



Movant-Intervenors Constellation Energy Nuclear Group, LLC (“CENG”), Exelon Corporation (“Exelon”), R.E. Ginna Nuclear Power Plant LLC, and Nine Mile Point Nuclear Station LLC (collectively, “Intervenors”) hereby answer the Complaint of Coalition for Competitive Electricity, Dynegy, Inc., Eastern Generation, LLC, Electric Power Supply Association, NRG Energy, Inc., Roseton Generating LLC, and Selkirk Cogen Partners, L.P., (together, “Plaintiffs”) as follows:

1. The allegations of the first two sentences in Paragraph 1 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny those allegations. Regarding the third sentence of Paragraph 1, Intervenors admit that the quotation is from the PSC’s Order Adopting A Clean Energy Standard (“Order”), but deny Plaintiffs’ characterization of it. Intervenors refer the Court to that document for a complete and accurate statement of its contents.

2. Intervenors deny each and every allegation in Paragraph 2.

3. Intervenors deny each and every allegation in Paragraph 3.

4. Intervenors deny each and every allegation in Paragraph 4.

5. Intervenors deny each and every allegation in Paragraph 5.

6. Intervenors deny each and every allegation in Paragraph 6.

7. The allegations in Paragraph 7 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny those allegations.

8. The allegations in Paragraph 8 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny those allegations.

9. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and therefore deny those allegations.

10. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10, and therefore deny those allegations.

11. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and therefore deny those allegations.

12. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and therefore deny those allegations.

13. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13, and therefore deny those allegations.

14. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and therefore deny those allegations.

15. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and therefore deny those allegations.

16. Intervenors admit, upon information and belief, that Audrey Zibelman is Chair of the New York Public Service Commission (“PSC”). Intervenors lack knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 16, and therefore deny those allegations.

17. Intervenors admit, upon information and belief, that Patricia L. Acampora is a Commissioner of the PSC. Intervenors lack knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 17, and therefore deny those allegations.

18. Intervenors admit, upon information and belief, that Gregg C. Sayre is a Commissioner of the PSC. Intervenors lack knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 18, and therefore deny those allegations.

19. Intervenor admits, upon information and belief, that Diane X. Burman is a Commissioner of the PSC. Intervenor lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 19, and therefore deny those allegations.

### **JURISDICTION AND VENUE**

20. The allegations in Paragraph 20 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenor denies those allegations.

21. The allegations in Paragraph 21 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenor denies those allegations.

22. The allegations in Paragraph 22 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenor denies those allegations.

23. The allegations in the first clause of the first sentence in Paragraph 23 call for a legal conclusion to which no answer is required. Intervenor lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 23, and therefore deny those allegations.

### **FACTS**

#### **Exclusive Federal Jurisdiction Over the Wholesale Electricity Market**

24. The allegations in Paragraph 24 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenor denies the allegations in Paragraph 24.

25. Intervenor admits that technological developments over the last century have made it increasingly possible to transmit energy over long distances. Intervenor denies the remaining allegations in Paragraph 25.

26. The allegations in Paragraph 26 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenor denies the allegations in Paragraph 26.

**The FERC Regulatory Regime and the NYISO**

27. Intervenors deny the allegations in the first sentence of Paragraph 27. Regarding the second sentence of Paragraph 27, Intervenors admit that the quotation comes from the Federal Energy Regulatory Commission's ("FERC's") Order No. 888, but refer the Court to that document for a complete and accurate statement of its contents.

28. Intervenors admit that FERC authorizes and regulates "independent system operators" and "regional transmission organizations." Intervenors further admit that the New York Independent System Operator, Inc. ("NYISO") conducts auctions wherein wholesale electricity is bought and sold. Intervenors further admit that some buyers in NYISO's wholesale auctions are in-state utilities and competitive retail electric suppliers that resell to New York customers and businesses, and lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the third sentence of Paragraph 28. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence of Paragraph 28. The allegations in the fifth sentence of Paragraph 28 call for a legal conclusion to which no answer is required.

29. Intervenors admit the allegations in Paragraph 29.

*Energy Markets*

30. Intervenors admit that one of the goals of the day-ahead and real-time auctions is to ensure that sufficient generation resources are dispatched to meet the actual amount of power used by consumers at any given moment. Intervenors admit that if the generation on the system falls short of demand levels, a grid operator should take a series of FERC-mandated steps to limit the negative consequences and prevent the possibility of blackouts, and that voltage reductions

and load shedding are among those steps. Intervenors deny all remaining allegations in Paragraph 30.

31. Intervenors admit that the transmission system has physical limitations and that the price of power can vary by location, but deny the remaining allegations in Paragraph 31.

32. Intervenors deny each and every allegation in Paragraph 32.

33. Intervenors deny each and every allegation in Paragraph 33.

34. Intervenors deny each and every allegation in Paragraph 34. Regarding footnote 5, the document speaks for itself. Intervenors refer the Court to the document cited for a complete and accurate statement of its contents.

Capacity Markets

35. Intervenors deny each and every allegation in Paragraph 35.

36. Intervenors deny each and every allegation in Paragraph 36.

37. Intervenors deny the allegations in the second sentence of Paragraph 37.

Intervenors admit the remaining allegations in Paragraph 37.

38. Intervenors deny each and every allegation in Paragraph 38.

39. Intervenors deny the allegations in the second, third, and fourth sentences of Paragraph 39. Intervenors admit the remaining allegations in Paragraph 39.

40. The document quoted in Paragraph 40 speaks for itself, and Intervenors respectfully refer the Court to that document for a complete and accurate statement of its contents.

Total Market Compensation

41. Intervenors deny each and every allegation in Paragraph 41.

42. Intervenors deny each and every allegation in Paragraph 42.

**How Zero Emission Credits Distort the Wholesale Market**

43. Intervenors deny each and every allegation in Paragraph 43.

44. Intervenors deny each and every allegation in Paragraph 44.

45. Intervenors deny each and every allegation in Paragraph 45.

46. Intervenors deny each and every allegation in Paragraph 46.

47. Intervenors deny each and every allegation in Paragraph 47.

48. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning the viability of Plaintiffs in the first sentence in Paragraph 48, and therefore deny those allegations. Intervenors deny each of the remaining allegations in Paragraph 48.

49. Intervenors deny the allegations in the first sentence of Paragraph 49. Intervenors admit the first sentence of footnote 8. Intervenors admit that the remaining allegations in Paragraph 49 and footnote 8 purport to characterize the PSC's Order, and respectfully refer the Court to that Order for a complete and accurate statement of its contents.

50. The allegations in Paragraph 50 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 50.

51. Intervenors deny each and every allegation in Paragraph 51.

**The New York ZEC Program**

52. Intervenors deny each and every allegation in Paragraph 52.

53. As to Ginna and Nine Mile, Intervenors admit the allegations in the first sentence in Paragraph 53. Intervenors lack knowledge sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 53 as to Fitzpatrick. The allegations in the second

and third sentences in Paragraph 53 call for legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny those allegations.

54. Intervenors admit that in 2014 the expected revenues from the sale of capacity and energy into the NYISO markets were insufficient to cover the costs of continuing to operate Ginna. Intervenors deny all remaining allegations in Paragraph 54. Intervenors state that CENG, not Exelon Corporation, owns the Ginna and Nine Mile plants, and that the Long Island Power Authority owns a portion of Nine Mile Unit 2. Exelon Corporation owns a majority interest in CENG.

55. Intervenors admit that FERC approved a Reliability Support Service Agreement between Ginna and Rochester Gas & Electric Company that remains in effect through March 2017 but deny the remaining allegations in Paragraph 55. Intervenors respectfully refer the Court to the documents cited in Paragraph 55 for a complete and accurate statement of their contents.

56. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first and third sentences in Paragraph 56, and therefore deny those allegations. Intervenors admit the allegations in the second sentence of Paragraph 56. Intervenors deny the allegations in the fourth sentence in Paragraph 56 and respectfully refer the Court to the document cited in Paragraph 56 for a complete and accurate statement of its contents.

57. Intervenors deny the allegations in Paragraph 57. Intervenors admit that the Nine Mile plant has two reactors, whereas Ginna and Fitzpatrick have one reactor each.

58. Intervenors deny the allegations in Paragraph 58. To the extent those allegations purport to characterize the PSC's Order, Intervenors respectfully refer the Court to that Order for a complete and accurate statement of its contents.

59. Intervenors deny each and every allegation in Paragraph 59. To the extent those allegations purport to characterize the PSC's Order, Intervenors respectfully refer the Court to that Order for a complete and accurate statement of its contents.

60. Intervenors admit that the PSC opened a proceeding in June 2015 with the docket number 15-E-0302, but deny that it was entitled "In the Matter of the Implementation of a Large-Scale Renewable Program and a Clean Energy Standard" at that time. Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations in the second, third, or fourth sentences in Paragraph 60 and therefore deny those allegations.

61. Intervenors deny the allegations in Paragraph 61. Intervenors respectfully refer the Court to the documents cited in Paragraph 61 for a complete and accurate statement of their contents.

62. To the extent that the allegations in Paragraph 62 purport to characterize the initial Staff White Paper dated January 25, 2016, the Staff White Paper speaks for itself. Intervenors respectfully refer the Court to the document cited in footnote 13 for a complete and accurate statement of that document's contents. Intervenors deny all remaining allegations in Paragraph 62.

63. The first sentence of Paragraph 63 states a legal conclusion to which no response is required. Intervenors deny each and every remaining allegation in Paragraph 63.

64. Intervenors deny each and every allegation in Paragraph 64. To the extent that the allegations in Paragraph 64 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

65. Intervenors deny each and every allegation in Paragraph 65. To the extent that the allegations in Paragraph 65 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

66. Intervenors deny each and every allegation in Paragraph 66.

67. To the extent that the allegations in Paragraph 67 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents. Intervenors otherwise deny each and every allegation in Paragraph 67.

68. Intervenors admit that the large block quote beginning with the second sentence in Paragraph 68 can be found in the PSC's Order. Intervenors admit that the PSC has found that there is a "public necessity" to procure ZECs from Ginna, Fitzpatrick, and Nine Mile. Intervenors admit that there has not yet been a finding of public necessity regarding Indian Point. Intervenors deny each and every remaining allegation in Paragraph 68. To the extent that the allegations in Paragraph 68 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

69. Intervenors admit that, under the ZEC Program, a participating generator may enter a contract with NYSERDA to sell ZECs to NYSERDA at a price determined administratively by the PSC. Intervenors admit that a nuclear facility creates a ZEC only to the extent that it produces electricity. Intevenors deny each and every remaining allegation in Paragraph 69. To the extent that the allegations in Paragraph 69 purport to characterize the PSC's Order, that document speaks

for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

70. Intervenors admit that for the first two years of the ZEC Program, from April 1, 2017 through March 31, 2019, the PSC has set the ZEC price at \$17.48 for each megawatt-hour of zero-emissions electricity that is produced by the facility, subject to a possible cap. Intervenors admit that the \$17.48 price for a ZEC is based on the social cost of carbon as calculated by a federal interagency working group, with adjustments to reflect the emissions rate of generation resources serving New York and the value of avoided greenhouse gas emissions already accounted for by the Regional Greenhouse Gas Initiative. Intervenors deny each and every remaining allegation in Paragraph 70. To the extent that the allegations in Paragraph 70 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

71. Intervenors admit that in years 3 through 12 of the program, the ZEC price can decrease below \$17.48 if certain forecast energy and forecast capacity prices rise above a baseline of \$39/megawatt-hour. Intervenors deny each and every remaining allegation in Paragraph 71. To the extent that the allegations in Paragraph 71 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

72. Intervenors deny each and every allegation in Paragraph 72. To the extent that the allegations in Paragraph 72 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

73. Intervenors admit that NYSERDA will resell the ZECs it purchases to New York load-serving entities, which have an obligation to procure a quantity of ZECs based on their share of the New York retail electric market. Intervenors deny each and every remaining allegation in Paragraph 73. To the extent that the allegations in Paragraph 73 purport to characterize the PSC's Order, that document speaks for itself and Intervenors respectfully refer the Court to the document for a complete and accurate statement of its contents.

74. Intervenors deny each and every allegation in Paragraph 74.

75. The allegations in the first sentence Paragraph 75 state a legal conclusion to which no answer is required. Intervenors deny the allegations in the second sentence of Paragraph 75.

### **CLAIMS FOR RELIEF**

#### **COUNT I** **FIELD PREEMPTION – SUPREMACY CLAUSE**

76. Intervenors repeat and reallege each and every response in Paragraphs 1 through 75 of this Answer.

77. Paragraph 77 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 77.

78. Paragraph 78 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 78.

79. Paragraph 79 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 79.

80. Intervenors deny the allegations in the first and fourth sentences in Paragraph 80. Intervenors admit the allegations in the second sentence in Paragraph 80. The remaining allegations in Paragraph 80 state a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny those allegations.

81. Paragraph 81 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 81.

82. The allegations in the first sentence in Paragraph 82 state a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny those allegations. Intervenors deny each and every remaining allegation in Paragraph 82.

83. Paragraph 83 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 83.

**COUNT II**  
**CONFLICT PREEMPTION – SUPREMACY CLAUSE**

84. Intervenors repeat and reallege each and every response in Paragraphs 1 through 83 of this Answer.

85. Paragraph 85 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 85.

86. The allegations in the first sentence in Paragraph 86 state a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny those allegations. Intervenors respectfully refer the Court to the document cited in Paragraph 86 for a complete and accurate statement of its contents. Intervenors deny each and every remaining allegation in Paragraph 86.

87. Intervenors deny each and every allegation in Paragraph 87.

88. Intervenors deny each and every allegation in Paragraph 88.

89. The first sentence in Paragraph 89 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny those allegations. Intervenors deny each and every remaining allegation in Paragraph 89.

90. Intervenors deny each and every allegation in Paragraph 90, except that Intervenors admit that PJM is the ISO for Pennsylvania, twelve other states, and the District of Columbia.

91. The first and second sentences in Paragraph 91 state a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny those allegations. Intervenors deny all remaining allegations in Paragraph 91.

92. Paragraph 92 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 92.

**COUNT III**  
**DORMANT COMMERCE CLAUSE, UNDER 28 U.S.C. § 1983**

93. Intervenors repeat and reallege each and every response in Paragraphs 1 through 92 of this Answer.

94. Paragraph 94 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 94.

95. Paragraph 95 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 95.

96. Paragraph 96 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 96.

97. Intervenors deny the allegations in Paragraph 97, except that Intervenors admit that the reduction of carbon emissions is important.

98. Paragraph 98 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 98.

99. The first sentence in Paragraph 99 states a legal conclusion to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in that sentence. Intervenors deny all remaining allegations in Paragraph 99.

100. Intervenors deny the allegations in Paragraph 100.

101. Paragraph 101 states legal conclusions to which no answer is required. To the extent an answer is required, Intervenors deny the allegations in Paragraph 101.

**PRAYER FOR RELIEF**

Intervenors deny that Plaintiffs are entitled to any relief from this Court.

**AFFIRMATIVE DEFENSES**

Intervenors assert the following affirmative and other defenses, without conceding that the following are in fact affirmative defenses or that Intervenors have the burden of proof on any issue as to which applicable law places the burden of proof upon Plaintiffs. Intervenors reserve the right to amend or modify the following defenses, or to raise any additional defenses or claims not asserted herein, of which Intervenors may learn through discovery or other investigation in this matter or otherwise.

1. Plaintiffs fail to state a claim upon which relief may be granted, because taking Plaintiffs' well-pled factual allegations as true, each of Plaintiffs' claims fails as a matter of law.

2. Plaintiffs do not possess a cause of action to pursue their preemption claims, because such a cause of action is unavailable for claims of preemption based on the Federal Power Act.

3. Plaintiffs lack Article III and prudential standing to bring their claims, because they have not suffered a legally cognizable injury that is both causally related to the aspects of the ZEC Program that they allege are illegal and redressable by this Court.

4. Plaintiffs' claims are not ripe for adjudication, because the PSC is still entertaining requests for rehearing regarding the ZEC Program, the contours of which may therefore change.

5. Plaintiffs' claims are barred in whole or in part by the doctrine of laches.

6. Plaintiffs' claims are barred in whole or in part by the doctrine of estoppel, because, on information and belief, Plaintiffs have themselves sought and/or received benefits from state programs similar to the ZEC Program.

7. Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands, because, on information and belief, Plaintiffs have themselves sought and/or received benefits from state programs similar to the ZEC Program.

8. Plaintiffs' claims are barred in whole or in part because Plaintiffs have not suffered any actual, legally cognizable injury or damages through the operation of the ZEC Program.

9. Plaintiffs' preemption claims should be dismissed on the ground of primary jurisdiction because FERC is the appropriate forum for those claims.

10. Plaintiffs' claims should be dismissed under federal abstention doctrines because parallel state proceedings are pending.

11. Plaintiffs' preemption claims should be dismissed under the filed rate doctrine because those claims essentially dispute the justness and reasonableness of rates that have been filed with and approved by FERC.

#### **Reservation of Defenses**

Intervenors reserve all affirmative defenses available under Rule 8(c) of the Federal Rules of Civil Procedure, and any other defenses, at law or in equity, that may be available now or may become available in the future based on discovery or any other factual investigation in this case, including inequitable conduct.

WHEREFORE, Intervenors respectfully request that the Court:

- A. Dismiss or stay Plaintiffs' Complaint in its entirety;
- B. Award Intervenors their reasonable costs and attorneys' fees incurred in having to defend this action; and
- C. Grant Intervenors such other and further relief as it may deem just and proper.

December 9, 2016

Respectfully submitted,

/s/ Elizabeth A. Edmondson

Elizabeth A. Edmondson  
JENNER & BLOCK LLP  
919 Third Ave.  
New York, NY 10022  
(212) 891-1606  
eedmondson@jenner.com

Matthew E. Price\*  
Paul M. Smith  
Zachary C. Schauf\*  
William K. Dreher\*  
JENNER & BLOCK LLP  
1099 New York Ave. NW, Suite 900  
Washington, DC 20001  
(202) 639-6873  
mprice@jenner.com

*Counsel for Intervenors*

\**Pro hac vice* application pending.