

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of the Application of  
SIERRA CLUB and CAROL CHOCK, President, on Behalf of  
RATEPAYER AND COMMUNITY INTERVENORS,

Petitioners,

-against-

Index No.

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.

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**PETITIONERS' MEMORANDUM OF LAW**

**PRELIMINARY STATEMENT**

By order dated June 13, 2014 (“Order”), the New York Public Service Commission (“PSC” or the “Commission”) approved a repowering agreement (“Agreement”) for the Dunkirk coal-burning power plant (“Dunkirk”) that requires National Grid ratepayers to subsidize a generating facility three times larger than is needed to maintain grid reliability at a cost four times that of equally reliable transmission alternatives. Under the Agreement, ratepayers will be required to expend more than \$150 million net present value over ten years to keep the currently uneconomical plant in operation. The resulting impacts to ratepayers are neither just nor reasonable, and the Commission’s approval of the Agreement therefore contravenes New York Public Service Law (“PSL”) § 65(1) and runs contrary to the Commission’s paramount duty to protect ratepayers.

The Order also is legally deficient because it relied upon a fundamentally flawed environmental assessment, and the resulting Negative Declaration under the State Environmental Quality Review Act (“SEQRA”), N.Y. Envtl. Conserv. L. Art. 8, was based on incorrect assumptions concerning current and future operations at the Dunkirk plant. The Negative Declaration wrongly assumed that natural gas would replace coal as the sole fuel source at all units at the facility and thus erroneously attributed environmental benefits to the repowering project. In fact, the Agreement allows Dunkirk to retain the capacity to burn coal at all four units while adding natural gas co-firing capability to three of the units, without any accompanying restriction on the amount of coal that can be burned. The environmental impacts of continued coal-burning at the Dunkirk plant are neither beneficial nor benign, yet the Commission utterly failed to address those impacts, much less give them the “hard look” that is required under SEQRA. Moreover, the Commission’s one paragraph Negative Declaration falls far short of the “reasoned elaboration” required under SEQRA to support a finding that a proposed action will have no significant environmental impacts.

Because the Commission’s Order violated PSL § 65(1) and its Negative Declaration failed to comply with SEQRA, Petitioners seek to have the Order annulled and vacated as arbitrary and capricious, an abuse of discretion, and contrary to law.

This action is ripe for adjudication because the Commission has failed to rule on Petitioners’ Motion for Rehearing on the Order within 30 days as required by PSL § 22, and has therefore constructively denied that motion. In the alternative, Petitioners seek an order of mandamus compelling the Commission to rule on the Motion for Rehearing and temporarily staying this action pending the Commission’s ruling.

## FACTUAL BACKGROUND

The Dunkirk generating station is a four-unit, 635 MW coal-fired power plant located on Lake Erie in Dunkirk, New York. Currently, only one of the four units is operating. Ex. 4 to Petition at 3. On March 14, 2012, the Dunkirk plant owner, NRG Energy, Inc. (“NRG”), filed with the Commission a notice of its intent to mothball indefinitely all four units at the Dunkirk facility effective September 10, 2012, stating that the facility is not currently “economic and is not expected to be economic.” Ex. 3 to Petition at 2.

On January 18, 2013, the Commission initiated a proceeding to consider repowering as an alternative to transmission upgrades for Dunkirk and another New York coal-fired power plant. The Commission established a schedule for National Grid, the electric transmission utility, and NRG to submit competing transmission and repowering proposals to address local reliability needs. The Commission also directed National Grid to evaluate the competing proposals and make recommendations to the Commission. The Commission indicated that it would evaluate transmission and repowering alternatives based on reliability and other impacts, including environmental impacts, enumerated in its Order. Ex. 5 to Petition at 3-4.

National Grid’s May 17, 2013 report and recommendations to the Commission evaluated the transmission and repowering proposals according to the PSC’s criteria. The May 17 Report concluded that the proposed repowering options were more expensive for ratepayers than transmission upgrades. National Grid found that on a 10-year net present value (“NPV”) basis, the option of adding gas co-firing capability to Units 2, 3 and 4 was three times as expensive as the transmission alternative (\$218 million versus \$70.5 million). Ex. 6 to Petition at 12, Table 1. National Grid’s consultant determined that the addition of gas co-firing capability to Units 2-4 would result in a \$470 million loss to customers. *Id.* at 16-17, Table 5.

The case for implementing transmission upgrades became even more compelling in September 2013 when National Grid released an updated reliability analysis for the region. National Grid concluded that, based on updated load projections, one of the most significant transmission upgrades it had previously identified would still be needed even if Dunkirk were repowered. Ex. 9 to Petition at Slide 5. In other words, even fewer transmission upgrades could be avoided by repowering the facility.

The revised reliability analysis also made clear that only 150 MW rather than 400-450 MW of generation were required on-site at Dunkirk in order to meet reliability needs in the absence of transmission upgrades. *Id.* at Slide 6 (“Based on updated results, 150 MW minimum Dunkirk repowering requirement needed as an alternative to transmission upgrades for local system reliability.”). Except for a single line in a subsequent presentation by National Grid, which stated only “Updated Repowering Options – 150 MW,” no further evaluation of options for repowering at 150 MW appears to have been conducted and no such evaluation appears anywhere in the Commission’s limited record. *See id.* at Slide 8.

Despite the fact that the Commission’s administrative proceeding to consider the relative merits and ratepayer impacts of transmission upgrades versus repowering was pending, on December 15, 2013, Governor Andrew Cuomo announced in a press release posted on the Commission’s website that the PSC had facilitated a repowering deal “to expand from current 75 MW to 435 MW” the generation at Dunkirk. Ex. 10 to Petition at 1. The Governor’s press release asserted without analysis that “[t]he repowering provides an environmental benefit by switching to cleaner-burning natural gas” and that it “would reduce costs for consumers.” *Id.* The press release did not contain any details of the repowering agreement.

The actual terms of the Agreement were released nearly two months later, on February 13, 2014, and differ in several significant respects from the Governor’s press release. The Agreement requires that National Grid’s ratepayers pay an NPV amount of \$150 million over ten years to finance the addition of natural gas capability at Units 2-4 of Dunkirk, but retains the coal-burning capacity of all four units and does nothing to limit or restrict the continued burning of coal at any of the units. Ex. 11 to Petition at Attachment 1. The Agreement also is conditioned on Dunkirk receiving an additional \$15 million in taxpayer subsidies from an unidentified state agency “in form and substance acceptable to Dunkirk.” *Id.* at 7 n.6. Although the Commission initiated a 45-day comment period on the proposed Agreement through a notice in the New York State Register, it failed to provide notice of the comment period on the electronic docket for its administrative proceeding and did not notify the parties to the proceeding of the opening of the comment period.

On April 1, 2014, only a few days before the end of the public comment period on the Agreement, NRG filed Part 1 of a Full Environmental Assessment Form (“EAF”) pursuant to SEQRA. The Commission subsequently filed Part 2 of the Full EAF on June 11, 2014, well after the public comment period on the Agreement had expired. Among several deficiencies, neither EAF addressed the environmental impacts of continuing to burn coal at the Dunkirk facility, which clearly is allowed by the Agreement.

Nevertheless, on June 13, 2014, the Commission issued the Order approving the Agreement between National Grid and Dunkirk Power LLC. Ex. 14 to Petition. The Order included a Notice of Determination of Non-Significance (“Negative Declaration”) under SEQRA. Within the 30-day period prescribed by PSL§ 22, Petitioners filed a Joint Motion for a Rehearing on the Order arguing that the Order was affected by errors of law and fact and should

be rescinded, and requesting that the Commission hold a public adjudicatory hearing presided over by an administrative judge. Ex.15 at 1. The Motion for Rehearing challenged the Commission’s Order on several grounds, including that: (1) the Order failed to address Petitioners’ arguments that a 435 MW repowered Dunkirk is excessive given the reliability need of only 150 MW; (2) the Negative Declaration does not meet the minimum requirements of SEQRA because it failed to identify relevant environmental impacts, take a hard look at those impacts, or provide a reasoned elaboration for the finding that not a single significant environmental impact may result from the Agreement; and (3) the Order’s evaluation of environmental impacts was flawed because the Commission failed to apply the appropriate baseline against which the potential impacts of the Agreement may be measured. *Id.* at 4-5.

The Commission was obligated by PSL § 22 to grant or refuse the Motion for a Rehearing within thirty days. Instead, on July 25, 2014, the PSC issued a one-page “Notice Concerning Petition for Rehearing.” Ex. 16 to Petition (“Notice”). Without citing to any authority or providing any explanation, the PSC in the Notice announced that a “Notice of Proposed Rule Making will be filed with the Department of State with respect to the Petition [for Rehearing].” *Id.* The Notice stated that comments on this “proposed rule” are due on September 29, 2014. To date, the Commission has taken no further action on the “rulemaking” and has not granted or refused the Motion for Rehearing.

## **ARGUMENT**

### **I. THE PSC’S CONVERSION OF THE MOTION FOR REHEARING INTO A RULEMAKING PROCESS WAS UNSUPPORTED BY LAW AND CONSTITUTED AN EFFECTIVE DENIAL OF THE MOTION FOR REHEARING.**

PSL § 22 imposes a clear duty on the Commission to either grant or deny a motion for rehearing within 30 days. PSL § 22 (“The decision of the commission *granting or refusing* the

application for a rehearing *shall* be made within thirty days after the making of such application.”) (emphasis added). There can be no dispute that the Commission has failed to comply with this clear statutory requirement.

The Commission’s unexplained and legally unsupported attempt to convert the Motion for Rehearing into a rulemaking does not cure its failure to comply with the statutory deadline. The Notice contained no grant or refusal of the Motion for Rehearing and fails to cite to any authority to support the conversion to a rulemaking. The Notice also failed to provide the relief sought by Petitioners in the Motion for Rehearing and thus effectively denied Petitioners’ application for a rehearing. *See N.Y. Tel. Co. v. Pub. Serv. Comm’n*, 59 A.D.2d 17, 20 (3d Dep’t 1977) (holding that a suit was not premature because although the PSC had failed to rule on a motion for rehearing, the Commission issued an order subsequent to the motion for rehearing that effectively denied the relief requested in the motion). Under these circumstances, this proceeding is ripe for adjudication. *Id.* at 19-20 (Commission’s effective denial of rehearing motion meant that “the present proceeding was not instituted prematurely.”).

## **II. THE COMMISSION’S APPROVAL OF A REPOWERING PROPOSAL THREE TIMES LARGER THAN THE RELIABILITY NEED WILL RESULT IN UNJUST AND UNREASONABLE RATES.**

The Order approving the Agreement is arbitrary, capricious, and contrary to law because it saddles National Grid’s ratepayers with costs that are neither just nor reasonable. It is undisputed that the reliability need in the absence of unavoidable transmission upgrades is 150 MW at the site of the Dunkirk facility. Ex. 9 to Petition at Slide 6. It also is undisputed that repowering options smaller than 435 MW are possible; indeed, NRG itself proposed one earlier in the proceeding. Ex. 6 to Petition at 6 (National Grid rejected NRG’s 285 MW repowering proposal based on the now outdated understanding that 400-450 MW were required at the site).

The Commission has provided no rational basis for requiring National Grid's ratepayers to subsidize a repowering proposal for 435 MW, which is 285 MW greater than the undisputed reliability need.

Despite determining that only 150 MW were needed to address reliability needs, the record does not contain any evaluation of potential 150 MW repowering options and their associated costs. Though a 150 MW repowering option would undoubtedly be much less expensive for ratepayers than the 435 MW option contemplated under the Agreement, the cost of the 150 MW option was never requested by the Commission or evaluated by National Grid or NRG. Ex. 9 to Petition at Slide 8. In addition to burdening ratepayers with unnecessary costs, the lack of evaluation of more cost-effective options and the approval of a grossly excessive repowering option is also expressly contrary to the guidance in the New York Energy Highway Blueprint, which provided the basis for initiating this proceeding. As National Grid itself previously noted in this proceeding:

The Energy Highway Task Force supports public policy to address community need, but does not support keeping uneconomic power plants online *if they have not been deemed necessary for reliability purposes*. To do so would undermine a significant benefit of the restructured energy markets, *which is that investors, not consumers, bear the financial and operating risks of power generation*.

Ex. 7 to Petition at 9-10 (emphasis added) (quoting New York Energy Hwy Blueprint at 78 (2012)).

To address these potential excessive costs to ratepayers, Petitioners and other parties expressed concerns during the public comment period about the inflated size of the repowering project in relation to the magnitude of the reliability need. However, the Order failed to respond directly to those concerns. The lone potential justification offered by the Commission for the overblown size of the repowering project is a reference to speculation from National Grid that



“refueling the Dunkirk facility units mitigates [the] potential reliability risk that may arise between 2015 and 2017 such as reliability impacts that may result from other generator shutdowns in the region.” Ex. 14 to Petition at 31. But the record does not substantiate the existence of this potential reliability need or demonstrate that 285 MW of additional capacity at Dunkirk will address it. The record also is devoid of any analysis that shows that an additional 285 MW of generation capacity at Dunkirk would alleviate or limit the reliability fixes that would be required if any of the other generators in the area were to shut down.

The Commission’s decision to approve an unnecessary and expensive additional 285 MW of generating capacity at the Dunkirk facility is unsupported in the record and therefore irrational, and the PSC’s decision to impose this unsupported cost on the ratepayers is neither just nor reasonable.

**III. THE NEGATIVE DECLARATION IS FATALLY FLAWED BECAUSE THE COMMISSION FAILED TO TAKE A HARD LOOK AT POTENTIAL ENVIRONMENTAL IMPACTS OF THE PROPOSED ACTION AND TO PROVIDE A REASONED ELABORATION FOR ITS DETERMINATION.**

Agency action taken pursuant to SEQRA is subject to the “arbitrary and capricious” standard of judicial review. N.Y. Civil Practice Law and Rules (“CPLR”) § 7803(3). SEQRA requires an agency to conduct a full environmental impact statement (“EIS”) of any proposed action that “may have a significant effect on the environment.” ECL § 8-0109(2); see *Cathedral Church of St. John the Divine v. Dormitory Auth. of State of N.Y.*, 224 A.D.2d 95, 99 (3d Dep’t 1996). Because SEQRA uses the word “may” as the trigger for full environment review, “there is a relatively low threshold for requiring an EIS.” *Shawangunk Mtn. Env’tl. Ass’n v. Planning Bd. of Town of Gardiner*, 157 A.D.2d 273, 275 (3d Dep’t 1990) (citing *H.O.M.E.S. v. N.Y.S. Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dep’t 1979)). Before deciding that the completion of an EIS “can be dispensed with,” *Desmond-Americana v. Jorling*, 153 A.D.2d 4, 10 (3d Dep’t

1989), the PSC must determine, in the form of a “filed and published” negative declaration, 6 N.Y.C.R.R. § 617.2(y), “that there will be no adverse environmental impacts” associated with the proposed action. *Id.* § 617.7(a)(2); see *Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1378 (3d Dep’t 2011).

The Negative Declaration is fatally flawed because the Commission failed to identify all relevant areas of environmental concern, take a hard look at them, and provide a reasoned elaboration of the basis for its decision that the repowering of the Dunkirk plant will have no significant environmental impact.

**A. The Commission Failed to Identify All Relevant Areas of Environmental Concern and Take a Hard Look at Them Because it Ignored the Environmental Impacts of Continued Coal-Burning at the Dunkirk Plant.**

It is settled law in New York that in order to withstand judicial scrutiny, a negative declaration under SEQRA must show that the reviewing agency “identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.” *Chinese Staff v. Burden*, 19 N.Y.3d 922, 924 (2012) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990)) (internal quotation marks omitted). The Commission failed to comply with SEQRA’s mandate because it completely ignored the environmental impacts of continued coal-burning at the Dunkirk plant, as well as the impacts of burning natural gas.

As noted above, the Agreement preserves the capacity of all four units at the Dunkirk plant to continue burning coal, and the Order does not include any enforceable limitation on the plant’s ability to burn coal. In fact, the Agreement may result in *more* coal-burning at Dunkirk than is presently occurring because, under the Agreement, the plant will change from a facility where a single coal-burning unit is operating to a facility which may burn coal at all four units, three of which will be able to burn either coal or gas.

The Negative Declaration erroneously claims that “refueling the facility with gas diminishes the possibility that it will be returned to service as a coal-fueled plant . . . thereby substituting a cleaner, more environmentally-beneficial fuel than was previously used” and that repowering will lead to “significantly reduced” emissions. Ex. 14 to Petition at 34, Notice of Determination of Non-Significance 1. These claims have no basis in the record for the simple reason that the Agreement does not require the plant to only burn natural gas at the three dual-fuel units, and thus Dunkirk is free to burn coal at those units when and if it so desires. As the Staff Report acknowledges, burning coal results in local emissions of sulfur dioxide, nitrogen oxides, and carbon dioxide. Ex. 13 to Petition at 27. The continued burning of coal at the Dunkirk plant will also contribute to emissions of greenhouse gases, yet the Commission failed to evaluate the potential climate change impacts of its decision. The Commission’s failure to assess the environmental impacts of continued coal-burning at all four Dunkirk units therefore renders the Negative Declaration fatally flawed.

In addition, the Negative Declaration incorrectly assumes that the burning of natural gas is “environmentally-beneficial” and has no potential adverse environmental impacts. Ex. 14 to Petition, Notice of Determination of Non-Significance 1-2. However, burning natural gas is not environmentally benign because it releases pollutants into the air, including greenhouse gases. The Commission also failed to consider the effects of the construction and operation of the added natural-gas-powered units, including the construction of a necessary natural gas pipeline to the Dunkirk facility, in concluding that the effects of burning natural gas are wholly beneficial.

**B. The Negative Declaration’s Conclusions Regarding Air Quality Impacts Are Flawed Because the Commission Failed to Use the Appropriate Baseline and Mischaracterized the Plant’s Operations After Repowering.**

The SEQRA regulations make clear that establishing baseline air quality is a necessary prerequisite to determining whether the air quality impacts of a proposed action will be significant. *See* 6 N.Y.C.R.R. § 617.7(c)(1)(i) (providing that in making a determination of significance, the reviewing agency must ascertain whether the proposed action will result in “a substantial adverse *change in existing* air quality.”) (emphasis added). In this case, the Commission used an incorrect environmental baseline for air quality because it erroneously assumed that the baseline condition is the burning of coal at all four Dunkirk units. In reality, the existing environmental baseline is the operation of a single coal-fired unit at the Dunkirk facility, as currently provided for by the RSSA. The Commission then compounded this error by wrongly assuming that only natural gas will be burned at the Dunkirk plant, when the Agreement plainly preserves the plant’s ability to burn coal at all four units.

The Commission’s failure to utilize the correct environmental baseline for air quality impacts renders the Negative Declaration fatally flawed. *Cf. Ohio Valley Env’tl. Coal., Inc. v. U.S. Army Corps of Engineers*, 716 F.3d 119, 124 (4th Cir. 2013) (in reviewing challenge to agency review under National Environmental Policy Act (“NEPA”) of potential watershed impacts from coal mine, court must review “whether the [agency] considered the ‘relevant factors’ when assessing the baseline conditions of the watershed”); *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012) (“A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious [NEPA] decision”); *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir.1988) (“[w]ithout establishing ... baseline conditions ...

there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA”); *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1126 (D. Nev. 2008) (“In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions”); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 76 Cal. App. 4th 931, 953 (1999) (“This dispute highlights the importance of an adequate baseline description, for without such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible”); *see also* Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* 13 (May 1999) (“The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process”).

The Commission’s utilization of the incorrect environmental baseline and its mischaracterization of the plant’s operations after repowering significantly skewed its analysis of the air quality impacts of the Agreement. The correct environmental baseline is what is currently allowed under the RSSA and what is in fact the current operating condition of the Dunkirk plant: the burning of coal in a single unit. The operations after repowering are properly characterized as a range of options that include the burning of coal at all four units, the burning of coal at one unit and burning natural gas at three units, the burning of natural gas at three units and no burning of coal, and any combination of the foregoing. Thus, the Commission should have, but did not, compare the baseline condition of coal-burning at a single unit with the range of post-repowering options,<sup>1</sup> including the burning of coal at all four units, or at two or three of the units. Such a comparison would have identified significantly different levels of air and other pollution

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<sup>1</sup> As discussed in Section III.C. below, the Commission also should have compared the baseline to the environmental benefits of choosing the transmission upgrades rather than repowering to satisfy reliability needs.

from the Dunkirk plant and, therefore, different levels of environmental and public health impacts, depending on which post-repowering option was pursued. Because it used the wrong baseline and the wrong post-repowering scenario, the Commission impermissibly ignored those impacts in issuing the Negative Declaration.

**C. The Negative Declaration is Based on a Flawed Environmental Assessment.**

The Negative Declaration's deficiencies are apparently based on the incomplete and inaccurate information in the EAF submitted by NRG only days before the close of the public comment period on the Agreement.

An agency's determination of significance under SEQRA is informed and guided by the information concerning a proposed project's scope and impacts as set forth in the EAF. *See* 6 N.Y.C.R.R. § 617.7(b)(2). The SEQRA regulations require an agency to review the information provided in the EAF and compare it to the significance criteria set forth in 6 N.Y.C.R.R. § 617.7(c) in order to determine whether the proposed action must be the subject of an EIS. *Id.* Thus, an accurate and complete EAF is indispensable to a correct determination of significance. *See id.* § 617.2(m) ("A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment"); *Corrini v. Vill. Of Scarsdale*, 1 Misc. 3d 907(A) (Sup. Ct. Westchester Co. 2003) (citing *Niagara Mohawk Power Corp. v. Green Island Power Authority*, 265 A.D.2d 711 (3d Dep't 1999), *app. dismissed*, 94 N.Y.2d 891 (annulling negative declaration because proposed project "has the potential to affect noise, visual aesthetics (lights), traffic patterns and the community or neighborhood character (even if those effects may not prove to be significant) [and] the responses provided on the EAF were misleading and failed to provide an adequate basis for the Board's adoption of a negative declaration in this case").

In this case, the EAF utilized an incorrect environmental baseline (assuming replacement of four coal-burning units at the plant with a plant fired only by natural gas) and failed to adequately assess the environmental impacts of continued coal burning at the Dunkirk plant as permitted under the Agreement. Thus, the incomplete and inaccurate information provided in the EAF undermines the conclusions set forth in the Negative Declaration concerning the environmental impacts of the Agreement. *Lorberbaum v. Pearl*, 182 A.D.2d 897, 899 (3d Dep't 1992) (annulling negative declaration which was based on inaccurate EAF).

The EAF and the Negative Declaration are also deficient for failing to assess the environmental benefits that would result from choosing transmission upgrades instead of repowering to meet reliability needs. In the absence of the Agreement, the Dunkirk coal plant would retire, produce zero emissions, and be replaced with transmission grid upgrades. According to NRG, absent a repowering deal the facility would cease operation as soon as necessary transmission upgrades are completed. Indeed, the only reason any portion of the Dunkirk facility is continuing to operate now is because NRG is receiving over \$25 million per year from National Grid's ratepayers to keep it running. As NRG clearly stated in its mothball notice:

Due to the current and forecasted wholesale electric prices in Western New York and the underlying cost of operation, the Dunkirk facility is, and would continue to be, operating at a net loss. *Thus, because the facility is not currently economic and is not expected to be economic, NRG intends to mothball the units until such time as market conditions improve.*"

Ex. 3 to Petition at 2 (emphasis added).

The Environmental Assessment—and the Negative Declaration—fail to analyze the environmental benefits that would result from addressing reliability needs through transmission upgrades rather than repowering, the mothballing of the facility, and cessation of all operations at

the Dunkirk coal plant. The failure of the Environmental Assessment and the Negative Declaration to analyze the significant environmental benefits associated with the zero emission scenario underscores the incomplete and arbitrary nature of the PSC's SEQRA analysis.

**D. The Commission Failed to Provide a Reasoned Elaboration for its Determination That Repowering the Dunkirk Plant Will Have No Significant Environmental Impacts.**

An agency issuing a negative declaration under SEQRA is required to provide a "reasoned elaboration" for its determination that the proposed action will have no significant environmental impacts. *Chinese Staff*, 19 N.Y.3d at 924. The Commission's one and a half page Negative Declaration falls far short of this requirement.

The entirety of the Commission's analysis of environmental impacts is set forth in a single paragraph:

Based on our review of the record, we find that the approval of the Term Sheet for refueling the Dunkirk facility with natural gas results in environmental benefits as opposed to countering the effects of mothballing through transmission upgrades or coal-fueled operation. Retaining generation at the Dunkirk location mitigates the impacts that would attend constructing additional transmission, opens existing transmission space to greater generation from renewable-fueled hydro facilities, and allows for greater flexibility in operating the transmission system in ways that are more efficient. Moreover, refueling the facility with gas diminishes the possibility that it will be returned to service as a coal-fueled plant either to mitigate the effects of mothballing or if economic considerations were to warrant, thereby substituting a cleaner, more environmentally beneficial fuel than was previously used.

Ex. 16 to Petition at Notice of Determination of Non-Significance 1-2.

This three sentence statement fails to identify a single potential environmental impact from the Dunkirk repowering proposal, much less provide a reasoned elaboration of the basis for concluding that none of those impacts will be significant. *See New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 349 (2003) (finding that a two paragraph



“explanation” supporting a negative declaration did not provide the “reasoned elaboration mandated by SEQRA.” (internal quotations omitted)).

Moreover, the Negative Declaration’s conclusions regarding the absence of environmental impacts are utterly lacking in specificity and provide no details concerning the facts upon which they are purportedly based. These types of conclusory statements in a Negative Declaration have consistently been rejected by courts as insufficient under SEQRA and must be rejected here. *See, e.g., Baker v. Vill. of Elmsford*, 70 A.D.3d 181, 190 (2d Dep’t 2009) (“The negative declaration [was] merely conclusory . . . and does not represent the ‘hard look’ with ‘reasoned elaboration’ mandated by SEQRA”); *Tonery v. Planning Bd. of Town of Hamlin*, 256 A.D.2d 1097, 1098 (4th Dep’t 1998) (“[T]he lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, unsupported by empirical or experimental data, scientific authorities, or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance.”).

**IV. IN THE ALTERNATIVE, A WRIT OF MANDAMUS SHOULD BE ISSUED COMPELLING THE COMMISSION TO RULE ON PETITIONERS’ MOTION FOR A REHEARING AND THIS PROCEEDING SHOULD BE TEMPORARILY STAYED PENDING THAT RULING.**

In the event that the Court finds that the Motion for Rehearing was not effectively denied, Petitioners ask, in the alternative, that the Court order the Commission pursuant to CPLR § 7803(1) to forthwith issue a ruling on the Motion and that this proceeding be temporarily stayed pending that ruling.

Mandamus is an appropriate remedy where the Commission has failed to rule within the statutorily prescribed 30-day time frame on a pending motion for rehearing. *See* PSL § 22; *Rochester Gas & Elec. Corp. v. Maltbie*, 272 A.D. 162, 166 (3d Dep’t 1947) (“If the [Public

Service] Commission is dilatory in rendering its decision on the application for rehearing, the party aggrieved may resort to a mandamus order to compel a decision”).

A temporary stay pending the Commission’s ruling on the motion for rehearing is appropriate. *See Amerivest Partners LLC v. Pub. Serv. Comm’n*, 39 Misc.2d 1211A (Sup. Ct. Albany Co. 2013) (issuing 30-day temporary stay pending PSC ruling on pending motion for rehearing); *Herald Co. v. Frey*, 35 A.D.2d 905 (4th Dep’t 1970) (reversing Supreme Court’s denial of stay of action pending completion of administrative proceeding involving same issues and parties); *Rural Energy Dev. Corp. v. Penn. General Energy Corp.*, 2003 WL 21297303 (Sup. Ct. Chemung Co., May 22, 2003) (stay granted pending completion of related NYSDEC administrative proceeding); *High v. Reuters America, Inc.*, 7 Misc.3d 1006A (Sup. Ct. Bronx Co. 2005) (granting stay pending completion of administrative proceeding); *Sterling Nat’l Bank v. Kings Manor Estates, LLC*, 9 Misc.3d 1116A (N.Y. Civ. Ct. 2005) (granting partial stay in light of “swiftly unfolding” administrative proceedings).

### **CONCLUSION**

For all of the reasons stated herein, Petitioners respectfully request that the Order be annulled and vacated in its entirety or, in the alternative, that the Commission be ordered to issue a ruling on Petitioners’ Motion for Rehearing and that this proceeding be temporarily stayed pending that ruling.

Dated: New York, New York  
September 25, 2014

Respectfully submitted,



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