STATE OF NEW YORK
SUPREME COURT
ALBANY COUNTY COURTHOUSE
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ROGER D. McDONOUGH
JUDGE

STEVEN M. CONNOLLY
LAW CLERK

ERIN M. GOLEN
SECRETARY

October 8, 2019

John C. Graham, Esq.
Public Service Commission of the State of New York
Three Empire State Plaza
Albany, NY 12223-1350

Re: In the Matter of Hudson River Sloop Clearwater, Inc., et al. v. NYSPSC, et al.
Index No.: 7242-16

Dear Mr. Graham:

Enclosed for filing please find an executed Decision/Order/Judgment in the above-captioned action.

Thank you for your attention to this matter.

Very truly yours,

Erin M. Golen

Enclosure

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

HUDSON RIVER SLOOP CLEARWATER, INC., GOSHEN GREEN FARMS LLC, NUCLEAR INFORMATION AND RESOURCE SERVICE, INDIAN POINT SAFE ENERGY COALITION, and PROMOTING HEALTH AND SUSTAINABLE ENERGY, INC.,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the CPLR,

-against-

NEW YORK STATE PUBLIC SERVICE COMMISSION along with KATHLEEN BURGESS in her official capacity as Secretary, AUDREY ZIBELMAN, in her official capacity as Chair, PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners,

Respondents-Defendants,

-and-

CONSTELLATION ENERGY NUCLEAR GROUP, LLC with subsidiaries and affiliates EXELON GENERATION COMPANY, LLC, R.E. GINNA NUCLEAR POWER PLANT, LLC and NINE MILE POINT NUCLEAR STATION, LLC,

Nominal Respondents-Defendants.

Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-16-ST8331 Index # 7242-16

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DECISION/ORDER/JUDGMENT

Roger D. McDonough, Justice

Petitioners seek a myriad of Article 78 and declaratory judgment relief in this challenge to the PSC's Clean Energy Standard ("CES") and Zero Emission Credit Program ("ZEC"). The respondents oppose the requested relief in its entirety. Additionally, a number of entities seek amicus standing. In this Decision, Order and Judgment, the Court must also address respondents' motions to strike significant portion of petitioners' reply submissions.[1]

Relief Sought

The final Amended Petition has five remaining causes of action. The first alleges that the PSC failed to follow the requirements of the State Administrative Procedure Act ("SAPA"). The second alleges that the PSC's actions were arbitrary and capricious and an abuse of discretion when it: (1) misapplied the social cost of carbon ("SCC") metric as the legal basis for Tier 3 of the CES; and (2) when it declared the reactors "publicly necessary". The third alleges that the PSC's Order contains a mistake of fact and violates SAPA § 201 which requires the use of words

[1] The Court has already held oral argument in this proceeding during the motion to dismiss phase. Petitioners have requested a second round of oral argument. No respondents joined in this request and PSC actually argues that the request was improperly made in the wrong submission. However, PSC further indicated that they had no objection to oral argument if the Court found it necessary. The Court has reviewed the submissions, the procedural history, and is well aware of the age of this proceeding. Based on all of the foregoing, and in accordance with 22 NYCRR 202.8(d), the Court finds that a second round of oral argument is unnecessary in this matter. Among the Court's concerns are that the delay associated with scheduling oral argument and retrieving a transcript would lead to further unsolicited submissions and motion practice from the parties.

with common everyday meanings. The fourth[2] alleges that PSC has violated Public Service Law § 66-c by setting rates which are unjust, unreasonable, unjustly discriminatory and unduly preferential. The final cause of action alleges that the PSC's adoption of Tier 3 is an abuse of discretion, arbitrary and capricious, lacking in rational basis and not otherwise in accordance with law. Petitioners request the following relief: (1) an Order vacating, annulling and rescinding the Tier 3 portion of the PSC's Order; (2) an Order declaring Tier 3 to be arbitrary and capricious and in violation of SAPA; (3) an Order striking all references to nuclear energy production as "zero-emissions"; (4) an Order declaring Tier 3 to be *ultra vires*, contrary to law and in violation of PSL § 66; (5) an Order declaring Tier 3 to be null and void as violative of the due process rights of petitioners under the New York State and United States Constitutions. Alternatively, petitioners ask the Court to remand Tier 3 to the PSC in order for PSC to follow lawful procedures and correct mistakes of fact.

Background

The focus of this litigation is petitioner's challenge to the purportedly unlawful creation of a "public financial subsidy for financially unsustainable nuclear power plants in New York State".

Hudson River Sloop Clearwater, Inc. ("Clearwater") is a New York State corporation whose stated purpose is to defend and restore the Hudson River. Goshen Green Farms, LLC ("Goshen Green") is a New York State limited liability company operating a commercial organic farm. Goshen Green is located with a 270 mile radius of several of the nuclear power plants at issue herein. Nuclear Information and Resource Service ("NIRS"), a party to the underlying regulatory proceeding, is an organization advocating for the cessation of nuclear power generation. Indian Point Safe Energy Coalition is a coalition of public interest, health advocate, environmental and citizen groups associated with addressing the challenges of the continued operation of the Indian Point nuclear power plant. Promoting Health and Sustainable Energy, Inc., is a public interest group that advocates for public health and sustainable energy.

The PSC is a New York State agency that is part of the New York Public Service

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[2] The causes of action have been renumbered by the Court in light of the Court's dismissal of the original fourth cause of action from the final amended complaint.

Commission. The PSC regulates and oversees numerous industries in New York including those for electric, gas and water. Additionally, petitioners have named the PSC's Chair and its commissioners in this action (hereinafter collectively referred to as "PSC"). The remaining respondents are the owners and operators of the following New York State nuclear power plants: Ginna, Nine Mile Point 1, Nine Mile Point 2, Fitzpatrick, Indian Point 2 and Indian Point 3 (hereinafter collectively referred to as "Constellation").

In August of 2016, the PSC approved a program named the Clean Energy Standard ("CES"). The goal of the CES is to promote a cost-effective transition to a clean-energy future for electricity production and transmission in New York State. Additionally, the CES includes a recognition of the environmental value of the absence of carbon dioxide air emissions from certain nuclear power plants. This is known as the zero emission credit program ("ZEC"). The ZEC calls for payments to eligible nuclear power plants in accordance with the "SCC". The payments are intended to reflect the environmental and social value provided by the zero emission producers in supplanting carbon-emitting production. Constellation are the owners of the nuclear power plants impacted by the CES and the ZEC. Ultimately, after transactions including the sale of zero emission credits to electric utilities, PSC estimates that the average[3] residential electric consumer will see a rise in their utility bills of less than two dollars per month. In response to numerous requests to reconsider or rehear certain aspects of the CES, the PSC issued a December 2016 Rehearing Order. The instant litigation ensued.

Procedural History

Petitioners commenced this proceeding seeking Article 78 and declaratory relief. Thereafter, petitioners served an Amended Verified Petition which added approximately sixty petitioners and new causes of action. Prior to respondents' appearances, petitioners provided the Court with a substituted page 49 containing "corrections" to the second cause of action of the Amended Verified Petition. Respondents objected to the "corrections", arguing that petitioners should be directed to seek leave to amend their pleadings. Thereafter, petitioners moved for leave to amend their amended verified petition. The motion's purpose was to properly

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[3] The subsidy affects all electrical ratepayers in the State.

incorporate the aforementioned "corrections" to the second cause of action. All respondents moved to dismiss the proceeding in its entirety. Additionally, Constellation opposed the motion to amend the amended verified petition.

The Court granted petitioners' motion for leave to amend the amended verified petition. Additionally, the Court partially dismissed the proceeding on the issue of timeliness as to all petitioners with the exception of Clearwater, Goshen Green, NIRS, IPSEC and PHASE. The Court also dismissed the fourth cause of action based on lack of standing to seek SEQRA relief. Additionally, the Court dismissed the proceeding as against the former Entergy respondents based on a ripeness issue[4]. Finally, the Court found that the remaining causes of action and requests for declaratory relief survived the CPLR § 3211(a)(7) motion to dismiss.

Thereafter, a dispute arose as to the contents of the administrative record. Motion practice ensued and this Court was compelled to judicially resolve the dispute. The Court found no basis to direct or compel the PSC respondents to take any further action with respect to the administrative record. Thereafter, a dispute arose as to the contents of the petitioners' reply papers. This dispute, the status of proposed amici, as well as the ultimate merits[5] of the litigation are now fully before this Court.

Motions to Strike Purportedly Improper Submissions

The remaining respondents have moved to strike the overwhelming majority of the submissions contained in petitioners' reply papers. Specifically, the PSC respondents seek to strike the following materials: (1) Exhibits S, T, U, V, W, X, and Y to the December 14, 2018 Affirmation of John L. Parker, Esq., and Exhibit 2 to the December 14, 2018 Affirmation 2 of John L. Parker, Esq.; and (2) certain arguments in petitioners' reply memorandum of law, including those that rely upon the aforementioned materials. The PSC respondents maintain that

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[4] The Court issued a subsequent Decision, Order and Judgment dated July 18, 2018 for the purpose of, *inter alia*, clarifying the dismissal of the litigation as to the former Entergy respondents.

[5] The Court finds that the matter is ripe for ultimate resolution. No party in this Article 78/Declaratory Judgment matter have spoken of the need for any discovery. Additionally, as respondents noted, CPLR § 409-b allows for summary determinations in special proceedings.

the materials must be stricken based upon: (a) their status as new documentary and testimonial evidence that is outside of the administrative record, and/or; (2) their status as new documentary and testimonial evidence submitted for the first time in reply papers, and/or; (3) their status as new legal arguments offered for the first time in reply papers.

Similarly, Constellation seeks to strike the following materials: (1) Exhibits J, S, T, U, V, W, X and Y to the Parker Affirmation of December 14, 2018; (2) all references to said exhibits in Petitioners' Reply Memorandum of Law; (3) all new and non-responsive arguments in the Petitioners' Reply Memorandum of Law. Constellation maintains that the cited materials in the Parker affirmation are outside the administrative record. Additionally, Constellation claims that numerous arguments were improperly raised for the first time. Alternatively, Constellation argues that the Court would be on firm grounds in simply striking the Reply Memorandum of Law in its entirety. The PSC has submitted an affirmation wherein they support Constellation's motion and arguments.

In opposition, petitioners stress that the expert affidavits and other factual materials are appropriate in the context of this hybrid proceeding and the unique circumstances of development of the administrative record in this matter. Additionally, petitioners assert that the majority of the arguments were clearly raised in their initial papers and/or motion papers.

In reply, Constellation argues that the administrative record has long been available to petitioners and the public. Further, Constellation maintains that this action is actually not a declaratory judgment action. They also note that one of the petitioners (NIRS) had access to the confidential materials from the outset and that nothing was preventing petitioners from developing and submitting their expert affidavits prior to their filing of the final Amended Petition. Additionally, Constellation maintains that petitioners are improperly using respondents' respective opposition papers as a springboard to advance new theories in their reply memorandums.

Similarly, PSC notes that petitioners had complete access to the public comments and confidential documents throughout the entire administrative proceeding. Additionally, all respondents note that petitioners' reply papers only made scant mention of the confidential documents. Specifically, confidential documents only encompassed roughly one-half page of the

109 page Reply Memorandum of Law. Additionally, PSC points out that a declaratory judgment cannot be used to expand judicial review beyond the agency record. All respondents also note that there was never any consent to the introduction of expert affidavits outside the record. Finally, PSC maintains that petitioners cannot rely upon vague and superficial language of the final amended petition for the proposition that arguments were not raised for the first time in reply papers.

The Court's review of PSC's administrative determinations is legally confined to the "facts and record adduced before the agency" (Matter of Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 757 [1st Dept. 1982] *aff'd for reasons below* 58 NY2d 952 [1983]). Additionally, it is black letter law that reply papers are to be used to address arguments made by respondents in opposition to the positions taken by the petitioners in their initial submissions (*see*, USAA Fed. Sav. Bank v Calvin, 145 AD3d 704, 706 [2nd Dept. 2016]). Reply papers may not be used to introduce new arguments, new grounds or new evidence in support of the relief requested in the initial submissions (Id.). Petitioners' five causes of action clearly seek Article 78 relief related to PSC's: (1) purportedly arbitrary and capricious actions in implementing Tier 3; (2) acting in excess of their statutory authority in implementing Tier 3; and (3) alleged violations of SAPA. The requests for declaratory relief, which are clearly directly related and dependent upon the respective Article 78 causes of action, do not alter the fact that this Court's review of PSC's actions must be limited to the facts and record adduced before PSC at the time the determinations were rendered. Additionally, as discussed below, the Court finds that declaratory judgment relief is not warranted in this proceeding. Further, neither petitioners' inapposite case law nor the legal gymnastics in which the parties engaged regarding the record, are sufficient to persuade this Court that the record and the arguments initially advanced should be significantly expanded in the manner the petitioners propose.[6] To do so would be wholly inconsistent with the expressed CPLR purpose of pleadings, initial motion submissions and reply

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[6] Due to the reply memorandum of law's length, presentation, new arguments, greatly expanded arguments and failure to reference which causes of action were being discussed, the Court was often at a loss to link petitioners' reply brief arguments to respondents' arguments, petitioners' causes of action/requests for relief and petitioners' initial arguments in support of the final amended complaint.

papers. Finally, the Court notes that no Court Order in this matter authorized the submission of materials beyond the facts and record adduced before the PSC in the underlying administrative matters. Accordingly, the Court must strike the following portions of petitioners' reply Affirmation and Reply Memorandum of Law[7]:

> 1) Exhibits S, T and U to the First Parker Affirmation and Exhibit 2 to the Second Parker Affirmation constitute materials outside of the administrative record which were generated approximately two years after PSC took the challenged actions. As such, they must be stricken from the reply papers along with all related arguments in the Reply Memorandum of Law.
> 2) Exhibits V, W, X and Y to the First Parker affirmation constitute materials outside of the administrative record. As such, they must be stricken from the reply papers along with all related arguments in the Reply Memorandum of Law.
> 3) Page 6 Figure 1 constitutes material outside the administrative record.
> 4) Pages 22-32 (except for portion addressing areas of the PSC's expertise) the *Boreali* arguments were improperly raised for the first time substantively in the reply papers and were not set forth as a cause of action in petitioners' final amended complaint.[8]
> 5) Pages 34-35 wherein petitioners quote from the stricken exhibits S & T.
> 6) Pages 41-44 starting with "The ZEC Program . . ." and ending with point b constitute materials outside the administrative record and arguments improperly raised for the first time on reply.
> 7) Pages 48-55 represent arguments that were improperly raised for the first time on reply and are improperly based on materials outside the administrative record.
> 8) Pages 55-56, Point 8 represents an argument that was improperly raised for the first time on reply.
> 9) Page 70, subpoint c represents an argument that was improperly raised for the first time on reply.
> 10) Pages 71-72, Point 3 represents an argument that was improperly raised for the first time on reply.
> 11) Pages 79-80, Points 6 and 7 represent arguments that were improperly raised for the first time on reply.

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[7] All page references are to the Petitioners' Reply Memorandum of Law.

[8] *Boreali* is a landmark Court of Appeals case discussing the separation of powers between the Legislature and the Governor/state agencies. There are numerous appellate level cases discussing *Boreali* and the four factor "test" associated with the case. Petitioners failed to include this argument or a "separation of powers" cause of action in their final amended complaint or their memorandum of law in support of their final amended complaint. To now advance ten pages of *Boreali* arguments, discussing the four part test in tremendous detail, strikes the Court as unfair and wholly noncompliant with the recognized CPLR requirements for reply papers and initial pleadings.

12) Pages 87-89, Point 3 represents an argument that was improperly raised for the first time on reply.

As to those portions where the Court has denied the motions to strike, the Court finds that the arguments and materials proffered are proper for reply submissions as they represent: (1) petitioners addressing arguments made by respondents in opposition to the positions taken by the petitioners in their initial submissions; and/or (2) the natural extension of arguments and claims sufficiently raised in petitioners' initial submissions.

Amici

There is no statutory guideline or controlling case law that address a trial Court's acceptance of an application for amicus curiae status. As this litigation clearly involves questions of important public interest, and based upon the quality of the submissions and the interests represented by the entities, the Court recognizes the value in granting amici status to all of the entities who have applied for such relief (*see*, Colmes v Fisher, 151 Misc. 222, 223 (Sup. Ct. Erie County 1934). Accordingly, the Court will grant all of the proposed motions for amicus status and consider the proposed submissions to the extent they are based on record evidence, relevant to the causes of action/requests for relief in the final amended complaint and not merely duplicative of arguments already made by any party to this proceeding. A brief summary of the submissions and the parties' responses, if any, is set forth below.

Alliance for a Green Economy

The Alliance for a Green Economy ("Alliance") is an entity focused upon encouraging the implementation of strategies promoting New York's transition to renewable energy. Alliance maintains that PSC exceeded its authority with the ZEC subsidy due to the failure to follow the State Energy Plan. Similarly, Alliance argues that the PSC has clearly crossed the line from rule-making into legislative policy-making. As to SAPA, Alliance argues that PSC failed to give the requisite notice and opportunity for consideration and comment.

In opposition, PSC argues that Alliance is merely duplicating arguments already raised by the petitioners. These include the arguments concerning: (1) the statutory authority, or lack thereof, for the Tier 3 subsidy; (2) the line crossing from rule-making into legislative policy; and (3) the noncompliance with SAPA.

Coalition for Competitive Energy

The Coalition for Competitive Energy, Dynergy, Inc., Eastern Generation, LLC, Electric Power Supply Association, NRG Energy, Inc., Roseton Generating LLC, and Selkirk Cogen Partners, L.P. ("Coalition") are independent power producers who compete with the respondent nuclear power plants. Relevant to this proceeding, Coalition argues that the ZEC program is not an environmental measure. Rather, Coalition maintains that ZEC is merely a mechanism to benefit the owners of the nuclear power plants. Coalition also emphasizes the radical change in the costs and terms of the proposed ZEC program that arose from the July 9, 2016 Responsive Proposal. Finally, Coalition argues that PSC failed to cite any evidence for the proposition that losses of the nuclear generated power would result in significantly increased air emissions due to heavier utilization of and/or construction of fossil-fuel power plants. Consistent with petitioners and several other proposed amici, Coalition also argues that the couching of the subsidy as an "environmental credit" was merely an effort to hide a multi-billion dollar bailout of the single private company that owns the nuclear power plants at issue.

EDF and Pace Energy

EDF is an environmental organization with over 30,000 members in the State of New York. Their core organization mission focuses upon protecting land, soil, forestry resources and as well as public health from harmful airborne contaminants. In their brief, EDF stresses that the PSC properly determined that the continued operation of nuclear power plants is necessary in order to prevent the replacing said plants with natural gas plants that would emit large amounts of the global warming pollutant, carbon dioxide. EDF stresses that the need to prevent an increase in carbon emissions, even on a temporary basis while the goal of increased renewable energy capacity and generation is pursued, is "vital, scientifically based and urgent."

Pace Energy describes itself as an energy and climate law and policy non-profit think tank with a focus on developing clean, sustainable energy policy in New York and the Northeastern United States. They argue that the ZEC program constitutes a reasonable short term tool for use in New York's overall goal of decarbonizing the electric generation sector. They conclude that there are simply not enough large-scale and customer-sited renewable sources current available or available tin the near-term to meet New York's emissions reductions goal. Accordingly, they

concur that any closure of the discussed nuclear power plants would result in the increase usage of fossil-fueled generation. Pace Energy echoes many of the arguments made by EDF regarding the value of the tool of the SCC. They also maintain that there is no justification for arguing that the tool cannot be applied beyond federal rulemaking and into the context of state regulatory proceedings. Finally, they note that the tool is arguably the most widely accepted method of valuing the society-wide cost of carbon.

Petitioners stress that EDF and Pace Energy are solely discussing issues that are not in dispute. Petitioners further argue that the proposed briefs do not address the improper promulgation, adoption and construction of Tier 3. In particular, petitioners focus upon the failure to address the April 2016 report concerning the impact any closure of the Ginna and Fitzpatrick plants would have on electricity reliability. Moreover, petitioners cite the inapplicability of using the term "zero-emissions" in describing nuclear power, and argue that increased use of fossil fuels would not be necessary to address the State's electricity reliability issues. Rather, petitioners maintain that said issues could be addressed by increased usage of already installed solar generation.

In reply, EDF reasserts that the issue of reliability has nothing to do with the increased carbon emissions that would be caused by retirement and replacement of the nuclear power plants. They also maintain that petitioners' idealistic view of increased solar generation is inconsistent with reality. As to the "zero-emissions" definition, EDF maintains that PSC has clearly explained that the term solely refers to emissions associated with actual generation at the existing, constructed, nuclear power plants.

Onondaga Nation, HETF and AILA

Onondaga Nation, HETF and AILA ("movants") discuss in great detail their claim of environmental harms related to the Nine Mile Point 1 and 2 reactors as well as the Fitzpatrick reactor. Particular focus is placed upon the impact on Lake Ontario. Movants identify the potential environmental impacts from nuclear power plant disasters as well as the storage and treatment of fuel rods, and flag the potential dangers associated with the transport of nuclear waste through the Onondaga Nation's "currently recognized territory".

In opposition, PSC argues that the movants' failed to discuss the legality of PSC's actions

at issue. PSC also objects to movants' attempts to introduce evidence outside the administrative record. Finally, PSC maintains that the issues raised by movants have nothing to do with the issues before the Court. Similarly, Constellation maintains that the issues and evidence presented are outside the record and/or irrelevant to the issues before the Court.

In reply, movants argue that the issues their submissions address are directly related to environmental matters that were or should have been before the PSC as it worked towards the Tier 3 Order. Additionally, movants argue that the environmental impacts of the aging, nuclear power plants demonstrates that this proceeding involves matters of important public interest. As such, movants argue that their submissions were necessary to establish the appropriateness of amicus relief

Policy Integrity

Policy Integrity is an entity affiliated with the NYU School of Law. Their averred goal is to improve the quality of governmental decision making in the fields of administrative law, economics and public policy. They describe themselves as a team of legal and economic experts whose training allows them to apply economic principles to regulatory decision making. Policy Integrity advises the Court that respondents consent to their motion for leave to file an amicus brief. The Court has not received any opposition to the motion from petitioners.

Policy Integrity argues that PSC's usage of the SCC tool was proper as these matters involve precisely the type of policymaking that the tool was designed to facilitate. They further assert that the tool was developed using the three most cited peer-reviewed models that have been developed to assess the global and local harms of climate change. Additionally, they stress that PSC properly used the SCC to calculate ZEC payments to properly reflect: (1) the environmental value generated by usage of nuclear power plants; and (2) the costs imposed on third parties by carbon emissions. Additionally, Public Integrity noted the ample opportunity and notice that was provided to the public prior to the Order. Finally, they argue that the PSC actions were appropriate in light of the many differences between the market structures of nuclear power plants and those for renewable energy sources.

Towns of Bedford and Lewisboro

The Towns of Bedford and Lewisboro ("Towns") argue that the financial impact of the

ZEC program on their ratepayers will be significantly higher than represented by the respondents. The Towns calculate the impact as being more than 100 percent higher for Bedford and more than 92 percent higher for Lewisboro The Towns also speak to the unfairness of having to subsidize nuclear power plants after they, at New York State's encouragement, have taken affirmative steps toward renewable energy sources.

In opposition, PSC argues that the Towns' calculations are unsupported and lacking in foundation. Additionally, PSC maintains that the Towns' data actually confirms, rather than rebuts, PSC's findings regarding the amount extra a typical residential ratepayer would pay.

Discussion

Standing

PSC argues that the petitioners lack individual and organizational standing. More specifically, PSC points to petitioners' lack of any unique or cognizable injury. Additionally, PSC argues that petitioners lack organizational standing based on their failure to properly represent the interests at issue in these proceedings. Specifically, PSC maintains that petitioners' organizational interests are not germane to the issues of utility ratepayer protection or to advocacy regarding upstate nuclear power plants. The standing issue, beyond the petitioners' original SEQRA cause of action, was not pursued in PSC's original motion to dismiss.

In opposition, the petitioners cite several injuries in fact, including: (1) denial of statutory process via, *inter alia*, the SAPA violations; and (2) injuries in fact based upon the monthly surcharges to be paid for allegedly unlawful nuclear subsidies. Alternatively, petitioners note that NIRS is a party to the underlying proceeding and therefore has standing. Finally, petitioners cite the caselaw that holds that only one petitioner needs to have standing in order for this action to proceed.[9]

The Court finds that petitioners have adequately set forth concrete interests in the matters the PSC acted upon as well as concrete injuries from PSC's purported failures to, *inter alia*, follow proper procedures (*see*, Association for a Better Long Island, Inc., v New York State Dept. of Environmental Conservation, 23 NY3d 1, 7-8 [2014]). Additionally, the Court

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[9] Petitioners also cite the fact that Constellation did not join in any of the standing arguments proffered by PSC.

recognizes that denial of standing here would insulate PSC's actions from judicial challenge (*see*, Id.). Said result is wholly undesirable from a public policy standpoint, particularly in a matter, like this one, which appears to be of significant public concern (*see*, Id.). Under these circumstances, and in light of NIRS' status as a party to the underlying administrative proceeding/actions, the Court declines to dismiss the proceeding due to lack of standing.

Review Standard under CPLR § 7803(3)

The standard of review for PSC's determinations is whether said determinations are arbitrary and capricious and lacked a rational basis (*see*, Multiple Intervenors v Public Service Com'n of State, 166AD2d 140. 144 [3rd Dept. 1991]).

First Cause of Action

Petitioners maintain that the PSC failed to follow SAPA in their July 8, 2016 announcement concerning Tier 3. Specifically, petitioners argue that PSC improperly classified the proceeding as falling under the so-called "soft rules" pertaining to rate-making proceedings. Instead, petitioners assert that the proceeding actually triggers SAPA's requirements for rule-making and fails to meet said requirements. The cause of action relies upon CPLR § 7803(3)'s violation of lawful procedure theory as well as SAPA § 202(8). SAPA § 202(8) theory allows a challenge on grounds of noncompliance with SAPA's procedural requirements. Alternatively, in the event the Court concludes that the rate-making "soft rules" apply, petitioners contend that the PSC was obligated to conduct administrative hearings.

In opposition, Constellation maintains that petitioners have waived this cause of action. As to waiver, Constellation argues that petitioners failed to properly raise their SAPA argument with the PSC.[10] Accordingly, Constellation claims that petitioner's SAPA claim is waived under the doctrine of "exhaustion of administrative remedies".

Alternatively, Constellation argues that the PSC properly complied with the applicable SAPA rule - SAPA § 102(2)(a)(ii). Under this rule, the "revised rule-making" requirement would not apply. As to SAPA § 102(a)(ii), Constellation maintains that PSC's actions were

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[10] Constellation concedes that petitioners did raise certain SAPA arguments in their petitions to PSC for rehearing. However, Constellation maintains that said arguments did not reference any argument concerning the PSC's classification usage of SAPA § 102(2)(a)(ii).

proper based on the plain text of the statute and the CES Order, as well as PSC's prior usage of the statute with prior clean energy programs.

Finally, Constellation argues that the July 8, 2016 announcement was not a "substantial revision". As such, the announcement would not require a new notice or any additional comment period. Specifically, Constellation maintains that all of the revisions relied upon by petitioner were "logical outgrowths" of the original proposal. As to petitioners' alternative argument, Constellation argues that the administrative hearing requirement would only apply to a "utility-initiated" rate-making change. Constellation notes that it was the PSC's decision, as opposed to any utility, to commence the CES proceeding.

PSC argues that petitioners' SAPA claims (including those in the third cause of action) are based upon misapplications of the law. Initially, PSC maintains that the ZEC program was properly promulgated as an economic rule under SAPA § 102(a)(ii). Specifically, PSC characterizes the ZEC program as both: (1) a prescription for future allowances for facilities and service; and (2) a practice bearing on rates. Accordingly, they maintain that ZEC clearly falls under SAPA § 102(a)(ii) and is exempt from the requirements of : (a) re-notice of any pre-adoption revisions; (b) the preparation of impact statements; and (c) filing requirements with New York's Secretary of State.

As to petitioners' alternative argument, PSC joins in Constellation's assertion that the issue is solely applicable to a "utility-initiated proceeding to increase rates". The PSC also raises an "exhaustion of remedies" argument as to this issue. Finally, PSC notes that the costs here would not constitute "major changes" to utility rates as contemplated by PSL § 66(12)(c).

In reply[11], petitioners point to language which they claim preserved their SAPA claim. Petitioners also stress how Tier 3 is a type (i) SAPA rule as opposed to a type (ii) SAPA rule. They further reiterate how PSC's Revised Proposal constituted a substantial revision. Additionally, they assert that Tier 3 was the type of rule that requires additional notice and comment periods when substantial revisions occur.

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[11] As noted above, many of petitioners' arguments were stricken as they were improperly raised for the first time on reply and/or based on materials outside of the administrative record.

Type (ii) rules are defined as:

> the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting or practices bearing on the foregoing whether of general or particular applicability. (SAPA § 102[2][a][ii])

The Court interprets the ZEC program and CES Order, by their clear language, to be type (ii) rules, falling under the rubric of a prescription for future allowances for facilities and services as well as a practice bearing on rates. As such, the revised rulemaking notice requirements for part (i) rules are not applicable here (*see*, SAPA § 202[4-a][a]). As to the alternative argument, the Court finds that the requirements associated with "major changes" in rates are only applicable in instances where PSC is reviewing utility-initiated proposals to change the rate schedule (PSL § 66[12][f]). The universally-applied rate change in this matter was initiated by the PSC directly.

Finally, assuming *arguendo* that PSC improperly proceeded with a type (ii) rule, the Court finds that the proposal at issue was not a "substantial revision" that would trigger additional notice and comment requirements. Specifically, the original notice adequately spoke of: (1) funding for nuclear facilities; and (2) the possibility of PSC's adoption, rejection or modification of the relief proposed and the related matters. In reviewing the notices at issue and the challenged proposal, the Court finds that the proposal did not materially alter the original notice's purpose, meaning or effect but rather included "logical outgrowths" of the initial notice (*see*, Matter of Industrial Liason Comm. of Niagara Falls Area Chamber of Commerce v Williams, 131 AD2d 205, 212 [3rd Dept. 1987] *aff'd* 72 NY2d 137 [1988]).

In sum, the Court finds that appropriate notices, comment periods and other SAPA requirements were properly afforded in accordance with SAPA and petitioners' constitutional due process rights. As such, the Court finds no violation of SAPA and no violation of petitioners' due process rights[12]. Further, the Court concludes that PSC's actions and inactions, as alleged in this first cause of action, were not arbitrary and capricious, lacking in a rational basis or in any way violative of CPLR § 7803(3).

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[12] To the extent, as discussed below in the declaratory relief section, that petitioners are still advocating any violations of their due process rights.

Second Cause of Action[13]

Petitioners' second claim alleges that the PSC misapplied the SCC metric as the legal basis for Tier 3 and improperly declared that the subject reactors were publicly necessary. The petitioners assert that said actions were arbitrary and capricious and an abuse of discretion. Specifically, petitioners note that the PSC failed to explain why the SCC metric should be applied differently to nuclear power versus all other energy sources. Further, petitioners point to the different SCC analysis used for Tiers 1 and 2. The differences included the uniform application of the social cost to all energy sources. Additionally, the petitioners argue that the PSC failed to support the public necessity finding with any type of factual record and/or detailed analysis.

Constellation principally argues that petitioners are ignoring the issue of whether the PSC had a "rational basis to support" the actions taken, namely: (1) setting the initial ZEC price based on the SCC; and (2) adopting a "public necessity" test and applying the test to the eligible plants.

As to the SCC, Constellation argues that the metric was appropriately used based on the PSC's well-established precedent. They further argue that the metric was best suited to set the ZEC price at an appropriate and fair value to reflect the environmental attributes of nuclear power generation. Constellation also notes that the PSC did appropriately explain the different carbon analysis between the Tiers. Said differences were attributed by the PSC to: (a) the absence of a sufficient number of nuclear power plant "owners" to use a competitive process; and (b) the contention that the "marginal cost of additional increments of renewable resources is expected to always be significantly higher than ZEC prices".

As to the "public necessity" finding, Constellation maintains that the PSC regularly makes such findings in the context of allowing power plants to be constructed. Constellation takes the position that the CES order simply adapts said principle to the context of expanding the operation of existing power plants. Additionally, Constellation argues that ample record evidence supports the key findings underpinning the ZEC program. Specifically, they point to

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[13] Based on the manner in which the parties presented the arguments, the Court's discussion and resolution of this cause of action also addresses arguments raised in the petitioners' fifth cause of action.

evidence that : (1) harmful emissions would actually increase if certain power plants retired; and (2) certain power plants were at risk of retiring in the absence of governmental intervention.

In their opposition, PSC points to relied-upon authority for the proposition that the SCC is an appropriate measuring tool to monetize the benefits of avoided/reduced carbon emissions.

In reply, petitioners note that the SCC and creation of the Tier 3 formula were not a product of PSC's special expertise. Rather, petitioners stress that the PSC simply seized the SCC model from federal authorities and demonstrated a lack of expertise in using said model as a basis for the creation of the Tier 3 formula. Accordingly, they continue to maintain that the use of the model was arbitrary, capricious and irrational.

The Court finds that there was adequate administrative record support for the PSC's usage of SCC in the calculation of ZEC payments. Accordingly, the Court finds that PSC had a rational basis for such usage. Specifically, the administrative record contains the detailed, persuasive advocacy from amici PECC and Policy Integrity as to SCC's status as the best tool to reflect the environmental monetary damages attributable to reduced carbon emissions. Further, the Court has not been persuaded that the usage of SCC constituted an actionable departure from any prior rule adopted by the SCC. There is simply no record support for said proposition as there is no evidence that any such rule was adopted during the proceedings that ultimately led to the CES Order. In any event, as argued by PSC, petitioners' quasi-judicial argument is simply inapplicable to quasi-legislative rulemaking proceeding at issue herein (*see*, Matter of Insurance Premium Fin. Assn of N.Y. State v New York State Dept. of Ins., 88 NY2d 337, 345 [1996]).

Similarly, the Court finds that there was adequate administrative record support for PSC's adoption and application of the "public necessity" test to the nuclear power plants eligible for the ZEC program. While the State Energy Plan does not discuss nuclear power plants, it also does not specifically exclude them. Further, PSC has meaningfully correlated the continued operation of the nuclear plants with the Plan's goal or reducing greenhouse gas emissions by 40% by the year 2030. The Court recognizes that the reduced carbon emissions issue has been heavily debated in this matter, but must conclude that there is an adequate and rational basis in the

record[14] to support PSC's conclusions regarding carbon emissions as well as PSC's findings of "public necessity".

Finally, the Court finds that respondents have persuasively established the irrelevance of the issues of PSC's reliability order and Ginna's and Fitzpatrick's prior status to the issues addressed by the PSC in the CES Order. Specifically, the reliability order and the possibility of both plants retiring are irrelevant to the issue of the manner and methodology of how New York would replace the electricity generated by both nuclear power plants.

Based on all of the foregoing, the Court finds that PSC's actions, as alleged in this second cause of action, were not arbitrary and capricious, lacking in a rational basis or in any way violative of CPLR § 7803(3).

Third Cause of Action

The third cause of action alleges another SAPA violation by the PSC. Petitioners maintain that the PSC's Tier 3 Order violates SAPA's § 201 requirement for the use of clear and coherent words with common everyday meanings. The petitioners characterize PSC's language as a false and confusing "sales pitch". Petitioners' primary focus is the application of the term "zero-emission" to nuclear power plants. The petitioners point to numerous sources of information for the proposition that nuclear power is far from a "zero emission" proposition.

Constellation maintains that this SAPA claim is not subject to judicial review. They note that SAPA § 202 solely authorizes proceedings to challenge noncompliance with SAPA §§ 202, 202-a and 202-b. Alternatively, Constellation argues that the PSC's use of the term "zero-emission" is proper based on the fact that nuclear power plants do not emit carbon dioxide when they generate electricity.

PSC echoes the justiciability claim raised by Constellation and describes SAPA § 201 as merely aspirational rather than doctrinal. Further, PSC describes petitioners' claims herein as a "philosophical disagreement" as to the meaning of the term "zero-emissions". In any event, PSC maintains that they did comply with the clear language requirement of the statutes. Specifically, PSC points to the CES Order's consistent explanations and emphasis on what they meant when

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[14] Constellation set forth the detailed record support at page 31 of their March of 2018 Memorandum of Law.

they referred to "zero-emissions".

In reply, petitioners principally argue that the "zero-emissions" term represents a misstatement of a scientific fact. Petitioners further argue that the use of this term violates SAPA § 201 and renders Tier 3 arbitrary and capricious. Additionally, petitioners stress that the SAPA statute is not merely aspirational and certainly constitutes a justiciable controversy. In support, petitioners rely upon SAPA § 205.

SAPA § 201, in relevant part, reads as follows: "Each agency shall strive to ensure that, to the maximum extent practical, its rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meanings." This language was added by the Legislature in 1992. Despite SAPA being an area rampant with litigation and relevant caselaw, neither the parties nor the Court found any caselaw discussing or interpreting this language. Based on this absence, and the plain language of the statute, the Court does not interpret the statute as presenting justiciable controversies capable of being meaningfully reviewed by the Court. Rather, the Court interprets the statute as setting a goal for state agencies to better communicate with the public. However, in the absence of any parameters, guidance or direction from the Legislature, the statute strikes the Court as impossible to meaningfully adjudicate. Additionally, SAPA § 205 pertains to the right to judicial review of rules and does not confer any direct or implied right to pursue an action challenging SAPA § 201. To the extent this cause of action is justiciable, the Court finds it to be without merit. Based on the administrative record and the clear definitions promulgated by PSC regarding their usage of "zero-emissions", the Court finds that PSC adequately strived to ensure, to the maximum extent practical, that the challenged rules, regulations and/or related documents were written in a clear and coherent manner, using words with common and everyday meanings. As such, the Court cannot conclude that petitioners' usage of the term "zero-emissions" renders Tier 3 or any of PSC's actions at issue, to be arbitrary and capricious, lacking in a rational basis or in any way violative of CPLR § 7803(3).

Fourth Cause of Action

Petitioners next cause of action alleges that the PSC's Orders exceed PSC's authority as codified in PSL § 66-c. Specifically, petitioners maintain that the PSC has unjustly and

unreasonably burdened "clean energy", "early adopter" individuals with an additional fee in the form of Tier 3's nuclear subsidy. They point to the silence in the 2015 State Energy plan regarding any role nuclear power would play. Further, petitioners contend that the nuclear subsidy is inconsistent with the appropriate focus placed upon the development of alternate energy production facilities, co-generation facilities and small hydro facilities. The petitioners also point to the disproportionate impact the nuclear subsidy would have on those municipalities who have already moved towards utilization of renewable sources of power.

In opposition, Constellation argues that petitioners waived their PSL § 66-c challenges by failing to appropriately raise them in their comments or rehearing petitions before the PSC. Alternatively, Constellation argues that § 66-c authorizes the development of programs like the ZEC program. In this vein, Constellation points to the ZEC's furtherance of the goal that 50% of New York's electricity should be generated by renewable sources by the year 2030. Specifically, they point to the necessity of preserving zero-emission attributes to provide an opportunity for renewable sources to grow without a corresponding rise in carbon emissions. Additionally, Constellation cites other PSL sections and the PSC's broad authority over the electricity sector for the proposition that the PSC was authorized to adopt and implement the ZEC program. Finally, Constellation maintains that the ZEC is consistent with and critical to New York's State Energy Plan.

As to the "early adopter" discrimination claim, Constellation notes that the uniform charge to all customers is rationally based. As to petitioners' reliance on PSL § 65(3), Constellation notes that said statute only applies to discrimination by "electric corporations".

Similar to Constellation, PSC relies upon relevant caselaw and statutory authority for the broad powers it possesses in fulfilling its granted authority over all significant aspects of electricity in the State of New York.

As to PSL § 66-c, the PSC maintains that it does not apply to the subject matter of the Orders at issue. Rather, PSC maintains that said statutory section only applies to small alternative energy facilities (limited to 80 megawatts of output). Alternatively, PSC asserts that the alleged applicability of § 66-c would not curtail their broader powers under the PSL or their authority to subsidize nuclear power plant resources based on environmental attributes.

PSC also argues that the petitioners are failing to recognize the difference between individual (meaning consumers, business and local/county governmental) purchases of renewal energy and the state-wide determination to purchase environmental attributes of "zero-emissions" electricity. They stress that New York's energy system currently results in other ratepayers subsidizing petitioners' (and like-minded individuals) renewable energy choices and that it is only fair and reasonable to require petitioners' and all ratepayers to contribute to the ZEC program.

Additionally, PSC points to the stated goal of the ZEC program to act as a bridge to the clean energy future. PSC emphasizes that the abrupt retirement of nuclear power plants would result, in the near term, in the likely replacement of said energy sources with fossil fuel generators. Said fossil fuel generators would lead to increased emissions of carbon, sulfur and nitrogen dioxides. PSC argues that this tradeoff is necessary to preserve the State's air quality until electricity generated by nuclear power plants can be replaced with renewable energy resources.

Finally, PSC alleges that the ZEC program is consistent with New York's Energy Plan to reduce greenhouse gas emissions. PSC notes that nothing in the Energy Plan precludes usage of nuclear energy to effectuate said goal. Additionally, PSC notes that petitioners lack standing to raise the issue of the impact on certain municipalities who have already adopted renewal energy strategies.

In reply, as to PSL § 66, petitioners argue that said statue only speaks to methodologies for improvements in gas and electricity. Petitioners maintain that Tier 3 does not even seek improvements but merely seeks to maintain the status quo. The petitioners again cite the inconsistency of nuclear power with New York's State Energy Plan. Finally, petitioners argue that PSC's administrative power is limited and cannot exceed beyond the authority enacted by the Legislature.

In their final Amended Petition, this cause of action's headline clearly states that the relief is being sought based on PSC's violation of the "just and reasonable" rate requirements of PSL § 66-c. Additionally, they point to a violation of PSL § 65(3)'s requirement that electric corporations not be granted any undue or unreasonable preferences or advantages. As to PSL

§ 66-c, the Court finds it inapplicable to the issues herein. Rather, as PSC argues, said statute pertains to the PSC's power to encourage electric utilities to purchase electricity from certain, specific types of alternate energy production facilities (PSL § 66-c[1-3]). Further, PSC has established that the only specific types of alternate energy production facilities that qualify are of the type limited to 80 megawatts of output. In sum, § 66-c simply has no applicability to any of the Tier 3 subjects at issue in this proceeding. Further, PSL § 65(3) also has no applicability here as it only applies to forbidden actions of gas corporations, electric corporations and municipalities. PSC is clearly not a gas or electric corporation or a municipality.

Turning to petitioners' theories that are tangentially associated to the statutory violations claimed in final amended petition, the Court finds them to be without merit. PSC's broad statutory powers in setting rates charged by utilities, as codified and recognized by the caselaw, sufficiently encompassed the actions taken by PSC in the underlying proceeding (*see*, Matter of Niagara Mohawk Power Corp. v Public Serv. Com'n. of State of N.Y., 69 NY2d 365, 368-369 [1987]). Further, the Court's review of the State Energy Plan, the CES, the ZEC and the other related documents does not reveal an actionable inconsistency. Specifically, the Court finds adequate administrative record support for the proposition that PSC's actions are wholly consistent with the Plan's goal of achieving a 40% reduction in greenhouse gas emissions from electric power production by 2030. Finally, the Court has not been persuaded as to the illegality of imposing certain rate increases to all ratepayers for the state-wide environmental benefits of the carbon-emitting production from nuclear power plants versus the carbon-emitting production of fossil fuel plants.

In sum, the Court concludes that petitioners' actions do not in any way implicate or violate PSL §§ 65(3) and/or 66-c. Based on all of the foregoing, the Court finds that PSC's actions, as alleged in this fourth cause of action, were not arbitrary and capricious, lacking in a rational basis or in any way violative of CPLR § 7803(3).

Fifth Cause of Action

The final cause of action alleges that the Tier 3 subsidy is an abuse of discretion, arbitrary and capricious, lacking in a rational basis and not otherwise in accordance with the law. Petitioners point to certain "unexplained inconsistencies" in PSC's methodology in promulgating

the subsidy. The petitioners principally maintain: (1) that the PSC had already authorized the retirement of the Ginna Nuclear Power Plant ("Ginna") while also authorizing the subsidization of Ginna to continue operating; (2) that PSC failed to properly assess the impacts of retirement of the Fitzpatrick Nuclear Power Plant ("Fitzpatrick"); (3) that the PSC engaged in an unexplained switch in methodologies; and (4) that PSC failed to follow its own rate-making guidelines for monopolies.

In opposition, Constellation argues that petitioners are confusing Ginna's "reliability need" for New York's energy system with the issue that the PSC was actually addressing. Namely, the manner and impact of how the energy generated by a nuclear power plant would be replaced if said plant retires. Constellation maintains that the "reliability need" issue has nothing to do with the environmental consequences the PSC was considering in the event that Ginna or Fitzpatrick or other nuclear power plants retired. Accordingly, Constellation argues that the "reliability need" findings about Ginna and Fitzpatrick are irrelevant to the CES Order and cannot be used to find said Order to be arbitrary and capricious.

As to petitioners' remaining arguments under this cause of action, Constellation asserts that they are meritless because the CES proceeding was not a "ratemaking proceeding". Accordingly, Constellation argues that the monopoly procedures and other PSC internal guidelines cited by petitioners are not applicable here.

Similarly, PSC argues that the ZEC program is wholly rational and lawful. Additionally, PSC raises the same "reliablity need" argument advanced by Constellation as to the Ginna and Fitzpatrick plants. PSC also notes that they did not switch methodologies because the "cost-of-service" methodology was never formally adopted. Finally, the PSC maintains that the monopoly argument raised by petitioner does not apply to the ZEC program. In any event, PSC notes that it would not have been required to base monopoly prices upon "cost-of-service".

In reply, petitioners again argue that nuclear power plants are not "carbon free" or "zero-emissions" sources of electrical power. Accordingly, they reiterate that Tier 3 is arbitrary, capricious and lacking in a rational basis.

The Court finds that there was adequate administrative record support for PSC's adoption and implementation of Tier 3. Accordingly, as Tier 3 was not lacking in a rational basis, the

Court must find this cause of action to be without merit. Again as to the issue of Ginna and Fitzpatrick, the Court finds that respondents have persuasively established the irrelevance of the issues of PSC's reliability order and Ginna's and Fitzpatrick's prior status to the issues addressed by the PSC in the CES Order. Specifically, the reliability order and the possibility of both plants retiring are irrelevant to the issue of the manner and methodology of how New York would replace the electricity generated by both nuclear power plants.

As to the monopoly pricing issue, PSC has adequately established that, even accepting petitioners' argument regarding monopoly utility services, PSC was under no obligation to use a cost-of-service methodology (*see*, Matter of New York State Council of Retail Merchants v Public Serv. Com'n. of State of N.Y., 45 NY2d 661, 669 [1978]). Said caselaw holds that there simply must be a rational basis for the classification chosen by PSC (*see*, Id.). The Court finds that the PSC has offered a rational basis for their ZEC pricing methodology in the unique circumstances presented herein. Said circumstances include the environmental attributes at issue and the absence of sufficient nuclear power plant owners to create adequate competition for price setting.

Based on all of the foregoing, the Court finds that PSC's actions, as alleged in this fifth cause of action as well as those actions alleged in both the fifth and second causes of action, were not arbitrary and capricious, lacking in a rational basis or in any way violative of CPLR § 7803(3).

Accordingly, the Court finds that petitioners' five causes of action must be dismissed and the relief requested therein must in all respects be denied.

Declaratory Relief

The Court finds that the five causes of action are solely CPLR Article 78 claims, thereby rendering petitioners' declaratory relief claims "duplicative and unnecessary" (*see*, GableTransport, Inc. v State, 29 AD3d 1125, 1128 [3rd Dept. 2006]). Additionally, as to the request for declaratory relief regarding due process rights under the New York and United States Constitutions, the Court finds that this argument was abandoned/waived based on petitioners' failure to meaningfully discuss it in their lengthy reply papers. In any event, to the extent that differing case law and statutory interpretations are deemed to require this Court to issue

declaratory rulings, the Court will issue declaratory rulings consistent with its findings as to the lack of viability of all of petitioners' causes of action..

The parties' remaining arguments and requests for relief have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's overall findings. Further, in light of the Court's findings, the Court finds no legal justification to make an award of costs, fees, disbursements or attorneys' fees to petitioners.

Based upon the foregoing it is hereby

ORDERED and ADJUDGED that the final amended petition is dismissed and the relief requested therein is in all respects denied for the reasons stated above; and it is further

ORDERED AND ADJUDGED that petitioners' request for declaratory relief is denied for the reasons state above; and it is further

ORDERED, ADJUDGED AND DECLARED, that to the extent petitioners are entitled to declaratory rulings, the Court declares that Tier 3 is neither arbitrary and capricious nor in violation of SAPA; and it is further

ORDERED, ADJUDGED AND DECLARED, that to the extent petitioners are entitled to declaratory rulings, the Court declares that Tier 3 is not *ultra vires*, contrary to law or in violation of PSL § 66; and it is further

ORDERED, ADJUDGED AND DECLARED, that to the extent petitioners are entitled to declaratory rulings and have not waived their constitutional arguments, the Court declares that Tier 3 is not null and void as violative of any provisions of the New York State or United States Constitution; and it is further

ORDERED AND ADJUDGED that, Constellation's motion to strike is granted to the extent directed above; and it is further

ORDERED AND ADJUDGED that, PSC's motion to strike is granted to the extent directed above; and it is further

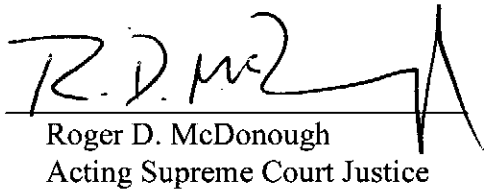
ORDERED and ADJUDGED that petitioners' request for costs, fees, disbursements and attorneys fees is hereby denied in its entirety.

SO ORDERED, ADJUDGED and DECLARED.

This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for PSC who is directed to enter this Decision, Order and Judgment without notice and to serve all counsel of record for parties and amici with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the papers considered to the County Clerk. The signing of the Decision, Order and Judgment and delivery of a copy of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: Albany, New York
October 8, 2019



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered[15]

As to Respondents' Motions to Strike

- Notice of Motion by PSC Respondents to Strike Certain Materials in Petitioners' Reply Submissions, dated December 28, 2018;
- Affirmation of John C. Graham, Esq., dated December 28, 2018, with annexed exhibit and Proposed Order;
- Notice of Motion by Constellation Respondents to Strike Certain Materials in Petitioners' Reply Submissions, dated January 4, 2019;
- Affirmation of Victoria A. Graffeo, Esq., dated January 4, 2019, with annexed exhibit and Proposed Order;
- January 7, 2019 Correspondence from State Respondents' Counsel, with annexed caselaw;
- Affirmation of John C. Graham, Esq., dated January 15, 2019;
- Affirmation of John L. Parker, Esq, received by the Court on January 15, 2019, with annexed exhibits;
- Reply Affirmation of John T. McManus, dated January 23, 2019, with annexed exhibit.

As to Proposed Amici

Alliance

- Notice of Motion for Leave for Alliance for a Green Economy to file an Amicus Curiae Brief, dated March 31,2017;
- Affirmation of James Bacon, Esq., dated March 31, 2017, with annexed exhibits;
- Memorandum of Law in Support of Motion for Leave for Alliance for a Green Economy to File an Amicus Curiae Brief, dated March 31, 2017;
- Affirmation of John C. Graham, Esq., in Opposition to Motion for Leave for Alliance for a Green Economy to File an Amicus Curiae Brief, dated April 10, 2017, with annexed exhibit;

Coalition

- Notice of Motion of Coalition, for Leave to File Amicus Brief, dated April 3, 2017;
- Motion of Coalition, for Leave to File Amicus Brief, dated April 3, 2017, with annexed exhibits;
- Correspondence from PSC's Deputy General Counsel regarding Coalition's Motion, dated April 27, 2017;

EDF and Pace Energy

- EDF's Motion for Leave to File an Amicus Brief, dated March 31, 2017;
- Affirmation of James T.B. Tripp, Esq., dated March 31, 2017;
- EDF's Proposed Amicus Brief, dated March 31, 2017;
- Notice of Petitioner's Reply to Proposed Amici Submitted by EDF and PECC, dated April 10, 2017;

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[15] The Court also received numerous memoranda of law from the parties and the proposed amici addressing the merits and various motions.

- Petitioner's Reply to Proposed Amici Submitted by EDF and PECC, dated April 10, 2017, with annexed exhibit;
- Reply of EDF to Petitioner's Reply, dated April 19, 2017, with annexed exhibit;
- Pace Energy's Motion for Leave to File Amicus Brief, dated March 30, 2017;
- Affirmation of Radina Valova, Esq., dated March 30, 2017, with annexed exhibit;
- Pace Energy's Proposed Amicus Brief, dated March 30, 2017;
- Pace Energy's Reply to Petitioner's Reply, dated April 18, 2017.

Towns

- Notice of Motion Seeking Leave for the Town of Bedford and Town of Lewisboro to File Amici Curiae Brief;
- Affirmation of Eric L. Gordon, Esq., dated March 30, 2017, with annexed exhibits;
- Proposed Brief of Amici Curiae Town of Bedford and Town of Lewisboro, dated March 30, 2017;
- Affirmation of John C. Graham, Esq., in Opposition to Motion of the Town of Bedford and the Town of Lewisboro for Leave to File an Amici Curiae Brief, dated April 10, 2017;
- Affidavit of Daniel Welsh in Reply to Opposition and in Further Support of Motion Seeking Leave for the Town of Bedford and the Town of Lewisboro to File an Amici Curiae Brief, sworn to April 18, 2017;

Policy Integrity

- Motion for Leave to File Amicus Brief;
- Affirmation of Bethany A. Davis Noll, Esq., dated March 28, 2018 with annexed proposed amicus brief.

Onondaga Nation, HETF and AILA

- Notice of Motion to file *amici curiae* brief, dated December 14, 2018;
- Affirmation of Joseph J. Heath, Esq., in support, dated December 13, 2018, with annexed exhibits and Memorandum of Law;
- Affirmation of Victoria A. Graffeo, Esq., in opposition, dated January 4, 2019;
- Affirmation of John C. Graham, Esq., in opposition, dated January 10, 2019;
- Reply Affirmation of Joseph J. Heath, Esq., received by the Court on January 15, 2019.

As to Merits of Litigation

- Notice of Verified Article 78 and Declaratory Judgment Petition, dated November 30, 2016;
- Verified Article 78 and Declaratory Judgment Petition, sworn to November 30, 2016, with annexed exhibits including Affidavit of David Conover, sworn to November 30, 2016; and Affidavit of Susan H. Shapiro, Esq., sworn to November 30, 2016;
- Affirmation of Susan H. Shapiro, Esq., in Support of Amended Verified Petition, dated January 12, 2017, with annexed exhibits A-Q (consisting of Affidavits in Support of the Amended Verified Petition);
- Notice of Amended Verified Petition, dated January 13, 2017, with annexed exhibits and summons;
- Amended Verified Petition, dated January 13, 2017;
- February 2, 2017 Correspondence from Petitioners, with annexed exhibits including

corrected page 49 to the Amended Verified Petition;

- February 6, 2017 Correspondence from Constellation's Counsel, with annexed exhibit;
- PSC's Motion to Dismiss, dated February 15, 2017;
- Affirmation of John C. Graham, Esq., in Support of Motion to Dismiss, dated February 15, 2017, with annexed exhibits;
- Nominal Respondents' Notice of Motion to Dismiss, dated February 15, 2017;
- Affirmation of Victoria A. Graffeo, Esq., in Support of Nominal Respondents' Motion to Dismiss, dated February 15, 2017, with annexed exhibits;
- Petitioners' Notice of Motion for Leave to Amend the Amended Verified Petition, dated February 16, 2017;
- Affirmation of John Parker, Esq., in Support of Motion to Amend Pleadings, dated February 16, 2017;
- Affirmation of Victoria A. Graffeo, Esq., in Opposition of Motion to Amend the Amended Verified Petition, dated March 10, 2017;
- Affirmation of Sanford I. Weisburst, Esq., in Opposition to Petitioners' Motion to Amend the Amended Verified, Petition, dated March 17, 2017;
- Affirmation of Susan H. Shapiro, Esq., in Opposition of Motion to Dismiss, dated March 24, 2017, with annexed exhibits (including Affidavits in Opposition to Motion to Dismiss);
- Reply Affirmation of Victoria A. Graffeo, Esq, in further Support of Nominal Respondents' Motion to Dismiss, dated April 28, 2017,;
- Reply Affirmation of John C. Graham, Esq., in Support of Motion to Dismiss, dated April 28, 2017, with annexed exhibit;
- July 28, 2017, Correspondence from Constellation's Counsel, with annexed caselaw;
- August 7, 2017 Correspondence from Petitioners' Counsel, dated August 7, 2017;
- August 9, 2017, Correspondence from Constellation's Counsel, with annexed caselaw;
- State Respondents' Verified Answer, Return and Objections in Point of Law, dated March 30, 2018;
- Affirmation of Donna M. Giliberto, Esq., dated March 30, 2018, with annexed exhibits;
- Verified Answer, Objections in Point of Law, and Affirmative Defenses of Nominal Respondents, dated March 30, 2018;
- October 31, 2018 Correspondence from PSC's Counsel, with annexed multimedia disc containing approximately 13,000 public comments submitted in Case 15-E-0302;
- Affirmation 1 of John L. Parker, Esq., dated December 14, 2018, with annexed exhibits including several affidavits;
- Affirmation 2 of John L. Parker, Esq., dated December 14, 2018, with annexed un-redacted copies of certain documents;
- April 16, 2019 Correspondence from PSC's Counsel, with caselaw update;
- April 19, 2019 Correspondence from Petitioners' Counsel, with caselaw update.