

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of the Application of  
CAROL CHOCK, President, on Behalf of  
RATEPAYER AND COMMUNITY INTERVENORS and  
CITIZENS CAMPAIGN FOR THE ENVIRONMENT,

Petitioners,

-against-

Index No. 6845-13

PUBLIC SERVICE COMMISSION OF THE STATE OF  
NEW YORK and NEW YORK STATE DEPARTMENT  
OF PUBLIC SERVICE,

Respondents,

for a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules.

-----X

**PETITIONERS' MEMORANDUM OF LAW**

**EARTHJUSTICE**

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Campaign for the Environment*

December 18, 2013

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**Preliminary Statement**

Petitioners Carol Chock, President, on behalf of Ratepayer and Community Intervenors ("RCI"), and Citizens Campaign for the Environment ("CCE") (collectively, "Petitioners") bring this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking judgment (i) annulling and vacating a November 13, 2013 Ruling issued by Respondents New York Public Service Commission ("PSC" or "Commission") and the New York State Department of Public Service ("DPS") which denied or constructively denied Petitioners' request for access to critical documents submitted in and relating to a Commission proceeding to which Petitioners are parties; and (ii) compelling Respondents to comply with their nondiscretionary duty to provide Petitioners with access to critical documents relating to the

Commission proceeding or, in the alternative, to post those documents on the Public Docket for the proceeding (“Public Docket”).

Petitioners are parties to the Commission’s Proceeding on Motion by the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Case 12-E-0577 (the “Proceeding”). The purpose of the Proceeding is to evaluate whether electricity reliability issues allegedly raised by the proposed “mothballing” of two coal-fired power plants in western New York State should be addressed through transmission line upgrades or by repowering the plants with natural gas.

Despite having party status, Petitioners have been denied access to documents submitted by and/or exchanged between other parties to the Proceeding, including (i) documents submitted to the Commission or DPS staff by the plant owners and transmission utilities; (ii) records of communications between DPS staff and the plant owners and transmission utilities; and (iii) records of meetings between Commission members and the plant owners and transmission utilities.

Upon information and belief, the documents to which Petitioners seek access address core issues in the Proceeding, including the potential rate and environmental impacts of the various transmission upgrade and repowering options under consideration, and document *ex parte* communications between the Commission and the plant owners and transmission utilities. Consequently, the withheld documents are indispensable to Petitioners’ ability to evaluate and comment on the various transmission upgrade and repowering options and to respond to arguments or claims made in the course of *ex parte* communications. Respondents’ failure and refusal to grant access to those documents is thus preventing Petitioners’ meaningful participation in the Proceeding.

Petitioners have repeatedly sought access to the requested records via motions filed in accordance with the procedures set forth in the regulations governing Commission proceedings. Respondents' November 13, 2013 Ruling denied or constructively denied those motions in violation of the disclosure and procedural requirements of the New York Public Service Law ("PSL"), Respondents' regulations, and two previous Orders issued by the Commission. Moreover, despite the fact that the utilities and plant owners have conducted discovery in the Proceeding, Respondents' November 13, 2013 Ruling denied Petitioners the right to seek discovery, thereby creating a double standard under which the utilities and plant owners are granted access to critical information while Petitioners are denied access to that information. For all of these reasons, the November 13, 2013 Ruling is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

Petitioners seek to lift the veil of secrecy that has cloaked the Proceeding, to compel Respondents to follow their own regulations governing Commission proceedings, to eliminate the double standard in the Proceeding that favors utilities and plant owners over public intervenors, and to shed light on the *ex parte*, secret backroom negotiations that have, upon information and belief, occurred regarding key issues in the Proceeding.

Petitioners seek a judgment (i) pursuant to CPLR Article 7803(3) annulling and vacating Respondents' November 13 Ruling as being in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and enjoining Respondents to provide Petitioners with access to the requested documents by a date certain; (ii) pursuant to CPLR 7803(1) enjoining Respondents to perform their nondiscretionary duty to provide Petitioner with the requested documents by a date certain or, in the alternative, to post those documents on the Public Docket by a date certain; and (iii) pursuant to CPLR 7803(1) enjoining

Respondents to perform their nondiscretionary duty to provide Petitioners with any similar future documents or, in the alternative, to post such documents on the Public Docket.

In the alternative, Petitioners seek judgment (i) pursuant to CPLR Article 78 that Respondents have failed to comply with the requirements of the New York Freedom of Information Law (“FOIL”), N.Y. Pub. Off. Law §§ 84 -90, and enjoining Respondents to provide Petitioners with the requested documents by a date certain; and (ii) pursuant to N.Y. Pub. Off. Law § 89(4)(c) awarding Petitioners reasonable attorneys’ fees and litigation costs.

### FACTS

The Proceeding involves the proposed mothballing of two coal-fired power plants: (1) the Dunkirk generating station (“Dunkirk Plant”) located in Chautauqua County, New York, and (2) the Cayuga generating station (“Cayuga Plant”) located in Tompkins County, New York. *See* Verified Petition (“Petition”) ¶ 13. On March 14, 2012, NRG Energy, Inc. (“NRG”) filed notice with the Commission of NRG’s intent to retire the Dunkirk Plant by no later than September 10, 2012, on the ground that the plant was not economic and was not expected to be economic. *Id.* ¶ 14. Subsequently, National Grid, the transmission utility responsible for ensuring reliability of electricity in that geographic area, entered into a Reliability Support Services Agreement (“RSSA”) with NRG to continue the Dunkirk plant’s operation in order to avoid potential reliability issues associated with the shutdown of the plant. *Id.* ¶ 15. NRG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Dunkirk plant would be addressed by reinforcements to the transmission system. *Id.* ¶ 16.

On July 20, 2012, Cayuga Operating Company, LLC (“Cayuga”) filed notice with the Commission of its intent to retire the Cayuga Plant by no later than January 16, 2013 on the ground that the plant was unable to operate economically. Petition ¶ 17. Subsequently, New York State Electric and Gas Company, Inc. (“NYSEG”), the transmission utility responsible for

ensuring reliability of electricity in that geographic area, entered into an RSSA with Cayuga to continue the Cayuga plant's operation in order to avoid potential reliability issues associated with the shutdown of the plant. *Id.* ¶ 18. NYSEG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Cayuga plant would be addressed by reinforcements to the transmission system. *Id.* ¶ 19.

The Commission initiated the Proceeding by Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (Case 12-E-0577 Filing No. 3, Jan. 18, 2013) (the "January 18 Order"), Exhibit A to Petition.<sup>1</sup> The January 18 Order directed the transmission and distribution utilities "to evaluate repowering [with natural gas] as an alternative outcome for these two retirements over a long-run horizon of at least ten years." Exhibit A at 3.

As part of that evaluation, National Grid and NYSEG were directed to (1) file with DPS staff the projected costs of the transmission alternatives that they propose to evaluate; and (2) request bids from the owners of the Cayuga and Dunkirk plants for the level of out-of-market support each would require in order to finance the repowering of their respective facilities. *Id.*

At or about the time the January 18 Order was issued, the Commission established the Public Docket for the Proceeding on the Commission's website for the purported purpose of providing parties to the Proceeding and the public at large with access to documents, motions, letters, reports, comments, and other written materials submitted in connection with the Proceeding. Petition ¶ 24.

On August 13, 2013, Petitioner RCI filed and served a Request for Party Status in the Proceeding. Affidavit of Carol Chock, sworn to on December 17, 2013 ("Chock Aff.") ¶ 7. Shortly after filing for party status, Petitioner's members discovered that critical documents filed

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<sup>1</sup> Hereinafter, all references to Exhibits are to the exhibits annexed to the Verified Petition.

in the Proceeding by or on behalf of NRG, Cayuga, National Grid, NYSEG and Niagara Mohawk Power Corporation (together, the “Transmission and Generating Entities”) were posted on the Public Docket in severely redacted versions that concealed critical economic and environmental information relating to the various transmission upgrade and repowering options under consideration in the Proceeding. The redactions were so pervasive and numerous that the documents were rendered essentially useless for purposes of meaningful review and comment by Petitioner. Petition ¶ 26.

On August 16, 2013, representatives of Petitioner RCI met with then-Acting Commission Secretary Jeffrey Cohen. Affirmation of Christopher Amato, Esq., sworn to on December 17, 2013 (“Amato Aff.”) ¶ 18. The purpose of the meeting was to request that the PSC post unredacted versions of the critical documents on the Public Docket or, alternatively, provide Petitioner with unredacted versions of those documents. *Id.*

Acting Secretary Cohen stated at the meeting that unredacted versions of the documents could not be released or provided due to trade secret claims made by the Transmission and Generating Entities concerning the redacted portions of the documents. Amato Aff. ¶ 19. He also stated that the Commission had received submissions from the Transmission and Generating Entities concerning issues in the Proceeding that were not posted on the Public Docket, but gave no reason why some submissions were posted on the Public Docket while others were not. Acting Secretary Cohen also stated that DPS staff had engaged in communications with the Transmission and Generating Entities concerning issues in the Proceeding, and acknowledged that Commission members may have met with representatives of the Transmission and Generating Entities. *Id.* ¶¶ 19-21.

Concerned that key documents on the Public Docket were severely redacted, that some undetermined number of submissions from the Transmission and Generating Entities did not appear on the Public Docket, and that records of communications and meetings between the Commission and/or DPS staff and the Transmission and Generating Entities were not being made public, Petitioners RCI and CCE<sup>2</sup> filed and served on September 16, 2013 a Motion for Access to Critical Documents Submitted in This Proceeding (“Motion for Access”). The Motion for Access was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought:

- (1) unredacted versions of twelve identified documents previously filed in the Proceeding by the Transmission and Generating Entities (the “Requested Filed Documents”);
- (2) all documents submitted to the Commission in the Proceeding by or on behalf of the Transmission and Generating Entities which did not appear on the Public Docket (the “Non-Public Submissions”);
- (3) all communications from the Commission or DPS staff to any one or more of the Transmission and Generating Entities which did not appear on the Public Docket (the “Non-Public Communications”);
- (4) all records of meetings between the Commission, any quorum of the Commission, or any Commission member and any one or more of the Transmission and Generating Entities (the “Meeting Records”); and
- (5) all documents filed in the Proceeding by the Transmission and Generating Entities and all communications from the Commission or DPS staff to the Transmission and Generating Entities after the date of the motion (the “Future Submissions”).

*See* Motion for Access, Exhibit C. The Motion for Access argued that Petitioners were entitled to all five categories of requested documents pursuant to PSL § 70, the Commission’s January 18

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<sup>2</sup> Petitioner CCE filed for party status in the Proceeding on September 12, 2013. *See* Smith Aff. ¶ 4.



Order and Retirement Order, the regulations governing Commission proceedings, and the New York Open Meetings Law, N.Y. Pub. Off. Law §§ 101-111. *Id.*

Rather than issuing a ruling on Petitioners' Motion for Access, the Commission Secretary informed Petitioners on September 23, 2013 that "I have reviewed your motion and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1 . . . [and] this request for access will be handled by the [PSC]'s Records Access Officer." *See* the Secretary's September 23 Letter, Exhibit D. By letter dated that same day, the PSC Records Access Officer ("RAO") informed Petitioners that "this matter has been referred to me by Secretary Burgess and will be treated as a request for records pursuant to [the] Freedom of Information Law (FOIL)." *See* the RAO's September 23 Letter, Exhibit E. Thus, Respondents made clear that they were converting Petitioners' Motion for Access into a simple FOIL request.

On September 26, 2013, Petitioners filed a Motion to Revoke Secretary's Conversion and Referral of Motion for Access to Documents ("Motion to Revoke"). The Motion to Revoke was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought an Order (1) revoking the Secretary's purported conversion of the Motion for Access into a FOIL request; and (2) revoking the Secretary's referral of the Motion for Access to the RAO for decision. *See* Motion to Revoke, Exhibit F. The grounds for the Motion to Revoke were that (i) neither the Secretary's September 23 Letter nor the RAO's September 23 Letter cited any legal authority for converting the Motion for Access into a FOIL request and no such authority exists; and (ii) the RAO lacks authority to rule on a motion filed in a Commission proceeding.

On October 9, 2013, the Commission Secretary issued a ruling on Petitioners' Motion to Revoke. Remarkably, the ruling flatly denied that the Motion for Access had been converted to a FOIL request, but then sought to justify the RAO's authority to issue a ruling on the Motion:

I write to clarify *that no conversion of [Petitioners'] motion took place* and that 16 NYCRR § 6-1.3 governs production of "trade secret" information in a notice and comment proceeding when no "presiding officer" is assigned. I further clarify that, pursuant to delegation under [PSL] § 8, the RAO exercises full authority to decide whether redacted documents will be made public pursuant to 16 NYCRR § 6-1.3 and whether to issue protective orders to make available access to materials deemed "trade secret."

See the Secretary's October 9 Ruling, Exhibit G.

The Secretary's October 9 Ruling dealt exclusively with trade secret issues which, upon information and belief, are relevant only to the Requested Filed Documents sought by the Motion for Access. The Secretary's October 9 Ruling failed to address – or even mention – the Non-Public Submissions, the Non-Public Communications, the Meeting Records, and the Future Submissions sought by the Motion for Access. This omission is significant, as Respondents have acknowledged that "[t]here are nearly 400 documents filed in this case." See RAO October 3 FOIL Determination, Exhibit H at 3 (emphasis added). To date, only 154 of the documents filed in the Proceeding have been placed on the Public Docket. Petition ¶¶ 48-50. Thus, upon information and belief, *nearly 250 documents* filed in the Proceeding are being withheld from Petitioners. *Id.*

Because the Secretary's October 9 Ruling failed to address the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access, Petitioners filed and served on October 17, 2013, a Motion for Rehearing on the Secretary's October 9, 2013 Ruling ("Motion for Rehearing"). The Motion was filed pursuant to the regulations governing Commission proceedings, 16 N.Y.C.R.R. §§ 3.6 and 3.7(a), and sought

an Order (i) granting rehearing on the Secretary's October 9 Ruling and (ii) reversing that portion of the Ruling that constructively denied access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access. *See* Motion for Rehearing, Exhibit J.

On November 13, 2013, the Commission Secretary issued a ruling on Petitioner's Motion for Rehearing claiming that Petitioner had not been denied access, "constructively or otherwise," to any documents. *See* the Secretary's November 13 Ruling, Exhibit K. The Ruling also affirmed the conversion of the Motion for Access into a FOIL request and the referral of that Motion to the RAO for decision. *Id.*

## **ARGUMENT**

### **POINT I**

#### **THE SECRETARY'S NOVEMBER 13 RULING WAS IN VIOLATION OF LAWFUL PROCEDURE, AFFECTED BY AN ERROR OF LAW, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION**

The Secretary's November 13 Ruling affirming conversion of Petitioner's Motion for Access into a FOIL request, affirming referral of Petitioner's Motion for Access to the RAO for decision, and denying or constructively denying document requests violates the disclosure and procedural requirements of the New York Public Service Law ("PSL"), Respondents' regulations, and two previous Orders issued by the Commission. It is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and this Court should issue an Order annulling and vacating the Ruling.

**A. The Secretary’s November 13 Ruling Violates the Respondents’ Regulations Governing Commission Proceedings By Affirming Respondents’ Unlawful Conversion of Petitioner’s Motion for Access Into a FOIL Request and Their Improper Referral of the Motion to the RAO for Decision**

Respondents’ handling of Petitioners’ Motion for Access has been a model of bureaucratic obfuscation and delay. The Commission Secretary first informed Petitioners that “I have reviewed your motion *and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1* [Respondents’ FOIL regulations]. . . [and] *this request for access will be handled by the [PSC]’s Records Access Officer.*” See Exhibit D (emphasis added). However, after Petitioners filed their Motion to Revoke challenging the legality of Respondents’ conversion of the Motion for Access into a FOIL request and the RAO’s lack of authority to rule on a motion made in a Commission proceeding, *see* Exhibit F, the Secretary flatly denied that the Motion had been converted into a FOIL request. See Exhibit G (“I write to clarify *that no conversion of [Petitioners’] motion took place . . .*”) (emphasis added). The Secretary flip-flopped once again in the November 13 Ruling stating, “I write to clarify . . . that *the handling of access to information in this case by the Records Access Officer (RAO) pursuant to 16 NYCRR §6-1.3 does not deny access, constructively or otherwise, to materials in this notice and comment proceeding. The RAO possesses full power under 16 NYCRR § 6-1.3 to grant the access [Petitioner] seeks . . .*” See Exhibit. K (emphasis added).

Regardless of Respondents’ conflicting claims, the plain fact is that Respondents did convert Petitioners’ Motion for Access into a simple FOIL request, and referred the Motion to the RAO for decision. This was done in flagrant disregard of the regulations governing Commission proceedings. Moreover, contrary to Respondents’ claim, the RAO has no authority to rule on Petitioners’ motion – or on any motion filed in a Commission proceeding.

### **1. There is No Legal Authority Permitting Respondents to Convert a Motion Made in a Commission Proceeding into a FOIL Request**

The Secretary's November 13, 2013 Ruling cites to no statutory or regulatory authority permitting a motion made in the context of a Commission proceeding to be "converted" to a FOIL request and, indeed, none exists. *See* Exhibit K. Although the Motion for Access seeks documents, this fact alone does not warrant conversion of the motion into a FOIL request. Indeed, such an interpretation would render the discovery procedures set forth in 16 N.Y.C.R.R. § 5.4 (regarding requests for documents) superfluous as to the Commission or its staff, since such document discovery would simply be converted into FOIL requests. This has not been the Commission's practice, nor is it one that has been sanctioned by the courts. *See M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 80, (1984) (drawing a distinction between the discovery rights of litigants under the CPLR and FOIL requests); *De Corse v. City of Buffalo*, 239 A.D.2d 949 (4<sup>th</sup> Dep't 1997) ("The provisions of the CPLR relating to discovery in civil actions do not apply to FOIL requests"). Accordingly, the mere fact that the Motion for Access involves documents in the possession of the Commission or its staff does not operate to automatically transform the motion into a FOIL request.

Moreover, the Secretary's "conversion" of the Motion for Access improperly relegates Petitioners to the status of outside observers who must file FOIL requests to obtain access to documents submitted in the Proceeding – documents that parties to the Proceeding should have unfettered access to in the first place. Having expended the time and effort to achieve party status, Petitioners are now being treated no differently than bystanders with no stake or involvement in the Proceeding. Thus, the Secretary's conversion of the Motion for Access creates the absurd result that interested public intervenors derive no procedural or substantive benefits from seeking party status in a Commission proceeding.

The inappropriateness of converting the Motion for Access into a FOIL request is underscored by the fact that the legal arguments upon which the Motion is based are incapable of being addressed in the context of a FOIL response – and in fact the RAO’s FOIL response utterly fails to address or respond to those arguments. *See* Exhibit E. The Motion for Access is grounded upon PSL § 70, the Commission’s January 18 Order and Retirement Order, the regulations governing Commission proceedings, and the New York Open Meetings Law, N.Y. Pub. Off. L. §§ 101-111. *See* Exhibit C. None of these legal grounds have any relevance to a FOIL request, but they are critical to Petitioners’ rights as parties to a Commission proceeding. Yet these core legal grounds supporting Petitioners’ claim for access are not even cited – much less addressed – in the RAO’s response. *See* Exhibit E.

Additionally, a FOIL response is incapable of affording the relief sought by Petitioners in the Motion for Access, a fact that is acknowledged in the RAO’s September 23, 2013 letter. *See* Exhibit E at 2 (“[w]ith regard to future submissions, *agencies are not obligated to respond to requests for future filings or submissions as these records do not yet exist*”) (emphasis added). While this may be true of FOIL requests, it is emphatically not true of a motion made in the context of a Commission proceeding; the Commission clearly has authority to issue an order requiring that Petitioners be provided with copies of all future submissions in the Proceeding. *See, e.g.*, PSL §§ 19-23 (Commission has power to issue orders, grant immunity to witnesses, and issue subpoenas in proceedings).

It is wasteful and obstructive for Petitioners to be compelled to file a FOIL request each time a party to this proceeding submits a document to the Commission that, for whatever reason, the Commission chooses not to place on the Public Docket, yet that is exactly what the Secretary’s November 13 Ruling decrees.

## 2. The RAO Lacks Authority to Rule on Motions Made in Commission Proceedings

There is no statutory or regulatory authority permitting the RAO to rule on a motion made in the context of a Commission proceeding. The Secretary's November 13 Ruling cites 16 NYCRR § 6-1.3 as providing the RAO "full power" to act on Petitioners' motion, *see* Exhibit K, but that regulation does no such thing. Section 6-1.3 is part of Respondents' FOIL regulations and simply specifies procedures to be followed regarding claims of confidentiality; it does not confer *carte blanche* authority on the RAO to rule on motions made in the context of Commission proceedings. In any event, the hundreds of documents sought by Petitioners are not, upon information and belief, subject to any claim of confidentiality, and Section 6-1.3 is therefore inapposite.

In fact, the Commission's regulations specifically require that all motions in proceedings be filed with either the Secretary or the presiding officer, *see* 16 N.Y.C.R.R. § 3.6(b), and neither the Commission nor the Secretary has delegated to the RAO the authority to rule on motions. Accordingly, the RAO lacks authority to issue a ruling on the Motion for Access and any attempt to do so would be *ultra vires*. *Bellacosa v. Classification Review Bd. of Unified Court Sys. of State of N.Y.*, 72 N.Y.2d 383, 391 (1988) (invalidating Review Board employment reclassifications because Board lacked authority to revise classifications in absence of lawful subdelegation from Chief Administrative Judge); *Garzilli v. Mills*, 250 A.D.2d 131, 137 (3<sup>rd</sup> Dep't 1998) (overturning disciplinary proceeding against teacher because school superintendent lacked authority to make "probable cause" finding initiating proceeding in absence of subdelegation from Schools Chancellor); *Adirondack Mtn. Club v. Adirondack Park Agency*, 33 Misc.3d 383, 393 (Sup. Ct. Albany Co. 2011) (lack of lawful subdelegation from agency commissioner to designee constitutes grounds for reconsidering vote); *Munter v. Gross*, 42

Misc.2d 690 (Sup. Ct. Kings Co. 1964) (school superintendent lacked authority to request teacher retirement based on disability in absence of delegation from Board of Education).

**B. The Secretary's November 13 Ruling is Unlawful Because it Denies Petitioners Procedural Rights Afforded Other Parties to the Proceeding**

The Secretary's November 13 Ruling claims that Petitioners are not entitled to any discovery in the Proceeding and that discovery is impermissible in the Proceeding under the Commission's regulations. *See* Exhibit K. The Secretary's Ruling misconstrues Petitioners' Motion for Access and the regulations governing Commission proceedings. First, the Motion for Access was not seeking discovery, but was seeking to enforce Petitioners' rights as parties to the Proceeding to be served with all documents submitted by, or exchanged among, other parties to the Proceeding as required by the Commission's regulations. *See* 16 N.Y.C.R.R. § 3.5(e)(1) (“[a] party who presents a document for filing in a proceeding in which there are other parties *shall at the same time serve the document on each such party*”) (emphasis added). Part 3 of Title 16 is entitled, “Procedures Applicable to All Proceedings,” and the procedures specified in that part are thus applicable to all Commission proceedings, including “notice and comment” proceedings. Thus, as parties to the Proceeding Petitioners have a legal right to be served with every document filed by another party, and are not (and should not be) required to serve a discovery request to obtain those documents.

Second, even if the Motion for Access was properly considered a discovery request, the claim in the Secretary's November 13 Ruling that no discovery is available in the Proceeding is clearly incorrect. Discovery has been served and responded to by the Transmission and Generating Entities in the Proceeding – a fact of which Respondents are well aware. In its appeal of the RAO's October 3 FOIL Determination, NRG identified categories of documents for which it was asserting confidentiality claims as including discovery requests and responses.



See Exhibit L (asserting confidentiality claims regarding “[t]he first set of Information Requests to NRG and Dunkirk from National Grid dated 4/1/13 and NRG’s responses thereto,” and “[t]he second set of Information Requests to NRG and Dunkirk dated 4/1/13 and NRG’s responses thereto.”). Those discovery requests and responses were explicitly referenced by the Secretary in a subsequent ruling on NRG’s appeal. See Exhibit M. Thus, two weeks after the Secretary explicitly referred to discovery requests and responses in a ruling issued in the Proceeding, the Secretary’s November 13 Ruling claimed that Petitioners are not entitled to any discovery and that discovery is impermissible in the Proceeding under the Commission’s regulations.

The Secretary’s November 13 Ruling thus establishes an impermissible, unjust and unlawful double standard under which Transmission and Generating Entities are allowed to obtain critical information in the Proceeding through discovery, but Petitioners are not. This violates the regulations governing Commission proceedings, including 16 N.Y.C.R.R. Parts 3 and 5. Moreover, allowing some but not other parties to have access to discovery in the Proceeding is impermissible and violates the concept of fundamental fairness. See *Seligson v. Fid. & Cas. Co. of New York*, 29 N.Y.2d 828, 830 (1971) (unanimously affirming the decision to require the Attorney General to make requested transcripts available to all parties in a private action and holding that allowing only one party to the proceeding to have access to the transcripts would “constitute denial of equal protection and violate concepts of fundamental fairness.”).

**C. The Secretary’s November 13 Ruling Violates the Regulations Governing Commission Proceedings by Denying or Constructively Denying Petitioners’ Motion for Access**

The regulations governing Commission proceedings specify that (“[a] party who presents a document for filing in a proceeding in which there are other parties *shall at the same time serve*

*the document on each such party*”) 16 N.Y.C.R.R. § 3.5(e)(1) (emphasis added). Respondents concede that there have been approximately 400 filings in the Proceeding, yet for reasons known only to them only a fraction of those filings have been posted on the Public Docket. *See* Petition ¶¶ 48-50. In fact, nearly 250 filings in the Proceeding have yet to be revealed to the public. *Id.* Regardless of whether these Non-Public Submissions were filed before or after Petitioners became parties to the Proceeding, once they became parties Petitioners were plainly entitled to those submissions upon request, and Respondents’ refusal to provide those documents violates the Commission’s regulations. *See* 16 N.Y.C.R.R. § 3.5(e)(1).

Moreover, Respondents have provided no legal justification for their refusal to grant Petitioners access to the Non-Public Submissions, Non-Public Communications and Meeting Records. This fact alone is sufficient for this Court to find that Respondents have acted arbitrarily and capriciously. Indeed, even though Petitioners have not been provided with a single requested documents to date, Respondents nevertheless claim that Petitioners have not been denied access, “constructive or otherwise,” to those documents. *See* Exhibit K. It is difficult to conceive of a more unreasonable or arbitrary response to Petitioners’ legitimate document demands.

## POINT II

### **THE PUBLIC INTEREST STANDARD THAT GOVERNS THE PROCEEDING IMPOSES A NONDISCRETIONARY DUTY ON RESPONDENTS TO PROVIDE PUBLIC INTERVENORS LIKE PETITIONERS WITH COPIES OF CRITICAL DOCUMENTS RELATING TO THE PROCEEDING**

Respondent Commission is “an administrative body established by the Legislature *for the paramount purpose of protecting and enforcing the rights of the public.*” *People ex rel. New York Tel. Co. v. Pub. Serv. Comm’n, Second Dist.*, 157 A.D. 156, 163, 141 N.Y.S. 1018, 1023 (1913) (emphasis added); *see also Smith v. Orange & Rockland Utilities, Inc.*, N.Y.S.2d 278, 281

(Sup. Ct. , Rockland County, 1994). The Commission’s duty to protect and enforce the rights of the public necessarily includes the fundamental obligation to ensure that its proceedings are conducted in a fair and equitable manner that ensures the right of the public to participate. In the case at bar, the Commission has utterly failed to discharge its duty to protect public rights. Indeed, by denying Petitioners access to critical documents and establishing a double standard under which the Transmission and Generating Entities are able to seek discovery and Petitioners are not, the Commission has acted in a manner that affirmatively undermines the rights of the public.

The public interest is particularly pivotal in decisions involving the proposed retirement of a power plant under PSL § 70. Proceedings under PSL § 70 are intended to protect against “generator retirement that could *harm the public interest.*” *Id.* at 15 (emphasis added). As the New York Court of Appeals has recognized, approval of a proposed retirement must “satisfy[] *the public interest requirement of Public Service Law § 70 . . . .*” *Luyster Creek, LLC v. New York State Pub. Serv. Comm'n*, 18 N.Y.3d 977, 978 (2012) (emphasis added). It is respectfully submitted that the public interest requirement of PSL § 70 imposes a nondiscretionary duty on Respondents to provide documents to public intervenors in a Commission proceeding when those documents are indispensable to the intervenors’ ability to meaningfully participate in the proceeding. This is particularly true where, as here, the documents at issue have been exchanged between Respondents and the Transmission and Generating Entities. *See* Petition ¶¶ 62-65.

A nondiscretionary duty is a positive one, where the right to that duty’s performance must “be free of reasonable doubt or controversy.” Siegel, N.Y. Prac. § 558 (5th ed.) (citing *Petz v. Property Clerk of the 68th Squad*, 149 N.Y.S.2d 179 (Sup. Ct., Kings County, 1956)). There is no room for “reasonable doubt or controversy” that the Commission has a duty to ensure that

all parties to a Commission proceeding are treated equally and fairly, and that documents exchanged between the Commission and some parties be made available to all parties to the proceeding.

Moreover, the Commission's prior Orders make clear that Respondents' overarching duty is to ensure meaningful public participation in a proceeding where key public issues – potential costs to ratepayers and environmental impacts – are at stake. The January 18 Order describes the purpose of the Proceeding as:

*to examine the relative costs and benefits of repowering the plants at their existing sites, and to compare those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term.* The benefits to be evaluated must include, but may not be limited to, the reliability, *environmental*, and *customer impacts* associated with the repowering and transmission solutions.

Exhibit A at 3 (emphasis added).

Upon information and belief, the documents to which Petitioners seek access address core issues in the Proceeding, including the potential rate and environmental impacts of the various transmission upgrade and repowering options under consideration, and document *ex parte* communications between the Commission and the plant owners and transmission utilities. Consequently, the withheld documents are indispensable to Petitioners' ability to evaluate and comment on the various transmission upgrade and repowering options and to respond to arguments or claims made in the course of *ex parte* communications. Respondents' refusal to grant access to those documents is preventing Petitioners' meaningful participation in the Proceeding by thwarting Petitioners' ability to provide public input on “the relative costs and benefits of repowering,” comparing “those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term,” and evaluating the “environmental and customer impacts” of the repowering and transmission options. Exhibit A at 3. This is in

complete disregard of the Commission's duty to protect and enforce the rights of the public. *People ex rel. New York Tel. Co. v. Pub. Serv. Comm'n, Second Dist.*, 157 A.D. at 163, 141 N.Y.S. at 1023.

The concealment from the public of critical information also violates the Commission's Retirement Order, which provides that, "[t]o the extent that devising a solution to a reliability detriment becomes necessary . . . *other parties may be allowed to offer solutions.*" Exhibit B at 16 (emphasis added). By concealing critical information from Petitioners, Respondents are thwarting any opportunity for Petitioner to offer solutions to the alleged reliability issues in contravention of the Retirement Order.

If nothing else, the public interest standard governing the Proceeding requires that, at a bare minimum, the Commission ensure a level playing field by according public intervenors like Petitioners the same procedural rights as the Transmission and Generating Entities. Yet, as noted above, the Commission has adopted a double standard in the Proceeding whereby the Transmission and Generating Entities are entitled to discovery while Petitioners are not. *See* Petition ¶¶ 62-65. Such crass favoritism clearly violates the Commission's duty to protect the public interest as required by PSL § 70 and *Luyster Creek*.

Indeed, the Commission's favoritism toward the power industry and its failure to disclose important information to the public was explicitly criticized in the recent Moreland Commission report:

The Commission learned during the course of its investigation that it is statutorily permissible *and common practice for utility company executives, lobbyists and other paid representatives of interested parties to have unfettered access to the PSC Chair and Commissioners without having to disclose details of these conversations, presentation materials or other specifics to the other parties participating in cases before the PSC . . . .* Of particular concern to the Commission is that many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks,

and that of other similarly situated New Yorkers. Such deficiencies may result in certain customers or customer groups, who are not in a position to advocate for themselves and may feel marginalized when compared to utility companies and other special interest groups during proceedings before the PSC. *The Commission questions the fairness of allowing one side with virtually unlimited resources total access, while the other side lacks a similar voice . . . .*

Perhaps one of the most important mandates of the PSC is to protect and enforce the rights of the public. The rules that govern New York's regulatory environment are complex and require specific acumen to navigate. *The public expects, and indeed deserves, to be afforded full disclosure of PSC and DPS interactions with the parties involved in its proceedings.*

Moreland Commission on Utility Storm Preparation and Response, Final Report (June 22, 2013) at 42, 44 (emphasis added).

While it may be statutory permissible (at least for the time being) for the Commission to engage in *ex parte* communications and meetings with the Transmission and Generating Entities, Respondents are violating their legal duty to protect the public interest by concealing the records of such communications and meetings from Petitioners, and the Court should order disclosure of those records in the public interest.

### **POINT III**

#### **IN THE ALTERNATIVE, RESPONDENTS' FAILURE AND REFUSAL TO GRANT PETITIONERS ACCESS TO THE REQUESTED DOCUMENTS VIOLATES FOIL**

In the alternative, even if Petitioners' Motion for Access was properly converted into a FOIL request by Respondents, which it was not, Respondents' failure and refusal to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records violates FOIL and Respondents' own regulations governing document disclosure. *See* N.Y. Pub. Off. Law § 89; 16 N.Y.C.R.R. § 6-1.1.

Both FOIL and Respondents' regulations require that, within five business days of the receipt of a written request for a record reasonably described, the agency shall (1) grant the

request and make the document available, (2) deny the request in writing, or (3) furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied. N.Y. Pub. Off. Law § 89(3); 16 N.Y.C.R.R. § 6-1.1(b). Neither the Secretary's September 23 Letter nor the RAO's September 23 Letter fulfilled this obligation for all the records requested by the Petitioner. The Secretary's September 23 Letter merely stated that the request for access would be referred to and handled by the RAO. *See* Exhibit D. The RAO's September 23 Letter completely ignored Petitioners' request for three of the four categories of records: the Non-Public Submissions, Non-Public Communications, and Meeting Records. Instead, the RAO's September 23 Letter focused exclusively on the first category of records Petitioners sought: the 12 redacted records that already were part of the Commission's Public Docket. *See* Exhibit E. Neither letter provided Petitioners with a decision on all of the requested records or an approximate date when such a decision would be provided.

Respondents also failed to avail themselves of the option under FOIL and their own regulations to grant Petitioners' request in whole or in part and delay disclosure of any record(s) that circumstances prevented them from immediately producing. Had they chosen this path, Respondents would have been required within twenty business days of the acknowledgement of the receipt of the request to "state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." N.Y. Pub. Off. Law § 89(3); 16 NYCRR § 6-1.1. Nothing in either the Secretary's September 23 letter or the RAO's September 23 letter – or any subsequent communication with Petitioners – meets this requirement. *See* Exhibits D and E.

Respondents' refusal to respond to Petitioners' request for all Non-Public Submissions, Non-Public Communications, and Meeting Records and failure to comply with the procedural requirements of Section 89(3) of the Public Officers Law constitute a constructive denial of access to the requested records. *See* N.Y. Pub. Off. Law § 89(4); *see also* *Legal Aid Soc'y v. New York State Dep't of Corr. & Cmty. Supervision*, 962 N.Y.S.2d 773, 775 (2013).<sup>3</sup>

Respondents further violated FOIL by failing to articulate the reasons for its denial of Petitioners' request in writing. N.Y. Pub. Off. Law § 89(4)(a). Respondents have the burden of demonstrating that their refusal to disclose the requested documents is because the records fall within one of FOIL's enumerated exemptions – a burden they have failed to sustain. *Id.*

Without explanation or following the required procedure, Respondents have failed to provide Petitioners with access to or a determination on the request for all Non-Public Submissions, Non-Public Communications, and Meeting Records. Respondents' constructive denial of Petitioners' request is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

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<sup>3</sup> The Secretary's November 13 Ruling on Petitioners' Motion for Rehearing refusing to reconsider the denial of access to all Non-Public Submissions, Non-Public Communications and Meeting Records constitutes a denial of Petitioners' appeal of the initial constructive denial of Petitioners' request for records. *See* Exhibits J and K.



## CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Court enter judgment against Respondents and in favor of Petitioners and grant the relief sought in the Petition.

Dated: New York, New York  
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Respectfully submitted,



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