STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Offshore Wind Energy	**Case 18-E-0071**
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 AND THE MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE

(I.D. Nos. PSC-26-23-00002-P; PSC-26-23-00003-P; and PSC-26-23-00004-P)

Dated: August 28, 2023

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PRELIMINARY STATEMENT

Multiple Intervenors[1] and the Municipal Electric Utilities Association of New York State[2] ("MEUA;" together, the "Customer Advocates") hereby submit these Comments to the New York State Public Service Commission ("Commission") in response to petitions filed in Cases 15-E-0302 and 18-E-0071 by the Alliance for Clean Energy New York ("ACENY"),[3] Sunrise Wind LLC ("Sunrise Wind"),[4] and, jointly, Empire Offshore Wind LLC ("Empire Wind") and Beacon Wind LLC ("Beacon Wind").[5] These Comments are submitted in accordance with the Notices of Proposed Rulemaking published in the June 28, 2023 edition of the *New York State Register* (I.D. Nos. PSC-26-23-00002-P; PSC-26-23-00003-P; and PSC-26-23-00004-P).

Petitioners seek to modify contracts that they (and, in the case of ACENY, its members) chose to compete for, bid on, negotiate, and voluntarily execute with the New York State Energy Research and Development Authority ("NYSERDA"). Petitioners now allege that failure to provide the relief requested would cause widespread project abandonment that would prevent New York from achieving mandatory clean energy objectives established by the

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1 Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

2 The MEUA is an association of 40 municipal corporations that operate municipal electric utilities in New York State. MEUA was formed to foster and advance the efficient operation of publicly owned and operated electric systems for public service. It is operated for the benefit of all members.

3 Case 15-E-0302, Proceeding on Motion of the Commission to Implement a large-Scale Renewable Program and a Clean Energy Standard, Petition of the Alliance for Clean Energy New York to Address Post COVID-19 Impacts on Renewable Development Economics and Contract Considerations (filed June 7, 2013) ("ACENY Petition").

4 Cases 15-E-0302, *supra*, and 18-E-0071, In the Matter of Offshore Wind Energy, Verified Petition of Sunrise Wind LLC for an Order Authorizing the New York State Energy Research and Development Authority to Amend the Offshore Wind Renewable Energy Certificate Purchase and Sale Agreement (filed June 7, 2023) ("Sunrise Wind Petition").

5 Cases 15-E-0302 and 18-E-0071, *supra*, Verified Petition for Expedited Approval of Enhanced Offshore Renewable Energy Credits (filed June 7, 2023) ("Empire Petition"). Empire Wind is developing the Empire Wind I and Empire Wind II offshore wind ("OSW") projects. Beacon Wind is developing the Beacon Wind I OSW project. Empire Wind and Beacon Wind collectively are referred to together in these comments as "Empire." Sunrise Wind and Empire collectively are referred to herein as the "OSW Petitioners." The term "Petitioners" as used herein refers to ACENY and the OSW Petitioners.

Community Leadership and Climate Protection Act ("CLCPA"), including the "70x30 Target" that requires 70% of energy consumed by end-use customers in the State to be derived from renewable energy systems by 2030.[6]

The contracts held by members of ACENY relate to the purchase and sale of renewable energy credits ("RECs") from onshore wind and solar generating facilities. Contracts held by the OSW Petitioners are for the purchase and sale of OSW RECs ("ORECs;" collectively, the "REC/OREC Agreements").[7] The OREC Petitions did not estimate the cost impact of the contract modifications proposed therein, while ACENY did. However, using (i) information disclosed in the less-redacted update to its original petition that Sunrise Wind submitted in response to the Motion to Compel Disclosure filed by Multiple Intervenors and the City of New York,[8] (ii) information available in the OREC Agreements, which are public documents, and (iii) an assumption that the strike price for each of the Empire projects would increase by at least $27.50/MWh as a conservative estimate because that value is the approximate incremental increase that Sunrise Wind is seeking for its project,[9] the incremental cost of Petitioners' proposals may be

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6 N.Y. Pub. Serv. Law § 66-p(2).

7 The Sunrise Wind Petition and the Empire Petition collectively are referred to herein as the "OREC Petitions" and, together with the ACENY Petition, the "Petitions."

8 Cases 15-E-0302 and 18-E-0071, *supra*, Motion to Compel Disclosure (filed July 27, 2023), *and* Verified Petition of Sunrise Wind LLC for an Order Authorizing the New York State Energy Research and Development Authority to Amend the Offshore Wind Renewable Energy Certificate Purchase and Sale Agreement (filed August 4, 2023). The term "Sunrise Wind Petition" hereinafter refers to this updated, less-redacted petition unless noted otherwise. Empire similarly responded to the Motion by filing a less-redacted version of its petition on August 4, 2023. The term "Empire Petition" responds to this updated petition unless noted otherwise.

9 Utilizing the Sunrise Wind estimated, proposed cost increase of $27.50/MWh for Empire appears conservative because Empire is proposing far more extensive contract modifications than Sunrise Wind that, if approved, likely would result in even larger cost increases to customers.

estimated.[10] The results are summarized on the following table and explained more fully in Point II, *infra*:

Table 1. Estimated customer cost increases proposed by the REC/OREC Petitions.

Project	Annual Increase	Total Increase
Empire Wind I	$137.64 million	**$4.13 billion**
Empire Wind II	$174.39 million	**$5.23 billion**
Beacon Wind I	$182.05 million	**$5.46 billion**
Sunrise Wind	$133.70 million	**$3.34 billion**
ACENY	$486 million	**$5.8 billion**
TOTAL	**$1.11 billion**	**$23.96 billion**

ACENY argues that changed market conditions have rendered all of the onshore wind and solar generation facilities that are the subject of its petition (the "Under Development Projects") uneconomic despite conceding that (i) it did not examine the potential financial need of any specific project within that portfolio, (ii) some projects could be built without incremental compensation, and (iii) some projects will be canceled even if they are awarded incremental compensation as proposed.[11] ACENY proposes that a formulaic adjustment mechanism be applied to the REC Agreements that its member companies chose to compete for, bid on, negotiate, and

[10] Customer Advocates submit that it was the OSW Petitioners' obligation in the first instance to specify in their filings an estimate of the increased compensation they are requesting. Their choice to omit this information intentionally has left critical gaps in the record. It should not be the responsibility of parties or other entities to attempt to fill in these gaps. Customer Advocates estimated the incremental compensation requested by Sunrise Wind using its estimated change in strike price and the number of ORECs potentially available for annual sale, as described further in Point II, *infra*, because the numbers are readily available and the calculation requires minimal assumptions. Customer Advocates did not attempt to estimate the increased compensation requested for each project in the Empire Petition using the formulas presented therein because it would require too many assumptions regarding the inputs that should be used. Estimating the proposed increases using the change in strike price provided by Sunrise Wind as a conservative proxy value for the Empire projects is a more straightforward approach to estimating the cost impacts that Empire chose to exclude from its Petition.

[11] ACENY Petition, Aff. at P51, 53, 71, 74. The Under Development Projects are projects that competed for and were awarded a REC Agreement by NYSERDA, have not been cancelled, are not yet operational, and are not yet nearing operation. (*Id*. at P5 and P50.)

voluntarily execute, at an estimated, incremental customer cost of approximately **$5.8 billion**.[12] As proposed, the cost of solar RECs ultimately borne by customers would increase by 43%-73%, and the cost of onshore wind RECs (also borne by customers) would increase by 54%-71%.[13] Interestingly, ACENY submitted its petition on behalf of itself, as an organization, and not on behalf of any of its individual member companies.[14] In other words, the owners of the Under Development Projects are seeking to increase their customer-funded compensation by almost $6 billion, but none of them apparently are willing to be formally associated with such a request.[15]

Sunrise Wind describes similar market conditions and argues that two adjustment mechanisms should be applied to its OREC Agreement to offset these conditions and preserve its opportunity to fulfill its contractual obligations. The company did not estimate how much its proposals, if granted, would cost the customers that are paying for those above-market premiums or subsidies. However, the less-redacted petition that Sunrise Wind filed in response to the Motion to Compel Disclosure provided sufficient information to calculate that Sunrise Wind is requesting incremental customer-funded compensation of approximately **$3.34 billion**.[16]

Empire also alleges that changed market conditions threaten the viability of the three OSW generation projects that are being developed by Empire Wind and Beacon Wind. It asserts that Empire Wind and Beacon Wind may choose to abandon their contractual commitments

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12 ACENY Petition, Affidavit at P79.

13 *Id*. at Table 17. The costs of RECs and ORECs ultimately borne by customers is in addition to the economic cost of the output of renewable generation projects, as established typically in the State's wholesale electricity markets.

14 ACENY Petition at 5, n.11.

15 It is not clear how or why the Commission could consider modifying the contracts of numerous developers – making them more expensive to customers by almost $6 billion, without any new consideration flowing back to customers – when such developers technically are not even seeking such modifications in their own name. Customer Advocates recommend that, as a starting point, entities seeking financial giveaways from the Commission that would be borne by customers be required to advance such requests in their own name prior to having them even be considered for approval.

16 *See* Point II(B)(iii), *infra*.

to build and operate their respective offshore wind facilities unless their OREC Agreements are (i) extended by five years, and (ii) modified by the application of three formulaic adjustment mechanisms that would increase customer-funded payments.

Empire makes no attempt to estimate how much its proposals would cost the customers funding them and it refused Multiple Intervenors' effort to obtain basic information that is relevant to this request but was omitted from the Empire Petition.[17] Nevertheless, given that Empire seeks far more extensive contract modifications and longer contract terms for the OREC Agreements awarded to Empire Wind I, Empire Wind II, and Beacon Wind I, it is highly likely that the incremental customer cost for each of those OREC Agreements would exceed the incremental cost associated with Sunrise Wind's requests. If the incremental increase in strike price estimated by Sunrise Wind is used as a conservative measure of how much the Empire Wind and Beacon Wind strike prices might increase if their proposed contract modifications are approved, then the Empire Petition is seeking approximately **$14.8 billion** in incremental customer-funded compensation,[18] and very likely much more than this amount.

Customer Advocates' members generally support reasonable decarbonization efforts and the prudent development of renewable generation facilities, and many members are pursuing their own decarbonization and sustainability initiatives. The Commission is overseeing a large number of programs and initiatives to achieve the decarbonization mandates established by the CLCPA. Customer Advocates submit that implementation of the CLCPA requirements must be balanced with maintaining system reliability and energy affordability. Department of Public Service Staff ("Staff") reported recently that the Commission already has approved approximately

[17] Cases 15-E-0302 and 18-E-0071, *supra*, Objection of Empire Offshore Wind LLC and Beacon Wind LLC to Multiple Intervenors Information Requests (filed August 14, 2023) ("Empire Objection").

[18] *See* Point II(B)(ii), *infra*. The magnitude of this increase on a percentage basis is not clear.

$43.8 billion of funding obligations, that have been or will be paid by customers, in an effort to achieve a portion of the CLCPA requirements.[19] This amount does not include billions of dollars of known implementation costs including, *inter alia*, (i) certain transmission investments that were deemed necessary to serve public policy objectives, including the CLCPA, and (ii) the costs of Clean Energy Standard Tier 3 (the Zero Emission Credit program for nuclear generation facilities) from April 2022 through the program's scheduled expiration in March 2029.[20] It also does not include costs to achieve the remainder of the CLCPA requirements. Those costs remain unknown but undoubtedly will be significant.

The amount of customer funding already authorized by the Commission is staggering. Customers simply cannot afford to pay for all of the costs and risks that merchant developers should bear but are unwilling to assume, or to pay the billions of dollars of incremental funding that Petitioners seek in exchange for doing nothing other than potentially honoring the terms and conditions of contracts that they chose to negotiate and voluntarily execute at prices they themselves chose to bid. The Commission should not grant requests by private developers to increase their customer-funded compensation by potentially more than $20 billion based on unsupported and untested statements from the developers seeking more money, and one round of stakeholder comments responding to petitions that lack sufficient information to fully evaluate the claims advanced therein. If the Commission elects that course of action, it effectively would be signaling that energy affordability is secondary to protecting developers' financial interests.

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[19] Case 22-M-0149, Proceeding on Motion of the Commission Assessing Implementation of and Compliance with the Requirements and Targets of the Climate Leadership and Community Protection Act, New York State Department of Public Service First Annual Informational Report on Overall Implementation of the Climate Leadership and Community Protection Act (dated July 20, 2023) at 29, Table 8 ("CLCPA Report").

[20] *Id*.

In light of this backdrop, Customer Advocates respectfully urge the Commission, for the reasons detailed below, to: (i) deny the Petitions; (ii) direct NYSERDA to issue new competitive solicitations if needed to replace developers that terminate their contracts without increased compensation; (iii) direct NYSERDA to utilize, prospectively, contract terms with more onerous provisions governing termination and breach so that the State's efforts to comply with CLCPA mandates are less susceptible to developers' threats seeking increased compensation and/or decreased risk; and (iv) if the Commission considers granting some part of the relief requested in the Petitions notwithstanding an egregious lack of record evidence to support such decision, then it should conduct a comprehensive and transparent investigation of each project requesting increased compensation. New York State energy consumers deserve full transparency in this process including the level of relief sought by each individual developer, a demonstration that any such relief actually is needed but not excessive, and how relief granted, if any, ultimately impacts monthly electric bills (both individually and in conjunction with all of the other customer-funded programs and initiatives).[21]

[21] If such an investigation is conducted, the Commission should issue a Protective Order to facilitate the exchange of information in discovery. While recognizing that certain developer financial and cost information should be treated confidentially, discovery is wholly appropriate in this situation. Developers are seeking many billions of dollars of customer funds. Therefore, parties – particularly those representing customers – should have access to and be able to evaluate the claimed justifications for the petitions.

COMMENTS

POINT I

THE PSC MUST CONSIDER THE BILLIONS OF DOLLARS IN INCREASED COMPENSATION REQUESTED BY THE PETITIONS IN THE CONTEXT OF THE TENS OF BILLIONS OF DOLLARS THAT ELECTRIC CUSTOMERS ALREADY ARE COMMITTED TO FUNDING IN FURTHERANCE OF CLCPA OBJECTIVES

At a high level, the Commission must strike a balance among the public interests in energy affordability, system reliability, and decarbonization efforts. Too great a focus on any one of these objectives can create an imbalance that may be detrimental to the other two. Interests and priorities frequently can compete against each other and force difficult choices to preserve balance. An imbalance that arises from ignoring energy affordability, for instance, presents risks to the economic well-being of New York State and its citizens.[22]

The CLCPA Report recently issued by Staff and NYSERDA included a summary of utility customer funding that the Commission has authorized to date for this purpose:

[22] In a recent report, State Comptroller Thomas P. DeNapoli cautioned that it would "be important for policymakers charged with implementing the CLCPA to consider mechanisms to hold down the cost of meeting its goals on the State's electric consumers." Report by Comptroller DiNapoli, *Renewable Electricity in New York State: Review and Prospects* (dated August 2023) at 16 ("Comptroller Report"), *available at* https://www.osc.state.ny.us/files/reports/pdf/renewable-electricity-in-nys.pdf.

Table 2. The PSC Has Authorized Customer Payments Totaling Approximately $43.8 Billion to Achieve Part of the CLCPA Targets.[23]

Program	Total Funding Authorized To Date
Clean Energy Standard	$25.242 billion
Clean Energy Fund	$7.011 billion
EV Make Ready Program	$0.701 billion
Energy Storage	$0.394 billion
IEDR	$0.072 billion
Electric Energy Efficiency & Heat Pumps	$4.337 billion
Transmission Upgrades	$5.999 billion
TOTAL	**$43.756 billion**

Importantly, Table 2 excludes billions of dollars of additional costs that customers also have been obligated to fund in support of CLCPA implementation:

- Public Policy Transmission Needs ("PPTN") projects totaling approximately $4.77 billion for bulk transmission projects that improve the deliverability of renewable generation: (i) Long Island Export Offshore Wind PPTN, approximately $3.36 billion;[24] (ii) Empire State Line, approximately $0.180 billion;[25] and (iii) AC Transmission PPTN, approximately $1.23 billion.[26] Moreover, the cost of the recently-instituted New York City OSW PPTN may dwarf all New York State transmission projects that came before it.

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23 CLCPA Report at 29 (citations omitted).

24 *Id*.

25 Construction starts on $180m Empire State Line transmission works in US, Power Technology (dated March 22, 2021), *available at* https://www.power-technology.com/news/construction-starts-on-empire-state-line-us/.

26 Transmission Projects Ready to Go: Plugging Into America's Untapped Renewable Resources (dated April 2021) at 6, *available at* https://cleanenergygrid.org/wp-content/uploads/2019/04/Transmission-Projects-Ready-to-Go-Final.pdf.

- The above table reflects only the costs of Tier 3 of Clean Energy Standard (*i.e.*, the Zero-Emission Credit Program) through March 31, 2022. The cost of that program for the first five years of operation was $2.642 billion.[27] Significantly, however, the Commission authorized this program for an additional seven years through March 31, 2029, and may reauthorize it past that date.
- Earnings Adjustment Mechanisms for the benefit of utility shareholders estimated in the hundreds of millions of dollars for the purpose of incentivizing utilities to help achieve certain State clean energy objectives.[28]
- Utility customers are and will be funding out-of-market payments at an indeterminate cost (believed to be substantial) to incentivize/subsidize Distributed Energy Resources ("DER") through net energy metering arrangements and "value stack" compensation.[29]
- Utility customers are and will be funding an Electric Generation Facility Cessation Mitigation Program designed to "compensate" municipalities that lose tax base when generation facilities retire due to the transition to a cleaner electric system, at a cost of $112.5 million through 2030.[30]

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27 CLCPA Report at 29, n.1.

28 *See generally* Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016) at 53-93 (discussing and then mandating the use of EAMs).

29 *See generally* Case 15-E-0751, *In the Matter of the Value of Distributed Energy Resources*. *See also id.*, Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters (issued March 9, 2017) (addressing, and providing exemptions to, an eventual transition from net energy metering, and also establishing value stack compensation for certain DER).

30 *See* Case 20-E-0473, *In the Matter of Developing a Funding Mechanism for the Electric Generation Facility Cessation Mitigation Program*, Order Authorizing Funding for Electric Generation Facility Cessation Mitigation Program (issued February 11, 2021) (establishing a budget of $12.5 million per year through 2030 to be funded by electric customers statewide).

- The State currently is planning to adopt a "cap-and-invest" program that, depending upon its design and implementation, may raise wholesale electricity and natural gas supply prices significantly, resulting in tens of billions in additional energy costs annually to customers.[31] This program also has the potential to increase costs at the pump (transportation sector), and the costs to heat homes and businesses (building sector).
- The Commission currently is considering a proposal that would double the target energy storage capacity from what is mandated by the CLCPA at a projected incremental cost to customers (compared to the existing target) of between $1 billion and $1.7 billion.[32]

It is significant that several of the funding commitments identified in the CLCPA Report represent budgets that end in 2025 and could be extended and, potentially, increased in value (*e.g.*, EV Make Ready Program, Energy Storage, Utility Energy Efficiency and Clean Heat).[33] The foregoing programs and budgets will not be sufficient to achieve the CLCPA targets.

These funding commitments, however, already have had a material, adverse effect on customer bills. The CLCPA Report estimates that CLCPA costs alone have increased monthly electric bills by the following amounts:

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[31] *See, e.g., Greenhouse gas 'Cap and Invest' on West Coast has lessons for New York: High prices paid for emissions credits suggests spikes in gasoline, heating costs*, Times Union, Updated April 13, 2023, *available at* https://www.timesunion.com/business/article/greenhouse-gas-cap-invest-west-coast-lessons-17888660.php (noting that "planners in New York estimated that … the cost to consumers could include … an 80 percent jump in the price of natural gas). In New York, wholesale electricity prices track wholesale natural gas prices very closely; thus, a potential, sharp increase in natural gas prices also could lead to a potential, sharp increase in electricity prices.

[32] Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, New York's 6 GW Energy Storage Roadmap: Policy Options for Continued Growth in Energy Storage (dated December 28, 2022) at 7.

[33] CLCPA Report at 29.

Table 3. Monthly Electric Bill Impacts of CLCPA Implementation, by Customer Class and Service Territory.[34]

Utility	Large Commercial Customer	Large Industrial Customer	Small Commercial Customer	Residential Customer
Central Hudson Gas & Electric Corp.	8.0%	8.6%	7.3%	6.1%
New York State Electric & Gas Co.	9.6%	10.6%	7.8%	7.6%
Rochester Gas & Electric Corp.	9.3%	10.6%	6.6%	7.7%
Niagara Mohawk Power Corp.	11.8%	12.6%	9.2%	9.8%
Consolidated Edison Company of New York, Inc.	5.2%	6.0%	4.5%	4.4%
Orange & Rockland Utilities, Inc.	7.3%	8.4%	6.2%	6.1%

The aggregated cost impacts these programs and initiatives have on customers is staggering, and the impacts from many of them have yet to commence or come close to hitting their peaks. Indeed, the Clean Energy Standard Tier 4 contracts alone may more than double the above impacts for larger non-residential customers when those costs start appearing on customer bills. Moreover, the above impacts do not appear to reflect the costs of Petitioners' existing contracts for projects yet to enter service, let alone the massively higher costs associated with the contract modifications requested in the Petitions.[35]

The Petitions seek to add billions of dollars of incremental funding – estimated above at $23.96 billion, or more than 50 percent – to the more than $43.8 billion that customers already have been obligated to pay to achieve some portion of the CLCPA targets. Worse, Petitioners are asking the Commission to approve contract modifications without knowing the full

[34] CLCPA Report at 25-26. To calculate these impacts, the CLCPA Report assumed that (i) the large commercial customer has a monthly demand of 2 MW and consumes 720,000 kW per month, and (ii) the large industrial customer has a monthly demand of 2 MW and consumes 1,296,000 kWh per month. (*Id*. at 25.)

[35] Moreover, pursuant to Commission orders, the vast majority of these costs currently are being borne on a volumetric basis (irrespective of cost causation), which renders the State increasingly non-competitive with respect to energy costs charged to large non-residential customers, many of which have alternatives to conducting business in New York. Given the proliferation of new and future costs to be borne by utility customers, many energy-intensive customers are experiencing a "death by a thousand cuts" and Consumer Advocates are very concerned that any gains in economic activity attributable to the CLCPA may pale in comparison to losses in economic activity, and jobs, caused by policies that render energy less and less affordable.

magnitude or having any evidentiary record of the increases being sought. ACENY estimated that approving the proposed contract modifications for all Under Development Projects would cost customers approximately **$486 million annually, or total incremental costs of approximately $5.8 billion**.[36]

Each Petitioner seeks to increase the compensation paid under its REC/OREC Agreement according to a formula rather than by a specific dollar amount or percentage. This obscures the potential customer impact of Petitioners' proposals, both individually and collectively. It is imperative that the Commission determine the likely cost impact of those proposals, and evaluate them against the backdrop of (i) the tens of billions of dollars that the Commission already has obligated customers to pay in support of CLCPA targets, (ii) tens of billions (or more) still required to achieve those objectives, (iii) electric utility rates that already are high and are at risk of exploding from the additive effects of expanding cost drivers including, but not limited to, aging infrastructure and policy objectives,[37] and (iv) the fact that customers would receive nothing for these increased costs beyond Petitioners' performance of contracts they previously executed voluntarily.

POINT II

THE COMMISSION SHOULD DENY THE PETITIONS

The Petitions demand significant, incremental customer funding based on inadequate information and implicit threats that failure to grant the relief requested would make it

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[36] ACENY Petition, Affidavit at P80.

[37] *See, e.g.*, Case 23-E-0418, Central Hudson Gas & Electric Corporation – Electric Rates, Filing Letter (filed July 31, 2023) at 4 and n.1 (proposing to increase electric delivery rates by 31.6%); and Cases 22-E-0117 *et al.*, New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation – Electric Rates, Joint Proposal (filed June 14, 2023) at App. A (proposing to increase NYSEG and RG&E net base electric delivery rates by 17.1% and 11.0%, respectively, per year for three consecutive years).

difficult or impossible for New York to satisfy CLCPA requirements.[38] As detailed below, Petitioners agreed to develop and operate their respective projects at the contract prices they chose and should be held to account for those commitments. Petitioners collectively have failed to demonstrate a need for either increased compensation, or the amount of increased compensation that they would receive through application of the proposed adjustment mechanisms. Their arguments supporting the requested relief rely on speculation and their proposals inappropriately shift excessive cost and market risk to customers, thereby obliterating a key benefit of relying on competitive procurements to pursue State policy objectives.[39] Granting the relief sought by Petitioners would set terrible precedent that would harm customers for decades.

A. Petitioners Agreed to Develop and Operate Projects at Contract Prices

The Commission relies in part on competitive procurements conducted by NYSERDA to solicit and obtain the renewable generation projects necessary to achieve CLCPA mandates. Empire Wind, Beacon Wind, Sunrise Wind, and the developers that did not join the ACENY Petition but would benefit from the relief requested therein (i) elected to participate in those solicitations, (ii) chose how much to bid, and (iii) on their own, contractually committed to develop and operate their respective projects at the bid prices. Now, however, Petitioners are requesting contract modifications that, if adopted, would massively increase costs to customers

[38] *See, e.g.*, ACENY Petition at 5-6 (stating that "failure to redress these Post-COVID Impacts on the Under Development Projects will significantly delay the development of Tier 1 renewable resources … [a]nd, protracted project completion will drastically derail the schedule for renewable development, exacting shortfalls violative of CLCPA mandates"); and Empire Petition at 2 ("[t]o fulfill the Commission's statutory obligation to procure sufficient offshore wind to meet the goals" enacted in the CLCPA, the Commission should approve the proposed contract modifications).

[39] One of the purported benefits of the present competitive solicitation process is that the risk of cost overruns would be on the developers voluntarily entering into the contracts, not customers.

because Petitioners are no longer satisfied with the prices that they chose to bid and the risks that they chose to assume.[40]

The relief that Petitioners seek should be recognized as extraordinary and defective. They are seeking major, unilateral contract modifications for which no consideration is being offered (*i.e.*, they are not proposing to make any incremental contribution to State policy goals, provide any new benefit, or otherwise add anything to their existing obligations in exchange for billions of dollars of increased compensation), based on petitions that lack sufficient information to verify either the claimed need for relief or that the proposed adjustments would meet that purported need without exceeding it, and all pursuant to an expedited timeline that does not accord Staff or interested parties sufficient time to investigate their claims.[41] Moreover, Petitioners refused stakeholder efforts to obtain basic facts that would add some clarity regarding the amount of incremental compensation requested and the analyses used to determine the amount of and claimed need for increased customer payments.[42]

Under these circumstances, and without any record basis for the predicate findings necessary to consider granting the relief requested, the Commission should deny the Petitions and require Empire Wind, Beacon Wind, Sunrise Wind, and the companies that seek similar relief but did not join ACENY's Petition to fulfill their contractual obligations under the terms and conditions that they negotiated with NYSERDA. If they are no longer willing to honor those

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[40] This concern undoubtedly applies only to the downside risk described in the Petitions. For instance, if costs had declined rather than increased, it is unlikely that these companies would have requested or agreed to after-the-fact contract modifications that lowered the prices they would be paid.

[41] It is not yet known whether the Commission will accede to Petitioners' demand for a decision on the Petitions in October 2023; suffice it to say, most parties seeking a ruling from the Commission via petition do not get to dictate the timeframe for a resolution. It also is unknown whether the Comptroller's office could or would approve consideration-less contract modifications costing in the tens of billions of dollars.

[42] Empire Objection; Cases 15-E-0302 and 18-E-0071, *supra*, Sunrise Wind LLC's Objections to Multiple Intervenors' First Set of Information Requests (dated August 14, 2023) ("Sunrise Wind Objection"). ACENY responded informally to Multiple Intervenors with similar objections.

commitments, then replacement projects should be procured through new competitive solicitations as described *infra*. Petitioners' threats and requests for expedited action cannot be allowed to distract the Commission from its obligation to critically evaluate poorly-supported requests for billions of dollars of incremental customer funding.

B. Petitioners Failed to Demonstrate a Need for Increased Compensation

Each of the Petitions presents a general discussion of macroeconomic trends that purportedly have degraded the economic viability of their projects. None of the Petitioners, however, demonstrated that any particular project actually would be abandoned without the billions of dollars in increased compensation that they request. Given this failure to demonstrate a particularized need for relief, the Petitions should be denied.

Customer Advocates acknowledge the possibility that one or more renewable projects might be canceled if the Commission holds Petitioners to the terms of the contracts they entered into voluntarily at prices that they bid. The Clean Energy Standard procurement targets, however, were developed based on a 20% project attrition rate.[43] Between 2005 and April 2023, the actual attrition rate has been approximately 11.3% of contracted capacity, which is well below the design level.[44] Petitioners do not demonstrate that the attrition rate might increase to a level that meets or exceeds the assumed level of 20% if their requests are denied or that the output of their projects could not be replaced in new solicitations.

The Clean Energy Standard is not intended to guarantee project viability and there are projects that will fail whether or not they are awarded additional compensation, as

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[43] Case 15-E-0302, *supra*, Order Adopting Modifications to the Clean Energy Standard (issued October 15, 2020) at 24, 26-28 (assuming a 20% attrition rate) ("CES 2.0 Order").

[44] Comptroller Report at 2.

acknowledged by ACENY.[45] The Commission must not over-react to the Petitioners' threats of cancelled projects by awarding them with billions of dollars in increased compensation for which they have not demonstrated a need. If certain developers do terminate projects, the State response should be to conduct new solicitations to replace such capacity, as addressed, *infra*.

i. ACENY

ACENY argues that macroeconomic trends have rendered the entire portfolio of Under Development Projects uneconomic notwithstanding that ACENY did not investigate whether any specific project actually requires incremental compensation. ACENY acknowledges these deficiencies:

- ACENY did not examine the "specific circumstances faced by any individual renewable energy project or developer,"[46] despite acknowledging that the "specific impacts" of changing market conditions "will ultimately be unique to each project."[47]
- ACENY states that there are projects that "could be built even if no adjustment is awarded."[48]

Rather than examining whether any specific project actually would need incremental compensation to proceed, ACENY considered "the costs for renewable projects ***viewed holistically***" – *i.e.*, on a portfolio basis and not on a project-specific basis.[49] Relying on a portfolio-level analysis that uses assumptions and estimates rather than actual data from ACENY member

45 ACENY Petition, Affidavit at P51.

46 *Id*. at P6.

47 *Id*. at P53.

48 *Id*. at P51.

49 *Id*. at P54.

companies, ACENY argues that it is "reasonable" for the Commission "to presume Under Development Projects are no longer economically viable under their existing contract terms."[50] ACENY apparently made no attempt to determine which projects "could be built even if no adjustment is awarded" so that those projects could be excluded from its superficial analysis.[51]

To summarize, ACENY is asking the Commission to increase the Under Development Projects' REC prices by 43%-73% and to approve at least **$5.8 billion** of incremental customer funding without (i) making such request on behalf of the member companies that would benefit directly from the relief requested, or (ii) providing any actual data or analysis purporting to demonstrate that any specific project might no longer be economic. These omissions are particularly troubling given that ACENY did estimate how much additional money each project might receive if its petition is granted.[52]

There is simply no rational basis on which the Commission could reasonably conclude that ACENY has demonstrated that the Under Development Projects require the relief requested. In the absence of any analysis purporting to demonstrate that macroeconomic trends have rendered any specific project uneconomic, ACENY instead asks the Commission to make a leap of faith and assume that all of the Under Development Projects require relief to be developed and commence operations, including those projects that it concedes "could be built even if no

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50 ACENY Petition, Affidavit at P54. *See also id*. (claiming "it is reasonable to assume" that most or all of the Under Development Projects "are no longer viable at their original strike price….").

51 Under this reasoning, it apparently would be "reasonable" for the Commission to require electric customers to pay billions of dollars in increased costs to ACENY members irrespective of whether those members really need the money and/or choose not to honor the contracts they entered into voluntarily and at the prices they themselves bid. Customer Advocates disagree. The Commission is obligated to perform a thorough analysis before considering requests of this nature and magnitude.

52 ACENY Petition, Affidavit at Table 17 (estimating the REC price impacts) and P78 (explaining that, to calculate the potential rate impact of the proposed Adjustment Mechanism, the consultant used project MWh volumes specified in project Bid Quantities, and the REC price that NYSERDA reported for each Under Development Project except for projects selected in RESRPF20-1, for which NYSERDA has reported to date only the volume-weighted REC price).

adjustment is awarded." Even if, *arguendo*, ACENY had demonstrated that the Under Development Projects require certain relief to move forward and that the Commission should commit billions more in customer money for no consideration whatsoever, there is no analysis or justification demonstrating that the requested relief is not excessive for its proposed purpose. Ironically, in Commission rate proceedings, utilities are required to present more support, and be subject to discovery, for a particular expense level rising by $100,000. Here, in contrast, the Commission is asked to rule on increasing an expense by at least 200,000 times that amount without comparable support or discovery. The relief should be denied.

ii. Empire Wind / Beacon Wind

Empire identifies various increases in costs and risk that it asserts have impacted the Empire Wind I, Empire Wind II, and Beacon Wind I projects. The Empire Petition includes information that is redacted in the public filing but is described as presenting the changes in the real internal rate of return and nominal equity internal rate of return from the time of their OREC bids to NYSERDA to the first quarter of 2023.[53] Empire claims that "the real returns on each of the Projects have fallen far below the range that can reliably attract the investment necessary to move forward in a globally competitive market for capital."[54]

There are two critical omissions from Empire's petition. First, Empire does not present any information regarding the level of return that it considers necessary to "reliably attract" investment. Second, Empire does not claim that it has experienced any difficulty securing investment in any of the projects. Put differently, Empire argues that increased customer

[53] Empire Petition at 9-10.

[54] *Id*. at 10.

compensation is necessary to "reliably attract" investment, but it provides no evidence whatsoever that the affected companies have experienced any material difficulty securing investment.

As noted above, the incremental costs that Empire is proposing to impose on customers may be estimated. Given that Empire is proposing that its OREC Agreements should be modified with three different adjustment mechanisms, and the term of each contract should be extended by 5 years, it is reasonable to assume that the cost impacts would be greater than the incremental costs associated with Sunrise Wind's proposals. Assuming for this reason that the strike price increase of $27.50/MWh estimated by Sunrise Wind is a "floor" value for Empire, then the contract modifications proposed in the Empire Petition would increase customer costs as follows: (i) Empire Wind I, **$4.13 billion**;[55] (ii) Empire Wind II, **$5.23 billion**;[56] and (iii) Beacon Wind I, **$5.46 billion** (totaling **$14.82 billion**).[57]

Rather than demonstrating that the various projects require incremental compensation to be developed, Empire details the various ways in which its costs have increased, recounts the benefits that it promised to deliver under existing OREC Agreements with prices the companies selected for use in their bids, and includes redacted information that is described as showing a reduction in projected returns. Empire presents this information and, like ACENY, invites the Commission to make a gigantic leap of faith that billions of dollars of incremental

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[55] The OREC Agreements include two values for the number of ORECs that may be generated each year – the Annual OREC Cap and the P10 Annual OREC Exceedance. The Annual OREC Cap is the higher value and was used to calculate the maximum potential impact of Empire's proposals based on the assumption that the strike price reflected in each of the Empire Wind and Beacon Wind OREC Agreements would increase by $27.50/MWh. The actual impact is likely to be much higher than this conservative estimate. The estimates were calculated as follows: ($27.50/MWh) x (Annual OREC Cap) x (30 years), where each each OREC equals 1 MWh. For Empire Wind I, the calculation was: ($27.50/MWh) x (5,005,000 ORECs) x (30 years) = **$4.13 billion**.

[56] The incremental cost proposed for this project was estimated as follows: ($27.50/MWh) x (6,341,610 MWh) x (30 years) = **$5.23 billion**.

[57] The incremental cost proposed for this project was estimated as follows: ($27.50/MWh) x (6,619,910 MWh) x (30 years) = **$5.463 billion**.

customer funding, substantially reduced risk, and longer contract terms are necessary for the projects to move forward.

The Commission should decline to make this leap of faith. Empire has not demonstrated that any incremental compensation is necessary for the projects to be developed under existing contracts and there are reasons to be skeptical of the suggestion that they might not proceed without the relief requested.

As to the ability of these projects to attract investment, Equinor sold a 50% stake in the Empire Wind 1, Empire Wind 2, and Beacon Wind 1 projects to bp plc ("bp") in 2021 for $1.2 billion.[58] Equinor realized a gain of $1.1 billion from the transaction, of which $500 million was prepaid in December 2022.[59] In its Petition, Empire does not claim that it actually has had difficulty attracting investment, nor does it argue that Equinor or bp would be unable or unwilling to invest additional capital if the projects were to experience such difficulty. Customer Advocates submit that the sale to bp indicates that the projects are able to attract capital investment. In any event, Empire has provided insufficient evidence that the incremental funding is needed for the project to be developed pursuant to the OREC Agreement.

iii. Sunrise Wind

Sunrise Wind similarly claims that increased costs have caused a "deterioration" in the project's return on investment.[60] The company "believes" that the estimated spread between the project's IRR and its weighted average cost of capital ("WACC") is not sufficient for the

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[58] Equinor 2022 Integrated Annual Report at 155 ("Equinor Annual Report"), *available at* https://ml-eu.globenewswire.com/Resource/Download/284e00ec-c14a-4b4a-830e-344a16c645f9. Following the transaction, Equinor remains the project operator and holds a 50% interest in it. (*Id*.)

[59] *Id*. at 155.

[60] Sunrise Wind Petition at 34.

project to receive a positive Financial Investment Decision ("FID") from its investors.[61] Sunrise Wind thus avers that the project is unlikely to proceed without incremental compensation. This opinion is speculative, however, and Sunrise Wind has presented insufficient evidence that its investors will walk away.

The Commission cannot rely on characterizations of the IRR and spread to WACC estimates presented in the Sunrise Wind Petition as determinative of whether the project truly requires incremental compensation to obtain a positive FID. Aside from stating its opinion that current estimates of the project's spread to WACC might be inadequate to obtain a positive FID, Sunrise Wind presented no evidence that incremental compensation is needed for the project to be developed according to the terms and conditions of its current OREC Agreement, or that the requested, incremental compensation that ultimately would be borne by customers is no more than what truly is needed (assuming any modifications should be granted over Customer Advocates' opposition thereto).

C. Petitioners Failed to Demonstrate a Need for the Amount of Incremental Compensation They are Requesting

Aside from failing to demonstrate a need for *any* incremental compensation, the Petitioners also failed to demonstrate a need for the specific amounts of incremental compensation individual projects would receive. Petitioners have not provided the Commission with sufficient record evidence to justify increasing by any amount the transfer of money from captive ratepayers to private developers.

Each Petitioner proposes to increase the value of its REC/OREC Agreements through a formulaic adjustment mechanism. None of them, however, attempt to (i) quantify the

[61] Equinor Annual Report at 35.

amount of incremental compensation that their projects purportedly need to be viable, or (ii) link that claimed amount to the incremental compensation that they would receive under the adjustment mechanisms they propose. It is impossible to discern whether the proposed relief would approximate, or materially exceed, the claimed need. Each of the Petitioners thus failed to demonstrate that their proposals could be granted without potentially creating windfall profits for shareholders, particularly as market conditions are stabilizing but contract changes reactive to current conditions would persist for at least 25 years. These failures provide an additional, independent basis on which to reject the Petitions.[62]

D. Petitioners' Arguments Purporting to Justify the Relief Requested Rely on Speculation

To the extent that the Petitioners fail to specify the amount of incremental compensation they are seeking for each project and the amount of incremental compensation that each project would receive if the Petitions are granted, they are demanding that the Commission simply assume that it must grant relief in order to satisfy project investors. Many of the arguments underlying their claims are based on speculation and thus should be discounted accordingly.

First, threats of project abandonment are speculative. None of the Petitioners demonstrates that specific projects would fail without the relief requested. Petitioners instead trade on fear that project cancellations would make it virtually impossible to achieve the CLCPA's 70x30 Target on time and/or without significant incremental costs to customers, and threaten that those cancellations will happen unless the Commission grants many billions of dollars in incremental customer funding. ACENY concedes that some of the Under Development Projects would be built without incremental compensation and that it did not investigate whether any

[62] In at least some if not many circumstances, developers with REC or OREC contracts may have procured equipment and materials prior to the impacts of any inflationary processes (and, to the extent developers failed to do so, it is not at all clear why intervening cost increases now should become an obligation of customers).

specific project might need such relief to remain viable. ACENY nevertheless threatens that the "portfolio of Under Development Projects cannot be built" unless customers are forced to pay almost $6 billion in incremental costs to developers that would not even associate themselves publicly with ACENY's Petition.[63] The OSW Petitioners raise similar doubts about the viability of their respective projects but similarly fail to demonstrate that any of those projects actually cannot proceed under current contract terms. These projects might appear to be less profitable now than when they were selected for REC/OREC Agreements, but developers should not be guaranteed a specific, customer-funded rate of return. Also, there is risk inherent in project development and there should be no expectation or requirement that every proposed offshore or onshore renewable project will be made viable on the backs of ratepayers. Indeed, the fact that the CES design includes an estimated project attrition rate evidences a Commission expectation that a reasonable number of proposed renewable projects – 20% – will not proceed.

As noted above, the actual attrition rate of projects participating in the Clean Energy Standard is well below the amount assumed for purposes of establishing procurement levels to achieve the 70x30 Target. The State, therefore, apparently could remain on target to achieve that goal even if there is an increase in the number of project cancellations following a denial of the petitions. The State also could replace canceled projects with newer ones based on future competitive solicitations, which would be far more equitable than simply ignoring the allocation of risk and prices in existing, executed contracts and simply giving the prior winning bidders more money.

[63] *See, e.g.*, ACENY Petition at 5 (stating that "the portfolio of Under Development Projects cannot proceed economically on existing contract terms") and 25.

Petitioners allege that many projects canceled without relief either would not bid into future competitive procurements, or they would bid in at substantially higher costs. These allegations also are purely speculative and, in any event, treat all projects as if they are the same. They are not. If a developer elects to terminate its REC/OREC Agreement, it still could elect to respond to a future procurement to the extent it is permitted to do so. Future project bids would reflect updated market conditions. Given that inflation is levelling off and there is a strong demand for renewable energy, it is possible that future bids would be submitted with prices and timelines that support achievement of the 70x30 Target at a cost to customers that would be lower than the incremental compensation requested by the Petitioners (even if that amount is greater than the costs reflected in current REC/OREC Agreements).

E. Petitioners Inappropriately Seek to Shift Excessive Market Risk to Customers

The competitive solicitations authorized previously by the Commission were supposed to place market risks and the risk of cost overruns on developers, not customers. Petitioners, however, seek to shift market risks to customers by asking them to bear inflationary and other increases,[64] including for interconnection costs, despite the contracts at issue making no such provision. Empire requests the most expansive contract modifications and shift of risk to customers by seeking to extend its OREC Agreements by five years and to receive incremental compensation to offset inflationary increases potentially incurred during the project development

[64] *See, e.g.*, ACENY Petition at 6-7 (requesting approval of an Adjustment Mechanism to offset the effect of cost increases on Under Development Projects); Empire Petition at 2 (requesting that the OREC Agreements be modified to include mechanisms that adjust for inflation and interconnection costs, and that the contracts be extended by 5 years); and Sunrise Wind Petition at 1 (requesting that the OREC Agreement be modified to include inflation and interconnection cost adjustment mechanisms).

period, inflationary increases incurred during each year of project operation, and increased interconnection costs.[65]

These requests, if granted, would eliminate the benefits that the Commission sought from competition. When the Commission deregulated the electric industry in New York State, for instance, it stated that "[c]ompetitive providers (generators and energy service companies)" should "bear more of the risk of investment decisions, and customers less, than under regulation."[66] Balancing the allocation of risk between customers and shareholders continues to be an issue of concern for the Commission. Modifying the Petitions as proposed, however, would represent a significant and inappropriate shift in risk allocation from shareholders to customers and should be denied.[67]

Petitioners seemingly want to achieve a guaranteed return for projects they bid competitively. Guaranteed returns, however, typically involve a higher, not lower, standard of review. For example, cost of service regulation typically is reserved for monopoly providers who agree to undergo scrutiny light years beyond what the Petitioners have chosen to disclose or subject themselves to here. Importantly, the Commission considered, and rejected, this approach in fulfilling the CLCPA generation mandates. The Commission instead chose to rely on competition to minimize the costs and risk for customers. Petitioners now seek to turn that paradigm on its

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65 Empire Petition at 43-44.

66 Cases 94-E-0953 *et al.*, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996) at 30-31.

67 The balancing of risks is an essential element of contracts and presumably can impact contract prices. For instance, prospective reliance on contracts with inflationary-type adjustments – while arguably unfriendly to customers – at least establishes how certain risks will be balanced and such reduction of risks on developers may place some downward pressure on future prices. The circumstances here are altogether different. Here, the contracts at issue – and the prices reflected therein (which were bid by developers) – clearly place the risk of rising prices on developers, and the bids presumably reflected such risk. The Petitions seek to re-write the balancing of risks in existing contracts in order to extract what appears to be tens of billions of dollars in increased compensation merely in hopes that more developers will choose to do what they previously committed contractually to do.

head by shifting the consequences of their choices onto customers. If, *arguendo*, the Commission considers granting any part of these Petitions, it first should subject Petitioners' claims to the same level of scrutiny and public input accorded to monopoly providers. Only then could customers know whether the relief sought here is necessary, and no more than necessary, to ensure prudent investment.

F. Granting the Relief Requested Would Set Terrible Precedent

Developers competed for and voluntarily executed the REC/OREC Agreements. They should not be allowed to threaten abandonment of their projects to get more money out of their contracts. To the extent that one or more of the projects demanding increased compensation might have been selected based on unrealistic bids that did not accurately reflect the likely or potential costs to develop and operate their projects, they should not be allowed to hold state policy hostage and demand that the Commission bail them out – at customer expense – from bids that they chose to advance and agreed to honor contractually.

Granting the relief requested would encourage unreasonably low bids in future solicitations based on the expectation that the compensation actually needed to construct a project can be secured later by threatening to abandon a duly executed contract. Such a precedent also would be patently unfair to developers that were not selected in prior solicitations, but might have submitted more accurate bids that could still be honored today. While Customer Advocates urge that the Petitions be denied, under no circumstances should the Commission consider increasing contract payments above the level of the lowest bids that previously were rejected for being too costly.

Approving the Petitions would signal that the Commission is unwilling to enforce its contracts, and is willing to commit incremental customer funds even in the absence of any

consideration. This would encourage developers to seek contract modifications whenever they can provide a veneer of justification to shift costs and/or risks to customers. If the Commission grants the Petitions in whole or in part, it should not be surprised if one or more of the companies awarded relief return in the future to seek additional, incremental increases in customer-funded compensation. By creating an expectation that the Commission is willing to use customers as a financial backstop to shield developers from market risk – including market risk that developers assumed willingly in their contracts – the Commission would undermine the credibility of solicitations conducted under its purview.

The Commission should note that renewable project developers in other states also are demanding increased compensation under existing contracts, and many of these demands are being denied for reasons that include cost concerns. Neighboring states are not simply caving to developer demands for increased compensation. In Rhode Island, for instance, the state's largest utility (Rhode Island Energy) recently decided to end the negotiation of a power purchase agreement ("PPA") with Commonwealth Wind.[68] The utility concluded that economic factors such as higher interest rates and capital costs made the agreement too expensive for customers.[69] The decision was made in consultation with and agreement by the Rhode Island Office of Energy Resources and the Rhode Island Division of Public Utilities and Carriers.[70]

In Massachusetts, Avangrid agreed to pay termination fees of $48 million to the state's three major electric utilities in order to terminate the PPA executed for its proposed offshore

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[68] RI Energy rejects plan for nearly 1000 MW offshore wind project, wpri (dated July 19, 2023), *available at* https://www.wpri.com/target-12/ri-energy-rejects-plan-for-100mw-offshore-wind-project/#:~:text=PROVIDENCE%2C%20R.I.%20(WPRI)%20%E2%80%94,of%20line%20with%20state%20law.

[69] *Id.*

[70] *Id.*

wind project.[71] Although that agreement is pending regulatory review, it is supported by the state's Department of Energy Resources.[72] The state's Attorney General's office expressed concerns with placing the risk of building offshore wind facilities on customers.[73]

Projects that default on existing off-take agreements generally may elect to bid into future solicitations. Given a choice between enforcing the terms and conditions of existing contracts or allowing developers to hold state policy hostage in exchange for increased subsidies, Customer Advocates submit that the former option sets better precedent and is more consistent with the public interest.

POINT III

NYSERDA INSTEAD SHOULD ISSUE NEW COMPETITIVE SOLICITATIONS IF NEEDED TO REPLACE DEVELOPERS THAT TERMINATE THEIR CONTRACTS WITHOUT INCREASED COMPENSATION

Denying the Petitions would not necessarily prevent the State from achieving the 70x30 Target and other CLCPA mandates, nor would granting the Petitions guarantee that those mandates are satisfied. If the Commission declines to grant the Petitions as recommended herein, but finds that some replacement capacity is necessary to offset defaulted contracts, then it should issue competitive solicitations for new projects. To the extent allowed, some of the defaulting developers are likely to apply for selection in future solicitations.

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[71] Avangrid agrees to pay $48m to terminate offshore wind deal, CommonWealth (dated July 17, 2023), *available at* https://commonwealthmagazine.org/energy/avangrid-agrees-to-pay-48m-to-terminate-offshore-wind-deal/.

[72] Commonwealth Wind Receives Support from State Department of Energy Resources to Terminate Energy Contracts, EnergyPortal.eu (dated August 15, 2023), *available at* https://www.energyportal.eu/news/state-energy-department-supports-scrapping-wind-contract-the-new-bedford-light/160589/.

[73] *Id*.

A future competitive solicitation is the procedural option most likely to secure the projects needed to meet the State's targets. The competitive nature of solicitations maximizes the range of projects and prices that can be used to weed out the least cost-effective projects. In contrast, the Petitioners' propose a generic approach that would award developers with incremental, customer-funded compensation whether or not the need for and/or magnitude of such relief can be justified and regardless of whether the projects now represent the lowest-cost options.

The Commission also should consider modifying the REC/OREC Agreements to include enhanced termination fees. This would increase the likelihood that, moving forward, State compliance with CLCPA mandates and other objectives cannot so easily be held hostage by developers that contractually committed to develop and operate projects for prices that they themselves proposed and agreed to. The increased risk and cost inherent in such proposals can and should be included in developers' bids at the outset. Only then can the Commission and NYSERDA accurately evaluate and compare projects before choosing to award contracts.

POINT IV

IF THE PSC CONSIDERS GRANTING SOME PART OF THE RELIEF REQUESTED, THEN IT SHOULD CONDUCT A COMPREHENSIVE AND TRANSPARENT INVESTIGATION OF EACH PROJECT REQUESTING INCREASED SUBSIDIES TO DETERMINE WHETHER SUCH RELIEF ACTUALLY IS NEEDED AND NOT EXCESSIVE

If, notwithstanding the foregoing arguments against granting the Petitioners' requests for relief, the Commission elects to consider granting those requests in part or in full, then it is critical that the Commission conduct a comprehensive and transparent investigation into the claimed need for increased subsidies before it reaches any decision. Petitioners provide limited

data in support of claims that their respective projects require billions of dollars of incremental customer subsidies. There is no sign that Staff has sought additional information or otherwise initiated an investigation into Petitioners' claims and requests. Multiple Intervenors served on each Petitioner information requests that sought basic information regarding the justification for and the impact of their claims and proposals, but each Petitioner refused to respond to those requests based in part on arguments that discovery is procedurally improper in this instance.[74]

The "record" developed to date is woefully inadequate for the Commission to commit billions of dollars in incremental customer funds. The Commission has a statutory obligation to ensure that rates are just and reasonable and, therefore, it must investigate these requests and critically review project-specific financial information to determine whether a financial need exists and, if so, the true magnitude of that need. There is no other way for the Commission to determine whether the costs, and resulting rates, are just and reasonable.

The Commission should direct Staff to conduct a transparent investigation with additional information disclosed to parties to the proceeding. A protective order may be issued as needed to enable the review and consideration of information claimed to be confidential and exempt from disclosure under the State's Freedom of Information Law. Parties should have opportunities to conduct discovery and investigate Petitioners' claims and arguments. The Commission used this process before deciding whether certain nuclear generation facilities should be awarded customer-funded subsidies to continue operating,[75] and it should not consider granting the Petitions in whole or part without the benefit of a comprehensive – and transparent – factual

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[74] Sunrise Wind Objection; Empire Objection. ACENY responded informally with objections to Multiple Intervenors' information requests.

[75] Case 16-E-0270, 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 Plant, Ruling Adopting Protective Order (issued May 18, 2016).

record. Indeed, it is difficult to fathom the Commission modifying existing contracts outside of a competitive process to provide developers with potentially tens of billions of dollars in increased compensation – for no consideration – based solely on the Petitions and a single round of comments in response thereto.

The Commission should not rush into a decision based on an inadequate record in response to an arbitrary timeline demanded by offshore wind developers and an industry trade group (whose member companies individually did not join the petition seeking billions of dollars on their behalf). Instead, the Commission should take the time it needs to complete the review necessary to create a public record that provides a sufficient and rational basis for decisionmaking. Further, the Commission's Order on the Petitions should describe this investigation, summarize the results of same, and connect any findings from the investigation to decisions reached in the Order.

CONCLUSION

For the reasons detailed above, the Commission should decline to approve the Petitions. If, however, the Commission elects to consider granting the Petitions in whole or in part, it should conduct a full and transparent investigation into the claims and proposals advanced in the Petitions.

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Albany, New York

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