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July 22, 2016

Hon. Kathleen H. Burgess
Secretary to the Commission
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 Honorable Burgess,

Public Citizen, Inc. hereby submits comments in Case 15-E-0302, regarding a proposal by the New York Public Service Commission (NYPSC) to provide more than $4.6 billion to three of the state's existing, merchant nuclear power plants through a new Zero Emissions Credit (ZEC). Public Citizen strongly opposes the proposed ZEC as an inappropriate and expensive transfer of risk away from corporate shareholders and onto New York's more than 8 million ratepayers. The two owners of the three nuclear power plants, until recently, likely enjoyed significant profits from operating these facilities, and under the state's deregulation experiment, were under no obligation to share those earnings with ratepayers. It is inappropriate to assign risk to ratepayers only when the nuclear power plants are no longer profitable, and only assign risk to shareholders when the power plants earn money.

In order for the public to properly evaluate this ZEC subsidy proposal, the owners of the nuclear power plants—Illinois-based Exelon Corp and Louisiana-based Entergy Corp—must make available as part of this proceeding, full, unredacted balance sheet data for all three power plants since their acquisition (including eventual affiliates, such as Constellation Energy), so that the public can have a better understanding how much profit these facilities earned their shareholders over the years. Only after the public disclosure of the plants' historical profitability can the ZEC be properly evaluated, as shareholders of both Entergy and eventual affiliates of Exelon benefited mightily for years under rate deregulation, and it is imperative to assess what appropriate responsibilities those shareholders have now to help ensure reliability.

For years while the nuclear power plants were profitable, the assets transferred significant value to the out-of-state owners, bolstering their stock price and helping to fund cash dividends to shareholders. It cannot be the job of captive ratepayers alone to pay for reliability when shareholders were rewarded handsomely for years, especially when the owners of the nuclear power plants prioritized the investment of profits earned in New York for billions of dollars in dividends and stock repurchase programs to benefit shareholders—instead of investing more money into ensuring the reliability of the New York power market. If elements of ZEC-like program are warranted, then it should be funded with shareholder money, with historical windfall profits clawed back for that purpose.

About Public Citizen, Inc.

Public Citizen is a nonpartisan, not-for-profit research and advocacy organization headquartered in Washington, DC representing the interests of our more than 400,000 household members and supporters across the United States, including more than 30,000 in New York state. We frequently intervene in cases before the Federal Energy Regulatory Commission and state utility commissions to advocate those wholesale electric power market reforms that ensure fair and affordable rates for household consumers. Public Citizen Energy Program Director Tyson Slocum also serves on the U.S. Commodity Futures Trading Commission's Energy and Environmental Markets Advisory Committee, where he advises federal regulators on oil, natural gas, electric power and other commodity markets.

Background

On May 20, 1996, partly in response to efforts by Enron, the NYPSC voted unanimously (5-0) to change a century of electric utility policy by replacing state-enforced, cost-of-service electricity rate regulation with market-based rates overseen by federal (instead of New York) regulators where rates are based not costs but on whatever price the market will bear based on theoretical competition between suppliers. This radical regulatory decision[1] set into motion a complete corporate restructuring of New York's electricity market over the next several years, where the original vertically-integrated utilities divested their generation assets to out-of-state corporations that then would theoretically "compete" with one another in a bid to sell power, with companies like Enron promising lower electric rates from the resulting competition. During this transition, electric rates went up as it became clear that the economic theory of electricity competition was difficult to successfully implement in practice, in part due to the continued ability of power sellers to engage in a variety of gaming and market manipulation schemes that were impossible to execute during the days of rate-based regulation.

But the biggest transition was the assumption of risk: in the old, vertically-integrated model, electric utilities were franchised monopolies that had their profits tightly-regulated. This eliminated the ability to earn windfall profits, but it also jettisoned shareholder risk, which is why utilities were known for decades as safe, predictable investments for "widows and orphans." To be sure, inefficiencies abounded under this monopoly system, particularly if state regulators did a poor job controlling costs or making poor long-term strategic decisions. But ratepayers were guaranteed electric rates directly tied to the cost of producing and delivering it, and utility shareholders were guaranteed a risk-averse investment.

And, importantly, reliability was ensured under the old vertically-integrated model because the utilities had a legal obligation to serve their customers. The whole point of New York's May 1996 PSC order was to upend this utility compact, doing away with state resource planning, where the state would authorize the construction of new capacity to ensure long-term system reliability, and replace the legal obligation to serve with a market-based, incentive approach to ensuring reliability. Power sellers were, for the first time, offered an opportunity to earn windfall profits, and in exchange they were supposed to invest those record earnings into new capacity investments in order to continue to earn long-term profits. Reliability would be incentivized with the lure of more profits to those that invested.

It can be argued that the May 1996 NYPSC deregulation order privatized the profit for the buyers of existing nuclear power plants, just as it can be argued that the NYPSC proposal at issue here now seeks to socialize these same companies' risks. It is, to put it mildly, an outrage to have allowed these companies to earn unregulated profits for years

[1] New York Public Service Commission Opinion No. 96-12, Cases 94-E-0952.

when market conditions were conducive for it, and then redesign the rules when market conditions change and transfer risk away from shareholders of the power plant owners and onto 8 million captive New York ratepayers. Therefore, at a minimum, the NYPSC must require Entergy and Exelon to make available to the public as part of this proceeding, the full, unredacted balance sheet data for all three power plants since their acquisition by their affiliates and eventual affiliates (Constellation Energy, in the case of Exelon) so that the historical profits of these facilities—and how the companies invested those earnings—can be evaluated.

The ZEC Proposal

PSC staff describe the ZEC as mechanism "to encourage the preservation of the environmental values…of zero-emissions nuclear-powered electric generating facilities…this proposal takes the approach of valuing and paying for the zero-emissions attributes based on a formula that starts with published estimates of the social cost of carbon." While it is certainly meritorious and important to consider investing ratepayer money into sustainable and reliable investments to both keep the lights on and address the very real threat of climate change, any proposal that involves removing market risk from owners of power plants must consider the historical rewards those owners enjoyed because of New York's rate-deregulation experiment. It is inappropriate to ask the families of New York to shoulder 100% of the risk of keeping aging nuclear power plants operating without first examining how the corporate shareholders benefited from years of rate-deregulation.

Entergy and FitzPatrick

In the several years after the May 1996 PSC order, the state's utilities began to divest their generation. In March 2000, Louisiana-based Entergy Corp announced the purchase of the Indian Point 3 and the 838MW FitzPatrick nuclear power plants from the New York Power Authority for $967 million. The sale closed in November 2000. The FitzPatrick power plant was originally placed in service in 1975.

A significant portion of FitzPatrick's output was available to Entergy to sell at market-based rates, with a portion available for NYPA to purchase at a fixed price. NYPA had rights to 100% of the output of FitzPatrick through 2003, and 45% in 2004. NYPA and Entergy also have had various value sharing agreements for FitzPatrick. For example, from January 2007 through December 2014, Entergy paid NYPA $3.91 per MWh for power sold from FitzPatrick, up to an annual cap of $24 million.

Entergy's annual 10-k filings with the U.S. Securities and Exchange Commission do not disclose financial earnings details for individual power facilities. But until 2010, Entergy grouped its merchant nuclear power plants, including FitzPatrick, into its "Non-Utility Nuclear" earnings division, along with between 3 and 5 other merchant nuclear facilities. From 2001 through 2009, this division earned total net income of $3.5 billion on $14.7 billion of revenue, for a 24% profit margin.[2] In that same time period, Entergy's traditional monopoly utility division earned net income of $5.7 billion on $75.2 billion of revenue, for a profit margin of 7.6%. It is therefore fair to conclude that Entergy's unregulated nuclear power plant division was the star attraction of Entergy's performance, delivering billions in profits that boosted the

[2] Public Citizen compilation of Non-Utility Nuclear earnings from Entergy 10-k reports filed with the SEC.

company's stock price. Indeed, Entergy Corp paid its shareholders $3.9 billion in cash dividends from 2001-09, which reflects the value that Entergy's Non-Utility Nuclear division brought to the company's shareholders.

Beginning in 2010, Entergy reorganized its financial reporting to the SEC, lumping in the company's merchant nuclear power plants with its fossil-fuel merchant power plants, and also ceased reporting actual revenue and income numbers for the various divisions. That year Entergy also, for the first time, explained that the once-high-flying merchant nuclear division had fallen on hard times: "negative trends in the energy commodity markets have resulted in lower natural gas prices and therefore lower market prices for electricity in the New York."[3]

But for nine years, Entergy was touted as a great stock investment, and paid out billions of dollars in dividends, because of the strong profits from its merchant nuclear fleet. The free-market designs unleashed by the NYPSC 1996 order worked very well for Entergy shareholders from 2001-09. It is therefore highly relevant, and very important, for the public to get an answer to the following questions: how much exactly did FitzPatrick earn in profits for the shareholders of Entergy Corp, and how did Entergy Corp invest those profits? Did they re-invest the money back into making the New York power system more reliable, as the deregulation proponents speculated should happen? And since Entergy Corp knew beginning in 2010 that the New York power market conditions were changing, how exactly did the company innovate and respond, and what new investments in New York did the company initiate? It is inappropriate for the NYPSC to now ask 8 million New York ratepayers to pay billions of dollars to the shareholders of Entergy Corp without first getting answers to all of these questions.

The Sale of Nine Mile Point and Ginna to Eventual Exelon Corp Affiliates

In December 2000, Constellation Energy bought Nine Mile Point for $815 million from Niagara Mohawk Power Corp and other utilities. Constellation agreed to sell 90% of its output to the vendors for 10 years at about 3.5 cents/kWh. Some $450 million in decommissioning funds were to be transferred to Constellation. Unit 1 of Nine Mile Point was originally placed in service in 1974.

In November 2003, Constellation Energy purchased the RE Ginna nuclear power plant from Rochester Gas and Electric Corp for $401 million plus $21.6 million for fuel. A sales contract committed 90% of ten years output to RG&E at 4.4 cents/kWh average. Ginna was placed in service in 1970.

Constellation Energy in January 2009 sold half the shares of its national nuclear power fleet—including both Nine Mile Point and Ginna—to the French Government-backed Electricité de France for $4.5 billion. The deal valued Constellation's merchant nuclear fleet at about $2,250/kWe, including fuel. The NY plants had been bought by Constellation for $533/kWe without fuel earlier in the decade, so Constellation's shareholders earned a whopping 320% rate of return on the sale of shares to EDF. It is important to note that the January 2009 sale of half the shares to EDF occurred just before the New York power market soured for merchant nuclear power plants.

In March 2012 Exelon Corp bought Constellation Energy and its significant merchant fleet of power plants for $8 billion. When Exelon agreed to spend $8 billion to acquire Constellation, the company and its shareholders were fully aware of the financial risk associated with both Nine Mile Point and RE Ginna, but yet agreed to expend significant shareholder resources to acquire the facilities.

[3] www.sec.gov/Archives/edgar/data/7323/000006598411000033/a10-k.htm

Again, neither Constellation nor Exelon provide power plant-specific earnings for Nine Mile Point and Ginna, so in order to effectively evaluate the proposed ZEC, Exelon must make available as part of this docket the full balance sheet financials for both Nine Mile Point and Ginna from Constellation's acquisition date of December 2000 (Nine Mile Point) and November 2003 (Ginna) to the present.

Conclusion

The NYPSC staff is proposing to spend more than $4.6 billion of New York ratepayer's money to provide direct, cash subsidies to the owners of three nuclear power plants in the name of reliability and combating climate change. The owners of eventual affiliates of the three nuclear power plants enjoyed significant profits selling electricity from these facilities for years under New York's deregulated power market, transferring billions of dollars from New York ratepayers to the shareholders of these companies. The NYPSC staff ZEC proposal fails to assign any risk to the shareholders of Exelon or Entergy, and instead directs New York's 8 million ratepayers to pay for 100% of the bailout, despite the fact that the whole point of New York's deregulation experiment was to transfer risk *away* from ratepayers and onto shareholders. In order for the NYPSC ZEC proposal to be adequately analyzed, both Exelon and Entergy must provide the full, unredacted balance sheet information for the FitzPatrick, Nine Mile Point and Ginna nuclear facilities from the date of their acquisition (including eventual affiliates, in the case of Constellation Energy and Exelon) to the present.

Respectfully submitted,

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