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May 2, 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 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard

Dear Secretary Burgess:

Pursuant to the *Order Further Expanding Scope of Proceeding and Seeking* Comments issued by the New York State Public Service Commission, enclosed for filing in the above-referenced proceeding is Multiple Intervenors' Comments on Proposed Expedited Program to Require Customers to Subsidize Selected Nuclear Generation Facilities.

Respectfully submitted,

MULTIPLE INTERVENORS

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Counsel to Multiple Intervenors

MBM/dp
Attachment
cc: Active Parties (via E-Mail; w/attachment)
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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 ON PROPOSED EXPEDITED PROGRAM TO REQUIRE CUSTOMERS TO SUBSIDIZE SELECTED NUCLEAR GENERATION FACILITIES

Dated: May 2, 2016

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PRELIMINARY STATEMENT

Pursuant to the *Order Further Expanding Scope of Proceeding and Seeking Comments* issued by the New York State Public Service Commission ("Commission") on February 24, 2016 ("Order") in Case 15-E-0302, Multiple Intervenors hereby submits its Comments on Proposed Expedited Program to Require Customers to Subsidize Selected Nuclear Generation Facilities.[1] For the reasons detailed within, Multiple Intervenors has numerous concerns pertaining to the proposals advanced within the Order for which comments were solicited.

On April 22, 2016, Multiple Intervenors submitted its Initial Comments on the *Staff White Paper on Clean Energy Standard* ("White Paper") issued by New York State Department of Public Service Staff ("Staff") in this proceeding. In those Initial Comments, Multiple Intervenors advanced positions raising concerns and objections regarding the Clean Energy Standard ("CES"), including proposals to subsidize selected nuclear generation facilities.[2] Multiple Intervenors will strive not to repeat those positions here but, rather, incorporates them by reference into these Comments.

As a result of the Order, the scope of this proceeding was expanded to address whether, and to what extent, electric customers should be forced to subsidize, on an expedited basis, "certain nuclear power plants that can demonstrate [a] lack of financial viability absent additional financial support." (Order at 1.) The Order also describes, and seeks comments on, a proposed expedited program to provide such subsidies. (*See id.* and Appendix.)

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[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*, *e.g.*, Case 15-E-0302, *supra*, Multiple Intervenors' Initial Comments on White Paper (dated April 22, 2016) at 4-5, 35-41.

Initially, Multiple Intervenors notes that the Order contains certain statements for which no factual basis has been presented and, separately, for which circumstances have changed materially since the Order was issued. For instance, in discussing fossil fuel usage (*i.e.*, oil, coal and/or natural gas), the Order states that: "The important role of nuclear power in contributing to fossil fuel displacement is not fully appreciated. While the fossil fuel usage has been displaced by increased production from zero-emission hydro and wind generation facilities, the greatest displacement has occurred as a result of increased production from zero-emission nuclear generation facilities." (Order at 3.) No factual support was proffered for this statement.

Multiple Intervenors contends that much of the State's fossil fuel usage has been displaced due to a combination of factors other than nuclear generation, including: (a) an aging fleet of fossil fuel generation facilities that are less-efficient than newer facilities; (b) increasingly-stringent and costly environmental requirements and regulations; (c) low natural gas prices, which are impacting detrimentally the comparative economics of oil- and coal-fired generation; (d) subsidized wind projects that have zero fuel costs; and (e) flat or decreasing electric demand in the State caused by a stagnant economy, a shrinking manufacturing base, and increased spending on energy efficiency. Significantly, however, no evidence has been presented that nuclear generation somehow is responsible for displacing a material amount of fossil fuel usage. In fact, inasmuch as the State's newest nuclear generating facility (*i.e.*, Nine Mile Point 2) is approximately 30 years old, any recent decrease in fossil fuel usage clearly is not the result of old nuclear generation facilities. To the contrary, it appears that the primary issues raised in the Order – *i.e.*, whether and to what extent customers should subsidize selected nuclear generation facilities – reflects the fact that low-priced natural gas is causing the economic displacement of nuclear generation.[3]

Additionally, the Order relies upon a February 11, 2016 assessment by the New York Independent System Operator, Inc. ("NYISO") of the planned deactivation of the James A. FitzPatrick Nuclear Generating Facility ("FitzPatrick"). (Order at 3-4.) The Order states that the NYISO "concluded that loss of the FitzPatrick plant along with a number of other plant retirements creates a statewide resource deficiency that constitutes a Reliability Need that would occur starting in 2019." (*Id.*; footnote omitted.)

Importantly, however, subsequent to the issuance of the Order, the NYISO revised its assessment of FitzPatrick's planned deactivation. Utilizing an updated load forecast, the NYISO concluded that the loss of FitzPatrick would <u>not</u> create a Reliability Need. The NYISO's revised assessment states that:

> The NYISO assessed the resource adequacy of the overall system, per the one-day-in-ten-years (0.1 per year) Loss of Load Expectation (LOLE) criterion, which measures the probability of disconnecting firm load due to a resource deficiency. No resource adequacy related Reliability Needs were identified in the near-term period.
>
> Additionally, the NYISO performed a transmission security assessment for the Bulk Power Transmission Facilities (BPTFs), and National Grid and NYPA each performed a transmission security assessment of their non-BPTFs. The NYISO reviewed and verified the analysis performed by National Grid and NYPA. No

[3] This conclusion is supported by the Staff White Paper, which states at page 28 that: "The low natural gas prices and the concomitant low electric wholesale energy market prices have led to lower revenues for all generators. This is an especially significant problem for upstate nuclear plants, which rely heavily on energy revenue margins to maintain their financial viability. The current market environment has resulted in multiple plant closure announcements in upstate New York and New England."

> transmission security related Reliability Needs were identified in the near-term period.[4]
>
> This analysis does not identify resource adequacy or transmission security-related Reliability Needs for the near-term period from 2016 through 2020.

Thus, the NYISO has concluded that the planned deactivation of FitzPatrick will not jeopardize electric reliability. Therefore, there are no reliability-related reasons to subsidize the continued operation of that facility.

Despite the shaky factual foundation for its conclusions, in the Order the Commission states that it "is concerned that the need for maintenance support [for selected nuclear generation facilities] is reaching a critical turning point such that expedited action is necessary. Nuclear power plant operation is highly dependent on pre-scheduled fuel cycles, therefore certainty as to the availability and level of maintenance support may be critical to the decision of plant operators to order fuel and commence future cycles." (Order at 4.) Consequently, the Commission has decided to consider an expedited program to force customers to subsidize selected nuclear generation and facilities and is soliciting comments on such program, which is set forth in an appendix to the Order. (*Id.* at 5-6 and Appendix.) As detailed in the Comments below, Multiple Intervenors urges that the proposed expedited program be modified in certain important respects.

[4] NYISO, *Generator Deactivation Assessment: James A. FitzPatrick Nuclear Generating Facility* (revised April 22, 2016) at 2-3 (citation omitted).

ARGUMENT

MULTIPLE INTERVENORS' COMMENTS ON PROPOSED EXPEDITED PROGRAM TO REQUIRE CUSTOMERS TO SUBSIDIZE SELECTED NUCLEAR GENERATION FACILITIES

Annexed to the Order is an Appendix setting forth a proposed expedited program to force customers to subsidize selected nuclear generation facilities. Multiple Intervenors' Comments on such proposed program are set forth below.

Initially, Multiple Intervenors disputes that a compelling case for forcing customers to subsidize nuclear generation facilities has been advanced to date. The State's electric utilities were pressured to divest their major generating facilities, including all of the existing nuclear generation facilities, quite some time ago in furtherance of policies that would unbundle generation and delivery service. Customers purportedly would benefit from such unbundling because the risk of developing, operating and maintaining generation facilities would be transferred away from utilities and their customers and onto developers willing to assume such risks. During times of high electricity prices – and, in particular, much-higher gas prices – nuclear generation facilities generally were believed to be profitable, sometimes highly profitable. Whatever profits the owners of New York's nuclear generation fleet experienced during those years flowed to the sole benefit of their shareholders, irrespective of customer impacts when wholesale electricity prices were high. Now, during periods of low gas prices and low wholesale electricity prices, proposals are being advanced to force captive customers to subsidize selected nuclear generation facilities at a potential cost that has yet to be determined or disclosed, but which may be substantial.

The policies and potential precedents at stake here warrant further consideration, as opposed to being mandated on an expedited basis. While New York's wholesale competitive markets arguably have benefitted consumers, utility customers should not be called on to bail out unregulated generators that have benefitted in the past from high-priced markets absent a demonstrated reliability need. To the extent the deactivation of a generation facility were to create an exigent reliability need, there is recourse to Reliability-Must-Run contracts to ensure that reliability is maintained. Here, however, proposals are being advanced that customers be forced to subsidize selected nuclear generation facilities based on a desire to retain a certain environmental attribute (*i.e.*, carbon-free emissions), while disregarding entirely all other environmental considerations associated with nuclear power, either positive or negative. In Multiple Intervenors' opinion, this creates a potentially-undesirable precedent of forcing customers to be the economic guarantors of merchant generation facilities.

Importantly, Multiple Intervenors recognizes that the possible subsidization of selected nuclear generation facilities for a limited duration may be in customers' best interests based on purely economic reasons (*i.e.*, without reliance on so-called externalities).[5] If that is the case, then such case should be advanced and subjected to rigorous and transparent analysis.[6]

Thus, for the foregoing reasons, as well as those advanced in Multiple Intervenors' Initial Comments on White Paper, Multiple Intervenors has concerns regarding proposals that customers be forced to subsidize selected nuclear generation facilities, and is opposed to an expedited process designed to rush aid to certain designated facilities. Without waiving those

[5] In its Initial Comments on White Paper, filed herein on April 22, 2016, Multiple Intervenors commented at page 37 that: "Multiple Intervenors acknowledges that reasonable minds can differ as to whether it is in customers' economic best interests to subsidize selected nuclear generating facilities for a limited period of time to ensure that they remain in operation. Indeed, under certain economic conditions – which may or may not exist here – Multiple Intervenors might agree that retaining selected nuclear generating facilities through temporary and limited subsidies is worthwhile."

[6] Multiple Intervenors has numerous concerns regarding the *Clean Energy Standard White Paper – Cost Study* that was issued previously in this proceeding. Multiple Intervenors will be submitting comments on said Cost Study by the currently-applicable June 6, 2016 filing deadline.

concerns or any of its rights, Multiple Intervenors hereby focuses the remainder of these Comments on the proposed program elements appended to the Order.

I. Definitions

Multiple Intervenors has two concerns regarding this section of the Appendix. First, the definitions rely on the use of zero-emissions credits ("ZECs"). (Appendix at 1.) For the reasons set forth in Multiple Intervenors' Initial Comments on White Paper (at pages 37-39), the use of ZECs to subsidize nuclear generation facilities appears unduly complex and may be unnecessary, particularly when it is considered that: (a) the number of nuclear generation facilities justifying the need for customer-funded subsidies is expected to be very limited; (b) there is unlikely to be any competitive market for the trading of ZECs; and (c) in order to avoid the imposition of even-greater costs on customers, each nuclear generation facility receiving subsidies should be awarded a different tier of ZECs because one facility may require much less in subsidies than other facilities.

Second, "going forward costs" should be defined with much-greater specificity. The proposed definition – "costs a generating facility could avoid if it removed the facility from providing energy and capacity in the market" – leaves a considerable amount open to interpretation and, possibly, negotiation.[7]

II. General Description

Multiple Intervenors has several comments regarding this section of the Appendix.

First, it is proposed that qualifying nuclear generation facilities be subsidized via ZEC payments pursuant to "short-term contracts" and that the Commission will consider "facility

[7] Multiple Intervenors is concerned that negotiations of the amounts of subsidies to be paid to nuclear generation facilities will lead to prohibitively-expensive "settlements," particularly if customer representatives are excluded from such negotiations.

refueling cycles in determining the term of such contracts." (Appendix at 1.) Multiple Intervenors recommends that this section be clarified to provide that the term of any subsidy contract will not exceed – but may be less than – a single refueling cycle. There is no justification for committing to subsidies beyond a single refueling cycle. Furthermore, the economic analysis that may be relevant to one such cycle may not be relevant to any subsequent cycle.

Second, repayment – or "clawback" – provisions are needed. For instance, it is proposed that customers subsidize, *inter alia*, new capital costs of selected nuclear generation facilities. (*Id.*) Significantly, however, the lives of such capital projects may (and likely will) exceed a refueling cycle, and there may be no justification for continuing subsidies beyond the current cycle. In that situation, wholesale electricity prices may be higher, resulting in a facility previously deemed uneconomic becoming financially viable. Under such circumstances, if the previously-subsidized nuclear generation facility wishes to remain in the market as a merchant facility, it should be required to pay back to customers, at a minimum, the non-depreciated portion of capital projects, plus interest. Additional clawback provisions – particularly where excess earnings may be realized (*e.g.*, wholesale market revenues exceed projections) – seemingly also would be warranted.[8]

[8] The Appendix appears to recognize this potential omission when it proposes that: "The Commission may establish such other review and contract requirements as it shall deem, in its discretion, to be in the public interest, including, potentially, reasonable clawback provisions triggered if earnings levels during periods of support or for a reasonable period after periods of support are excessive, or for other purposes." (Appendix at 2.) Multiple Intervenors recommends that this provision be made stronger (*e.g.*, substituting "shall" or "may" and possibly detailing the clawback provisions that will be utilized). Multiple Intervenors contends that if customers are going be forced to make out-of-market subsidy payments to selected nuclear generation facilities because they purportedly are no longer economically viable, then customers should be entitled to a very-high percentage of any "excess" profits ultimately realized by those facilities.

Third, the proposed ceiling on compensation should be modified. The Appendix proposes that: "In no event shall such support be any more than the level otherwise required to encourage new renewable facilities." (Appendix at 2.) The scope of such ceiling is too narrow. Even if, *arguendo*, the sole focus of the Commission is on carbon reduction irrespective of costs to customers, the cost of other carbon-free alternatives still should be included in the ceiling. For instance, if an equivalent amount of incremental energy efficiency and/or emission-free demand response is achievable by 2030 at a lower cost than new renewable facilities, such lower cost should constitute the ceiling on payments to nuclear generation facilities.

Finally, the Appendix proposes that:

> The source of funds for this support, and the costs of administration of the contracts, may come from any of the following sources, if available:
> (i) Existing funds previously collected for other system benefits programs and made available by the Commission for that purpose;
> (ii) Charges imposed by the Commission on retail electric customers for that purpose; and
> (iii) Funds from other sources that become available to the Commission or to NYSERDA for that purpose.

(*Id.*) Multiple Intervenors strongly urges the Commission that if, *arguendo*, it decides to require customers to subsidize selected nuclear generation facilities, the funds utilized for such purpose should be reallocated from other system benefits programs or other funding sources that become available, and should not be the subject of new or incremental surcharges to customers.

The CES was mandated by Governor Cuomo in late-2015. The existing level of surcharges recovered currently from electric customers was set prior to that time by the Commission without benefit of knowing the enormous, additional costs that would be imposed on customers as a result of the CES. Had the Commission known of the CES, it may have adopted lower surcharge levels to fund other programs. In any event, to the extent that there are collected but uncommitted funds being held for the benefit of customers by NYSERDA, those funds should be utilized to cover the costs of subsidizing selected nuclear generation facilities. The repurposing of such funds would be wholly consistent with the "clean energy" purposes for which those funds were collected in the first place. Moreover, the reallocation of funds for such purposes is a far better alternative than adding to customers' existing (and already-substantial) burdens through the imposition of new or higher surcharges. Accordingly, existing retained funds – whether stemming from "system benefit" or other programs – should be the mandatory funding source for expedited subsidies to selected nuclear generation facilities, rather than the possible imposition of new or higher surcharges on customers.[9]

III. **Procedures**

Initially, Multiple Intervenors has no criticisms of the information proposed to be required and utilized in determining "the certification, selection and funding" of subsidized nuclear generation facilities. (Appendix at 2-3.) Prior to authorizing the collection and the expenditure of customer funds, the Commission and Staff should possess any and all desired information, within reason, to make such determinations. Moreover, to the extent nuclear generation facilities elect to apply to the Commission for customer-funded subsidies, they should be more than willing to disclose financial and related information deemed relevant by regulators.

The proposed procedures then provide that a Staff representative (*i.e.*, the Director of the Office of Electric, Gas and Water) would: (a) determine whether an applying nuclear generation facility is eligible for subsidies; and (b) make recommendations as to the magnitude of

[9] If, contrary to Multiple Intervenors' positions, the Commission elects to recover the costs of expedited subsidies to nuclear generation facilities from customers via surcharges or similar rate mechanisms, such costs should be allocated, subject to any previously-established exemptions (*e.g.*, New York Power Authority allocations – *see* Multiple Intervenors' Initial Comments on White Paper at 13-18), on a statewide basis because such facilities would not be retained to address local reliability issues but, rather, to assist in the achievement of a statewide objective.

subsidies that may be warranted. (Appendix at 4.) Thereafter, the proposed procedures call for the Commission to "apply the SAPA notice and comment provisions before making a final determination." Multiple Intervenors has two concerns regarding this proposed process.

First, it is not clear whether, and to what extent, financial information provided by subsidy-seeking nuclear generation facilities will be made available publicly. Inasmuch as customers may be forced to make out-of-market subsidy payments to these facilities, Multiple Intervenors submits that such information should be made public, similar to a utility being required to justify increased delivery rates in a rate proceeding.[10] If a nuclear (or technology) generation facility relies on wholesale market revenues as a merchant facility, there would be no rationale for requiring the submission or the disclosure of its financial information. If, however, that same facility claims that it is not economically viable and requires customer-funded subsidies to remain operational, then such facility no longer should be considered a merchant facility but, rather, should be treated as a regulated facility and the case for possibly subsidizing that facility with customer funds should be transparent. Additionally, if relevant financial information is not going to be made available publicly, then what is the purpose of the proposed notice and comment process? Multiple Intervenors contends that it would be difficult – if not impossible – for interested stakeholders, including customers being forced to pay the subsidies, to comment intelligibly on Staff's recommendations if none of the underlying financial information is made public.

Second, it also is not clear whether, and to what extent, Staff's recommendations will be based on negotiations with subsidy-seeking nuclear generation facilities. If Staff's recommendations to the Commission are based solely on its independent review of financial and

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[10] If Staff recommends that a nuclear generation facility applying for subsidies does not qualify for same, then there would be no need to disclose that facility's financial information.

related information, then this potential concern would not be applicable. If, however, Staff intends to enter into settlement-type negotiations with facilities, then such negotiations should be on notice to interested parties, including customers that would be funding the subsidies.

CONCLUSION

For all the foregoing reasons, as well as those advanced in its Initial Comments on White Paper, Multiple Intervenors has numerous objections and concerns regarding the CES and its proposed implementation, including proposals that, if adopted, could require customers to fund financial subsidies to selected nuclear generation facilities. Without waiving any of those objections and concerns, to the extent the Commission adopts an expedited process to subsidize selected nuclear generation facilities, it should modify the process proposed in the Appendix to the Order in a manner consistent with Multiple Intervenors' positions.

Dated: May 2, 2016
Albany, New York

Respectfully submitted,

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