New York electric customers sufficient to ensure that 50 percent of the State's electricity consumption is produced by renewable resources by 2030; and (b) the subsidization of certain upstate nuclear generation facilities aimed at preventing their deactivation while operating under valid federal licenses.⁵ The Commission directed DPS Staff ("Staff") to prepare a "White Paper" addressing numerous CES-related matters and then issued same for public comment.⁶ The White Paper and parties' comments thereon currently are pending at the Commission.

Shortly thereafter, the Commission issued another order expanding the scope of Case 15-E-0302 "to include the consideration of an expedited program to provide financial support for the benefit of the electric system to maintain the viability of certain nuclear power plants that can demonstrate the lack of financial viability absent additional financial support."⁷ That order

⁴ Case 15-E-0302, *supra*, Order Expanding Scope of Proceeding and Seeking Comments (issued January 21, 2016).

⁵ *See id.* at 2-3.

⁶ *Id.* at 6-7. DPS Staff complied with this directive on January 25, 2016. *See* Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard ("White Paper") (dated January 25, 2016). Parties initially were accorded 49 days to respond to the White Paper, from January 25 to March 14, 2016, prior to that deadline being extended until April 22, 2016. *See* Case 15-E-0302, *supra*, Notice Soliciting Comments and Providing for Technical Conference and Public Statement Hearings (issued January 25, 2016).

⁷ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard* (issued February 24, 2016) at 1.

solicited comments on the possible elements of an “expedited program” to provide customer-funded subsidies to selected nuclear generation facilities.⁸

In response to the Commission’s orders, Multiple Intervenors and numerous other parties prepared and submitted comments on the White Paper pertaining to the proposed CES and the possible elements of an expedited program to subsidize selected nuclear generation facilities.⁹ The possible expedited program and parties’ comments thereon currently are pending before the Commission.

On May 9, 2016, during the pendency of Case 15-E-0302, Constellation Energy Nuclear Group LLC, Ginna Nuclear Power Plant, LLC, and Nine Mile Point Nuclear Station, LLC (collectively, “Constellation”) filed a petition in this proceeding seeking: (a) the initiation of this proceeding to accept certain financial data concerning New York nuclear facilities owned and/or operated by Constellation and its affiliates; and (b) a determination of the appropriate costs for such facilities under the proposed CES being examined in Case 15-E-0302 (“Petition”). (See Petition at 1.)¹⁰ In response, the Commission solicited comments on Constellation’s Petition.¹¹

⁸ *Id.* at 5-6.

⁹ See Case 15-E-0302, *supra*, Multiple Intervenors’ Initial Comments on White Paper (dated April 22, 2016) and Comments of Multiple Intervenors on Proposed Expedited Program to Require Customers to Subsidize Selected Nuclear Generation Facilities (dated May 2, 2016). Multiple Intervenors’ prior submissions on the proposed CES in Case 15-E-0302 are incorporated by reference into these Initial Comments.

¹⁰ Constellation owns and operates the R.E. Ginna Nuclear Power Plant (“Ginna”) and the Nine Mile Point Nuclear Station (“Nine Mile”). (*Id.*) The Nine Mile facility has two generating units, referred to herein as Nine Mile 1 and Nine Mile 2.

¹¹ See Case 16-E-0270, *supra*, (i) Notice Seeking Comments, (ii) Notice of Proposed Rulemaking, published in the May 25, 2016 edition of the *New York State Register* (I.D. No. PSC-21-16-00009-P), and (iii) two Notices Extending Comment Deadline.

Upon learning of the Petition, Multiple Intervenors submitted an initial response thereto on an expedited basis.¹² In that response, Multiple Intervenors asserted, *inter alia*, that the Petition was premature, particularly because the Commission had yet to rule either on the proposed CES or the possible expedited program to subsidize selected nuclear generation facilities.¹³ In fact, Multiple Intervenors asserted that: “At a bare minimum, before considering any individualized subsidy requests, the Commission should determine the processes that will govern – and apply to all interested parties – the submission, the evaluation, and the resolution of such requests.”¹⁴

On July 8, 2016, during the afternoon of the business day before these Initial Comments previously were due, the Commission issued a notice soliciting comments in Case 15-E-0302 with respect to an entirely new Staff proposal to govern the subsidization of selected nuclear generation facilities.¹⁵ The New Staff Proposal, issued without any advance notice to or consultation with the parties, and without considering any of the comments that were scheduled to be submitted herein, would render this proceeding moot and meaningless. Specifically, rather than rely, in part, on the projected operating costs of a nuclear generation facility to determine whether and to what extent such facility should receive customer-funded subsidies, the New Staff Proposal

¹² See Case 16-E-0270, *supra*, Initial Response of Multiple Intervenors (dated May 16, 2016).

¹³ *Id.* at 2.

¹⁴ *Id.* As detailed, *infra*, the Commission’s decision not to reject or hold in abeyance Constellation’s Petition as premature may have resulted in an enormous amount of resources being expended unnecessarily in this proceeding.

¹⁵ See Case 15-E-0302, *supra*, Notice Soliciting Additional Comments (issued July 8, 2016) and Staff’s Responsive Proposal for Preserving Zero-Emissions Attributes (“New Staff Proposal”) (dated July 8, 2016).

would rely on, *inter alia*, estimates of the social cost of carbon. (See, e.g., New Staff Proposal at 5, ¶ 10.) Thus, the relief sought in the Petition, *i.e.*, a determination of the appropriate facility costs for Constellation’s New York nuclear generation facilities, seemingly would not matter in the slightest under the New Staff Proposal.

Multiple Intervenors hereby submits its Initial Comments on Constellation’s Petition. Significantly, however, Multiple Intervenors notes that, to date: (a) there is no Commission order adopting a CES; (b) there is no Commission order describing how a proposed CES would or should be implemented (either generally or with specific regard to nuclear generation facilities); and (c) there is no Commission order resolving the myriad of issues pertaining to a possible expedited program to subsidize selected nuclear generation facilities. In fact, as detailed, *supra*, Staff just issued an entirely new proposal regarding nuclear subsidies that differs tremendously from what it advanced in the White Paper. Accordingly, Multiple Intervenors – and other interested parties – essentially are being required to comment on Constellation’s Petition in the absence of any Commission determinations on the primary CES-related issues involving nuclear generation facilities and in knowledge of the fact that the very-recent New Staff Proposal, if adopted, would obviate the need for this entire proceeding.

In resolving the issues in this proceeding, the Commission should focus primarily, if not exclusively, on the best economic interests of electric customers, who already are overburdened by being forced to fund and/or subsidize, *inter alia*, (i) the System Benefits Charge, the Renewable Portfolio Standard, the Energy Efficiency Portfolio Standard and/or the Clean Energy Fund (“CEF”), (ii) utility-administered energy efficiency programs not part of the CEF, (iii) the subsidization of LSR outside of the CEF, (iv) recent and proposed funding of investments in furtherance of the Reforming the Energy Vision proceeding, including, possibly, some of the

extremely-expensive projects proposed recently by the State’s electric utilities as part of their Distributed System Implementation Plans,¹⁶ and (v) recently-approved large increases in residential low-income program budgets.¹⁷

Such discretionary costs do not even include CES-related costs, which are expected to run well into the billions of dollars, nor do they account for delivery rate increases awarded recently to – or currently under consideration for – the State’s electric and gas utilities. Quite simply, Multiple Intervenors is very concerned that the Commission is underestimating the aggregate price and rate impacts of its various initiatives and rate proceedings on customers. The newly-proposed subsidization of merchant-owned nuclear generation facilities – which is directly contrary to prior Commission decisions approving the divestiture of those facilities in order to, *inter alia*, transfer market-price risk from customers to merchant owners purportedly willing to accept such risks – raises new and financially-impactful issues that should not be resolved on an unduly-expedited basis.

Multiple Intervenors’ Initial Comments are organized into six points. In Point I, Multiple Intervenors asserts that Constellation’s Petition is premature and only should be considered, if at all, after the Commission rules on the proposed CES and the possible expedited program to subsidize selected nuclear generation facilities.

In Point II, Multiple Intervenors asserts that as a condition precedent to any customer-funded CES subsidies, the owner of an upstate nuclear generation facility should be

¹⁶ See generally Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*.

¹⁷ See Case 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers, Order Adopting Low Income Program Modifications* (issued May 20, 2016), Appendix C (detailing annual budget increases exceeding \$115 million – i.e., from \$132,469,057 to \$247,727,238 – or approximately 87%).

required to demonstrate (i) an intent to deactivate the facility absent such subsidies, and (ii) that such facility is expected to be uneconomic over the foreseeable future.

In Point III, Multiple Intervenors asserts that the Commission should refrain from mandating long-term contracts to implement subsidies of selected upstate nuclear generation facilities.

In Point IV, Multiple Intervenors asserts that any nuclear-related subsidies implemented as part of a CES should be calculated on a facility-specific basis.

In Point V, Multiple Intervenors asserts that any nuclear-related subsidies implemented as part of a CES should be calculated in a manner that minimizes costs to customers.

Finally, in Point VI, Multiple Intervenors asserts that the Commission should allow for the submission of supplemental comments herein if, following the resolution of CES-related issues, Constellation's projected operating costs are determined to have relevance to potential customer-funded subsidies that may be awarded to Ginna and/or Nine Mile. Parties should not be expected to address Constellation's projected operating costs in detail here when, only a short time ago, the Commission solicited comments on the New Staff Proposal which, if adopted, would render such costs meaningless.

ARGUMENT

POINT I

CONSTELLATION'S PETITION IS PREMATURE

Constellation's Petition seeks one or more Commission rulings as to the appropriate facility costs under the CES for the nuclear generation facilities it operates in New York. (Petition

at 1.) For the reasons set forth below, the Petition is premature, as Multiple Intervenors asserted immediately in response thereto.¹⁸

As detailed, *supra*, the Commission has yet to approve any CES, including one that may mandate customer-funded subsidies for merchant-owned generation facilities. As also detailed, *supra*, the Commission has yet to rule on a possible expedited program for subsidizing selected nuclear generation facilities, including what such program might entail and/or how it would be implemented. In fact, the New Staff Proposal, if adopted, seemingly would render the Petition moot and meaningless. Thus, Constellation's Petition seeks an expedited ruling from the Commission related to a CES that has yet to be approved and in accordance with an expedited program that has yet to be implemented or defined. It also seeks to establish the projected operating costs for Ginna and Nine Mile, notwithstanding the fact that such information – as proposed in the New Staff Proposal – may not even be relevant. In other words, the cart has been placed squarely ahead of the horse and parties already have expended far too much time on a proceeding that never should have been instituted until, at the earliest, the underlying CES-related issues were resolved.¹⁹

Even if, *arguendo*, it is safe to assume that a CES will be approved by the Commission in some form – notwithstanding concerns raised by Multiple Intervenors and others regarding the potential exorbitant costs to customers – it currently is unclear, *inter alia*, (i) whether such CES will include a nuclear tier, (ii) how such a nuclear tier would be structured and implemented, (iii) whether such tier would include an expedited program to subsidize certain

¹⁸ See Case 16-E-0270, *supra*, Initial Response of Multiple Intervenors at 2.

¹⁹ Multiple Intervenors contends that the New Staff Proposal is fatally flawed in numerous respects. Contemporaneously herewith, Multiple Intervenors is submitting comments on the New Staff Proposal in Case 15-E-0302.

nuclear generation facilities well before there is any evidence that such facilities otherwise would retire, and, if so, (iv) how such a program would be structured and implemented. Against this backdrop of uncertainty, it is premature to determine “appropriate facility costs” for individual nuclear generation facilities. Indeed, the answers to the questions posed in Constellation’s Petition very well may be contingent upon Commission rulings that have yet to be made. Moreover, the Commission’s ultimate rulings on those issues may impact the positions that parties otherwise would advocate in response to the Petition. For instance, if the New Staff Proposal is adopted in whole or large part, Constellation’s facility costs seemingly would be irrelevant.

In its Petition, Constellation argues that the Commission needs to issue rulings ensuring that customer-funded subsidies will be available for at least 12 years (commencing April 1, 2017) because it has operational decisions to make soon. (*See, e.g.*, Petition at 1, 5.) Multiple Intervenors agrees that the Commission should address CES-related issues with due deliberation and resolve them in a timely manner. Importantly, however, the issues raised in the Constellation Petition – *e.g.*, the possible subsidization of Ginna and Nine Mile for up to a 12-year period – could wind-up costing customers many billions of dollars through 2029. The Commission should not decide those issues “with a gun to its head,” nor should it seek to grant Constellation relief at the expense of customers on an unduly-expedited basis. As addressed, *infra*, there is no evidence whatsoever that Constellation currently is planning to deactivate Nine Mile in the near future. Furthermore, the decision to continue operating Ginna upon expiration of the customer-funded Reliability Support Services Agreement (“RSSA”), while somewhat imminent, does not need to be made today or tomorrow.²⁰

²⁰ The Commission needs to consider carefully the impacts of its policies and decisions on customers. For instance, with respect to Ginna: (a) the Commission required customers of Rochester Gas and Electric Corporation (“RG&E”) to fund an RSSA that will cost hundreds of

For the foregoing reasons, the Petition is premature at this time. The Commission should resolve issues related to the proposed CES and the possible expedited program on a generic basis later this summer. Upon the issuance of those orders, it may be appropriate – depending on the substance of the Commission’s rulings – to then consider Constellation’s Petition, provided that interested parties first are accorded an opportunity to comment thereon in full knowledge of the Commission’s orders. Such an approach would allow for a ruling on the Petition, if necessary, sometime this fall. The Commission should refrain from being rushed into making hasty long-term decisions that could impact already-overburdened customers in a detrimental manner.

POINT II

CUSTOMERS SHOULD NOT BE FORCED TO SUBSIDIZE A NUCLEAR GENERATION FACILITY THAT HAS NO DEMONSTRABLE PLAN TO DEACTIVATE

The CES, as mandated by Governor Cuomo and proposed by the Commission and Staff, envisions subsidizing selected upstate nuclear generation facilities for the purpose of retaining those facilities, at least as a short-term bridge until the State’s reliance on renewable resources grows to the level desired by current policymakers. Importantly, to the extent those nuclear generation facilities would continue operating irrespective of a CES, there is absolutely no

millions of dollars to retain Ginna notwithstanding the fact that its owner never filed a written notice of intent to deactivate that facility; (b) RG&E’s customers now are funding the construction of a very-expensive transmission upgrade for the primary purpose of ensuring that Ginna will retire upon the conclusion of the RSSA in early-2017 without impacting electric reliability (that upgrade even was named the “Ginna Retirement Transmission Alternative”); and (c) New York electric customers now are facing the prospect of subsidizing the continued operation of Ginna, possibly for as long as 12 years, even though it will not be needed for reliability, thereby raising the issue of whether the Ginna-related transmission upgrade was needed at this time. At every turn, customers are being forced to pay substantial costs that may not be necessary or in the public interest.

need for customers to start subsidizing them, in addition to new and existing renewable resources, energy efficiency programs, *etc.* Accordingly, the Commission should rule that an owner of a nuclear generating facility desiring customer-funded subsidies is required to demonstrate, as conditions precedent to any subsidies, (i) a clear intent to deactivate the facility absent such subsidies, and (ii) that such facility is expected to be uneconomic over the foreseeable future. Absent such demonstration, customers could be forced to pay billions of dollars in subsidies that are not necessary to retain certain nuclear generation facilities.²¹

In expanding the scope of this proceeding to consider a CES, the Commission noted Governor Cuomo’s directive to include certain nuclear generation facilities:

Specifically, the Governor stated that “elimination of upstate nuclear facilities, operating under valid federal licenses, would eviscerate the emission reductions achieved through the State’s renewable energy programs, diminish fuel diversity, increase price volatility, and financially harms host communities.”²²

Thus, there is no evidence that Governor Cuomo is interested in subsidizing nuclear generation facilities indiscriminately; rather, the focus of the proposed effort is on preventing the early elimination – or deactivation – of upstate nuclear facilities operating under valid federal licenses.

Similarly, the Commission’s focus to date also has been on preventing such early deactivation of nuclear generation facilities:

²¹ For instance, there is no evidence whatsoever that Constellation is planning to deactivate Nine Mile in the foreseeable future. Absent such evidence – *e.g.*, the filing of a written notice of an intent to retire or mothball and a demonstration that Nine Mile will be uneconomic for the foreseeable future – the forced payment of customer-funded subsidies to Constellation related to Nine Mile would serve no real purpose other than to bolster that company’s bottom line and increase the cost of electric service to New York customers.

²² Case 15-E-0302, *supra*, Order Expanding Scope of Proceeding and Seeking Comments at 3 (footnote omitted).

[S]ome nuclear facilities in the State have indicated an intent to retire In assessing a CES, careful thought needs to be given regarding the need to preserve the emission gains made by the State. Unexpected retirement of these units due to economic conditions or other factors beyond the State’s direct control could possibly lead to an increase of over 12 million metric tons in carbon dioxide emissions alone, a truly unacceptable outcome.²³

Again, the focus is on preventing the retirement of selected nuclear generation facilities.

As detailed, *supra*, on January 25, 2016, Staff issued a White Paper on certain CES issues.²⁴ With respect to nuclear generation facilities, Staff asserted that the objective of a CES is to: “Prevent premature closure of upstate nuclear facilities.” (White Paper at 3.) Staff proposed that in order to receive subsidies under a CES “nuclear facilities must have an in-service date of January 1, 2015 or earlier, *be facing financial difficulty as determined by a Staff examination of the books and records of the facility*, operating pursuant to a fully renewed license by the NRC until 2029 or beyond, and consistent with any other federal and state authorizations.” (*Id.* at 31-32; emphasis added; footnote omitted.) While the proposed standard of “financial difficulty” – which has yet to be approved by the Commission – is open to interpretation, it was clear that, at least prior to issuance of the New Staff Proposal, Staff envisioned subsidizing selected nuclear generation facilities only to the extent necessary to ensure they remain operational. (*See id.* at 32, wherein Staff posits that: “These eligibility criteria reflect the State’s interest in minimizing the level of customer support for ZECs to only those facilities that are currently experiencing, as well as forecasted to experience, financial difficulty.”)

²³ *Id.* at 5 (footnote omitted).

²⁴ Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard (dated January 25, 2016) (hereinafter, “White Paper”).

Multiple Intervenors urges that if, *arguendo*, a CES with a nuclear tier is adopted, an owner of a nuclear generation facility desiring customer-funded subsidies be required to demonstrate, as conditions precedent to any such subsidies, (i) a clear intent to deactivate the facility absent such subsidies, and (ii) that such facility is expected to be uneconomic over the foreseeable future. As detailed above, the focus of the proposed nuclear tier should not be to force customers to subsidize indiscriminately merchant-owned nuclear generation facilities whose owners willingly assumed all operational, regulatory and market price risks when they purchased the facilities. Rather, any subsidies mandated would be to prevent selected nuclear facilities from retiring prematurely during this “bridge” period.

In order to ensure that customers are not forced to pay subsidies unnecessarily, the Commission first should require that an owner of a merchant generation facility seeking customer-funded subsidies demonstrate a clear intent to deactivate the facility. Absent such demonstration, customers could wind-up subsidizing nuclear generation facilities that otherwise would remain operational, thereby rendering the subsidies paid wholly unnecessary for purposes of achieving the CES objectives under consideration. Simply put, if the primary purpose of subsidizing a particular nuclear generation facility is to ensure that it remains operational, and the facility has no real intent to deactivate, why is any subsidy needed or appropriate? Again, these are merchant-owned facilities that were purchased by entities willing to assume operational, regulatory and market price risks. Indeed, the utility divestiture of such facilities was motivated, in large part, on a desire to shift such risks from utility customers to third-party owners and developers.²⁵

²⁵ The purchase price paid by Constellation for Ginna and Nine Mile presumably reflected the transfer of such risks from the former utility owners and their customers to Constellation. If it had been known years ago that customers would be forced to subsidize Constellation if and when wholesale market revenues declined, those purchase prices likely would have been higher.

Thus, Multiple Intervenors urges the Commission to require that a nuclear generation facility owner submit a written notice of retirement or mothball as a condition precedent to qualifying for CES-related subsidies. Additionally, in order to ensure that such notices and/or a claimed intent to deactivate a nuclear generation facility is not advanced solely for the purpose of obtaining customer-funded subsidies, the Commission also should require, as a condition precedent, a demonstration that such a facility is expected to be uneconomic over the foreseeable future. Nuclear generation facilities are very large assets. No reasonable owner of such a facility would elect to deactivate if it is projected to lose money for a year or two (or even longer) if it then expects to return to long-term profitability. It is not the role of captive electric customers to guarantee that a merchant-owned facility is profitable every year.

Ironically, Constellation's primary concern regarding proposed CES eligibility requirements is that it opposes any need to demonstrate financial distress as a prerequisite to eligibility. It is Constellation's position that nuclear generation facilities should be subsidized by electric customers solely because of their zero-emissions characteristics.²⁶ There are numerous problems with that position. First, as detailed above, the stated intent of the proposed CES is to ensure that selected upstate nuclear generation facilities refrain from retiring prematurely, not to subsidize them irrespective of their profitability.

Second, New York already has a structure in place to recognize carbon-free generation – it is called the Regional Greenhouse Gas Initiative (“RGGI”). Carbon-emitting generation facilities – presumably excluding nuclear generation facilities – are forced to pay for and procure RGGI allowances (which then are reflected in those facilities' energy bids, thereby

²⁶ Case 15-E-0302, *supra*, Comments of Constellation Energy Nuclear Group, LLC Concerning Staff White Paper on Clean Energy Standard (dated April 22, 2016) at 2-3.

increasing the prices paid to nuclear and other carbon-free generation facilities). Adoption of Constellation's position essentially is an admission that RGGI is not achieving its stated objective and that New York will impose even more costs on customers that are not borne by businesses and residents within or outside of the other RGGI states.

Third, although nuclear generation may not emit carbon, it has characteristics that also differentiate it from other forms of generation, such as radioactive waste, wide-scale safety-related concerns, risk of inadequate decommissioning funds, and possibly others. If the proposed CES is going to account for one externality benefit that purportedly is not recognized in energy markets (*e.g.*, carbon-free generation), then equity would dictate that externality costs that also are not recognized in energy markets (*e.g.*, radioactive waste, wide-scale safety-related concerns, risk of inadequate decommissioning funds) similarly be recognized.²⁷

Accordingly, Constellation's argument in support of customer-funded subsidies for nuclear generation facilities irrespective of profitability should be rejected. If a CES with a nuclear tier is adopted notwithstanding concerns advanced by Multiple Intervenors and other parties, customers should not be forced to subsidize a nuclear generation facility unless it has filed a written notice of an intent to deactivate and demonstrates that the facility is projected to be

²⁷ This proceeding illustrates some of many problems related to an overreliance on so-called externalities – they can be incredibly difficult, if not impossible, to quantify accurately, and entities often rely selectively on some externalities while disregarding others entirely. Another example of such selectivity is touting jobs at nuclear generation facilities that possibly may be saved while ignoring the likely much-larger loss of jobs that will occur as New York becomes even less competitive vis-à-vis other states in terms of electricity costs. This concern is particularly relevant given Commission and Staff proposals to implement a CES that causes massive subsidies to be paid by customers on a volumetric (per kWh) basis though commodity prices and charges. Thus, the enormous proposed cost of the CES would be borne disproportionately by large, high-load-factor customers, many of which are very-large employers and also operate manufacturing and other facilities in other states and countries.

uneconomic over the foreseeable future. Under such circumstances, subsidies may be needed to ensure that the subject facility remains operational (although whether such subsidies should be paid raises other issues). Absent such circumstances, however, subsidies would be unnecessary and extremely costly to customers with no discernible benefit if the facility would remain operational irrespective of any subsidies paid.²⁸

POINT III

THE COMMISSION SHOULD REFRAIN FROM MANDATING LONG-TERM CONTRACTS TO IMPLEMENT SUBSIDIES OF SELECTED UPSTATE NUCLEAR GENERATION FACILITIES

In its comments in Case 15-E-0302, Constellation requests a 12-year commitment that it be subsidized financially, via contract and/or administratively-priced zero-emission credits (“ZECs”).²⁹ The Commission should reject this argument and refrain from mandating long-term contracts to implement subsidies of selected upstate nuclear generation facilities.

With all due respect, the Commission is unable to predict whether, and to what extent, nuclear generation will be needed and/or require subsidies in 2029, and the same can be said for most of the years preceding 2029. For instance, the idea that the State even would consider

²⁸ Based on Multiple Intervenors’ initial review of the New Staff Proposal, it appears that Staff fails to recognize the fact that CES subsidies paid to a nuclear generation facility that has no tangible plan to retire produce *zero* incremental benefits to customers. In the parlance of energy efficiency programs, such facilities are “free riders.” Under such circumstances, proposed nuclear subsidies would result in substantial incremental costs to customers without any offsetting benefits whatsoever.

²⁹ See Case 15-E-0302, *supra*, Comments of Constellation Energy Nuclear Group, LLC Concerning Staff White Paper on Clean Energy Standard at 14-15.

subsidizing nuclear generation facilities was unfathomable only a short time ago. Additionally, the following criteria that are or may be highly relevant to this proceeding currently are unknown:

- New York's generation resource mix during the next decade;
- whether technological advances may lead to increased development of renewable resources and/or implementation of energy efficiency, thereby reducing the State's perceived dependence on nuclear generation;
- whether increased transmission capacity under consideration will help to eliminate or reduce the State's perceived dependence on nuclear generation earlier than anticipated currently;
- the cost of nuclear generation over the next 12 years compared to other forms of electric generation as well as wholesale market revenues available to nuclear generation facilities;
- the environmental requirements that may or may not be applicable in the next decade or beyond, and the identity and perceived value of externalities that may (or may not) be important to future Commissions and other regulatory agencies in the coming decade and beyond.

In the absence of an accurate crystal ball, the Commission should refrain from committing captive electric customers to 12 years of financial obligations to subsidize a product (*i.e.*, nuclear-generated electricity) that may not be needed, or even desired, during the entirety of that time period. Multiple Intervenors reminds the Commission that the last time the State decided to force customers to subsidize an environmentally-preferred form of generation (*i.e.*, cogeneration) under the Six-Cent Law, the costs of such decision were enormous and disastrous, resulting in tens of billions of dollars in stranded, above-market costs. As Multiple Intervenors

has advocated repeatedly herein and in prior proceedings, the Commission should not repeat the mistakes of the past by relying on long-term financial contracts or similar commitments to subsidize generation facilities, either nuclear or renewable. In the case of nuclear generation facilities, many business decisions are made focused on refueling cycles, which tend to be scheduled on 18-24 month intervals. Accordingly, Multiple Intervenors recommends that any subsidies and/or financial commitments authorized herein be limited in duration either to one-year periods or, at most, the normal interval between a facility's refueling cycles.

For the foregoing reasons, the Commission should refrain from mandating the use of long-term contracts or other financial commitments as a means of implementing customer-funded subsidies of selected upstate nuclear generation facilities.

POINT IV

ANY NUCLEAR-RELATED SUBSIDIES IMPLEMENTED AS PART OF A CES SHOULD BE CALCULATED ON A FACILITY-SPECIFIC BASIS

In this proceeding, Constellation is seeking the establishment of a single cost figure for its fleet of New York nuclear facilities (*i.e.*, Ginna and Nine Mile). (*See* Petition at 2.) The Commission should reject this approach. If, *arguendo*, a CES is approved that authorizes the implementation of customer-funded subsidies of merchant-owned nuclear generation facilities, such subsidies should be calculated on a facility-specific basis.³⁰ To adopt a single price or value for subsidies could result in customers paying more than necessary, which should be avoided.

³⁰ Such calculation also should be transparent. In this context, the owner of a nuclear generation facility is requesting out-of-market subsidies from a regulatory agency (*i.e.*, the Commission) that would be funded by captive electric customers. Under such circumstances, the public, and the public interest, demand that any such subsidies be calculated in an open and transparent manner, similar to the public record that is developed in utility rate proceedings.

The White Paper envisioned that subsidies paid to owners of qualifying nuclear generation facilities via ZECs, with an Alternative Compliance Payment (“ACP”) being set administratively by the Commission. (White Paper at 31-32.)³¹ It appears that Staff’s proposal relied on a single type or class of ZEC that would be applicable to all qualifying nuclear generation facilities and a single ACP price. That Staff proposal, which has been superseded by the New Staff Proposal, should be rejected. Because the Commission has yet to rule on the proposed CES, the proposed nuclear tier and/or a possible expedited program to subsidize selected nuclear generation facilities, Multiple Intervenors is forced to address this issue in response to Constellation’s Petition, although it really should be resolved on a generic basis.

Multiple Intervenors’ concern is that if ZECs are valued at the price necessary to ensure that the most uneconomic nuclear generation facility remains operational, such an approach would result in the over-subsidization of all other facilities qualifying for subsidies. For instance, if, hypothetically, Ginna needed \$10 per MWh in subsidies to remain operational and Nine Mile needed \$4 per MWh in subsidies to remain operational, then use of a single ZEC value – *e.g.*, \$10 per MWh – would over-subsidize Constellation for the operation of Nine Mile by \$6 per MWh. Such over-subsidization could result in excessive and unnecessary costs to customers totaling hundreds of millions of dollars annually. Accordingly, if, *arguendo*, a CES with a nuclear tier employing ZECs is approved by the Commission, it should rely on facility-specific ZECs instead of utilizing a one-size-fits-all approach.

³¹ Because there is no real market for ZECs, Multiple Intervenors believes that the ACP set by the Commission – as envisioned in the White Paper – essentially would become the *de facto* price for ZECs.

With respect to Constellation in particular, the adoption of Multiple Intervenors' position in Point II, *supra*, would alleviate any perceived need to decide now whether Nine Mile should be viewed as one facility or two separate facilities (*i.e.*, Nine Mile 1 and Nine Mile 2). There is no need to evaluate the costs of Nine Mile because Constellation has not demonstrated any intent to retire either or both of that facility's generating units. If, at some time in the future, Constellation files a written notice of an intent to deactivate Nine Mile 1 *or* Nine Mile 2, then the projected costs and revenues of that single unit could be evaluated in isolation. Alternatively, if at some future time Constellation files a written notice of an intent to deactivate Nine Mile 1 *and* Nine Mile 2, then the projected costs and revenues of both units would be evaluated in the aggregate. This approach: (a) recognizes the absence of any need to subsidize a nuclear generation facility that has no plans to deactivate; and (b) limits the evaluation of Nine Mile's projected costs and revenues for possible subsidies to the unit or units that truly are at risk to deactivate.

For the foregoing reasons, any nuclear-related subsidies implemented as part of the CES should be calculated on a facility-specific basis.

POINT V

ANY NUCLEAR-RELATED SUBSIDIES IMPLEMENTED AS PART OF A CES SHOULD BE CALCULATED IN A MANNER THAT MINIMIZES COSTS TO CUSTOMERS

There appears to be an assumption by Constellation and, at one point, Staff, that subsidies to owners of selected upstate nuclear generation facilities should be calculated in a manner to cover any and all projected annual shortfalls between wholesale market revenues and projected operating costs. (*See, e.g.*, White Paper at 32.) Multiple Intervenors disagrees emphatically with such assumption. Instead, if, *arguendo*, electric customers are forced to

subsidize owners of merchant nuclear generation facilities, such subsidies should be calculated in a manner that minimizes costs to customers.

For instance, Multiple Intervenors contends that it would be inherently – and incredibly – inequitable to require customers to subsidize Constellation’s nuclear fleet by “covering” 100% of any projected revenue shortfall during a “down” year for wholesale market revenues while also allowing Constellation to retain 100% of all projected profits during an “up” year for wholesale market revenues. Under such an approach, customers always get the short end of the stick: they are forced to protect Constellation’s revenues and profits on the downside while, at the same time, they are precluded from any type of upside and are exposed to full market-based prices when such prices are high. How is this result fair to customers? Is this how competition in New York is supposed to work?

There are at least two alternate approaches that would be fairer to customers. First, if nuclear subsidies are to be calculated based on Constellation’s so-called cost of service, whereby customers are required to “make-up” 100% of the difference between projected costs and projected revenues, then customers should be entitled to all or most of the profits when projected revenues exceed projected costs. In the context of cost-of-service ratemaking as applied to regulated utilities, this objective is achieved through what commonly are referred to as excess earnings sharing mechanisms. To the extent Constellation and/or any other owner of merchant nuclear generation facilities seeks out-of-market subsidies from captive electric customers, they arguably should be treated the same as – and certainly no better than – a regulated electric utility. So-called merchant generation owners – nuclear and non-nuclear – should not be allowed to reap and retain

100% of all market-based profits when prices are high and then come running to the State and the Commission for financial bail-outs whenever they experience down years.³²

An alternate approach is that if, *arguendo*, customers are forced to subsidize one or more of Constellation's nuclear generation facilities with no opportunity to share in any of those facilities' future profits, then the amount of the subsidies should be calculated to minimize the costs to customers even if it means that some or all of the facilities lose money in one or more years, so long as they remain operational. For instance, if a nuclear facility is projected to lose \$5 million in 2017, Multiple Intervenors would argue that no subsidy should be paid because it is extremely unlikely that a rational owner of a nuclear generation facility would retire the facility because it may experience what in relative terms is a fairly modest annual loss. Indeed, if projected market revenues are expected to rise in one, two or three years as natural gas prices move off of historic lows, there may not be any need to provide subsidies because, again, a rational owner of a nuclear generation facility would be unlikely to retire the facility to avoid modest losses in the near-term if larger profits are expected in the foreseeable future.

Furthermore, if the Commission believes that there is a high likelihood that a specific nuclear generation facility would deactivate absent subsidies, that does not mean that customers necessarily need to – or should – pay subsidies equal to 100% of the facility's projected losses. For instance, subsidies covering one-third (or half or two-thirds) of the facility's projected

³² Multiple Intervenors expresses no opinion here as to whether this approach would be consistent with current federal law regarding the operation of wholesale electric prices. Multiple Intervenors submits that to the extent the approach could be subject to legal challenge, the same also can be said for the approaches proposed in the Staff White Paper and the New Staff Proposal.

losses may be adequate to ensure that the facility remains operational in the near-term (*e.g.*, in anticipation of future profitable years).³³

For the foregoing reasons, Multiple Intervenors urges the Commission to minimize any subsidies that customers may be forced to pay to merchant nuclear generation facilities.

POINT VI

THE COMMISSION SHOULD ALLOW THE FUTURE SUBMISSION OF SUPPLEMENTAL COMMENTS IF CONSTELLATION'S PROJECTED OPERATING COSTS HEREINAFTER ARE DEEMED RELEVANT UNDER ANY CES THAT MAY BE ADOPTED

As Multiple Intervenors advocated in its initial response herein, the Petition – and, thus, this entire proceeding – is premature. The Commission has yet to approve a CES, including one with a nuclear tier. The Commission also has yet to approve any expedited program to subsidize owners of selected upstate nuclear generation facilities and, even if such approval occurs, that does not mean that the relief sought in the Petition – *i.e.*, the establishment of appropriate costs for Constellation's New York nuclear generation facilities – will have any relevance in the calculation of customer-funded subsidies. Indeed, it appears that under the New Staff Proposal, if adopted by the Commission, Constellation's costs – and the Petition and all of the work conducted herein by numerous parties – will have been rendered moot and meaningless.

³³ Any uncertainty as to whether a nuclear generation facility really would be deactivated absent customer-funded subsidies would be eliminated – or reduced substantially – if the Commission adopts Multiple Intervenors' position in Point II, *supra*, and requires, *inter alia*, that a written notice of an intent to retire or mothball a nuclear generation facility be filed as a prerequisite to eligibility for subsidies. Multiple Intervenors also urges the Commission to retain the flexibility to determine that an individual nuclear facility simply may be too expensive to force customers to subsidize, notwithstanding the desire to retain zero-emitting generation sources.

Based on these circumstances, including the July 8, 2016 issuance of the New Staff Proposal for comment, the Commission should hold this proceeding in abeyance and, should it subsequently determine that Constellation's projected operating costs for its New York nuclear facilities have any relevance, allow parties to submit supplemental comments thereon. Importantly, parties should not be required to expend even more resources briefing cost-related issues in this proceeding that ultimately may become null and void.

A substantial amount of the work underlying these Initial Comments was performed prior to the issuance of the New Staff Proposal. To the extent Constellation's projected operating costs are relevant, there are additional arguments that could be advanced in response to the Petition. For instance, Multiple Intervenors contends, *inter alia*, that: (a) the value of Constellation's existing hedges should not be ignored in calculating any cost-based subsidies; (b) Constellation's proposal that customers bear the cost of certain operational and market risk adders as part of any cost-based subsidies should be rejected; (c) to the extent any cost-based subsidies include the cost of large capital expenditures, appropriate "clawback" provisions protecting customers would be necessary and appropriate; and (d) the costs of any subsidies awarded to Constellation and/or other owners of New York nuclear generating facilities should *not* be allocated to or recovered from customers on a volumetric basis, nor should any such subsidy costs be recovered in conjunction with New York Power Authority allocations.

Inasmuch as Staff apparently no longer considers Constellation's projected operating costs to be relevant to this proceeding or Case 15-E-0302, it is difficult – if not impossible – for Multiple Intervenors to justify expending even more resources herein briefing

these positions with one notable exception.³⁴ Indeed, given the circumstances, and the potentially-unnecessary expenditure of substantial party resources to date in furtherance of a proceeding that arguably was premature and never should have been instituted in the first place, Multiple Intervenors recommends that, to the extent Constellation's projected operating costs hereinafter are deemed relevant by the Commission for purposes of calculating CES-related subsidies, parties should be authorized to submit supplemental comments on cost issues at an appropriate time.

CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to adopt the positions advanced in these Comments.

Dated: July 22, 2016
Albany, New York

Respectfully submitted,

Michael B. Mager

Michael B. Mager, Esq.
Counsel to Multiple Intervenors
540 Broadway, P.O. Box 22222
Albany, New York 12201-2222
(518) 320-3409

S:\DATA\Client19 17201-17600\17448\Documents\Comments on Constellation Petition.docx

³⁴ Multiple Intervenors' Comments in response to the New Staff Proposal in Case 15-E-0302 addresses cost allocation issues.