BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

---X

PROCEEDING ON MOTION OF THE COMMISSION TO EXAMINE REPOWERING ALTERNATIVES TO UTILITY TRANSMISSION REINFORCEMENTS

Case 12-E-0577

NOTICE OF MOTION

---X

PLEASE TAKE NOTICE, that Sierra Club, and Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the "Moving Parties"), hereby jointly move the New York Public Service Commission ("Commission") pursuant to 16 N.Y.C.R.R. §§ 3.6 and 3.7(a) for an Order (1) granting rehearing on the Commission's Notice of Filing Deadline issued on September 24, 2013 ("Notice") on the ground that it is affected by errors of law and fact; and (2) withdrawing the Notice based on the aforementioned errors of law and fact. The Moving Parties also move for an interim Order staying the Notice pending a final determination of this motion.

Dated: New York, New York
October 2, 2013

Respectfully submitted,

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TO: Service List, Case 12-E-0577

BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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PROCEEDING ON MOTION OF THE COMMISSION TO EXAMINE REPOWERING ALTERNATIVES TO UTILITY TRANSMISSION REINFORCEMENTS

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---X

JOINT MOTION FOR REHEARING AND STAY

PRELIMINARY STATEMENT

Sierra Club, and Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the "Moving Parties"), hereby jointly move the New York Public Service Commission ("PSC" or "Commission") pursuant to 16 N.Y.C.R.R. §§ 3.6 and 3.7(a) for an Order (1) granting rehearing on the Commission's Notice of Filing Deadline (Filing No. 106, September 24, 2013) ("Notice") on the ground that the Notice is affected by errors of law and fact; and (2) withdrawing the Notice based on the aforementioned errors of law and fact. The Moving Parties also move for an interim Order staying the Notice pending a final determination of this motion.

In its Notice, the Commission expressed a belief that "a revised repowering solution could be consistent with the best interests of the public and ratepayers" and, consequently, called for New York State Electric and Gas Corporation ("NYSEG") and Cayuga Operating Company, LLC ("Cayuga") to submit a joint revised repowering proposal within 30 days. Notice at 1. The Notice continues the pattern in this proceeding of keeping the Moving Parties – and the public at large – completely in the dark as to the facts underlying the determinations of what will

purportedly be in their "best interests." The Notice contains no findings of fact or conclusions of law to support its apparent determination that repowering the Cayuga power plant could be in the public interest. The determination appears to be based on findings by Department of Public Service ("DPS") staff that have not been placed on the public docket or made available for public review and comment. Moreover, despite widespread opposition to the repowering proposal and the submission of thousands of comments by the Moving Parties and the public, the Notice fails to address or respond to a single comment. Additionally, the Notice fails to explain how the Commission justifies its apparent finding that repowering is likely to be in the public interest while it is simultaneously rejecting the repowering proposal now pending before it and directing Cayuga and NYSEG to submit a revised proposal. Nor does the Notice explain why the pending proposals were deficient, in what respects the proposals need to be revised, or how such revisions will be consistent with the public interest or protect the ratepayers. Moreover, the Notice's failure to provide any concrete direction to Cayuga and NYSEG strongly suggests the existence of prior non-public meetings between the Commission and/or its staff, Cayuga and NYSEG.

It is respectfully submitted that the parties to this proceeding and the public deserve – and are legally entitled to – a more open and accessible decision-making process on issues that have such profound rate and environmental implications for the people of New York. The Moving Parties therefore request that the Commission grant rehearing and stay the Notice pending a final determination of this motion. The Moving Parties further request that the Notice be withdrawn until answers to the important questions raised above have been provided to the public.

PROCEDURAL BACKGROUND

This proceeding involves the proposed retirement of two coal-fired power plants: (1) the Dunkirk generating station located in Chautauqua County, New York, which consists of four units with a combined rating of approximately 635 megawatts ("MW"); and (2) the Cayuga facility located in Lansing, New York, which consists of two units with a combined capacity of approximately 312 MW.

On March 14, 2012, NRG Energy, Inc. ("NRG"), the owner of Dunkirk Power LLC, filed notice with the Commission of NRG's intent to indefinitely mothball the Dunkirk facility by no later than September 10, 2012, on the ground that Dunkirk was not economic and was not expected to be economic.

On July 20, 2012, Cayuga, the owner of the Cayuga facility, filed notice with the Commission of its intent to indefinitely mothball the facility by no later than January 16, 2013. In support of its decision, Cayuga stated that current and forecasted wholesale electric prices in New York are inadequate for the Cayuga facility to operate economically.

The Commission initiated this proceeding by Order Instituting Proceeding and Requiring Evaluation of Generation Repowering, (Filing No. 3, Jan. 18, 2013) (the "January 18 Order"). The January 18 Order directed the transmission and distribution utilities National Grid and NYSEG 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.

On January 30, 2013, Sierra Club filed and served a request for party status in this proceeding. The Sierra Club is a nonprofit environmental organization with over 600,000

members nationally, including more than 35,000 members in New York State. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club's membership includes individuals and electric ratepayers who reside in the vicinity of the Cayuga plant who have a financial and public health stake in the future of the plants.

On August 13, 2013, the Ratepayer and Community Intervenors filed and served a Request for Party Status in this proceeding. The Ratepayer and Community Intervenors include four county legislators, four town supervisors, four town board members, two mayors, one city council member, four community organizations, three scientists and engineers, and fifteen individual ratepayers, all of whom are concerned about the potential rate and environmental impacts associated with repowering the Cayuga and Dunkirk facilities.

On August 26, 2013, Earthjustice filed and served a Party Representative Form providing notice that it would be representing the Ratepayer and Community Intervenors in this proceeding.

On September 12, 2013, Citizens Campaign for the Environment (CCE") filed and served a Request for Party Status in this proceeding. CCE is a non-profit, non-partisan organization that empowers communities and advocates solutions to protect public health and the natural environment in New York State. CCE has 80,000 members in New York State and its staff work out of regional offices located in Buffalo, Syracuse, Albany, White Plains, and Farmingdale, New York.

On September 13, 2013, Environmental Advocates of New York ("EANY") filed and served a Request for Party Status in this proceeding. EANY is a non-profit government watchdog group that holds lawmakers and agencies accountable for enacting and enforcing laws that protect natural resources and public health. EANY has more than 13,000 individual members.

On September 16, 2013, Earthjustice filed and served on behalf of CCE and EANY a Motion for Access to Critical Documents Submitted in This Proceeding, seeking access to complete and unredacted versions of numerous documents that have been either heavily redacted or completely withheld from the public. That motion is still pending before the Commission.

On September 24, 2013, the Commission issued the Notice.

ARGUMENT

I. Rehearing is Necessary Because the Notice is Afflicted With Numerous Errors of Law and Fact

The Commission's regulations allow any person who is interested in an order to request rehearing within 30 days of service of the order.[1] 16 N.Y.C.R.R. § 3.7(a). A request for rehearing may be sought only on the grounds that the Commission committed an error of law or fact. *Id*. § 3.7(b). As discussed in detail below, the Notice suffers from numerous errors of law and fact and is therefore properly the subject of rehearing.

The Notice is legally defective because it:

(1) is based on a DPS staff analysis that has not been filed on the public docket in this proceeding and that has not been made available for public review and comment;

[1] Although labeled as a "Notice," the September 24, 2013 action by the Commission was, in actuality, an order appearing to make a determination on the merits and directing two of the parties to make an additional submission.

(2) appears to make a determination that repowering of the Cayuga power plant is consistent with the best interests of the public and ratepayers without stating the grounds for that determination, and without responding to any of the numerous comments submitted by the parties to this proceeding and by the public opposing the repowering proposal;

(3) appears to make a determination that repowering is in the best interest of the public and ratepayers even though the Notice rejects the repowering proposal now pending before the Commission as unacceptable;

(4) rejects the repowering proposal now pending before the Commission without identifying the deficiencies in the pending proposal (which the Moving Parties believe are numerous);

(5) directs Cayuga and NYSEG to submit a revised repowering proposal without specifying how or why the repowering proposal must be revised, suggesting that a revised repowering proposal has been the subject of prior non-public discussions between the Commission and/or its staff, Cayuga and NYSEG, and depriving the Moving Parties of the opportunity to provide input on needed revisions;

(6) provides only thirty (30) days from the date of the Notice for Cayuga and NYSEG to submit a revised repowering proposal, again suggesting that a revised repowering proposal has been the subject of prior non-public discussions between the Commission and/or its staff, Cayuga and NYSEG; and

(7) provides no guarantee that public input will be sought or received on the revised repowering proposal required by the Notice, thereby potentially vitiating the public comments provided to date on proposals which have now apparently been rejected by the Commission.

The Notice's failure to set forth findings of fact supporting the Commission's apparent determination to approve repowering flies in the face of settled principles of administrative law. As stated by the New York Court of Appeals:

> Findings of fact in support of decisions by courts and administrative boards alike serve to give assurance to parties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations. Where, as in this instance, a statutory review of the decision may be had . . . findings of fact in some form are essential to enable the parties and any appellate court intelligently to determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the evidence.

In re N.Y. Water Serv. Corp., 283 N.Y. 23, 30 (1940). *See also N.Y. State Guernsey Breeders Co-op. v. Noyes*, 284 N.Y. 197, 204 (1940) ("In order that the basis for the determination may be definite and certain where issues of fact are presented and in order that the determination may be reviewed, a duty is imposed upon the determining body or officer to set forth the factual grounds of the decision"); *Sherman v. Frazier*, 84 A.D.2d 401, 411 (2nd Dep't 1982) ("When an agency fails to delineate the findings which provided the basis for its decision, proper judicial review is impossible").

The Commission's failure to support its apparent determination with findings of fact only adds to the public confusion already surrounding this proceeding. The integrity of the administrative process depends upon public access, scrutiny, and input. The elucidation of specific grounds for agency action is an indispensable component of transparency:

> Findings of fact serve other purposes besides affording a basis for intelligent judicial review. The obligation to formulate findings, rather than simply to announce a result tends to assure considered action by the administrative deciding officer. As a corollary, the findings themselves offer some assurance to the parties that the decision has been arrived at rationally, on the evidence; and the findings at least enable the parties to judge for themselves the soundness of the decision, and afford them assistance in deciding [. . .].

Scudder v. O'Connell, 272 A.D. 251, 253-54 (1st Dep't 1947).

The Notice is bereft of any reference to applicable law or regulations, cites to no facts in the record to support the Commission's apparent determination, and ignores the numerous substantive comments of parties opposed the repowering proposal. Nearly identical facts led the Court of Appeals to vacate a decision by the New York State Tax Commission:

> The Tax Commission has appealed from judgments of the Appellate Division which annulled the determinations, but in the cases before us *has failed to present sufficient findings of fact, or indeed any findings, upon which review could be predicated . . . No reference was made to the agency's own regulations, nor were findings of fact posited which demonstrated the basis for its conclusion; and, indeed, no relationship between findings of fact and the conclusory statements were presented*. Under these circumstances the Tax Commission failed to provide statements of decision sufficient for review, and its determinations must be annulled.

Montauk Improvement, Inc. v. Proccacino, 41 N.Y.2d 913, 914 (1977) (emphasis added).

Like the Tax Commission in *Montauk*, the Commission's Notice fails to cite any governing statute or regulations, and refers to not a single finding of fact to support its conclusory statement that "a revised repowering solution could be consistent with the best interests of the public and ratepayers." Notice at 1. Given these deep-seated legal deficiencies, there is no question that a court would find "the determination was arbitrary and capricious and lacked a rational basis." *Multiple Intervenors v. Pub. Serv. Comm'n of N.Y.*, 166 A.D.2d 140, 144 (3rd Dep't 1991).

The Notice is also legally defective because it is based on information outside the record; namely, DPS staff findings that are not part of the public docket and have not been subject to public review and comment. The Notice states:

> At the Commission Session held on September 19, 2013, [DPS] Staff reported that its review of the Cayuga repowering proposal and NYSEG's report indicated that a revised repowering solution could be consistent with the best interests of the public and ratepayers.

Notice at 1.

DPS Staff's "review" has not been made available to the Moving Parties or to the public. In fact, the "report" of DPS staff at the September 19, 2013 Commission Session consisted, in its entirety, of the following:

> MR. ADDEPALLI: And then you have the repowering proposal. So what we believe could be done is--first also the Cayuga proposal we should note all the four proposals that the generator filed for repowering all have one common feature, which is shift the risk of market-- both energy and capacity market risks to NYSEG rate payers. So how do we move forward with this information?
>
> One pathway forward that we can see, staff can see, is that there could be a solution that would be in the interest of the ratepayers to bring about overall lower net cost to ratepayers and still accommodate repowering. And so we suggest some guidelines for the parties to follow in having further conversation, NYSEG and Cayuga, that the solution that is adopted should meet the reliability needs over a long horizon, long-term horizon, and the rates for ratepayers had to be just and reasonable and also the lowest net cost alternative. And it should also consider other public policy factors that the Commissioner had asked them to consider, economic development and emissions. And, importantly, it should minimize ratepayer risk. So with these principles we believe the two parties can work together over 1 the next month and come up with solutions that would meet the needs of the reliability needs of the ratepayers and at the lowest overall net cost. And staff is available to facilitate a conversation if needed between the parties and that's where we are. And there are a couple of next steps that Liz can articulate.
>
> MS. GRISARU: Yes, maybe only a--maybe really only two. We've asked--as Raj said, we've asked Cayuga and NYSEG to go to work and sharpen their pencils and to try to develop a solution. We have asked them to bring a proposal back to the commission and our expectation is that you will act on that proposal at the December session.
>
> So the time is running. The RSS--the current RSS contract needs to be renewed, if it's going to be, for the beginning of 2014. So we want to bring this back to you in December. And, as Raj said, we have offered to assist the parties in their discussions and, you know, we're ready to do that.

Regular Meeting of the Pub. Serv. Comm'n, Transcript of Proceedings at 35-36 (Sept. 19, 2013).

DPS staff clearly acknowledges that the ratepayers are being asked to act as guarantors for any market risk associated with the repowering proposals ("[A]ll the four proposals that the generator filed for repowering all have one common feature, which is shift the risk of market--

both energy and capacity market risks to NYSEG rate payers"). Yet in the next breath, staff claims – without explanation or elaboration – that somehow "the two parties can work together over the next month and come up with solutions that would meet the needs of the reliability needs of the ratepayers and at the lowest overall net cost." Quite frankly, it is impossible to follow the logic of this progression, and staff offers no grounds for its optimistic appraisal that a repowering "solution" can be found that will be in the public interest.

The DPS staff report is as remarkable for what it omits as for its internally contradictory statements. There is no discussion of the numerous public comments received in opposition to the repowering proposals; no reference to the statutory or regulatory standards governing this proceeding; no discussion of any of the numerous specific deficiencies in the four repowering options; and no mention of the ongoing dispute over the mass redactions of critical documents.[2] Whatever analysis the DPS staff has conducted on the repowering proposal, and whatever facts have led them to conclude that repowering could be in the public interest, have yet to be disclosed to the Moving Parties or the public.

If the Notice was based on the exceedingly brief presentation by DPS staff at the September 19, 2013 Commission Session, it is a disservice to the Moving Parties and the public. Surely, the issues at stake in this proceeding deserve more care and scrutiny than the brief end-of-session colluquy reflected in the transcript. If, however, the Commission has been provided with DPS staff analyses or reports that have not been made public and the Notice is based on those analyses or reports, it runs afoul of proper administrative procedure.

Administrative determinations must be made on the record, and it is improper for an administrative agency to base its decision on matters outside the record. *Simpson v. Wolansky*,

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[2] In fact, the DPS staff comments make clear that their prime concern is with meeting an arbitrary, self-imposed December deadline for a decision on the Cayuga repowering proposal.

38 N.Y.2d 391, 396 (1975) ("It is not proper for an administrative agency to base a decision of an adjudicatory nature, where there is a right to a hearing, upon evidence or information outside the record"); *Multari v. Stony Point*, 99 A.D.2d 838 (2nd Dep't 1984) ("Where a hearing has been held, it is improper for an administrative agency to base a decision upon information outside the record because such a procedure denies the parties an opportunity to refute the outside information"); *Scarpitta v. Glen Cove Hous. Auth.*, 48 A.D.2d 657, 658 (2nd Dep't 1975) ("An even graver error was committed by the board in basing part of its determination upon unspecified reports not received into evidence at the hearing . . . Such error was highly prejudicial"); *New Rochelle Water Co. v. Maltbie*, 248 A.D. 66, 73 (3rd Dep't 1936) ("The commission in fixing rates chargeable by a public utility may not base its orders on facts dehors the record concerning which the utility had no knowledge and no opportunity to be heard in respect thereto").

The prohibition against considering matters outside the record extends to the undisclosed reports or statements of agency subordinates. *In re N.Y. Water Serv. Corp.*, 283 N.Y. at 31 (annulling determination based on executive engineer's report because parties denied opportunity to test engineer's conclusions or offer evidence to refute them); *Trustees of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 NY 123 (1908) (holding that an administrative order fixing the rates of a public utility cannot be based upon ex parte statements of the commission's agents and inspectors); *Long Island Lighting Co. v. Grossmann*, 231 N.Y.S.2d 867, 869 (Sup. Ct. Nassau Cnty. 1962) (improper evidence outside the record may have influenced decision and defendant therefore entitled to a new trial). Thus, reliance on non-public DPS staff reports or analyses is improper and renders the Notice legally flawed.

Moreover, the Commission's failure to respond to any of the numerous public comments received runs contrary to its obligation to protect the public interest. *N.Y. State Guernsey Breeders Co-op. v. Noyes*, 284 N.Y. at 204 ("The mandate for a public hearing and notice thereof imports the obligation to consider whatever testimony is given").

The above-noted deficiencies, taken together, have operated to deprive the Moving Parties of due process in this proceeding:

> Due process considerations mandate that findings of fact be made in a manner wherein the parties are assured that the decision is based on evidence in the record, uninfluenced by extralegal considerations, and that both an intelligent challenge by a party aggrieved by the determination and an adequate judicial review are possible.

Goohya v. Walsh-Tozer, 292 A.D.2d 384, 384-85 (2nd Dep't 2002).

In this case, the Commission's bare-bones Notice provides no assurance that its apparent determination on repowering was based on evidence in the record and was not influenced by extralegal considerations.

For all of the above reasons, the Notice is legally deficient and must be withdrawn.

II. Before the Commission Can Approve Repowering as in the Best Interest of Ratepayers, it Must Expressly Address the Significant Evidence in the Record to the Contrary

It is respectfully submitted that the Notice fails to consider crucial facts that demonstrate that repowering is not consistent with the interests of the public or the ratepayers. These facts have been placed before the Commission in previous comments by the Sierra Club, the Multiple Intervenors, NYSEG, Lockport Energy Associates, and Indeck Energy Services[3] showing that any perceived benefits to the public and ratepayers are likely to be illusory at worst and short-term at best. Moreover, as the comments submitted to the Commission warn, the consequences

[3] *See* Comments of Lockport Energy Associates, L.P. and Indeck Energy Services, Inc., N.Y. Pub. Serv. Comm'n Docket No. 12-E-0577 (Aug. 30, 2013).

of tampering with New York's competitive and deregulated electric market in the manner contemplated by this docket, and the precedent it will establish, will have negative repercussions for New York ratepayers and power providers well beyond the confines of this narrow proceeding that far outweigh any perceived benefits. Consequently, before approving a repowering solution, the Commission must address the substantial evidence adduced to date that repowering is not the most beneficial long-term solution for New York's ratepayers or the solution most consistent with the local reliability concerns that originally motivated this docket.

A. Before Selecting Repowering, the Commission Must Address the Concern That Requiring Ratepayers to Subsidize the Repowering of Cayuga Undermines New York's Competitive Electricity Market, Creating Negative Ripple Effects Beyond This Docket and Establishing a Dangerous Precedent that Is Likely to Increase Long-term Costs to New York Ratepayers.

Before it can move forward with selecting a repowering solution in this docket, the Commission must address the fact that tampering with New York's competitive electric markets in the manner contemplated in this docket will have significant negative ramifications for New York's electric sector and New York ratepayers beyond the narrow costs and benefits being considered here. In addition to setting a precedent that the state is prepared to force ratepayers to subsidize the repowering of uneconomical generating resources—a sufficient concern in and of itself to reject repowering—if the Commission chooses to provide out-of-market payments to Cayuga, those subsidies will distort New York's competitive market and make other resources less economical, increasing the likelihood that additional facilities will come to the PSC seeking similar treatment on the backs of ratepayers.

In deregulating the New York electric sector in 1996, the Commission "declare[d] [its] intent to encourage competition wherever feasible." Opinion and Order Regarding Competitive Opportunities for Electric Service at 32, N.Y. Pub. Serv. Comm'n Docket No. 94-E-0952 (Filing

No. 9, May 20, 1996). The Commission placed its trust in the competitive market to "reduce rates over time, increase customer choice, and encourage economic growth," *id*., believing that ratepayer costs will be lowered by economic generators competing with each other without ratepayer assistance, thereby phasing out uneconomic generation. Moreover, the Commission expressly contemplated the possibility of generator retirements, but noted that the economic impacts would be offset by competitively financed new generation and "ancillary businesses such as energy service companies providing DSM and related services." *Id*. at 85.

Despite its clearly stated intent to encourage competition, the Commission is now proposing to unravel nearly two decades of work by requiring ratepayers to finance otherwise uneconomic generation in the face of a generator request to mothball. Requiring ratepayers to subsidize the repowering of an uneconomical generation resource will establish a dangerous precedent. No unique justification for ratepayer subsidization has been offered in the context of Cayuga that would distinguish it from Dunkirk or the host of future facilities that are or may become uneconomic in the future. Consequently, a repowering decision here runs the significant risk of limiting the Commission's ability to protect ratepayers in the face of future repowering requests.

Moreover, forcing ratepayers to subsidize repowering of one plant makes additional mothball and retirement requests more likely, thereby raising the stakes of the Commission's decision in this proceeding. As the Federal Energy Regulatory Commission ("FERC") has observed, "all uneconomic entry has the effect of depressing prices below the competitive level." N.Y. Independent System Operator, Inc.,124 FERC ¶ 61,301 at 29 (2008), *on reh'g*, 131 FERC ¶ 61,170 (2010). Artificially depressing prices decreases margins and renders other generators less able to compete on their own merits. The economic impacts of selecting repowering here should

be viewed in the broader context of the additional repowering requests that ratepayers may be asked to subsidize in the future and, unless and until the Commission addresses this concern, repowering should be rejected.

B. Before the Commission Acts to Approve a Repowering Solution Based on Reasons Other than Reliability, It Should Explain How This Approach is Consistent With Its Role Post-Deregulation

The Commission should avoid turning this docket into a broad referendum on New York's energy policy regarding generator retirements or community economic stimulus. This type of broad policymaking is directly antithetical to a functioning deregulated electric market and beyond the role of the Commission post-deregulation. The local reliability needs that motivated the creation of this docket were narrow and should be addressed narrowly in accordance with the evidence before the Commission about the relative reliability merits of transmission versus repowering. To the extent the Commission shares the concerns voiced by a number of stakeholders about economic stimulus in upstate New York or community transition more broadly, there are myriad alternatives to providing out-of-market subsidies to a specific uneconomical generating resource to address these economic concerns.

This proceeding was motivated by narrow local reliability concerns identified by the local transmission owners in response to requests from the owners of Cayuga and Dunkirk to indefinitely mothball those facilities. In the January 18 Order, the Commission identified the considerations that would be used to compare transmission and repowering solutions, separating them into "Reliability" and "Other Impacts." January 18 Order at 3-4. Consistent with the Commission's role in a deregulated market, reliability is and should remain the primary consideration in the Commission's determination. To stray too far into the realm of "Other

Impacts"[4] risks turning this proceeding into a political referendum on energy policy in upstate New York, an undertaking beyond the purview of the Commission. Indeed, the limited role that a state public service commission has in decisions about subsidizing new generation was recently emphasized in *PPL Energyplus, LLC v. Nazarian,* 2013 WL 5432346 (D. Md. Sept. 30, 2013). There, the court ruled that the Maryland Public Service Commission's efforts to bring new generation online in Maryland by requiring distribution utilities to enter into contracts for differences with a pre-selected generator violated the Supremacy Clause by impermissibly infringing on FERC's authority to establish wholesale rates. As addressed in numerous previous filings, the Commission here should limit its consideration to the local reliability issues within its purview, and as these filings further establish, NYSEG's transmission upgrades are the appropriate low-cost, most reliable solution to address local reliability concerns associated with Cayuga's retirement.

Moreover, to the extent that the Commission considers broader upstate economic impacts, it should not view this docket as the sole, or even the appropriate, means of addressing these impacts. Many of the arguments in favor of repowering these uneconomic plants claim that doing so will drive upstate economic development. While this is a laudable policy objective, it should be met through the appropriate mechanisms such as Regional Economic Development Council grants or general fund allocations. Given the limited scope of this docket—considering only repowering requests from two generators for two specific facilities—the Commission is not well situated to opine on the best solutions to provide economic stimulus for upstate New York. And even if upstate economic stimulus were an appropriate motivation for the Commission's decision, as discussed above, the net economic impact of repowering on ratepayers should be considered in light of the immediate costs and benefits, but also in light of the legal and

[4] Appropriately, the Commission recognized "Other Impacts" as including "electric market competitiveness."

economic ripple effects the decision will have, rendering other generation less economically viable and cabining the Commission's discretion to reject future repowering proposals.

C. Before the Commission Approves Any Pending or Revised Repowering Proposal, It Must Address Cayuga's Failure to Provide an Environmental Analysis of Repowering

In contravention of the Commission's January 18 Order, the revised repowering proposal submitted by Cayuga on September 6, 2013 lacks any analysis of the environmental impacts of repowering the Cayuga plant. Cayuga Revised March 26 Proposal (Filing No. 98, Sept. 6, 2013) ("Revised Proposal"). Indeed, the proposal is bereft of any section discussing the environmental impacts of repowering. The only mention of environmental impacts consists of two identical conclusory statements claiming that all four repowering options will "generate dramatically cleaner energy and improve air quality in central New York with reductions in all major emission categories." Revised Proposal at 7, 42. This claim is wholly unsupported and simply incorrect.

Cayuga's claim is based on the assumption that if repowering is not approved, the Cayuga plant will continue to burn coal indefinitely. This is fiction. As the Commission is well aware, this proceeding arises out of Cayuga's notice to the Commission that it intends to mothball the Cayuga plant. Thus, if repowering is not approved, the plant will presumably be mothballed, with the end result being zero emissions from the plant.[5] Accordingly, the environmental baseline against which the repowering options must be measured is the zero emission scenario, not the coal-burning scenario.[6] When viewed in the context of the correct

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[5] Indeed, if the plant were economical to operate as a coal-fired facility any time before the completion of the transmission or repowering solution, it would be inappropriate for NYSEG ratepayers to be forced to continue to support the plant at an annual cost of $30 million.

[6] Even if some limited generation at the Cayuga plant is deemed necessary to address interim reliability demands, such limited operations would result in substantially lower emissions that the full-time year-round coal-burning scenario assumed by Cayuga.

environmental baseline, each of the repowering options will result in more, not less, emissions of major pollutants than the baseline condition.

The only environment-related information provided by Cayuga is found in Attachment 3 to the Revised Proposal. However, the Attachment consists almost entirely of listings of federal, state and local environmental permits that would be required for each repowering option. Only two pages of the Attachment contain any data, and those data are flawed and incomplete. The Attachment displays two tables purporting to compare emissions of several pollutants from coal-fired and natural gas scenarios at the Cayuga plant. Revised Proposal at 71-72. However, as noted above, the plant's prior coal-burning emissions are irrelevant to an environmental analysis of the mothballing versus natural gas repowering scenarios. Having proposed to mothball the plant, Cayuga cannot now pretend that it never made that proposal and claim an environmental "benefit" that is completely illusory.

Moreover, even the limited and flawed data in the Revised Proposal is cherry-picked. For example, Cayuga completely ignores methane emissions associated with natural gas, which are well-documented and have potentially serious climate change impacts because methane is a far more potent greenhouse gas ("GHG") than carbon dioxide. *See, e.g.*, Ramon A. Alvarez et al., *Greater focus needed on methane leakage from natural gas infrastructure*, Proc. of the Nat'l Acad. of Sci. 1, 1 (Feb. 13, 2012)[7] ("[M]ethane . . . the prime constituent of natural gas, is itself a more potent GHG than carbon dioxide . . . [methane] leakage from the production, transportation and use of natural gas can offset benefits from fuel-switching."). Cayuga's failure to even mention methane in the Revised Proposal is symptomatic of its inadequate treatment of the environmental issues associated with natural gas repowering.

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[7] *Available at* http://www.pnas.org/content/early/2012/04/02/1202407109.full.pdf+html.

The Revised Proposal also incorrectly claims that "[i]n contrast to the proposed transmission reinforcements, none of the [repowering] options negatively impact greenspace." Revised Proposal at 8. Once again, Cayuga offers no facts to support this sweeping conclusion. Cayuga conveniently fails to consider the natural gas pipeline infrastructure that will be needed to convey natural gas to the plant if repowering is approved. The Revised Proposal contains no information regarding this essential component of any repowering option. At the very least, Cayuga should be compelled to disclose its pipeline infrastructure plans to the public before making broad claims that its repowering proposals will have no negative impact on greenspace.

The plain language of the January 18 Order required that the environmental impacts of repowering be analyzed. January 18 Order at __. However, Cayuga has chosen to omit any discussion of the environmental impacts of repowering, and the limited environmental data provided are flawed and incomplete. It is respectfully submitted that the Commission must insist that Cayuga complete the environmental analysis required by the January 18 Order and make it available for public review and comment before any final determination on repowering.

III. An Interim Order Staying the Notice is Necessary and Appropriate

The Moving Parties request that the Commission temporarily stay the Notice pending a final determination of this motion. If, as the Moving Parties believe is legally necessary, the Notice is ultimately withdrawn, it serves no purpose to have Cayuga and NYSEG forge ahead on an extremely tight deadline to craft a revised repowering proposal that will almost certainly be challenged. In light of the significant procedural and substantive issues raised by this motion, it would be prudent for the Commission to maintain the status quo while these matters are under consideration.

There is no need for a rush to judgment on the proposal for repowering. A temporary stay will not unduly delay this proceeding or prejudice other parties. In fact, additional time is

absolutely necessary for the Commission and DPS staff to provide details to the Moving Parties and the public about the internal analyses that have been conducted on the repowering options, the findings that have been made, the conclusions (if any) that have been reached, and the rationale supporting those conclusions. On the other hand, absent a stay the Moving Parties and the public will be prejudiced by being deprived of the basis for the Commission's apparent determination on the core issues in this proceeding.

In any event, it defies credulity that a modified repowering proposal that addresses the numerous significant deficiencies and concerns identified in comments submitted by the Moving Parties and the public could be devised in such a short time frame. Indeed, the deficiencies in the Revised Proposal's treatment of environmental issues alone are so pervasive and significant that it is unfeasible that they can be remedied by the 30-day deadline imposed by the Notice.

For all of the above reasons, the Moving Parties request that the Commission stay the Notice pending a final determination of this motion.

CONCLUSION

For the reasons set forth herein, the Moving Parties request that the Commission forthwith enter an Order (1) granting rehearing on the Notice on the ground that the Notice is affected with errors of law and fact; (2) withdrawing the Notice based on the aforementioned errors of law and fact; (3) staying the Notice pending a final determination of this motion; and (4) granting such other and further relief as the Commission deems just and proper.

Dated: New York, New York
October 2, 2013

Respectfully submitted,

_______/s/__________________

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