UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Nuclear FitzPatrick, LLC

Docket No. EC16-169

Exelon Generation Company, LLC

Dated October 11, 2016

Protest of Public Citizen, Inc.

On September 19, FERC issued an order extending the public comment period for this docket from October 3, 2016 to October 10. Under FERC's rules, because October 10, 2016 is a federal holiday, the comment "period does not end until the close of the Commission business of the next day,"[1] which is October 11.

About Public Citizen, Inc.

Public Citizen, Inc. is a consumer advocacy organization representing the interests of our more than 400,000 members and supporters across the United States. Our members are household consumers of electricity and other energy products, and are directly impacted by the activities of entities producing power under FERC jurisdiction, including transactions that transfer ownership of FERC-jurisdictional assets. Public Citizen filed a timely, unopposed motion to intervene on September 1.

[1] 18 CFR § 385.2007

The Proposed Transaction

On August 9, Exelon Corp announced it would purchase the FitzPatrick nuclear power facility, located within NYISO, for $110 million from Entergy Corp. On August 19, the companies submitted their request to transfer ownership of the facility under Section 203 of the Federal Power Act.

Public Citizen's Protest

We protest the proposed transaction for two reasons. First, Exelon's application to acquire FitzPatrick must be considered incomplete because, inexplicably, it fails to incorporate any mention or analysis of New York's proposed Zero Emission Credit (ZEC) payment subsidy scheduled only for Fitzpatrick and for both of Exelon's two in-state nuclear facilities. This payment subsidy, estimated at a total of $8 billion in six two-year increments, will significantly distort the NYISO energy and capacity markets and fundamentally alter the economics of Exelon's power generation operations in NYISO, including FitzPatrick. The failure to incorporate analysis of the impact of New York's proposed ZEC on Exelon's acquisition of FitzPatrick, including in Exhibit J of the application, must render the application incomplete.

Second, we believe the structure of the ZEC may conflict with elements of the NYISO, FERC-approved tariff, particularly FERC's mandate for incentives through the NYISO installed capacity market (ICAP). While the New York Department of Public Service (NYDPS) and other state proponents claim the ZEC is designed to combat climate change, a realistic analysis shows that the primary purpose of the ZEC is to keep select economically uncompetitive nuclear power plants operating, regardless of the impact on greenhouse gas emissions. And the state's decision to discriminate between different nuclear generating stations for reasons other than climate change or the environment further complicates the true purpose of this expensive ZEC subsidy.

For these reasons, FERC should order Exelon's 203 application incomplete; require it to perform a market power analysis that incorporates the full market impact of the ZEC; and examine as part of this docket whether the ZEC conforms with FERC's rules and regulations.

The ZEC

In December 2015, New York Governor Andrew M. Cuomo ordered the NYDPS to "develop a process to prevent the premature retirement"[2] of politically important nuclear power facilities located upstate. On February 24, 2016, the NYDPS issued an order to expand an existing proceeding designed to encourage the development of renewable energy in order "to provide financial support for the benefit of the electric system to maintain the viability of certain nuclear power plants that can demonstrate the *lack of financial viability absent additional financial support*."[3] After the NYDPS held several technical conferences, NYDPS staff issued a formal proposal on July 8, 2016, called a Zero Emission Credit, to provide significant financial assistance to select nuclear power facilities, and gave the public exactly two weeks to comment on this new ZEC proposal. On August 1, 2016, the NYDPS issued its final order adopting the ZEC. Public Citizen, along with many other parties, intervened in that docket.

[2] www.governor.ny.gov/news/governor-cuomo-directs-department-public-service-begin-process-enact-clean-energy-standard
[3] NYDPS Case 15-E-0302 (emphasis added).

The final NYDPS order structures the ZEC in six two-year tranches beginning in April 2017, with a payment made to only select nuclear facilities: Exelon's Ginna and Nine Mile Point units 1 and 2, and Entergy's FitzPatrick. The ZEC segregates the politically controversial Indian Point nuclear facility, located just outside New York City, from all of the other upstate nuclear facilities, requiring the Indian Point facilities to undergo a separate financial viability assessment not required by Ginna, Nine Mile Point or FitzPatrick. The likely purpose of segregating Indian Point from all of the other nuclear power plants is that the Governor has had the State of New York formally intervene in a number of different proceedings and venues with the goal of closing the Indian Point facility.[4]

The value of the ZEC payment is based primarily on the U.S. Interagency Working Group's social cost of carbon[5], with adjustments for each two-year tranche based upon power prices in NYISO and other variables. Independent estimates calculate the ZEC could be worth about $8 billion for the owners of the three nuclear power facilities, which, if FERC were to approve this proposed transaction, would all be owned by Exelon.

Elements of the NYDPS ZEC order suggest that its primary purpose is not to reduce greenhouse gas emissions, but rather to serve as an economic development program to retain certain preferred nuclear power plant jobs and the associated tax base, all funded through a wholesale-market-distorting subsidy ultimately funded by captive New York ratepayers. For example, in the NYDPS order, there is a section named *ZEC Price Formula Mechanics* which,

[4] Scott Waldman, "NRC declares Indian Point safe, despite Cuomo's protestation," Politico, June 6, 2016, www.politico.com/states/new-york/city-hall/story/2016/06/nrc-declares-indian-point-safe-cuomo-disagrees-102549

[5] www.globalchange.gov

among other things, contains a subsection labeled *Facility Closure Contingency*.[6] This subsection proscribes changes to the ZEC program should any of the reactors at the three facilities cease operating during or prior to a ZEC tranche. The subsection describes these reforms as necessary "as an incentive to the [nuclear] facility owners to keep all of the plants operating"—regardless of the state's overall power sector needs, and absent any analysis of expected impact on greenhouse gas emissions.[7] Indeed, footnote 100 of the August 1 NYDPS ZEC order dictates that "If either unit [of Nine Mile Point] permanently ceases producing zero-emissions credits, it will be treated as if the entire qualified Nine Mile Point facility has permanently ceased producing zero-emissions credits." So this footnote further constrains the recipients of ZECs on behalf of Nine Mile Point to keep both reactors fully operational—again, regardless of the state's overall power needs and without any sort of greenhouse gas emission analysis. In short, between the ZEC program's arbitrary designation of deserving nuclear facility qualifications and the perverse incentives to keep units operations without any justifiable market or emissions analysis, it appears as though a primary goal of the ZEC is for the state to make arbitrary decisions as to which New York generation capacity can receive significant financial assistance.

Why Didn't Exelon Mention The ZEC As Part of Its 203 Application with FERC?

When Exelon applied to the Nuclear Regulatory Commission for permission to acquire FitzPatrick on August 18, 2016, the company explicitly stated that the ZEC "program significantly changes the economics of FitzPatrick, thus leading to Exelon Generation's interest in this proposed transaction ... The transaction is also conditioned upon ... the implementation

[6] http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-e-0302
[7] NYDPS August 1, 2017 Order, at Page 146.

of the NYPSC [ZEC] program as anticipated."[8] Because the NRC requires a showing of financial viability as part of its review process, Exelon had to mention that the ZEC is the only reason the company is seeking to acquire FitzPatrick. In fact, as Exelon clearly states in its NRC application, it will not proceed with the acquisition of FitzPatrick unless the facility qualifies for the ZEC.

As Exelon stated to the NRC, obtaining the financial value of the ZEC is the only reason why Exelon would seek to acquire FitzPatrick. The ZEC will not just provide a massive financial boost to Exelon's New York nuclear operations, but also profoundly alter the structure of the NYISO energy and capacity markets.

But in its FERC application under 203, Exelon makes no mention whatsoever of the importance of the ZEC for the purchase of FitzPatrick, of the ZEC's role in allowing for economic viability of FitzPatricks's operation, or of the significant impact the ZEC will have on aspects of FERC-jurisdictional energy and capacity markets.

As part of Exelon's 203 Application, the company hired Julie Solomon of Navigant Consulting, Inc. to perform a detailed market power analysis using proprietary software.[9] But Ms. Solomon includes no mention or analysis of the impacts of ZEC pricing either on Exelon's ability to exercise market power or the broader impact the ZEC will have on the functioning of the NYISO energy and capacity markets. For example, the ZEC subsidy will instantly transform all of Exelon's current New York nuclear facilities—including its proposed acquisition target, FitzPatrick—from financial liabilities into economic juggernauts beginning in April 2017, thereby strengthening the company's bidding strategies, and will result in profound pricing changes in

[8] *Application for Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment*, Docket Nos. 50-333 and 72-012, Pages 5 and 6 (of 15).
[9] Exhibit J of the Applicants' August 19 filing.

the NYISO energy and capacity markets. The failure of Ms. Solomon to account for the ZEC in her analysis must render Exelon's 203 application incomplete.

Furthermore, the NYISO is moving forward with a variety of changes to aspects of its tariff all with the assumption that both the Ginna and FitzPatrick are set to retire beginning in 2017, and therefore their energy and capacity will not be available. For example, a September 15, 2016 *NYISO Staff Recommendations – ICAP Demand Curve Reset* report states that: "Notably, at this time, the owners of the Ginna and Fitzpatrick nuclear units have not rescinded any retirement notices" and therefore market design calculations will proceed on the assumption that both of these nuclear units will not be in service.[10] Given the significant number and complex nature of ongoing NYISO tariff filings and stakeholder processes, we are uncertain as to how many current NYISO calculations and market proposals are based on the assumption that certain New York nuclear units will not be available beginning in 2017. As a result, a full accounting of interrelated NYISO tariffs that are directly impacted by Exelon's existing and proposed New York nuclear units receiving the ZEC—and how the ZEC instantly transforms certain nuclear units from retirement to extremely profitable—must be reflected in the appropriate market power analysis as part of this Section 203 Application.

In addition, there are multiple requests for rehearing of the NYDPS August 1 ZEC order, potentially casting doubt on whether the current ZEC structure will remain fully intact, or whether modifications may be made to the ZEC. Given the central importance of the ZEC to the

[10] At Page 27, www.nyiso.com/public/webdocs/markets_operations/market_data/icap/Reference_Documents/2017-2021_Demand_Curve_Reset/NYISO%20Staff%20Final%20DCR%20Recommendations%20-September%2015%202016.pdf

FitzPatrick transaction, it may be prudent for FERC to delay making a final decision until after the various rehearing requests have been exhausted.

Finally, the ZEC price subsidy may violate aspects of the NYISO tariff. FERC authorizes NYISO to incent capacity through ICAP, but the ZEC subsidy regime directly interferes with the purpose, design and operation of the NYISO ICAP. Since the ZEC is the central determinant as to whether Exelon proceeds with its FitzPatrick acquisition, FERC must consider whether the ZEC violates FERC rules before it can approve the transaction. The appropriateness of the ZEC is a central issue in this Section 203 Application.

Conclusion

A state-based financial incentive initiative, the ZEC, is the only reason Exelon has proposed acquiring the FitzPatrick nuclear facility. The failure of Exelon to include any mention or analysis of the expected ZEC payment to FitzPatrick as part of its required market power analysis must render this 203 application incomplete. Questions about the true intent of the design of the ZEC, and whether it is consistent with FERC's rules and regulations, must be considered as part of this Application.

Respectfully Submitted,

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