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PSC Monthly meeting - 11-17-2016

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

MEETING OF THE PUBLIC SERVICE COMMISSION

Thursday, November 17, 2016
10:30 a.m.
Three Empire State Plaza
Agency Building 3, 19th Floor
Albany, New York

COMMISSIONERS

AUDREY ZIBELMAN, Chair
GREGG C. SAYRE
PATRICIA L. ACAMPORA
DIANE X. BURMAN

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2 CHAIR ZIBELMAN: Well, good morning,
3 everyone. I'd like to bring the session of the Public
4 Service Commission to order. Secretary Burgess, are there
5 any changes to be made to the agenda today?

6 MS. BURGESS: Good morning, Chair and
7 Commissioners, there's no changes to this morning's
8 agenda.

9 CHAIR ZIBELMAN: Okay. So good morning,
10 everyone. And in order for us to have enough time on the
11 regular session, what I'm going to do today is take this a
12 little bit of out of order, and we're going to do the
13 consent agenda first.

14 So I'd like to ask the Commissioners, are
15 there any comments or questions on the consent agenda?
16 Ms. Burman?

17 COMMISSIONER BURMAN: Yes. Could you --
18 can I have our general counsel just clarify the two C.E.S.
19 consent agenda items?

20 CHAIR ZIBELMAN: Yes. Mr. Agresta?

21 MR. AGRESTA: I'd be happy to clarify the
22 clarification.

23 Okay. So there's two items on -- under
24 C.E.S. Item 370 is a clarification. In the C.E.S. order
25 there was a number stated of 0.6 percent and it wasn't

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2 clear by the way it was stated in the order what that
3 number was meant to be. That number is the progress
4 towards the goal for 2017. It is not the mandate that the
5 LSEs will have to achieve during 2017. The actual mandate
6 is only 14 percent of that number. The rest of that
7 number is going to be achieved through the New York Sun
8 and the customer sided tier programs.

9 So the clarification is simply that the LSE
10 mandate is .035 percent rather than point 6 percent. And
11 so that has implications for both the -- the people who
12 hide behind the meter of resources as to how those
13 resources are treated and then also has implications for
14 how much the LSEs have to acquire in 2017.

15 But the clarification doesn't change any of
16 the numbers. It just clarifies how they're characterized.
17 Is that -- do you have any questions on that one before I
18 go to the next one?

19 COMMISSIONER BURMAN: You can go to the
20 next one.

21 MR. AGRESTA: Okay. And the next one is
22 Item 374. And 374 is action on a petition by NYSERDA.
23 NYSERDA's petition is not a petition for rehearing. A
24 number of C.E.S. petitions for rehearing were held -- were
25 submitted. None of those are on the agenda for today.

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2 They'll be dealt with at a future session.

3 So this one was in the C.E.S. order. The
4 Commission as NYSERDA to submit a petition stating what
5 the administrative cost would be and for both the REC and
6 the ZEC programs so that plans could be made for adders to
7 be put onto the ZEC and REC costs so that those -- in
8 other words, it -- it costs money for NYSERDA to
9 administer those programs. It has to be -- it has to get
10 its costs from the participants in the programs. And so
11 we needed to set an adder prior to the beginning of 2017
12 for RECs and prior to April 1st for ZECs so that NYSERDA
13 could begin to collect those costs.

14 NYSERDA's petition proposes that the one-
15 time cost to set up the whole system for the new programs
16 under the C.E.S. order, instead of being collected from
17 rate payers and an adder, actually be paid for by monies
18 that have already been collected from rate payers and that
19 NYSERDA has on hand in a cash balance.

20 The only -- the recommendation in the -- in
21 the item is that the only additional collections be for
22 the annual administration cost for the ZEC program. And
23 there's an adder in there for that.

24 Also in that order is a NYSERDA proposed
25 standard contracts that it would enter into with the LSEs

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2 to implement the C.E.S. order. There's over a hundred
3 LSEs that will have to sign a contract with NYSERDA for
4 the purchase of RECs, and ZECs and NYSERDA wanted a
5 standard contract so it didn't have to individually
6 negotiate over a hundred contracts. And parties had an
7 opportunity to comment on it, and we received their
8 comments. And the item goes through the comments and
9 approves a standard contract for both RECs and ZECs.

10 And then finally, NYSERDA proposed a
11 backstop process so that if some

12 -- if an LSE can't meet its obligation for
13 NYSERDA to be reimbursed and the order includes principles
14 for that backstop process, but it also requires a
15 collaborative process to work out the details and to come
16 back to the Commission yet again.

17 So this is just one of the many
18 implementation steps that will be going on at -- over time
19 as the C.E.S. order is implemented. And there should be -
20 - there will be additional implementation steps in the
21 future.

22 CHAIR ZIBELMAN: But just to be clear,
23 NYSERDA's petition with respect to the administrative cost
24 was in response to the Commission's directive to identify
25 what those costs would be. So this was their compliance

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2 actually of our decision.

3 MR. AGRESTA: That's correct.

4 COMMISSIONER BURMAN: So the Commission
5 will have an opportunity to look further, and Commission
6 as a whole, in the implementation plan and different
7 things that come before us?

8 MR. AGRESTA: Yeah. The implementation
9 plan is not a single document. It will be a number of
10 implementation steps, and they will come to you over time
11 and you'll get another chance to look at all those things
12 and -- and to vote on them as envisioned by the C.E.S.
13 order.

14 COMMISSIONER BURMAN: All right. And to
15 clarify, we're not deciding the petitions for rehearing at
16 this time.

17 MR. AGRESTA: No, not at all.

18 COMMISSIONER BURMAN: Okay. On those two,
19 I have no further questions.

20 MR. AGRESTA: Thank you.

21 COMMISSIONER BURMAN: Thank you.

22 CHAIR ZIBELMAN: I did want to note for the
23 record, just NYSERDA's done a -- I think a very good job
24 of managing how to implement the -- the C.E.S. program at
25 the lowest cost. So frankly, what they've been able to

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2 accomplish through various efforts, I think, is that
3 they're anticipating that the whole of the program, both
4 the -- the R.E.C. program and the Z.E.C. program on
5 average will cost residential consumers about fifteen
6 cents a year.

7 So if you think about what we're doing it's
8 a -- it's a great buy.

9 So any other further questions on the
10 consent agenda?

11 COMMISSIONER BURMAN: Yes. I have two. On
12 Item 371, can you just clarify what we're doing on this
13 item?

14 CHAIR ZIBELMAN: Which item? Can you read
15 it so people know?

16 COMMISSIONER BURMAN: I'll wait until Paul
17 gets to it. This is addressing the time of use issue.

18 CHAIR ZIBELMAN: It's a -- Mark -- Marco,
19 why don't you respond to that?

20 MR. PADULA: Sure. So this item is
21 adopting a voluntary time of use rate for National Grid
22 that was actually submitted in compliance with the
23 Commission order in the rate case 12E0201.

24 COMMISSIONER BURMAN: Okay. So the -- the
25 issue that I have is this docket was opened in 2012, was

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2 part of the rate case, which was decided. And at that
3 time, when the rate case was decided from a joint
4 proposal, there was in the order a decision not to
5 definitively decide the time of use issue and to have the
6 company work with folks and put together a report, which
7 they did December 20th, 2013.

8 Thereafter, we, in Tract 2, in our REV
9 proceeding, we were looking at and are still looking at
10 time of use issues. And so my confusion here is since
11 I've looked at the full docket, that there's been nothing
12 in terms of a notice or a SAPA on the report that was
13 issued that was back in 2013. So it seems like for some
14 folks that this might come out of the blue in our decision
15 making on what we're doing here.

16 And my concern is whether we are being
17 clear in our processes where folks were focused on the
18 Tract 2 order and the time of use issues there and now it
19 sort of pops up what might appear to some folks, myself
20 included, to be out of the blue in decision.

21 I don't necessarily have a problem with the
22 substance. My concern from a process perspective is what
23 if from the time that that 2013 order was written there've
24 been different thoughts, other parties who may have been
25 interested, and we might benefit from a fuller discussion

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2 to make sure that this is the right place to decide that
3 since people seem to be focused on deciding it in the
4 Tract 2 processes including, I think, some of the REV
5 demos, or at least one REV demo.

6 So from my perspective, the -- the focus I
7 have in looking at the regulatory certainty and making
8 sure that when we are doing things we're not making things
9 less clear, and in fact, people can follow where we're
10 deciding or where we may be deciding things and the
11 opportunity that they may have to weigh in before that
12 decision because my fear is that afterwards we may hear
13 from folks who have different thoughts from the report
14 since we never issued it for a notice or comments.

15 And as far as I can tell, having looked at
16 the docket, which had a lot of different documents in
17 there, there was nothing that indicated people thought
18 they had an opportunity to -- to comment on it. So for
19 this item, I'm going to be a no purely on the sense that I
20 do think we need to make sure that we are fully engaging
21 all parties, including the public on items that may be
22 relevant, especially when we can look to other areas that
23 are already underway examining them.

24 If this report had been written recently, I
25 might be less inclined to vote no. But since this report

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2 was back in 2013, I'm really very hesitant to, in a broad
3 brush, say okay and adopt this going forward, so.

4 CHAIR ZIBELMAN: So before -- first of all,
5 I -- I don't -- because this was on the consent agenda, I
6 don't like to have things on the consent agenda where
7 there's a dissent because people then don't know what
8 we're talking about. Either Scott, Marco, or Paul, I
9 think that this thing has been amply noticed and that
10 people know exact -- had plenty of notice and there's a
11 lot of good conversation about why we were doing this.

12 So do any of you want to kind of explain
13 for the other commissioners why Commissioner Burman's
14 concerns may not be a concern that others share?

15 MR. AGRESTA: I'm going to pass that to
16 Marco. But I want to apologize to Marco because I was the
17 judge who suggested that this needed to be segmented from
18 the rate case, and handled separate --

19 CHAIR ZIBELMAN: We'll blame you?

20 MR. AGRESTA: -- back when it started. And
21 I know Marco's aware of that.

22 MR. PADULA: Thanks.

23 Just to be clear, the -- the report and --
24 and the associated draft tariffs were SAPA'd, went
25 through the full SAPA comment period and there were no

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2 comments provided by any -- any -- anybody in the public.

3 Just to add a little bit of additional
4 information, you know, everything in the rate design
5 behind the voluntary time of use rate that staff actually
6 worked with the company in developing reflects a lot of
7 what the Commission has expressed in the Tract 2 order
8 under REV in terms of getting both a time differentiated
9 delivery and commodity rate and attempting to reflect cost
10 during periods of time when they incur costs by the
11 utility system.

12 So in my -- in my opinion, the rate that is
13 before us is very reflective of the direction that REV is
14 moving toward, and I would, you know, fully support
15 adoption of this rate at this time.

16 CHAIR ZIBELMAN: Thank you, Marco. You're
17 welcome to join us any time, too, up here.

18 But you know, I -- I agree. I mean, I
19 think -- first of all, I think as we said in the REV
20 proceeding, time of use rates are very important element
21 of giving customers who want the opportunity to engage in
22 activities to reduce their energy use, to see that
23 reduction reflected in their energy bills. And it's
24 probably one of the cheapest ways that we can go forward
25 in looking at gaining energy efficiency and the ability to

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2 get opportune -- you know, an opportunity to actually see
3 this happen in action is something I know that National
4 Grid is really anxious to do.

5 The other piece I believe of this raise is
6 that it also allows as people add on electric vehicles to
7 get the advantage of seeing what it means to plug in your
8 car at night, which is when prices are low. And this
9 could be advantageous to the system. And so there's
10 nothing but good that comes out of this experience, and
11 certainly I think there's been plenty of a debate and --
12 and earlier on time of use. And so I -- I don't think
13 there's going to be any confusion. And as we've said
14 frequently at this Commission, there's nothing but
15 experience that can help us get to the future. And so
16 moving on these things as opposed to delaying them, I
17 think are very, very important.

18 So any other comments on the consent
19 agenda?

20 COMMISSIONER BURMAN: I -- yes. I do want
21 to follow up. And I thank you. I just want to make sure
22 that folks understand that I'm not substantively opposed
23 to this. In fact, I think that it's a -- necessarily
24 could be a good thing.

25 My real clear message is, is that we need

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2 to be clear on the different dockets that we're following.
3 And when people are focused on other areas where we're
4 talking about electric vehicles or time of use, especially
5 when it's in a more generic proceeding with the Tract Two
6 and being moved forward in that way. But to the extent
7 that we're now dusting off an old report from 2013,
8 especially when at the time that we made that decision, in
9 -- on the joint proposal with the rate case, we had had
10 robust conversation, discussion on that, and we decided
11 that we needed a fuller record, which was why we had the
12 report.

13 So to the extent that I'm cognizant of the
14 fact that there are other times where we're moving in one
15 direction in another proceeding and it pops up somewhere
16 else, I think it's very important for me to look and say
17 even if I'm okay with this it may be an opportunity to
18 make sure that folks have had a -- an opportunity to give
19 information in a timely fashion, not a few years later.
20 And since they didn't, I would not like to see that we
21 then are subjected to a not -- having a -- as detailed
22 record as we could to make sure that we're laser focused
23 on those issues.

24 With that -- that being said, I do look
25 forward to our continued dialogue in the REV Tract 2 as it

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2 relates to timely use and how that may play out,
3 especially as it may affect, you know, the residential
4 sector, a number of different folks, including the low-
5 income.

6 CHAIR ZIBELMAN: Okay. I understand that's
7 your concern and you don't disagree on the substance of
8 issue, Commissioner Burman. But I'm going to be really
9 clear on this.

10 There was no procedural objection for us
11 moving forward. In fact, Utility wanted us to move
12 forward so they could implement this and get the
13 experience. And there has been no objections. I don't
14 want any confusion that somehow or another this isn't
15 something that everybody wants us to do.

16 With that, I'm going to take a vote on the
17 agenda. Do you have any further comments?

18 COMMISSIONER ACAMPORA: Yeah. I just
19 wanted to pop in on this. I know when I was in the
20 legislature many of the elected officials were really
21 interested in New York moving to a time of use rate as
22 something they thought was beneficial. So as the Chair
23 just said, I think there's a lot more support for this
24 than people may think.

25 CHAIR ZIBELMAN: Commissioner Sayre? Do

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2 you have anything because --

3 MR. SAYRE: I would just say -- .

4 CHAIR ZIBELMAN: -- I guess we should have
5 put this on the regular agenda.

6 COMMISSIONER SAYRE: I would just say in
7 general I'm a strong supporter of voluntarily time of use
8 rates. And I hope this particular structure will spark
9 some interest and be a success.

10 CHAIR ZIBELMAN: Commissioner Burman?

11 COMMISSIONER BURMAN: Yes. I'm -- I'm
12 going to move to Item 372. Item 372, if you can just give
13 me a brief explanation on this farm net metering item, I'd
14 appreciate it.

15 CHAIR ZIBELMAN: Who wants to take that?
16 Michael?

17 MR. WORDEN: Sure. I'll take that.

18 CHAIR ZIBELMAN: Mr. Worden?

19 MR. WORDEN: So the -- the -- the -- the
20 primary focus of 372 is to raise the cap on farm waste net
21 metering from 1 megawatt to 2 megawatt to comply with most
22 recent P.S.L. changes. That's essentially the reason for
23 this item.

24 CHAIR ZIBELMAN: So we're implementing a
25 statutory change.

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2 MR. WORDEN: Correct. The Power Coalition
3 did raise some concerns about billing that the item offers
4 a -- a way of addressing. You know, we would be
5 addressing these outside of the item if we didn't have an
6 item. But you know, the essence of the item is to raise
7 the cap from 1 to 2 megawatts.

8 CHAIR ZIBELMAN: Which is something that
9 the agro business, particularly, and agricultural waste is
10 looking for. So and, you know, obviously, that's a very
11 important market because U.S. -- or New York is leading in
12 this area, and -- and many of our farmers are looking at
13 these types of projects that could be beneficial to them.

14 MR. WORDEN: They're very anxious to get
15 this one to two megawatt cap raised, again, in compliance
16 with the change to the P.S.L.

17 COMMISSIONER BURMAN: Right. So this
18 P.S.L. Section 66-J I'm very familiar with, and looking at
19 it, I do think that the parties who submitted comments
20 made a compelling argument on their concerns and the need
21 for us to look at ways that we can promote and advance
22 their on-farm anaerobic digester systems and looking at
23 ways that we can work from the perspective of different
24 processes that they're concerned about.

25 We have in other areas when it comes to

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2 process issues, interconnection issues in particular,
3 which they also raise, we have had an opportunity where we
4 have an ombudsman looking at those issues and working with
5 folks.

6 I am laser focused on the need to make sure
7 that we fully understand that -- the farmers' concerns
8 here. So I'm highlighting as understanding the importance
9 of it, but also to the extent that it references Public
10 Service Law 66-J, there is a pending petition for a
11 hearing on another aspect of the net metering different
12 from the farmers which has been pending where I did
13 dissent. That dissent does not conflict with my decision
14 to go forward here. In fact, in some ways, to the extent
15 that here we are saying that we can't go further because
16 of the statutory construct that limits us at this time,
17 and we're implementing the statute amendments that are
18 necessary and the tariffs, I do just want to highlight the
19 need to address the ongoing petition for rehearing, which
20 again, with net metering, there are many different
21 proceedings and many different focuses with that.

22 So to the extent that there may need to be
23 some clarification overall, it's important to me that
24 we're laser focused on making sure that we are taking into
25 consideration all the competing interests and the issues

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2 relevant to that, so thank you.

3 CHAIR ZIBELMAN: I appreciate your concern
4 on that. Actually, as a matter of fact, I think the order
5 calls out the fact that the -- the issues related to
6 pricing is something that is going -- is being addressed
7 in the value of distributed energy resources docket. We
8 recently received staff's white paper on that and would
9 expect are going to be getting comments and will be
10 looking at that. And I -- and so that's one piece.

11 The other aspect of concern that folks have
12 raised is -- is around interconnection processes, and
13 we've got numerous activities both at a technical level
14 working with the utilities to address those concerns as
15 well as I know some pending proceedings to make that work
16 better. Plus, of course, we have put in place the
17 ombudsperson to -- to work with distributed energy
18 resource providers as well -- of all types, and as well as
19 NYSERDA's done the same.

20 And I also want to note that the utilities
21 have also put people in place to work with developers to
22 make sure that there is focus. So I -- I would think that
23 we should all -- you know, one thing that I would say is
24 there's many, many activities that are going on, and
25 people are very focused. It's a -- I think a big

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2 attention on part of our staff but also many others
3 because one thing that's happened in New York as a result
4 of REV is we've really changed the corn -- turn -- turned
5 the corner on this.

6 And our utilities, rather than looking for
7 ways to impair or impede distributed energy resources, are
8 working very hard to figure out to use -- how to put in
9 place best practices. And I'm hearing from a lot of the
10 utility executives that they're really pushing on their
11 folks to rethink these things and -- and be the smartest
12 people on the block.

13 So I would say more than laser focused on
14 this. We are definitely advancing well beyond other
15 states in our thinking on how to work with distributing
16 energy resource providers. And that's something I think
17 we should all be proud of.

18 Mr. Weiner.

19 MR. WEINER: Yes. I just want to make the
20 point that the agro business interests, specifically cow
21 power, have been and continue to be very active
22 participants in the value of D.E.R. proceeding. Of
23 course, that report was recently issued -- a staff report
24 and recommendations was recently issued. It's been
25 SAPA'd now for comments, and initial comments are due in

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2 a couple weeks.

3 CHAIR ZIBELMAN: Okay. Thank you.

4 COMMISSIONER BURMAN: Thank you. That's
5 very helpful.

6 CHAIR ZIBELMAN: Any other comments on the
7 consent? All right.

8 So I'm going to move. All those in favor
9 of the items on the consent agenda please indicate by
10 saying aye.

11 MULTIPLE: Aye.

12 COMMISSIONER BURMAN: And aye for all
13 except 371. As to the process, I'm dissenting, and as to
14 370 and 374, these are the C.E.S. related items, and I am
15 concurring as I did in the original majority opinion.

16 CHAIR ZIBELMAN: Okay. With that in mind,
17 I'm hearing opposition to only one. All the
18 recommendations are adopted, and we can all proceed. So
19 thank you.

20 So we are going to turn now to the -- to
21 the regular agenda. And before we proceed on that, I do
22 want to note that Senator Ritchie is with us today, and I,
23 you know, certainly want to note my appreciation for the
24 support and continuing support that Senator Ritchie has
25 provided to the Agency and certainly on the topic of the

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2 Fitzpatrick plant, so welcome and -- and thank you for
3 joining us.

4 So first of all, before we proceed on this
5 matter, I think we've all -- everyone has been Mirandized
6 on the rules of this agency. So you know, I -- we
7 appreciate everyone's attention. We think this is really
8 and a very critical matter. We are appreciative of the
9 fact as an agency we get to contribute so much to this
10 state and welcome everybody here. But would ask that you
11 respect our process and respect each other. So we ask
12 that there be no commentary, no noise, and that if you
13 have a sign you don't block the people behind you. So we
14 would ask you not to lift your signs so that folks who
15 might want to see our gorgeous faces can see them, so.

16 With that, I'm going to turn to Mr. Belsito
17 who will be introducing the matter. And so on the regular
18 agenda, we're talking about Item 301, which is the joint
19 petition for the transfer of the Fitzpatrick Nuclear Power
20 Plant and declaratory ruling. And Anthony Belsito is in
21 our counsel's office will be presenting this item. And we
22 have staff also available for questions. So Tony, please
23 proceed.

24 MR. BELSITO: Thank you, Chair,
25 Commissioners.

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2 As you say, the purpose of today's session
3 item is for the Commission to consider the joint petition
4 of Enter -- Entergy Nuclear Fitzpatrick, LLC and Exelon
5 Generation Company, LLC for the transfer of the James A.
6 Fitzpatrick Nuclear Power Plant from Entergy to Exelon.

7 This matter has generated a considerable
8 amount of interest by the public. But from a regulatory
9 point of view, the matter before you is relatively
10 straightforward. In fact, your review under the Public
11 Service Law and the state's Environmental Review Law comes
12 down to four essential questions. These tests are the
13 same tests or the same questions that the Commission
14 applies to every Section 70 transfer petition.

15 First to consider is whether the transfer
16 will cause significant impacts to the environment.
17 Second, does Exelon, the buyer, have the financial and
18 operational capacity to make the trans -- the transaction
19 economically feasible and to operate the plant in a safe
20 and reliable manner? Third, will Exelon's ownership
21 create the potential for undue market power, Exelon's
22 ownership of the plant as well as its existing assets.
23 And fourth, is it appropriate for Exelon as the new owner
24 to be regulated in the same manner as the existing owner,
25 Entergy?

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2 As I'll describe, it is staff's
3 recommendation that the proposed -- the proposed transfer
4 passes each of these four tests and is in the public
5 interest. Therefore, joint petitioners under the
6 relevant statutes are entitled to approval of the
7 petition. A little background on the plant -- the

8 Fitzpatrick Nuclear Plant is located in Oswego County and
9 has a generating capacity of approximately 882 megawatts.

10 We began commercial operation 1975 and is
11 operating under a license from the Nuclear Regulatory
12 Commission that does not expire until 2034.

13 Fitzpatrick is an important contributor to
14 the state's clean energy electric resource portfolio. And
15 on November 2nd of 2015, Entergy filed a formal notice of
16 intent to retire the Fitzpatrick facility. Exelon wants
17 to purchase the plant and would like to keep it running.
18 On July 22nd, 2016, Entergy reaffirmed that the
19 Fitzpatrick facility will be permanently retired if the
20 transfer to Exelon does not go through.

21 Regarding the first test, the environmental
22 impact test, approval of the transfer is not expected to
23 have any negative -- significant negative impacts on the
24 environment. To the contrary, the transfer will
25 facilitate continued operation of the facility and

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2 maintenance of an important source of clean energy for the
3 state's retail energy customers.

4 The transfer does not involve construction
5 or new construction or any physical modification to the
6 environment or to the existing community -- excuse me.

7 Further, approval of the transfer will not
8 result in the creation of environmental hazards or result
9 in ad -- adverse change to natural resources. To the
10 extent approval of the transfer facilitates continued
11 operation of the Fitzpatrick facility, impacts from that
12 continued operation have already been considered when the
13 NRC considered and approved the license through 2034 of
14 the Fitzpatrick facility.

15 As for the second test, the financial and
16 operational capacity test, Exelon has an -- an investment
17 grade bond rating and has the necessary assets and revenue
18 to be financially qualified. It also has significant
19 nuclear operation and management experience. It currently
20 has ownership interests and operates thirteen nuclear
21 plants consisting of 22 generating facilities including
22 several in New York.

23 As to the third test regarding market power
24 issues, staff has reviewed the impact of the transfer on
25 the relevant markets and recommends that the Commission

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2 find that no horizontal market power issues or concerns
3 exist that are sufficient to warrant disapproval of the
4 transfer.

5 As to vertical market power, Exelon does
6 not own any transmission or distribution assets or
7 facilities that would be used to give preference to its
8 generation assets.

9 As to the fourth test regarding the
10 appropriate regulatory regime, in the past, the Commission
11 has considered at great length the appropriate regulatory
12 regime for nuclear facilities. That regime is currently
13 applied to Entergy's operation of the Fitzpatrick
14 facility. Staff recommends that nothing in this
15 transition alters the reasoning or circumstances relevant
16 to the regulatory regime of the Fitzpatrick facility and
17 that the same regime should be applied to Exelon if the
18 transfer goes through.

19 The recommended -- the recommendations I
20 have summarized here are described in much greater detail
21 in the proposed order along with an analysis of all the
22 comments that we received regarding the petition. If you
23 vote to approve the recommendations, you'll be voting to
24 approve both a negative declaration regarding the likely
25 environmental impacts of the transfer and approval of the

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2 transfer and regulatory regimes sought in the joint
3 petition.

4 This concludes my petition. This concludes
5 my presentation, and staff is available to answer any
6 questions you may have.

7 CHAIR ZIBELMAN: Great. Thank you. Thank
8 you.

9 So first of all, I -- I agree that -- or
10 note that the factors that, as Tony has talked about, that
11 we talk -- that we look at when there's an asset transfer
12 for determining the public interest are factors that the
13 Commission has applied in many, many asset transfers in
14 terms of what is the public interest, how do you define it
15 when someone's selling a generating plant in a wholesale -
16 - in a competitive wholesale market. And I -- you know, I
17 would think that we could all agree that these factors
18 have withstood the test of time, which is I think probably
19 the best test of whether we're satisfying the public
20 interest when we -- when we look at these types of things.

21 You know, we -- we do worry about the
22 environmental impact. We worry about whether there's an
23 adverse impact on the competitiveness of the wholesale
24 markets. We certainly worry about whether or not the new
25 owner of the plant is going to be able to operate it in a

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2 reliable and safe manner. Do they have the financial
3 wherewithal.

4 And of course then, the -- then the other
5 question that's before us today, which I think is whether
6 we should continue to forebear from applying regular --
7 all aspects of our regulatory authority and oversight in
8 what's relevant in the context when you have a competitive
9 wholesale market and owners of competitive generation and
10 whether or not do those -- that balance that we strike in
11 terms of how best to regulate in this context should
12 continue as is.

13 Like, as Tony mentioned, that these are
14 very straightforward analyses from our perspective and
15 very consistent. We apply them -- have applied them, and
16 they've worked. And I -- you know, and so from my
17 purpose, it's exactly what we should do here.

18 I recognize that there's a -- this is a
19 significant transaction for this state, that it's
20 obviously very critical for the state to be able to meet
21 its environmental objectives. But it -- in my opinion,
22 when you have something as significant as this, that is
23 the time for actually consistency and it would be
24 certainly inappropriate for us to vary how we look at
25 these transactions to determine how best to proceed either

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2 because of or in spite of the importance of this
3 transaction to the state.

4 So I am very comfortable that the
5 requirements that we've imposed are consistent with the
6 requirements and the analysis we've done in the past, and
7 I intend to vote for the recommendation.

8 Any other questions or comments? Mr.
9 Sayre?

10 COMMISSIONER SAYRE: This is a business-as-
11 usual case. I concur with staff's recommendation that
12 transfer of ownership here has no negative impacts on the
13 environment and does not create undue market power.

14 The proposed new owner is fully qualified
15 financially and operationally to run the plant. That's
16 enough under our settled process to approve a transaction
17 like this, and I see no reason in this situation for us to
18 abandon our settled process for determining what is in the
19 public interest.

20 So I, too, will be in favor of this item.

21 CHAIR ZIBELMAN: Commissioner Burman?

22 COMMISSIONER BURMAN: I think I have a
23 question for Warren.

24 MR. MEYERS: I'm sorry. I spent the entire
25 election season yelling at the TV, so I was watching it on

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2 TV instead. I apologize.

3 COMMISSIONER BURMAN: We can do it that way
4 if you want. Could you explain the market power test, the
5 horizontal and the vertical, and go through --

6 MR. MEYERS: Sure.

7 COMMISSIONER BURMAN: -- the differences
8 for people to understand?

9 MR. MEYERS: Sure. So horizontal market
10 power is whether or not you have a large enough share of a
11 particular market to withhold some of your output to drive
12 the price up and do it profitably. Vertical market power
13 basically requires horizontal market power in one market
14 and then using it to leverage a related market.

15 In this case, the -- the most important
16 related market is transmission and gen -- related markets
17 are transmission and generation. And just to get rid of
18 vertical market power quickly, they all note transmission
19 or distribution resources in the state, so that was a no-
20 brainer. They really didn't have an opportunity to
21 leverage the monopolistic ownership of the wires to
22 enhance their profits in the generation market.

23 Horizontal market power analysis in this
24 case, there -- there was a filing from the joint
25 petitioners that pretty much follows the FERC approach to

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2 horizontal market power analysis, H.H.I. analysis, which
3 is really just sum and squared of market share. So look
4 at the market shares and then square them and sum them.
5 And the reason for squaring them is because it -- it -- it
6 exacerbates or -- or enlarges the large ownership of
7 market share by squaring it. It -- it really emphasizes
8 when one or more parties have too much of a share of the
9 market.

10 In this case, Entergy currently owns -- in
11 -- in the entire New York generation market, about 7
12 percent of the market, and Exelon Constellation about 6
13 percent of the market, which makes them fourth and fifth
14 in line behind larger owners of shares in the market. And
15 it really just swaps a little bit of that. It -- it swaps
16 about two percent on the entire market where the market
17 share form -- from Entergy goes down from 7 to 5 percent,
18 and the market share for Exelon goes up from six to 8
19 percent. So they just switch positions from 4 and 5 to 5
20 and 4.

21 So but we -- we look at -- in -- in New
22 York State, I know I'm a little biased, but I think we do
23 a better job, a more focused job at looking at market
24 power than the FERC does. And so we looked all of the
25 traditional things that we look at for market power given

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2 the specific things we know about each individual
3 transaction, looked at them here just as we look at them
4 in any case, including when these were divested or from
5 the utilities, when -- when the nukes were divested from
6 the utilities. And it raises, according to all the due
7 diligence, zero concerns from our office point of view.

8 COMMISSIONER BURMAN: Thank you. I'm going
9 to save my -- .

10 CHAIR ZIBELMAN: Oh, please, please proceed
11 now because I'm going to ask Commissioner Acampora to go
12 next.

13 COMMISSIONER BURMAN: Right. I'm going to
14 save it for when I vote and my explanation when I vote.

15 CHAIR ZIBELMAN: I would ask that we just
16 do our comments now.

17 COMMISSIONER BURMAN: It's part of my
18 decision, my vote.

19 CHAIR ZIBELMAN: Commissioner Acampora.

20 COMMISSIONER ACAMPORA: Warren, you had
21 mentioned that, you know, we do our examination better
22 than FERC. That's no problem. I like to hear that.

23 However, I -- and I don't know who will
24 answer this -- are there other agencies that need to look
25 at this either on a state level or a federal level?

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2 MR. MEYERS: Typically, it's us and FERC
3 who approve this.

4 COMMISSIONER ACAMPORA: What about the
5 Department of Justice?

6 MR. MEYERS: Well, they certainly implement
7 the antitrust laws in this country, but there's a lot of
8 state action going on here. So I -- I'm not going to
9 opine on the law. I'll let Paul.

10 CHAIR ZIBELMAN: Paul?

11 MR. AGRESTA: They might advise FERC, but I
12 -- I don't think there's an actual approval -- .

13 COMMISSIONER ACAMPORA: Right. But they
14 advise then FERC. Has -- has that been approved or
15 disapproved?

16 MR. AGRESTA: Not yet.

17 COMMISSIONER ACAMPORA: Or when does it go
18 there? Do we know that? It just happens.

19 CHAIR ZIBELMAN: There's a pending
20 proceeding at FERC, right?

21 COMMISSIONER ACAMPORA: I would think so,
22 yeah.

23 CHAIR ZIBELMAN: On -- on the trans -- the
24 same -- under Section 203 of the Federal Power Act there's
25 a petition, and FERC will look at it in due course.

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2 MR. AGRESTA: And they also go to the
3 Nuclear Regulatory Commission, but not for market power
4 issue.

5 COMMISSIONER ACAMPORA: Right. Yeah.
6 Okay. Well, as Commissioner Sayre and the Chair has
7 already said, I've been here long enough to know that this
8 is a straightforward -- and Tony did a very good job in
9 laying this out. So this is -- this is nothing new under
10 the sun as part of the work product that we do here and
11 have done all through the years. So I will be voting in
12 favor of this item.

13 CHAIR ZIBELMAN: So now I'm going to move
14 to a vote. Commissioner -- Commissioner Burman, would you
15 like to now comment?

16 COMMISSIONER BURMAN: Yes. For my
17 explanation on my voting, yes. So I do think that this is
18 a significant item, and when I look at it, it comes to me
19 in what is my obligation as a decision maker. And I have,
20 as my colleagues have, spent tireless hours going through
21 the record and hearing from folks on both sides of the
22 issue.

23 Public Service Law Section 70 is really the
24 -- the vehicle right now for decision making and the legal
25 standard of review for that. And there's really three

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2 prongs that we have to look at. We have to first look at
3 the financial viability of the buyer and whether they have
4 sufficient financial resources to make the transaction
5 feasible.

6 The second is whether is they have the
7 ability to render safe, adequate, and reliable service
8 from the facility. And then the third comes down to the
9 market power issues. If those three are met favorably,
10 then the transaction can go forward.

11 There has been a lot of side issues that
12 are in this proceeding, very important side issues, but
13 the public interest legal standard really comes down to
14 those three. At times, we can get lost in those side
15 issues and there may be opportunities where we address
16 them.

17 But we also have to look at what our
18 jurisdiction is and what's in our lane. And what's there
19 right now are these three prongs. So for me, when I look
20 at side issues like NYPA's letter of credit or the
21 decommissioning funds, neither of those are under our
22 jurisdiction. Those aspects are not part of the decision
23 today. They're not going to be coming before us.

24 The same with the NYSERDA agreement -- our
25 decision today is separate and apart from those, and it's

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2 separate and apart from the Clean Energy Standard as a
3 whole. So when I look at this, I'm very mindful of the
4 passion on either side. But I am comfortable in voting
5 for this at this time because the public standard legal
6 review has been done, and I believe that all three aspects
7 -- prongs are met.

8 And therefore, it's -- it's important to
9 recognize what we've done today with that and understand
10 that it is a transaction under the Public Service Law
11 Section 70. And the other aspects are not under Section
12 70, and therefore, don't come before us for decision
13 making.

14 So I want to be clear in what I am voting
15 for, so I concur on that.

16 CHAIR ZIBELMAN: Thank you.

17 So first of all, I -- you know, I
18 appreciate all of the work that the staff has done on this
19 as well as parties and the Commissioners' attention. I
20 also want -- appreciate the attention of the folks in this
21 room and your -- your respect for our process.

22 You know, clearly under the leadership of
23 Governor Cuomo as well as the legislature and responsible
24 administrative agencies we're doing something really
25 important in New York, which is to show that if you pursue

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2 climate change and a reduct -- and in a -- the battle
3 against climate change in a balanced way, you can achieve
4 both the environmental objectives and economic objectives.
5 And that what we can do and what we're doing today with
6 this type of proceeding is showing that we can get to
7 where we want to go in terms of reduction of fossil
8 emissions in a way that's both good for -- and necessary
9 for the -- the environment and also good for the economic
10 pocketbook.

11 You know, it's -- it's -- although we
12 didn't plan it, just it's interesting that we're -- we're
13 discussing this matter during a time when people are in
14 Morocco trying to figure out how do we effectively combat
15 climate change across the world. And what I'm hoping is
16 that the leadership that New York is -- is showing, the
17 path that we're taking, which is to recognize that what's
18 good for the environment can also be good for the economy,
19 is a path that I believe can show the rest of the nation
20 and rest of the world that we can get there when you get
21 there in a deliberate and planned way.

22 Now, I -- I recognize that there's some
23 folks who be -- who would like to see the nuclear plant
24 close, but that really does, as we said in the C.E.S. --
25 C.E.S. order, fly against the fact that every time a

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2 nuclear plant has closed it's been replaced by increased
3 fossil emissions. That's what we've seen, certainly are
4 seeing in Germany today and are seeing in -- in -- in the
5 New England states.

6 And so what we are recognizing is that by
7 maintaining the operation of the Fitzpatrick plant, not
8 only as well as the other nuclear units in the C.E.S.
9 order, not only are we retaining thousands of jobs, we're
10 also helping get to our goal in New York to reduce
11 emissions by 40 percent by 2030 and doing it in a way as
12 the least cost from an economic perspective through the
13 entirety of the C.E.S.

14 So while -- what I would like to think
15 about because, you know, as we talked about when we
16 approved the C.E.S. order, we really are the last
17 generation that's going to be able to combat climate
18 change. As rather than fighting, let's figure it out. We
19 have a lot of wind we need to develop in New York. We
20 have a lot of solar we want to develop in New York. There
21 are a lot of other renewable resources that we want to
22 develop.

23 We want to pursue an awful lot around
24 energy efficiency so that we can get to emission
25 reductions. And to me, what we're looking to do in New

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2 York is to make sure through these types of trans --
3 through today and through our actions in August that in
4 the end what we're going to be able to show is that we can
5 achieve both very important aspects for the environment as
6 well -- and do it in a way that's economical for the
7 state. And I -- I would ask and invite, you know,
8 everyone to, now, let's get on with it and really move
9 forward in -- in where we need to go.

10 So with that, I am going to move to a vote.
11 Do you have a further comment?

12 COMMISSIONER BURMAN: I just want to make
13 clear that as to the pending petitions for rehearing, none
14 of us, including you, have -- are taking a position on
15 that, on pending dockets.

16 CHAIR ZIBELMAN: No. I'm not taking a
17 position on pending dockets. And thank you for the
18 clarification. I'm really talking today about reiterating
19 why we need to move forward with this transition and why
20 we approved the C.E.S. in the first instance.

21 So with that -- and thanks for the
22 clarification. I appreciate that. Let me -- all those in
23 favor of the recommendation on -- to approve the transfer
24 and continued lightened regulation as to conscribe, please
25 indicate by saying aye.

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2 MULTIPLE: Aye.

3 CHAIR ZIBELMAN: Opposed?

4 Hearing no opposition, the recommendations
5 are adopted. So thank you very much for joining us.

6 CHAIR ZIBELMAN: We'll take that. But are
7 there any other items that come in front of us today,
8 Secretary Burgess?

9 MS. BURGESS: There are no further items,
10 and the Commission's next meeting is December 15th in the
11 New York City office.

12 CHAIR ZIBELMAN: Great. Thank you. Thank
13 you.

14 (The hearing concluded.)

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3 STATE OF NEW YORK

4 I, JANET AXTON, do hereby certify that the foregoing was
5 reported by me, in the cause, at the time and place, as
6 stated in the caption hereto, at Page 1 hereof; that the
7 foregoing typewritten transcription consisting of pages 1
8 through 39, is a true record of all proceedings had at the
9 hearing.

10 IN WITNESS WHEREOF, I have hereunto
11 subscribed my name, this the 24th day of November, 2016.

12

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14 JANET AXTON, Reporter

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