

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,

VERIFIED PETITION

-against-

Index No.

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

Respondents,

**ORAL ARGUMENT
REQUESTED**

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

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Petitioners Sierra Club and Ratepayer and Community Intervenors (“RCI”) (collectively, “Petitioners”), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), by their attorneys, Earthjustice, allege as follows:

PRELIMINARY STATEMENT

1. This proceeding challenges the June 13, 2014 Order Addressing Repowering Issues and Cost Allocation and Recovery (“Order”) issued by Respondents New York Public Service Commission (“PSC” or “Commission”) and the New York State Department of Public Service (“DPS”) approving a February 13, 2014 Term Sheet Agreement filed by National Grid (the “Agreement”) to add natural-gas firing capability to the Dunkirk coal-burning power plant (“Dunkirk”).

2. 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.

3. 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. Evtl. Conserv. L. Art. 8, was based on incorrect assumptions concerning current and future operations at the Dunkirk plant.

4. 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 burning coal.

5. The Negative Declaration also failed to compare the environmental impacts of the Agreement against the current baseline: the limited operation of a single small coal-fired unit. Instead, the Commission's analysis inflated the purported environmental benefits of the Agreement by assuming that four of the Dunkirk plant units are operating.

6. 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.

7. 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.

8. 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.

PARTIES

9. Petitioner Sierra Club is a national not-for-profit organization with approximately 40,000 members in New York State. *See* Affidavit of Diane Hofner, sworn to on August 29, 2014, annexed to this Petition as Exhibit 1, ¶ 3. Sierra Club's mission is to protect the environment and promote the responsible use of the earth's ecosystems and resources. Sierra Club's efforts include improving public health and the environment in New York by, among other things, working to curtail the burning of fossil fuels to generate electricity, including at the Dunkirk coal-fired power plant. Affidavit of Christina Jarvis, sworn on September 9, 2014, annexed to this Petition as Exhibit 2, ¶ 2. Sierra Club has members who are National Grid ratepayers and whose rates will be affected by the Agreement. Ex. 1 at ¶ 5; Ex. 2 at ¶ 4. Sierra Club members also live or recreate near the Dunkirk plant. Ex. 1 at ¶¶ 1, 8; Ex. 2 at ¶ 5. Sierra Club intervened in and is a party to the administrative proceeding ("Proceeding") that is the subject of this petition. Sierra Club submitted comments on the Agreement and filed a July 14, 2014 Joint Motion for Rehearing ("Motion for Rehearing") requesting a rehearing on the Commission's Order.

10. Petitioner RCI is an unincorporated association of elected and public officials, community organizations, scientists, engineers, and others formed to represent the interests of the public, including individual ratepayers and local community residents and groups who are concerned about both the economic and environmental impacts of energy decisions in New York State. *See* Ex. 1, ¶ 2. RCI was formed for the express purpose of intervening and participating in the Commission’s proceedings relating to the proposal to mothball the Dunkirk plant. The founding members of RCI are concerned about the economic and environmental harms associated with forcing ratepayers to subsidize the continued operation of the Dunkirk plant. *Id.* RCI members live in the National Grid service area that will be impacted by the Order and will experience electric rate increases from the approval of the Agreement. *Id.* ¶ 5. RCI intervened in and is a party to the Proceeding. *Id.* ¶ 12. RCI submitted comments on the Agreement and filed a July 14, 2014 Joint Motion for Rehearing (“Motion for Rehearing”) requesting a rehearing on the Commission’s Order. *Id.*

FACTS

11. On March 14, 2012, NRG Energy, Inc. (“NRG”) filed notice with the Commission of its intent to mothball the 635 MW coal-fired Dunkirk Plant by no later than September 10, 2012. NRG, Notice of Intent to Mothball (Mar. 14, 2012), annexed to this Petition as Exhibit 3. The notice stated that the plant was being retired because it was not economic to operate and was not expected to be economic. *Id.* at 2.

12. In order to address reliability impacts of mothballing the facility, National Grid, the electric transmission utility, proposed a set of transmission reinforcements, and entered into a

Reliability Support Services Agreement (“RSSA”) with NRG to temporarily continue the Dunkirk plant’s operation until the transmission reinforcements could be completed.¹

13. In January 2013, the Commission initiated the Proceeding in which it directed National Grid “to evaluate repowering as an alternative outcome for [retirement] over a long-run horizon of at least ten years.” PSC, Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (January 18, 2013), annexed to this Petition as Exhibit 5.

14. After NRG submitted three repowering options for the Dunkirk plant, National Grid filed a report comparing the cost-effectiveness of NRG’s repowering options with potential transmission reinforcements to address reliability issues. National Grid, Report on Repowering Options (May 17, 2013), annexed to this Petition as Exhibit 6. In that report, National Grid recommended that “the Commission support the Transmission Upgrades to address the reliability needs at *the lowest overall cost, least risk to customers, and with minimum impact on competitive markets.*” *Id.* at 24 (emphasis added). In supplemental comments, National Grid reiterated its support for transmission reinforcements, noting that:

the repowering options would cost National Grid customers three to seven times more per year than the transmission solutions...National Grid cannot support requiring its customers to pay so much more to address a reliability need that can be resolved much more cheaply with transmission.

National Grid, Comments 1 (Aug. 16, 2013) (emphasis added), annexed to this Petition as Exhibit 7.

15. National Grid’s 2013 reliability study further reinforced that transmission upgrades were more cost-effective than repowering. The August 31, 2013 study concluded that

¹ Dunkirk and National Grid entered into an initial RSSA to keep Dunkirk Units 1 and 2 operating until May 31, 2013. Upon expiration of that RSSA, a second RSSA was entered into that provides for Unit 2 to stay on-line until May 31, 2015. Letter from Carlos Gavilondo, National Grid to Jeffrey Cohen, PSC Attachment 1 (Mar. 5, 2013), annexed to this Petition as Exhibit 4.

one of the major transmission projects that would be required if the Dunkirk plant were mothballed was necessary regardless of whether the plant retired. Letter from Carlos A. Gavilondo, National Grid to Kathleen Burgess, PSC 4 (Sept. 4, 2013), annexed to this Petition as Exhibit 8. Based on the results of the reliability study, National Grid also concluded that only 150 MW of capacity were required at the Dunkirk site to maintain reliability. National Grid, Presentation on Repowering and Transmission Reinforcement Alternatives Slide 6 (Oct. 31, 2013), annexed to this Petition as Exhibit 9. In light of these new findings, National Grid stated that “National Grid is not willing to enter into a repowering contract voluntarily that would require its customers to pay more than the costs of providing reliable service with a lower cost transmission solution.” *Id.* at Slide 9.

16. On December 15, 2013, prior to the conclusion of the Proceeding and without opportunity for public review or comment, Governor Andrew Cuomo announced that NRG and National Grid had reached an agreement to keep the Dunkirk plant operating by “repowering” Dunkirk Units 2, 3, and 4 from coal to natural gas. New York State Executive Chamber, “Governor Cuomo Announces Dunkirk Power Plant to Be Repowered and Expanded to Cost Effectively Meet Reliability Needs, Restoring Payments to Local Government and Preserving Jobs” (Dec. 15, 2013), annexed to Petition as Exhibit 10.

17. The terms of the Agreement were not released until February 13, 2014.

18. Rather than replacing coal-firing capability at Dunkirk, the Agreement actually provides for the addition of natural gas fired capacity to the coal-fired Units 2-4 at the Dunkirk plant, providing total electric generation of 435 MW. National Grid, Statement of Niagara Mohawk Power Corporation d/b/a National Grid in Support of Term Sheet Agreement, Attachment 1 (Feb. 13, 2014), annexed to this Petition as Exhibit 11. The Agreement requires

National Grid's ratepayers to pay a net present value ("NPV") amount of \$150 million to finance the addition of natural gas capability to Dunkirk's coal plant and to subsidize the continued operation of the plant for the next 10 years. *Id.* 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.

19. The Agreement does not shut down or replace any of the four existing coal-burning units at the Dunkirk plant, and does not include any restriction on, or prohibit, the burning of coal at any of the four units.

20. Only a single unit at the Dunkirk plant, coal-fired Unit 2, is currently operating at a 75 MW limit. Ex. 4 at Schedule 1. By adding natural gas capability to Unit 2 and the currently mothballed Units 3-4, the Agreement would increase the capacity of the Dunkirk plant from its current 75 MW to 435 MW.

21. On February 19, 2014, the Commission initiated a 45-day comment period regarding the proposed Agreement through a notice in the New York Register. The Commission, however, failed to provide notice of the comment period on its own electronic docket for the Proceeding and did not notify the parties to the Proceeding of the comment period.

22. Petitioners Sierra Club and RCI filed comments on the Agreement on April 7, 2014. Sierra Club and RCI, Comments and Motion for Procedural Order (Apr. 7, 2014), annexed to this Petition as Exhibit 12. The comments highlighted that previous National Grid studies concluded that transmission upgrades were the most cost effective option and that, even if the Commission opted to repower, only 150 MW of generation from Dunkirk was necessary to address reliability issues. Petitioners comments noted that the record therefore did not support the need for the 435 MW of generation proposed in the Agreement. *Id.* at 17.

23. Petitioners' comments also pointed out flaws in the Commission's environmental analysis, including that the Commission used an incorrect environmental baseline and failed to consider the environmental impacts of allowing continued coal-burning at all four units of the Dunkirk plant.

24. On May 16, 2014, the Commission released a Staff Report, which purported to address the public comments on the proposed Agreement. The Staff Report however failed to directly address Petitioners' April 7 Comments. PSC, Staff Report (May 16, 2014), annexed to this Petition as Exhibit 13.

25. The Commission allowed parties to the Proceeding only six business days to respond to the Staff Report, far shorter than prior comment periods on repowering and transmission proposals in the Proceeding.

26. On June 13, 2014, the Commission issued the Order approving the Agreement between National Grid and Dunkirk Power LLC. PSC, Order Addressing Repowering Issues and Cost Allocation and Recovery (June 13, 2014), annexed to this Petition as Exhibit 14. The Order accepted the terms of the Agreement and did not limit or restrict the amount of coal that could be burned in Units 2-4. The Order also did not address whether and how Unit 1 could be operated.

27. The Order failed to respond directly to Petitioners' comments questioning the need for a 435 MW project given the undisputed 150 MW reliability need.

28. The Order included a three-paragraph Notice of Determination of Non-Significance ("Negative Declaration") under the State Environmental Quality Review Act ("SEQRA"). The Negative Declaration included only one paragraph that purported to address the environmental impacts of the Commission's decision to approve the Agreement, but did not

even acknowledge, much less address, the environmental impacts of allowing the Dunkirk plant to continue to burn coal.

29. Petitioners filed a Petition for a Rehearing on the Order approving the Agreement on July 14, 2014. Sierra Club and RCI, Joint Petition for Rehearing (July 14, 2014), annexed to this Petition as Exhibit 15. The Petition for Rehearing sought a Commission order (1) granting rehearing on the Order on the ground that it was affected by errors of law and fact; (2) rescinding the Order and Negative Declaration issued pursuant to SEQRA; (3) directing National Grid to evaluate a 150 MW repowering option; (4) directing that a public adjudicatory hearing, presided over by an administrative law judge be held regarding the Agreement and alternatives for meeting reliability needs; (5) establishing a schedule for the parties to conduct discovery, present testimony, and cross examine witnesses regarding the Agreement; and (6) directing that the administrative law judge make a recommendation to the Commission, at the conclusion of the hearing, regarding whether the Agreement is just, reasonable, and in the public interest. *Id.* at 1.

30. Public Service Law (“PSL”) § 22 provides that “[t]he 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). Pursuant to that statutory provision, the Commission was required to grant or deny Petitioner’s Motion for Rehearing no later than August 13, 2014.

31. By notice dated July 25, 2014, the Commission announced that it had filed a purported “Notice of Proposed Rulemaking” with the Department of State concerning the Motion for Rehearing. *See* Notice Concerning Petition for Rehearing (July 25, 2014), annexed to this Petition as Exhibit 16. The “Notice of Proposed Rulemaking” did not cite to any legal authority for converting Petitioners’ Motion for Rehearing into a rulemaking proceeding.

32. Despite the clear requirement of PSL § 22 that the Commission either grant or deny a motion for rehearing within 30 days after filing, the Commission's July 25, 2014 Notice purported to give parties to the Proceeding until September 29, 2014—more than 60 days after filing—to submit comments on Petitioners' Motion for Rehearing.

33. More than two months have passed since the filing of Petitioners' Motion for Rehearing without any decision by the Commission on whether to grant or deny the motion.

34. The Commission's purported conversion of Petitioners' Motion for Rehearing into a Notice of Proposed Rulemaking and its failure to render a decision within the timeframe imposed by PSL § 22 effectively denied Petitioners' Motion for Rehearing.

FIRST CAUSE OF ACTION

35. Petitioners repeat and reallege the allegations in paragraphs 1 through 34 as though fully set forth herein.

36. The Agreement requires ratepayers to pay \$150 million for the addition of natural gas capacity to Dunkirk Units 2-4 that would result in almost three times more generation capacity than is needed to address reliability.

37. The Agreement requires ratepayers to pay for a repowering option that is significantly more expensive than transmission upgrades that can address reliability needs.

38. The Agreement will result in unjust and unreasonable rates.

39. For all of the above reasons, the PSC's decision to approve the Agreement was affected by errors of law, arbitrary and capricious, and an abuse of discretion

SECOND CAUSE OF ACTION

40. Petitioners repeat and reallege the allegations in paragraphs 1 through 39 as though fully set forth herein.

41. In issuing the Negative Declaration, the Commission failed to identify all relevant areas of environmental concern, take a hard look at them, and provide a reasoned elaboration for its conclusion that repowering the Dunkirk plant will have no significant environmental impacts.

42. The Negative Declaration fails to consider the environmental impacts of allowing the burning of coal at all four units at the Dunkirk plant, even though the Agreement specifically retains coal-burning capacity at those units and does not include any restrictions on such coal burning.

43. The Negative Declaration fails to adequately assess the environmental impacts of the Agreement because it incorrectly assumes all of Dunkirk's coal-fired units currently are operating and will be replaced by natural gas generation.

44. The Negative Declaration fails to compare post-repowering air quality impacts to the correct environmental baseline, which is the current operation of a single coal-fired unit.

45. The Negative Declaration is based on a flawed and incomplete Environmental Assessment provided by the applicant.

46. The Negative Declaration fails to contain a reasoned elaboration of the basis for the Commission's conclusion that repowering the Dunkirk plant will have no significant environmental impacts.

47. The Negative Declaration fails to evaluate the environmental benefits of choosing transmission upgrades, rather than repowering, to satisfy reliability needs.

48. For all of the above reasons, the PSC's issuance of the Negative Declaration was affected by errors of law, arbitrary and capricious, and an abuse of discretion.

THIRD CAUSE OF ACTION

49. Petitioners repeat and reallege the allegations in paragraphs 1 through 48 as though fully set forth herein.

50. In the alternative, the Commission failed to perform a duty imposed by statute by failing to either grant or deny Petitioners' Motion for Rehearing within 30 days as required by PSL § 22.

WHEREFORE, Petitioners respectfully request that this Court enter judgment against Respondents pursuant to CPLR §§ 7803(1), 7803(3) and 7806 as follows:

- A. Adjudging and declaring that the Commission's Order approving the Agreement was in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;
- B. Annuling and vacating the Order in its entirety;
- C. In the alternative, ordering the Commission to forthwith issue a ruling granting or denying Petitioners' Motion for Rehearing, and temporarily staying this action pursuant to CPLR § 2206 pending issuance of that ruling;
- D. Granting Petitioners the costs and disbursements of this action; and
- E. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 25, 2014

Respectfully submitted,



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*Counsel for Petitioners Sierra Club and Ratepayer and
Community Intervenors and Sierra Club*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
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VERIFICATION

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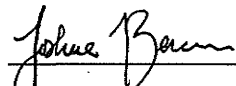
for a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules.

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STATE OF NEW YORK)
) ss.:
COUNTY OF TOMPKINS)

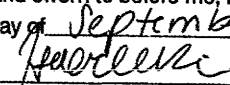
JOSHUA BERMAN, being duly sworn, deposes and says:

I am a staff attorney in the Washington D.C. office and am an official representative of Sierra Club. I have reviewed the annexed Verified Petition and know its contents. The Verified Petition is true to my knowledge, except as to matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.



Joshua Berman



District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 29 day of September, 2014


Isabelle Riu, Notary Public, D.C.
My commission expires May 31, 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
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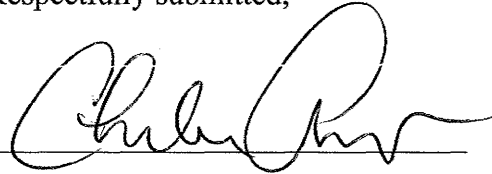
PLEASE TAKE NOTICE, that upon the annexed Verified Petition and the exhibits annexed thereto, the Affidavit of Diane Hofner, sworn to on August 29, 2014, the Affidavit of Christina Jarvis, sworn to on September 9, 2014, and the accompanying Memorandum of Law, Petitioners will move this Court at an Article 78 Term at the Albany County Courthouse, 16 Eagle Street, Albany, New York, on the 7th day of November, 2014 at 9:30 a.m. in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Sections 7803(1), 7803(3), and 7806 of the New York Civil Practice Law and Rules (“CPLR”):

- A. Adjudging and declaring that Respondents’ issuance of the June 13, 2014 Order Addressing Repowering Issues and Cost Allocation and Recovery (“Order”) was in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;
- B. Annuling and vacating the Order in its entirety;

- C. In the alternative, ordering Respondents to forthwith issue a ruling granting or denying Petitioners' July 14, 2014 Motion for Rehearing, and temporarily staying this action pursuant to CPLR § 2201 pending issuance of that ruling;
- D. Granting Petitioners their costs and disbursements; and
- E. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 26, 2014

Respectfully submitted,



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