BEFORE THE NEW YORK STATE
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 SIERRA CLUB, EARTHJUSTICE, NY RENEWS, FOSSIL FREE TOMPKINS, AND ALLIANCE FOR CLEAN ENERGY NEW YORK IN RESPONSE TO THE DEPARTMENT OF PUBLIC SERVICE STAFF'S PROPOSED DEFINITIONS OF KEY TERMS IN PSL § 66-P

January 22, 2025

I. Introduction

Earthjustice, Sierra Club, the Alliance for Clean Energy New York, NY Renews, and Fossil Free Tompkins ("Commenters") appreciate the opportunity to provide these comments regarding Department of Public Service ("DPS") Staff's Proposed Definitions of Key Terms in PSL § 66-p. As discussed in Commenters' previous filings,[1] the 2040 zero emissions requirement in the Climate Leadership and Community Protection Act ("CLCPA" or "Climate Act") is a linchpin of the statute. With electrification of transportation and buildings identified by the Climate Action Council as an "essential part" of any pathway that achieves the Climate Act's 2050 emission mandates, a robust and textually faithful definition of zero emissions is critical to achieving the Climate Act's required deep emission reductions.

Commenters concur with a number of important aspects of DPS Staff's proposed definitions. In particular, Commenters believe Staff correctly interpreted "zero emissions" to mean zero *gross* emissions, not zero *net* emissions, as some commenters had counter-textually urged.[2] Additionally, Commenters endorse Staff's proposal to extend the scope of "cognizable emissions" for zero emissions purposes to including "both a resource's operations and its fuel production process."[3] Commenters also support Staff's proposed inclusion of most imported electricity within the scope of the "statewide electrical demand system,"[4] which is essential to preventing perverse outcomes that would undermine compliance with the CLCPA.

At the same time, however, as set forth below, Commenters diverge from DPS Staff's recommendations regarding discrete aspects of the definitions and respectfully urge the Public Service Commission ("PSC" or "the Commission") to adopt a plain meaning interpretation of "emissions" that includes both greenhouse and non-greenhouse gases ("GHG" & "non-GHG"), and interprets the "statewide electrical demand system" to include behind-the-meter resources that participate indirectly in jurisdictional markets. Finally, Commenters offer some preliminary thoughts on next steps, including the importance of continuing to analyze and prioritize minimization of the dispatchable emissions free resource gap, and look forward to providing additional comments on any concrete proposals for advancing achievement of the zero by 2040 mandate. Commenters continue to urge caution and an incremental approach in this proceeding, with 15 years to implement the 2040 mandate. Such an approach will maximize the Commission's ability to benefit from continuing technological advances in energy storage and other dispatchable zero emissions technologies. The development of more effective approaches to load management over this period will also facilitate the Commission's provision of reliable service in the period after 2040.

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[1] Sierra Club and Earthjustice's Comments in Response to the Commission's Order Initiating Process Regarding Zero Emissions Target, PSC Case No. 15-E-0302 (Aug. 16, 2023) (hereinafter "August 2023 Comments"); Sierra Club and Earthjustice's Comments in Response to the Commission's Notice Seeking Further Comment on the Order Initiating Process Regarding Zero Emissions Target, PSC Case No. 15-E-0302 (Feb. 20, 2024) (hereinafter "February 2024 Comments"); Sierra Club and Earthjustice's Comments in Response to Comments of Roger Caiazza, PSC Case No. 15-E-0302 (July 18, 2024).

[2] Department of Public Service Staff Proposed Definitions of Key Terms in PSL § 66-p at 19–23, PSC Case No. 15-E-0302 (Nov. 4, 2024) (hereinafter "DPS Staff Proposed Definitions").

[3] *Id*. at 16.

[4] *Id*. at 9–11.

II. Non-GHG Emissions:

1. *Statutory Meaning of "Zero Emissions"*

Staff does not dispute that the term "zero emissions" ordinarily refers to both greenhouse gases and other air pollutants, as argued by Commenters.[5] Instead, Staff suggests that a court would find the ordinary-meaning canon of statutory construction to be inapplicable to the term "zero emissions" in PSL § 66-p(2)(b).[6] Staff has erred in not applying this principle of statutory construction. Courts in New York dispense with the ordinary meaning of terms in a statute *only* if a "contrary intent is clear."[7] There is no "clear" indication anywhere in the text of the CLCPA that the Legislature sought to assign the term "zero emissions" a peculiar, rather than ordinary meaning. Like Commenters, Staff scoured the CLCPA in its entirety, reading its Legislative findings and all of its definitions line-by-line. It is telling that at the end of this statutory review Staff also failed to find a single section of the CLCPA that expressly states that non-GHG emissions should be excluded from the 2040 target contained in PSL § 66-p(2)(b).[8]

Looking to the broader statutory text beyond PSL § 66-p, Staff asserts that greenhouse gas emissions reduction, renewables deployment, and the designation of Disadvantaged Communities ("DACs") are "primary" purposes of the CLCPA, whereas the regulation of other air pollutants is a mere "secondary" purpose.[9] But Staff does not explain why the reduction of air pollutants in the state's electrical demand system would be contrary to any of these other purposes of the CLCPA. Instead, by assigning "zero emissions" its ordinary meaning the Legislature plainly sought to simultaneously advance the various purposes of the CLCPA from reducing GHG emissions, to protecting disadvantaged communities, to reducing air pollutant emissions more generally.

Rather than reading the CLCPA as a kind of grab-bag with several disparate, compartmentalized statutory purposes, it is only rational to construe the statute as a coherent whole.[10] The four statutory purposes described by Staff are inextricably linked. The Legislature directed the state to undertake a multi-decade program to transform the state's energy system. In doing so, the Legislature understood that this ambitious program would help the State avoid or mitigate enormous future costs of climate change, such as the "exacerbation of air pollution" anticipated in the CLCPA's legislative findings.[11] The Legislature also recognized that New Yorkers would be more likely to support this transition if the State could point to immediate, local benefits for New Yorkers[12]--especially if those benefits were distributed across the State in

[5] *See* August 2023 Comments at 3–5; *see also* February 2024 Comments at 4.
[6] *See* DPS Staff Proposed Definitions at 13 (citing *People v. Holz*, 35 N.Y.3d 55, 59, 148 N.E.3d 513 (2020)).
[7] *See People v. Holz*, 35 N.Y.3d 55, 59 (2020).
[8] *See People v. Addison*, 51 Misc. 3d 498, 503 (Sup. Ct. Bronx Cnty. 2016) ("[T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.") (citation omitted).
[9] *See* DPS Staff Proposed Definitions at 14.
[10] *See Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 N.Y.3d 1, 7 (2019) ("[S]tatutory language should be harmonized.") (citation omitted).
[11] *See* CLCPA § 1(1)(e).
[12] *See, e.g.*, ECL §§ 75-0103(14)(b), 75-0119(c), (g).

a fair manner.[13] The maximal reduction of air pollutant burdens throughout New York is a primary local benefit offered by the act.[14] The various terms of the CLCPA referring to co-pollutants, the community air monitoring program,[15] and the zero emissions mandate are just a few of the provisions of the CLCPA that empower and mandate the State to improve local air quality as it acts to reduce GHG emissions between now and 2050.

A close reading of floor statements made by legislators who sponsored or voted in favor of the CLCPA confirms that the goal of reducing air pollution across New York was, in fact, quite important to the lawmakers who enacted the statute. The lead sponsor of the legislation in the State Senate, Senator Kaminsky, explained his support for the law by stating "[o]ur *air* has suffered, our climate has suffered, and our future will suffer immeasurably if we don't do something." State Senators Sepúlveda,[16] Bailey,[17] Biaggi,[18] Comrie,[19] and Ramos also all linked their votes in favor of the CLCPA to their concerns about air quality or respiratory illnesses. Senator Ramos was especially direct, stating:

> I'm voting in the affirmative because at least 4,000 people die every day in New York from illnesses related to pollution, and my district is no exception. Because we have a facility that spews fossil fuels into our air.[20]

It is apparent from this statement that when voting in favor of the CLCPA, Senator Ramos did not expect the local fossil fuel-fired facility plaguing her constituents to be replaced with a zero-GHG facility that similarly pollutes local air and contributes to respiratory illnesses.

On the State Assembly floor, Assemblymember Englebright's statement that "we've… set in the bill a target of achieving 100 percent *renewable* energy" is also telling.[21] The bill's leading

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[13] *See, e.g.*, CLCPA § 1(7), (10); ECL §§ 75-0109(3)(a), 75-0117; PSL § 66-p(7)(a).
[14] *See, e.g.*, ECL § 75-0109(4)(h) (noting that greenhouse gas emission offset projects approved by DEC must not only reduce GHG's, but also "enhance the conditions of the ecosystem or geographic area adversely affected; and []substantially reduce or prevent the generation or release of pollutants through source reduction").
[15] *See id.* § 75-0115.
[16] *See* New York State Senate Transcript at 6440-41 (June 18, 2019 1:56 p.m.) (lamenting asthma and pollution suffered by constituents noting that "with the CLCPA, there's reason for hope"), https://legislation.nysenate.gov/pdf/ transcripts/2019-06-18T13:56/ (hereinafter "Senate Transcript").
[17] *See id.* at 6446–48 ("… air quality are so much lower in communities of color. And we have to find a way to make communities of color understand that climate change is real, that environmental racism has been happening and it will continue to happen unless we put a stop to it. And I think this bill is going to start those necessary conversations and components of it. You know, I remember, growing up, watching a cartoon called Captain Planet. And they said: 'Captain Planet, he's our hero, going to take pollution down to zero.'").
[18] *See id.* at 6459 ("…without a planet that is healthy and that can sustain the test of time, rent laws and other issues that we take up won't even be relevant because we won't even have clean air to breathe.…in Hunts Point, the air is dirtier, the air creates so many problems for the people who live in that community. And I am so proud to be taking such a bold step forward with all of my colleagues here today.").
[19] *See id.* at 6450 ("I'm going to thank Senator Kaminsky for … understanding that this is the basis for a lot of work that has to be done for us … to relieve the scourge of airborne diseases in our community.").
[20] *See id.* at 6443.
[21] *See* New York State Assembly Transcript at 401 (June 19, 2019 10:03 a.m.), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/6-19-19.html (emphasis added) (hereinafter

sponsor in the lower legislative chamber apparently assumed and intended that a carbon-free electrical demand system would be powered by sources that do not generate other harmful air pollutants. Assemblymember Englebright also stressed that meeting the CLCPA's renewables targets would "have many benefits, including… better health outcomes for our citizens."[22]

Assemblymember Latrice Walker, another bill sponsor, explained her vote for the CLCPA with a lamentation that "polluting power plants" trigger "asthma attacks and lung disease among New York's most vulnerable communities."[23] She added that such health burdens themselves make New Yorkers "less prepared to deal with the impacts of climate change."[24] Assemblymember Ortiz echoed Assemblymember Walker's concerns about respiratory illnesses stating that "I hope that with this particular bill and the projection of emission reduction in the future, we will be able to accomplish our mission of reducing asthma not only in my district, but throughout the state of New York."[25] Finally, Assemblymember Blake, after mulling "the opportunities of zero emissions" noted that the effort to pass the CLCPA would give "us a chance to live and *breathe* better."[26]

A textually faithful reading of "zero emissions," ascribing the term its ordinary meaning, effectuates the obvious intent of these legislators to enact a statute that improves New York's local air quality while contributing to the global effort to reduce GHG emissions.

2. *The Commission's Obligation to Consider Co-Pollutants Notwithstanding the Definition of Zero Emissions*

It is worth noting that even Staff acknowledges that "the Climate Act identifies co-pollutants as a factor to weigh when choosing among regulatory measures."[27] It is presently unclear whether and to what extent PSC is weighing the impacts of co-pollutants as it chooses among regulatory measures for meeting the 2040 mandate. Here, Commenters remind PSC that the agency has an independent regulatory obligation to reduce local air pollution in DACs, which is apparent from the text of CLCPA § 7(3). The Commission must explain the steps it plans to take to ensure that air quality in DACs across the state will improve as the agency deploys zero emissions sources between now and 2040.

III. Statewide Electrical Demand System:

The term "statewide electrical demand system" should be broadly construed to support achievement of the Climate Act emissions mandates and to avoid creating loopholes that can undermine achievement of these mandates. As the final Scoping Plan makes clear, electrification

"Assembly Transcript"). Assemblymember Barclay, an opponent of the bill, apparently shared Englebright's reading of the statute. *See Id.* at 349 ("I understand what the bill is trying to do as far as the energy producers, electricity, want to move towards renewables.").

[22] *See id.* at 343.
[23] *See id.* at 419.
[24] *See id.* at 420.
[25] *See id.*at 437.
[26] *See id.* at 443 (emphasis added).
[27] *See* DPS Staff Proposed Definitions at 14.

is an "essential part" of any pathway that achieves the CLCPA's emissions limits.[28] Construing the "statewide electrical demand system" broadly to cover all resources serving electricity demand in New York state will ensure that the zero emissions electricity mandate is able to carry out this core function.[29] While Commenters support DPS Staff's proposed inclusion of most imported electricity within the scope of the "state wide electrical demand system,"[30] Commenters are concerned that Staff's narrow approach to the scope of the term as applied to behind-the-meter resources unnecessarily and imprudently excludes resources that affect the State's ability to achieve its climate mandates.

In particular, DPS Staff observe that the Climate Act did not "alter the extent of the Commission's jurisdiction" and suggest that the "Commission should, therefore, carry out its responsibilities under PSL § 66-p within the bounds of its jurisdictional constraints."[31] While DPS Staff are correct that the Commission must act within its jurisdiction, that does not mean that the definition of the term "statewide electrical demand system" must be coterminous with the boundaries of that jurisdiction as a legal or functional matter. Indeed, the word "jurisdictional"—used in § 66-p(2)(a) to describe the contours of the 70 percent by 2030 renewable generation requirement—is conspicuously absent from § 66-p(2)(b)'s phrase "statewide electrical demand system." In particular, contrary to DPS Staff's recommendation,[32] Commenters urge the Commission to ensure that sources that participate *indirectly* in jurisdictional markets—for example as back-up generation in jurisdictional demand response programs—are compliant with the definition of "zero emissions" as that term is used in the Climate Act, and submit that the Commission has the ability to influence the emissions from these resources independent of whether the resources themselves directly fall within the Commission's jurisdiction.

First, resources that participate indirectly in jurisdictional markets must be incorporated within the "statewide electrical demand system" because they implicate the Commission's legal obligation to provide safe and reliable access to electricity at rates that are just and reasonable.[33] While DPS Staff interprets this obligation to limit the scope of the "statewide electrical demand system" to resources that participate *directly* in those jurisdictional markets,[34] resources that participate *indirectly* in these markets can have significant rate impacts as well. Entities can currently participate in demand response programs by shifting from grid power to on-site backup generation. If that backup generation is fossil-fueled, as is frequently the case, electric customers are effectively paying for non-Climate Act-compliant resources. Indeed, DPS Staff expressly identify the potential opportunity "to arbitrage emitting backup power for cleaner grid-based power" through participation in demand response programs.[35] Enabling such arbitrage opportunities by excluding backup generators participating indirectly in demand response programs would result in unjust and unreasonable electric rates, and necessitates incorporating

[28] N.Y. Climate Action Council, Scoping Plan 3 (Dec. 2022), https://climate.ny.gov/-/media/Project/Climate/Files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf.
[29] *See* February 2024 Comments.
[30] DPS Staff Proposed Definitions at 9–11.
[31] *Id*. at 4.
[32] *Id*. at 12.
[33] *Id*. at 5.
[34] *Id*. at 12.
[35] *Id*.

these backup generation resources within the scope of the "statewide electrical demand system" to prevent this outcome.

Second, exclusion of behind the meter resources that participate indirectly in jurisdictional markets has the potential to create a significant loophole that would thwart efforts to meet the emission reduction requirements of the CLCPA. In the context of imported electricity, DPS Staff reasoned that excluding this electricity would be "inconsistent with the Climate Act," which defines New York's greenhouse gas emissions to include those "produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state."[36] Moreover, DPS Staff noted that "ignoring these emissions would create a potent perverse effect, inviting the State's power sector to 'comply' with emissions limits by merely ensuring that all emissions occur outside of New York's borders," which, as Staff points out, "would be wholly at odds with the logic of the Climate Act . . . ."[37]

The same concerns and logic apply to backup generation that participates indirectly in jurisdictional markets. The emissions from these backup units unquestionably fall within the scope of greenhouse gas emissions and local air pollutants covered by the Climate Act, and as DPS Staff notes,[38] the exclusion of these facilities creates similar market opportunities to excluding electricity imports. To avoid similarly incentivizing gaming of the definition by simply shifting emissions to sources outside of the scope of the "statewide electrical demand system," the definition must extend to these behind-the-meter resources as well.

Third, DPS Staff acknowledges that behind-the-meter resources participating indirectly in jurisdictional markets would be encompassed within the phrase "statewide electrical demand" but that the inclusion of the word "system" constrains the scope to resources that "participate in the operation of the statewide electric grid and do so in a routinized or systematic way."[39] But resources that enable participation in jurisdictional markets—by allowing an entity to receive compensation through a demand response program—*do* participate in the operation of the statewide electric grid "in a routinized or systematic way." They are systematic in that many are or can be run regularly, many others operate during extreme (and increasingly frequent) weather events, and their operations can have significant impacts on the system, especially for large loads, which are growing. Especially with the latter, market signals are also systematic. Thus, even granting Staff's reasoning and interpretation are correct, these behind-the-meter resources should be included within the definition.

Finally, any jurisdictional concerns arising from inclusion of behind the meter resources that participate indirectly in jurisdictional markets can be addressed through the rules governing those markets, as DPS Staff appears to recognize.[40] For example, whether or not a fossil backup generator's output falls directly under the Commission's jurisdiction, if its owner is relying on

[36] *Id*. at 9.
[37] *Id*. at 10.
[38] *Id*. at 12.
[39] *Id*. at 9.
[40] *Id*.at 12 (noting that program rules for demand response programs could be updated to eliminate incentives for arbitrage).

that facility to receive compensation through a jurisdictional demand response program, the Commission could limit the resource's participation in the jurisdictional program by requiring its owner to certify the generator's compliance with the Climate Act's zero emissions mandates.

IV. Next Steps

Commenters support DPS Staff's efforts to plan for successful achievement of the provisions of PSL § 66-p, including the zero by 2040 mandate,[41] which is an integral component of the long-term emission reductions mandated by the Climate Act. As Staff notes, forecasts of the magnitude of the "gap" that must be filled by dispatchable emissions-free resources ("DEFRs") vary greatly.[42] Recent load forecasts have dramatically increased projected 2040 electricity demand, driven in significant part not only by predicted electrification of buildings and transportation, but also hydrogen production, cryptocurrency mining, and data centers.[43]

As the New York Independent System Operator ("NYISO") observes in its System & Resource Outlook, enabling "load flexibility"—the ability to move load from times of greater system demand to times of lower demand or higher renewable energy production— "can significantly reduce the generation capacity buildout required."[44] Commenters encourage further analysis of the role that load flexibility can play in mitigating the forecasted DEFR gap. Commenters applaud the Commission for proactively evaluating grid flexibility in the context of distributed resources in its recently-opened Grid of the Future docket (24-E-0165). The forthcoming grid flexibility study in that docket should provide important insights about the degree to which heat pump and electric vehicle load can be managed to minimize impacts on the grid. Commenters encourage the Commission to pursue a similar analysis for the large loads that are currently anticipated to interconnect to the grid in the coming years.

Beyond analyzing the role that grid and load flexibility can play in mitigating the need for additional generation resources, Commenters encourage the Commission to continue to prioritize achievement of the 2030 renewable energy mandate in the near term. The initial biennial review of the Clean Energy Standard, released in July 2024, identifies a number of concrete steps that the Commission can and should take to accelerate buildout of renewable energy resources in furtherance of the Climate Act's 70 percent requirement with all due haste, which were amplified and augmented by Commenters.[45] Implementing these recommendations will be critical to minimizing the DEFR gap. At the same time, Commenters strongly caution against authorizing the construction of new, long-lived generation resources today – 15 years before the mandate – that are inconsistent with DPS Staff's proposed definitions, as building out non-Climate Act consistent resources today would exacerbate the challenge of achieving a zero emission "statewide electrical demand system." Commenters look forward to responding to any

[41] *Id*. at 30–34.
[42] *Id*. at 32.
[43] NYISO, 2023-2042 System & Resource Outlook (The Outlook) at 32, Tbl. 10, 33 (July 23, 2024) https://www.nyiso.com/documents/20142/46037414/2023-2042-System-Resource-Outlook.pdf/8fb9d37a-dfac-a1a8-8b3f-63fbf4ef6167?t=1721752637474.
[44] *Id*. at 35.
[45] *See* Comments of Earthjustice on the Draft Clean Energy Standard Biennial Review, PSC Case No. 15-E-0302 (Sept. 23, 2024), Comments of Sierra Club and Natural Resources Defense Council Regarding Draft Clean Energy Standard Biennial Review, PSC Case No. 15-E-0302 (Sept. 23, 2024).

concrete proposals from the Commission and DPS Staff regarding near-term implementation of the Climate Act's zero by 2040 mandate.

Respectfully submitted,

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