

**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

**COMMENTS OF
MULTIPLE INTERVENORS
IN RESPONSE TO
NOTICE SEEKING FURTHER COMMENT**

Dated: February 20, 2024

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits these Comments in response to the Notice Seeking Further Comment (“Notice”) and Notice Extending Comment Period, issued by the New York State Public Service Commission (“Commission”) on October 20, 2023, and January 17, 2024, respectively, in Case 15-E-0302.¹

The Notice was issued as part of the Commission’s continuing evaluation on the need for zero-emission generation facilities to ensure that electric reliability is maintained as the State increases its reliance on intermittent, weather-dependent renewable generation resources in an effort to comply with the Climate Leadership and Community Protection Act (“CLCPA”). In comments filed herein on August 16, 2023, Multiple Intervenors set forth its positions in response to 14 questions posed previously by the Commission.²

In the Notice, the Commission sets forth a second series of questions, posited by New York State Department of Public Service Staff (“Staff”), for which comments are solicited. In an attachment to the Notice, Staff provides the following guidance: “These questions seek to elicit legal interpretations rather than policy considerations, along with reasoning and analysis that supports or cuts against those legal interpretations.” (Notice, Attachment at 1.) Multiple Intervenors’ responses to the questions posed in the Notice follow.

¹ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*.

² See Case 15-E-0302, *supra*, Order Initiating Process Regarding Zero Emissions Target (issued May 18, 2023) and Notice Extending Comment Period (issued June 28, 2023).

**MULTIPLE INTERVENORS' RESPONSES
TO QUESTIONS POSED IN THE NOTICE**

1. **PSL §66-p does not expressly indicate whether “zero emissions” refers to greenhouse gas emissions only, or greenhouse gases and also the "co-pollutants" referred to elsewhere in the CLCPA. Commenters offered different interpretations. Staff asks for further comment on this issue. Does the CLCPA, the PSL, and other relevant sources of authority argue for reading “emissions” in the term “zero emissions” as encompassing all air pollutants, greenhouse gas emissions only, or some other subset of air pollutants?**

Section 66-p of the New York Public Service Law (“PSL”) directs the Commission, *inter alia*, to establish a program to require that by 2040, “the statewide electrical demand system will be zero emissions.” That statute does not define “zero emissions,” nor does it make clear whether such term refers to greenhouse gas (“GHG”) emissions or encompasses all or a subset of other types of emissions. Such omission notwithstanding, the Commission should recognize that the CLCPA is focused principally on the reduction of GHG emissions and, therefore, should interpret PSL section 66-p as mandating establishment of a program to require that the “statewide electrical demand system” have zero GHG emissions by 2040.

After discussing climate change generally in Paragraphs 1 and 2 of the “Legislative Findings and Declaration” section of the CLCPA, Paragraph 3 provides that:

Action undertaken by New York **to reduce greenhouse emissions** will have **an impact on global greenhouse gas emissions** and the rate of climate change. In addition, such action will encourage other jurisdictions **to implement complementary greenhouse gas reduction strategies** and provide an example of such strategies can be implemented. It will also advance the development of green technologies and sustainable practices within the private sector, which can have far-reaching impacts such as a reduction in the cost of renewable energy components, and the creation of jobs and tax revenues in New York.³

³ Chapter 106 of the Laws of 2019, § 1 (“Legislative findings and declaration”), paragraph 3 (emphasis added).

Thus, the focus of the CLCPA is to achieve reductions in GHG emissions, and to encourage such reductions in other jurisdictions.

Lest there be any doubt of such focus, Paragraph 4 of the CLCPA’s “Legislative Findings and Declaration” section provides that:

It shall therefore be a goal of the state of New York **to reduce greenhouse gas emissions** from all anthropogenic sources 100% over 1990 levels by the year 2050, with an incremental target of at least a 40 percent reduction in climate pollution by the year 2030, in line with [U.S. Global Change Research Program] and [Intergovernmental Panel on Climate Change] projections of what is necessary to avoid the most severe impacts of climate change.⁴

In discussing the principal goals of the CLCPA, the Legislature focused on GHG emissions, not all or other air pollutants.

The focus on GHG emissions again is highlighted in Paragraph 6 of the CLCPA’s “Legislative Findings and Declaration” section:

New York should therefore minimize the risks associated with climate change through a combination of measures **to reduce statewide greenhouse gas emissions** and improve the resiliency of the state with respect to the impacts and risks of climate change that cannot be avoided.⁵

Clearly, the focus of the CLCPA is on the reduction of GHG emissions, as opposed to all or other air pollutants.

Finally, the CLCPA refers explicitly to the zero emissions electrical demand system by 2040 goal as pertaining to such reduction in GHG emissions. Paragraph 12 of the CLCPA’s “Legislative Findings and Declaration” section states in pertinent part that:

By exercising a global leadership role **on greenhouse gas mitigation** and climate change adaptation, New York will position

⁴ *Id.*, § 1, paragraph 4 (emphasis added).

⁵ *Id.*, § 1, paragraph 6 (emphasis added).

its economy, technology centers, financial institutions, and businesses to benefit from national and international efforts to address climate change. New York State has already demonstrated leadership in this area by undertaking efforts such as ...

d. the adoption of a state energy plan establishing clean energy goals for the year 2030 aimed at reducing greenhouse gas emission levels by 40% from 1990 levels, producing 70% of electricity from renewable sources, increasing energy efficiency from 2012 levels by 23% **and the additional expressed goal of reducing 100% of the electricity sector's greenhouse gas emissions by 2040**⁶

Thus, the CLCPA makes very clear that not only is its focus targeted at GHG emission reductions, but the description of the goal of a zero emissions electrical demand system by 2040 explicitly relates to a 100% reduction in GHG emissions, and not the reduction of all or other pollutants.

For the foregoing reasons, the Commission should: (a) interpret the CLCPA directive to enact a program requiring a zero emissions electrical demand system by 2040 to be focused on the elimination of GHG emissions from the electric generation sector, consistent with the text of the legislation; and (b) refrain from inserting artificially a broader requirement of eliminating all or other pollutants from the sector, which would be directly contrary to the clear language and the intent of the CLCPA.

2. **Multiple commenters discussed the relationship between the term “zero emissions” and the term “net zero emissions,” which appears elsewhere in the CLCPA but not in provisions to be codified in the PSL. Staff asks whether the Commission must read these terms as distinct, and if so, how the Commission should characterize and apply the distinction between them.**

Initially, for the reasons set forth in response to Question No. 1, *supra*, the Commission should interpret the CLCPA requirement that it establish a program requiring a zero emissions electrical demand system by 2040 as pertaining to GHG emissions, as opposed to all or other pollutants. With respect to “zero emissions” and “net zero emissions,” the two terms can

⁶ *Id.*, § 1, paragraph 12 (emphasis added).

have distinct meanings, particularly when contrasted to each other. For instance, achieving “zero emissions” generally refers to releasing no GHG emissions into the atmosphere, while achieving “net zero emissions” generally refers to ensuring that the amount of GHG emissions released into the atmosphere, if any, is offset in full by the amount of GHG emissions that are removed from the atmosphere. “Zero emissions” unquestionably satisfies the definition of “net zero emissions,” but the opposite is not necessarily true.

As noted by the question posed, the CLCPA employs both terms – “zero emissions” and “net zero emissions.” Unfortunately, however, the CLCPA (i) only uses the terms on a very limited basis (*i.e.*, two uses of “net zero emissions” and one use of “zero emissions”), and (ii) does not include definitions of either term. Such limited use and the absence of controlling definitions creates some uncertainty regarding how the terms should be interpreted.

Initially, the CLCPA required the Climate Action Council to “approve a scoping plan outlining the recommendations for attaining the [required] statewide greenhouse gas emissions limits ... and for the reduction of emissions beyond eighty-five percent, **net zero emissions** in all sectors of the economy” in order to inform the future adoption of a State Energy Plan. New York Environmental Conservation Law (“ECL”) § 75-0103(11) (emphasis added). Second, in setting forth the DEC’s obligation to establish statewide greenhouse gas emissions limitations, the CLCPA provides that the DEC “may establish an alternative compliance mechanism to be used by sources subject to greenhouse gas emissions limits to achieve **net zero emissions.**” ECL § 75-0109(4) (emphasis added). Finally, in setting forth the Commission’s obligations, the CLCPA refers to the establishment of a program to require that by 2040, “the statewide electrical demand system will be **zero emissions.**” PSL § 66-p(2) (emphasis added).

That is the full sum and substance of the CLCPA’s use of the terms “zero emissions” and “net zero emissions.”

Given the lack of usage and the absence of definitions of the two terms in the legislation, Multiple Intervenors agrees that there is uncertainty as to how the Commission should interpret the use of “zero emissions” in PSL section 66-p(2). In light of the use of “net zero emissions” in two prior instances, it is possible that the legislation inadvertently omitted the word “net” as “zero emissions” applies to the Commission.

In response to the specific question posed by Staff, Multiple Intervenors does not believe that the Commission *must* interpret “zero emissions” and “net zero emissions” as distinct terms, but it would be within its discretion to do so. Multiple Intervenors notes, however, that achievement of a “zero emissions” statewide electrical demand system by 2040 may be considerably more challenging – and more expensive for customers – to achieve as compared to a system that is “net zero emissions.” The CLCPA authorizes the Commission to suspend or modify the 2040 objective upon a finding that it “impedes the provision of safe and adequate electric service” and/or “there is a significant increase in arrears or service disconnections” related thereto. PSL § 66-p(4). Thus, the Commission may find it preferable to utilize the more permissive term – *i.e.*, “net zero emissions” – thereby reducing the likelihood that pursuit of the 2040 objective will need to be suspended or modified.

3. **The Commission’s Initiating Order notes that the Department of Environmental Conservation (DEC), pursuant to regulations it adopted at 6 NYCRR pt. 496 under the Environmental Conservation Law as amended by the CLCPA, has counted the emissions arising from the combustion of biomass for electricity generation on a gross rather than a net basis. Staff asks for further comment on whether DEC’s emissions accounting regulations constrain or otherwise inform the Commission’s definition of the phrase, “by the year [2040] the statewide electrical demand system will be zero emissions.” (Footnote omitted.)**

This question seeks input as to whether the decision by the New York State Department of Environmental Conservation (“DEC”) to count emissions arising from the combustion of biomass for electricity generation on a gross rather than a net basis constrains or informs the Commission’s decision as to how to define the phase, “by the year [2040] the statewide electrical demand system will be zero emissions.” For the reasons set forth below, the Commission may allow DEC’s decision – rendered in a different context – to inform its own decision should it so choose, but the Commission should not consider itself constrained to having to follow or adopt DEC’s decision as its own on this issue.

Pursuant to ECL section 75-0107, DEC is the entity responsible for establishing statewide GHG emissions limits (*i.e.*, 60 percent of 1990 emissions by 2030, and 15 percent of 1990 emissions by 2050). ECL § 75-0107(1). DEC also is responsible for issuance of periodic reports on statewide GHG emissions. *See* ECL § 75-0105. It is for those purposes that the DEC is required to determine how emissions arising from the combustion of biomass for electricity generation should be counted.

Initially, in a Revised Regulatory Impact Statement, DEC notes how the reporting for emissions arising from the combustion of biomass for electricity generation attempts to reflect its characteristics while avoiding double-counting:

Carbon dioxide (CO₂) emissions from the combustion of biomass or biomass-based products are captured within the CO₂ emissions in the [Agriculture Forestry and Other Land Use] AFOLU sector through the estimated changes in carbon stocks from biomass harvest, even in cases where the emissions physically take place in other sectors (e.g., energy). This approach to estimate and report all CO₂ emissions from biomass or biomass-based products in the AFOLU sector was introduced in the first IPCC guidelines for national greenhouse gas emissions (IPCC 1995), reflecting close linkages with data on biomass harvesting, and for the pragmatic reason to avoid double counting. In the Energy sector, CO₂ ... emissions from combustion of biomass or biomass-based products

for energy are estimated, but the CO₂ emissions are recorded as an information item that is not included in the sectoral total emissions for the Energy sector, as they are already included in AFOLU.⁷

DEC also notes that: “The United States reports CO₂ emissions from biomass combustion as a memo item to the [United Nations Framework Convention on Climate Change] UNFCCC, but does not report CO₂ emissions associated with organic waste in the Energy or Waste sectors.”⁸

Based on the foregoing, the DEC: (a) proposed that anthropogenic CO₂ emissions resulting from the combustion of biomass and biofuels be included in the 1990 statewide emissions baseline; (b) noted that the accounting of such emissions may need to be reevaluated as part of net statewide GHG emissions for reporting purposes to avoid double-counting in light of the CLCPA’s separate requirement that the State to achieve net zero emissions; and (c) recognized that the sustainable use of New York’s agricultural and forested lands is necessary both to achieve the goals of the CLCPA and to support landowners, communities, and the environment, and, therefore, anticipated working in a separate process to establish a net accounting framework that benefits long-term, sustainable land management in the state and informs future regulatory and policy action by the [DEC] and the State.⁹

Thus, DEC’s guidance on this issue is nuanced, reflecting multiple considerations, and hardly should be seen as dispositive for all purposes. Moreover, it is important for the Commission to recognize that DEC’s treatment of biomass generation emissions for accounting requirements and/or the establishment of statewide GHG emission limitations are different

⁷ DEC, Regulatory Impact Statement, 6 NYCRR Part 496, Statewide Greenhouse Gas Emission Limits at 8 of 34 (footnote omitted).

⁸ *Id.* (footnote omitted).

⁹ *Id.* at 9 of 34.

purposes than the obligation imposed by the CLCPA on the Commission. While the DEC is responsible for the accounting of statewide GHG emissions and establishing statewide GHG emissions limits, the Commission is the entity responsible under the CLCPA for establishing a program to require that by 2040, “the statewide electrical demand system will be [net] zero emissions.” PSL § 66-p(2).

In designing a program to eliminate GHG emissions from the undefined “statewide electrical demand system” by 2040, the Commission should not consider itself constrained or bound by how the DEC elects to handle emissions reporting or statewide GHG emissions limitations applicable in 2030 and 2050. These CLCPA requirements have different purposes, and the legislation is devoid of any language binding the Commission to adhering to DEC-established definitions (and *vice versa*). As the Commission recognized earlier in this proceeding: “Thus, to implement the CLCPA, it appears that both the Commission and DEC must address questions about what energy generation technologies qualify as zero-emission.”¹⁰ Accordingly, while the Commission certainly can be informed by DEC definitional determinations if it so chooses, there is nothing in the CLCPA requiring that such determinations be binding on the Commission. To the contrary, the dual – and different – delegations of responsibility by the Legislature supports a conclusion that both agencies are expected to exercise their independent judgment as to how best to fulfill their respective responsibilities.

Finally, Multiple Intervenors notes that satisfaction of the CLCPA goal of a zero emissions – or net zero emissions – statewide electrical demand system by 2040 will be incredibly challenging, as well as incredibly expensive for customers. The aggressiveness of the objective

¹⁰ Case 15-E-0302, *supra*, Order Initiating Process Regarding Zero Emissions Target (issued May 18, 2023) at 13.

was not lost on the Legislature – the CLCPA authorizes the Commission to suspend or modify the goal upon a finding that it “impedes the provision of safe and adequate electric service” and/or “there is a significant increase in arrears or service disconnections” related thereto. PSL § 66-p(4). Thus, in determining how to treat biomass from electric generation, and whether to focus on net or gross emissions, the Commission should consider refraining from determinations at this time that would render achievement of CLCPA objectives more difficult and/or more expensive for customers. In this regard, focusing on net emissions – as opposed to gross emissions – may help to potentially preserve a role for biomass in electric generation in 2040 and beyond, as opposed to eliminating it from future consideration or inclusion at this time, irrespective of the possible reliability and economic consequences of such a decision.

4. **Defining an emissions limit requires specifying, among other things, which elements of a lifecycle of a given emissions source are to be counted, and the threshold level above which emissions from that source are impermissible or disqualifying. Staff seeks comments on what discretion the CLCPA leaves for the Commission when it specifies each of these parameters.**

Initially, the CLCPA does not appear to define lifecycles of emissions sources, nor does it constrain the Commission explicitly with respect thereto. With respect to emissions limits, the CLCPA requires adoption of statewide GHG emissions limits of (i) 60% of 1990 emissions by 2030 and (ii) 15% of 1990 emissions limits by 2050. ECL § 75-0107(1). DEC – and not the Commission – is tasked with promulgating regulations to ensure compliance with those emissions limits. ECL § 75-0107(2)(a).

With respect to portions of the CLCPA where the Commission is the lead agency, it is required, *inter alia*, to adopt a program to require that: (a) 70 percent of the electricity consumed in New York by 2030 is generated by renewable energy systems; and (b) the statewide electrical demand system is zero emissions by 2040. PSL § 66-p(2). It is not clear whether

renewable energy systems such as wind and solar can be considered “zero emissions” if the entire lifecycle is to be counted towards emissions limits (given that production of the materials needed for such systems indisputably result in GHG emissions).

It also is not clear that resolution of the issues raised in Question No. 4 is required at this time. Indeed, the Commission may be best served reserving judgment on such issues. If, *arguendo*, the Commission elects to resolve these issues, Multiple Intervenors contends that all potential technologies should be treated in the same manner with respect to any examination of lifecycle emissions.

5. **PSL §66-p(2) designates “fuel cells which do not utilize a fossil fuel resource in the process of generating electricity” as a “renewable energy system.” What significance, if any, does this designation have for characterizing fuel cells that consume hydrogen, biogas, renewable natural gas, or other non-fossil fuels as “zero emissions”?**

Initially, Multiple Intervenors notes that “renewable energy system” does not necessarily have the same exact meaning as “zero emissions.” As indicated in response to Question No. 1, *supra*, the CLCPA does not define “zero emissions.” Thus, it is at least possible that a technology could satisfy the definition of “renewable energy system” but not be considered “zero emissions.”

That noted, such an interpretation seemingly would be problematic. The State’s policy is to encourage the development of renewable energy systems. Indeed, as detailed, *supra*, the CLCPA requires that 70 percent of the electricity consumed in New York by 2040 be generated by renewable energy systems. It makes little sense to encourage the massive development of such systems by 2030 only to determine that they then must cease operations or undergo extensive modifications in order to continue operating as of 2040 when the statewide electrical demand system must be zero emissions. Thus, while the CLCPA neglects to define or describe a “zero

emissions” statewide electrical demand system, that mandate, when read in conjunction with the 2030 renewables mandate, arguably is evidence of – or creates – a strong presumption that the two terms should be interpreted as synonymous such that qualifying fuel cells would be “zero emissions” for regulatory purposes.

6. **As some commenters point out, the “statewide electrical demand system” is not defined in the CLCPA or elsewhere. Staff asks for further comment on the meaning of this term. What definitions does the law support, and how do those definitions relate to electricity generated by resources that are located:**
- (a) outside of New York State, or**
 - (b) behind-the-meter?**

The Commission is responsible for developing a program to achieve a statewide electrical demand system that is zero emissions. As noted in the question, neither “statewide electrical demand system” nor “zero emissions” are defined in the CLCPA. Importantly, however, as explained below, the Commission does not possess jurisdiction over electricity generated by resources that are located outside the State or behind-the-meter and, therefore, such resources should be excluded from any definition adopted with respect to a zero emissions statewide electrical demand system.

New York’s electric grid is interconnected with multiple other regions. Electricity flows where it is needed. If electricity is imported into New York, there is no possible way to ascertain the specific generating facility or facilities that supplied such energy. Thus, so long as New York remains interconnected with other regions – which is how the system is constructed and is very beneficial (if not absolutely essential) to maintaining reliability – then there is no means by which the Commission effectively can ensure that only electricity from “zero emissions” sources are being imported into the State.

Similarly, the operation of behind-the-meter generation generally is exempt from Commission jurisdiction. *See, e.g.*, PSL § 2(13) (exempting, *inter alia*, owners of electric plant

from regulation as electric corporations where the electric plant in question is generating electricity for the owner's own use or the use of its tenants). Absent statutory modifications, the Commission is not empowered to prevent an authorized behind-the-meter generating facility from operating. Accordingly, electricity produced by such facilities should not be included in the definition of statewide electrical demand system.

For the foregoing reasons, Multiple Intervenors recommends that the Commission interpret the statewide electrical demand system to include solely those electric generating facilities that are in front of the meter and located within New York State. In addition to physical and legal bars to adopting a broader interpretation, Multiple Intervenors notes that achieving a zero emissions statewide electrical demand system defined as recommended without sacrificing reliability will be extremely challenging, and the Commission should refrain from adopting an even more aggressive interpretation of the CLCPA that realistically cannot be achieved and/or would jeopardize electric reliability.

CONCLUSION

For all the foregoing reasons, the Commission should resolve the issues raised in the Notice in a manner consistent with Multiple Intervenors' positions.

Dated: February 20, 2024
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Respectfully submitted,

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