



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

February 20, 2024

Hon. Michelle L. Phillips, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

VIA ELECTRONIC SUBMISSION

Subject: Case 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard

Dear Secretary Phillips:

In response to the Public Service Commission’s (the Commission or PSC) Notice Seeking Further Comment issued October 20, 2023 (the Notice),¹ as modified by the Notice Extending Comment Period issued January 17, 2024,² the Institute for Policy Integrity at New York University School of Law³ (Policy Integrity) respectfully submits the following comments. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has extensive experience advising stakeholders and government decisionmakers on the rational, balanced use of economic analysis, both in federal practice and at the state level.

We are grateful for your consideration of these comments.

Sincerely,

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¹ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Seeking Further Comment (October 20, 2023) [hereinafter Notice].

² Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Extending Comment Period (January 17, 2024).

³ This document does not purport to present the views, if any, of New York University School of Law.

POLICY INTEGRITY COMMENTS IN RESPONSE TO NOTICE SEEKING FURTHER COMMENT

I. Introduction

Since January 2016, this docket has provided a forum for the Commission to develop programs to ensure the achievement of New York’s increasingly ambitious renewable energy targets in tandem with greenhouse gas (GHG) emissions reductions from the electric sector.⁴ Now, the Climate Leadership and Community Protection Act (CLCPA or the Act) requires the Commission to revisit and reconsider the relationship between these twin efforts. In its Order Instituting Process Regarding Zero Emission Target, issued May 18, 2023 (the Order),⁵ the Commission formally commenced its iterative exploration of the CLCPA’s instruction that “by the year two thousand forty... the statewide electrical demand system will be zero emissions.” The Order posed a series of questions, including how the term “zero emissions,” as used in PSL § 66-p(2)(b), should be defined, as well as a wide range of other questions.

In the Notice, the Commission set forth a series of additional questions. The Notice states that “[t]hese questions seek to elicit legal interpretation rather than policy considerations, along with reasoning and analysis that supports or cuts against these legal interpretations.” We offer some reasoning with respect to the first question.

In addition to offering reasoning with respect to the first question, these comments address an issue that has arisen outside of this docket but relates to question 6. On December 20, 2023, Department of Environmental Conservation (DEC) and the New York State Energy Research and Development Authority (NYSERDA) released their *New York Cap-and-Invest Pre-Proposal Outline* (the “Outline”).⁶ The juxtaposition of the Outline with the Commission’s Notice suggests an urgent need for prompt and ongoing coordination between the Public Service Commission, the DEC, and NYSERDA.

⁴ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Expanding Scope of Proceeding and Seeking Comments (Jan. 21, 2016).

⁵ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Instituting Process (May 18, 2023) [hereinafter Order].

⁶ DEC and NYSERDA, *New York Cap-and-Invest Pre-Proposal Outline* (Dec. 20, 2023), available at <https://capandinvest.ny.gov/-/media/Project/CapInvest/Files/Second-Stage-of-Pre-Proposal-Outreach.pdf> [hereinafter Outline].

As further explained below, the CLCPA contemplates a comprehensive regulatory program for reducing statewide greenhouse gas emissions, and defines “statewide greenhouse gas emissions” as including in-state emissions from all sources as well as some upstream emissions associated with producing and importing energy and fuel. The program that the DEC will establish under Section 75-0109 is still under development, but the Outline indicates certain “pre-proposal program leanings.”⁷ Based on the Outline, it appears possible that the DEC may exempt the entire electric sector from the obligation to hold allowances under its economy-wide cap-and-invest program, suggesting an intention to rely on other programs—including the PSC’s programs adopted under Section 66-p—to achieve emissions reductions in the electric sector. According to the Outline, “Electricity sector obligations have not yet been determined. *The Agencies are seeking comments on whether and how to obligate electricity generation and electricity import emissions.*”⁸

Regardless of how the Commission ultimately interprets the phrase “statewide electrical demand system,” the Commission and the DEC must work cooperatively to ensure that the CLCPA’s comprehensive regulatory program, which includes the DEC’s program as well as the PSC’s program, addresses *all* statewide greenhouse gas emissions, including emissions associated with imported electric generation and behind-the-meter generation.

Question 1. PSL § 66-p does not expressly indicate whether “zero emissions” refers to greenhouse gas emissions only, or greenhouse gases and also the “co-pollutants” referred to elsewhere in the CLCPA. Commenters offered different interpretations. Staff asks for further comment on this issue. Does the CLCPA, the PSL, and other relevant sources of authority argue for reading “emissions” in the term “zero emissions” as encompassing all air pollutants, greenhouse gas emissions only, or some other subset of air pollutants?

It is clear from the structure of the CLCPA that the Commission should read “zero emissions” to refer to greenhouse gas emissions [GHGs] only.

The CLCPA is reasonably clear that its overarching emissions targets are specifically *greenhouse gas emissions* targets, with provisions to address the health impacts emissions being

⁷ Outline at 1.

⁸ Outline at 12 (emphasis original).

addressed in different sections. As detailed below, the CLCPA repeatedly uses the term “emissions,” without an accompanying qualifier, in contexts where there is no question that the intended meaning is *greenhouse gas* emissions. By contrast, communities and community protection are mentioned primarily in the context of adaptation in the face of climate change impacts, the need for investment in disadvantaged communities and their residents in the context of the energy transition, and the need to remedy the disproportionate environmental burden presently experienced by some communities, including the impact of co-pollutants.⁹

In the “legislative findings and declaration” section of the statute, climate change is the first issue mentioned, followed immediately by the need for greenhouse gas reductions. The first subsection states explicitly that “Climate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,” and the second identifies greenhouse gas emissions reductions as essential to tempering the severity of climate change effects.¹⁰ Subsequently, the CLCPA’s legislative findings and declaration section also establishes an overall *goal* for the State of New York to reduce “greenhouse gas emissions from all anthropogenic sources 100% over 1990 levels by the year 2050, with an incremental target of at least a 40 percent reduction in climate pollution by the year 2030, in line with USGCRP and IPCC projections of what is necessary to avoid the most severe impacts of climate change.”¹¹

The legislative findings and declaration section ends with a statement that “[t]his legislation will build upon these past developments by creating a comprehensive regulatory program to reduce greenhouse gas emissions that corresponds with the targets established in executive order no. 24, the state energy plan, and USGCRP and IPCC projections.” Importantly, at one point, the legislative findings and declaration section refers to GHG emissions simply as “emissions” for short, observing that “substantial *emissions* reductions are necessary to avoid the

⁹ Notably, co-pollutants receive *no mention at all* in either the legislative findings and declaration section of the CLCPA, nor in Public Service Law Section 66-p, the provision of the CLCPA that is at issue here. Instead, the statute’s discussion of co-pollutants is entirely contained in the new Article 75 of the Environmental Conservation Law, a new comprehensive provision directing the Department of Environmental Conservation to address climate change and provide pollution relief and investment in disadvantaged communities, and to Section 7(3) of the statute, which obligates various entities including the Commission to align with the DEC’s efforts to avoid disproportionately burdening disadvantaged communities and to *prioritize* greenhouse gas and co-pollutant reductions in those communities (but does not speak to the overall magnitude of those reductions).

¹⁰ C.L.C.P.A. § 1(1, 2).

¹¹ C.L.C.P.A. § 1(4).

most severe impacts of climate change”;¹² in this context, “emissions” clearly refers solely to those emissions that cause climate change, i.e., GHGs.

The “comprehensive regulatory program” that the CLCPA establishes to reduce greenhouse gas emissions aligns with the overall *goal* set forth in the declarations. Section 2 of the CLCPA adds the new Article 75 (Climate Change) to the Environmental Conservation Law (ECL). As the title suggests, Article 75 is focused on achieving the reductions in climate pollution (greenhouse gases) that are contemplated in the CLCPA’s declarations. The new § 75-0107 of the ECL directs the DEC to establish “statewide greenhouse gas emissions limits.” These limits align with the policy adopted in the declarations section of the CLCPA. By 2030, the statewide greenhouse gas emissions are not to exceed 60% of 1990 emissions—a 40% reduction compared to the baseline, as required by CLCPA Section § 1(4). The 2050 *limit* is less obviously aligned with the language of § 1(4)—a budget of 15% of baseline means an 85% reduction, rather than the 100% stated in the declarations—but other provisions of Article 75 encourage the DEC in fact to attempt to surpass the required 85% reductions to achieve that 100% *goal*.

Notably Section 75-0109(4) states that the DEC “may establish an alternative compliance mechanism to be used by sources subject to greenhouse gas emissions limits to achieve net zero emissions,” and that “the use of such mechanism shall account for not greater than fifteen percent of statewide greenhouse gas emissions estimated as a percentage of nineteen ninety emissions..., provided that the use of this mechanism must offset a quantity greater than or equal to the greenhouse gases emitted.”¹³ Like the declarations section of the CLCPA, Article 75 occasionally refers to greenhouse gas emissions as simply “emissions,” such as when the CLCPA directs the DEC to “establish a statewide greenhouse gas emissions limit as a percentage of 1990 *emissions*,”¹⁴ and when Section 75-0109(1) directs the DEC to “promulgate rules and regulations to ensure compliance with the statewide *emissions* reduction limits,”¹⁵ when the only statewide emissions limits that are set forth in the statute concern greenhouse gas emissions (a

¹² C.L.C.P.A. § 1(5) (emphasis added).

¹³ N.Y. Env'tl. Conserv. Law § 75-0109(4)(a), (b).

¹⁴ N.Y. Env'tl. Conserv. Law § 75-0107(1) (emphasis added).

¹⁵ N.Y. Env'tl. Conserv. Law § 75-0109(1) (emphasis added).

fact that is also reflected in that section’s caption, “Promulgation of regulations to achieve statewide greenhouse gas emissions reductions”).¹⁶

The CLCPA is of course concerned with co-pollutants, but it addresses them in discrete provisions that complement the provisions that govern greenhouse gas emissions. Additionally, whereas the provisions that concern greenhouse gas emissions reflect an awareness of the global nature of GHG pollution (hence the inclusion, within the definition of “statewide greenhouse gas emissions,” of certain upstream emissions associated with imported fuel and electricity¹⁷), the provisions concerning co-pollutants largely focus on community-level impacts, especially impacts on disadvantaged communities. For example, in the context of the provision directing DEC to adopt GHG emissions limit regulations, the CLCPA notes a separate responsibility to “[e]nsure that activities undertaken to comply with the regulations do not result in a net increase in co-pollutant emissions or otherwise disproportionately burden disadvantaged communities....” E.C.L. § 75-0109(3)(c). This provision shows that while the CLCPA recognizes co-pollutant emissions as a harmful factor that must be mitigated, that pollution is not directly covered by the greenhouse gas emissions reductions goals for which the DEC is creating a comprehensive program (indeed, as the quoted provision recognizes, co-pollutants could even increase as greenhouse gas emissions decline, if care is not taken to avoid that outcome). The distinction between these two endeavors—statewide greenhouse gas emissions reductions in alignment with the specified targets, and reducing the harm caused by co-pollutants especially in disadvantaged communities—is further underlined by the structure of Section 7 of the CLCPA, which distinguishes between greenhouse gases and co-pollutants by addressing alignment with statewide greenhouse gas emissions targets in Section 7(2) and prioritization of disadvantaged communities, including with respect to co-pollutant impacts, in Section 7(3).

Whereas Section 2 of the CLCPA establishes the new Article 75 of the Environmental Conservation law, the new Section 66-p of the Public Service Law is established by Section 4 of the CLCPA. A key question is whether the Commission’s program to be created under Section 66-p is part of the “comprehensive regulatory program to reduce greenhouse gas emissions” that the CLCPA announces in the recitals, or whether it is a complement to that program. If it is part of the same “comprehensive regulatory program” as the DEC’s Article 75 (Climate Change)

¹⁶ N.Y. Evtl. Conserv. Law § 75-0109.

¹⁷ N.Y. Evtl. Conserv. Law § 75-0101(13).

program, then it stands to reason that its concerns about “emissions” should align roughly with those of Article 75—which is to say that “emissions,” where not otherwise specified, should be understood to be greenhouse gas emissions.

A strong expert consensus holds that the electric system is the lynchpin of economywide decarbonization, because the technology to reduce or eliminate power sector emissions is reasonably advanced and many polluting end uses can be electrified. To effect a decarbonization strategy that relies heavily on electrification would require special attention to the utility energy sector. Although the CLCPA does not expressly state that such a strategy is the basis for the relationship between Article 75 of the Environmental Conservation Law and Section 66-p of the Public Service Law, the statute incorporates compelling evidence that the comprehensive regulatory program it contemplates would be built on such a strategy. Specifically, Section 75-0103(13), which details requirements for the scoping plan to be produced by the Climate Action Council, requires that the scoping plan specifically consider *both* some of the precise requirements to decarbonize the electric system that are incumbent on the Public Service Commission under Section 66-p of the Public Service Law¹⁸ *and* a variety of opportunities to decarbonize other sectors of the economy by relying on the decarbonized electric system through “beneficial electrification.”¹⁹

The fact that the Public Service Commission has a special, critical role to play in achieving the goals of the comprehensive regulatory program is further underlined by Section 8 of the CLCPA, which directs a variety of agencies—the Public Service Commission is at the top of the list—to “promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law.”²⁰ This Commission obligation does not exist in a vacuum; rather, it is expressly linked to DEC’s

¹⁸ The Scoping Plan must consider, inter alia, “[m]easures to reduce emissions from the electricity sector by displacing fossil-fuel fired electricity with renewable electricity or energy efficiency” (N.Y. Env’tl. Conserv. Law § 75-0103(13)(b)) and “[m]easures to achieve six gigawatts of distributed solar energy capacity installed in the state by two thousand twenty-five, nine gigawatts of offshore wind capacity installed by two thousand thirty-five, a statewide energy efficiency goal of one hundred eighty-five trillion British thermal units energy reduction from the two thousand twenty-five forecast; and three gigawatts of statewide energy storage capacity by two thousand thirty” (N.Y. Env’tl. Conserv. Law § 75-0103(13)(e)).

¹⁹ Beneficial electrification opportunities that must be considered in the Scoping Plan include those that may exist in the transportation and freight context (N.Y. Env’tl. Conserv. Law § 75-0103(13)(f) as well as in the buildings context (N.Y. Env’tl. Conserv. Law § 75-0103(13)(g)).

²⁰ C.L.C.P.A. § 8.

obligation to promulgate a regulations to ensure statewide greenhouse gas emissions be met.²¹ These structural features of the CLCPA demonstrate that the Commission’s Section 66-p program is an integral part of the CLCPA’s “comprehensive regulatory program to reduce greenhouse gas emissions.”

²¹ See N.Y. Evtl. Conserv. Law § 75-0109(1).