December 10, 2013

VIA ELECTRONIC MAIL

Hon. Kathleen Burgess
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350
Email: secretary@dps.ny.gov

RE: Case No. 12-E-0400; Petition of Cayuga Operating Company, LLC to Mothball Generating Units 1 and 2—Comments of Sierra Club and Ratepayer and Community Intervenors Regarding Proposed Reliability Support Services Agreement II

Dear Secretary Burgess:

The Sierra Club and Ratepayer and Community Intervenors respectfully submit the following comments regarding the proposed Reliability Support Services Agreement 2 ("RSSA 2" or "Agreement") between New York State Electric & Gas ("NYSEG") and Cayuga Operating Company, LLC ("Cayuga"). For the reasons set forth below, the Agreement raises serious concerns that ratepayer interests are not being adequately protected and must therefore be modified to ensure that ratepayers are not saddled with unjust and unreasonable rates in violation of Public Service Law § 65(1).[1]

SUMMARY OF COMMENTS

Under the proposed Agreement, NYSEG's ratepayers are being once again asked to shoulder a major financial burden by supporting the continued operation of a facility that purports to be uneconomical. This burden is now being extended by at least three-and-a-half years and is being substantially increased. Not only would annual fixed payments rise by more than $4.2 million between 2013 and 2014 under RSSA II (from $29.1 million to $33.5 million), but the proposed Agreement would also require ratepayers to fund more than $42 million in capital expenditures at the Cayuga plant through July 2017, an expenditure rate nearly three times that of the original agreement.

[1] The New York Public Service Law provides that "[a]ll charges made or demanded" by any electric corporation for electricity or any service "shall be just and reasonable." Pub. Serv. L. § 65(1). "Every unjust or unreasonable charge made or demanded for . . . electricity or any such service . . . is prohibited." *Id.*

Moreover, not only does the Agreement do little to clarify the nature of or need for these improvements, but based on the descriptions provided in Exhibit 4 at least several appear to be expensive, unnecessary for the reliable and safe operation of the facility through the Initial Term, and more likely calculated to facilitate long-term operation of the facility as a merchant plant beyond the expiration of the RSSA.

Consistent with the Commission's obligation to protect customers from unjust and unreasonable rates, New York ratepayers should not be required to subsidize expenditures that are not strictly necessary for the safe and reliable operation of the grid. To this end, Sierra Club and Ratepayer and Community Intervenors urge the Commission to take the following actions:

- Limit the duration of the Agreement by ensuring that the transmission upgrades previously identified as necessary to alleviate the reliability need for the Cayuga plant are moving forward expeditiously;

- Require that a reliability analysis be conducted immediately for the retirement of a single Cayuga unit and ensure that this analysis is updated regularly as the transmission upgrades are implemented or other circumstances change that could alleviate the need for one of the units;

- Require that the Agreement expressly authorize unilateral termination by NYSEG upon reasonable notice <u>at any time</u> once NYSEG determines that only a single unit is needed to maintain reliability; the four-month window identified in Section 3.6(b) is arbitrary and unduly narrow and should be rejected;

- Require that the Agreement expressly authorize unilateral termination by NYSEG prior to the end of the Initial Term should subsequent reliability analysis determine that the reliability need for the Cayuga facility has been eliminated;

- Carefully scrutinize the list of applicable capital expenditures in Exhibit 4 to ensure that New York ratepayers are not being asked to pay for significant long-term upgrades to the facility, but rather are underwriting only those expenditures required to ensure the facility operates safely and reliability through the Initial Term of the Agreement;

- Modify the unit selection provision in Section 3.6(a) to clarify that if NYSEG limits the Agreement to a single unit, Cayuga must keep operational the unit that will result in lower capital expenditures; and

- Require that, if the Agreement retains the current excessive capital expenditure levels, Cayuga be required to pay back <u>all</u>, not merely a fraction of these capital expenditures if the plant operates as a merchant plant beyond the end of the Agreement.

These recommendations are explained in greater detail below.

The Sierra Club and Ratepayer and Community Intervenors also request that the Commission clarify that its September 20, 2013 order purportedly making "permanent" certain tariff amendments relevant to the RSSA was not intended to extend the tariff impacts of either the first or second RSSA beyond the terms specified in the Agreements themselves. And the undersigned also request that the Commission require NSYEG to file an unredacted or substantially less redacted version of its Auburn Area Solicitation Evaluation and Results and Recommendations dated September 5, 2013 and filed with the Commission on September 10, 2013, and to explain in sufficient detail the basis for any remaining redactions in the document in order to enable parties to evaluate the legitimacy of the requested withholdings. The present near-fully-redacted document and boilerplate request for exemption from disclosure plainly do not meet the requirements for withholding pursuant to Pub. Off. L. § 87(2) as clarified by recent rulings by the Records Access Officer, *see, e.g.*, Determination – Trade Secret and Critical Infrastructure Information, Case No. 12-E-0577 (reissued Oct. 8, 2013), *affirmed on appeal*, Determination on Appeal of Records Access Officer's Determination (Oct. 29, 2013).

RECOMMENDATIONS

Consistent with the Commission's obligation to review the proposed Agreement to "ensure the provision of safe and adequate service at just and reasonable rates,"[2] the Sierra Club and Ratepayer and Community Intervenors make the following recommendations.

A. To Minimize the Duration of the RSSA, the Commission Should Ensure that the Transmission Upgrades Identified as Necessary to Alleviate the Reliability Need for the Cayuga Facility Continue to Move Forward Expeditiously.

Under the proposed Agreement, NYSEG's ratepayers would be liable for over $155 million through July 2017 to subsidize the continued operation of a purportedly uneconomical coal plant. This represents an average of more than $44.5 million per year in ratepayer subsidies. Given that this significant burden on ratepayers will persist as long as the RSSA remains in effect, as part of its obligation to ensure that NYSEG's customers are not subjected to unjust and unreasonable charges in violation of Public Service Law § 65(1), the Commission must take steps to make certain that the duration of the Agreement is no longer than is strictly required to maintain grid reliability.

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[2] Order, Pet'n of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Case No. 12-E-0136 (Aug. 16, 2012), at 3-4.

Transmission upgrades have previously been identified that would alleviate the reliability need for the Cayuga facility.[3] Indeed, Commission orders from as early as 1998 identify the need for transmission upgrades in the load pocket around Cayuga and indicate that NYSEG had planned to have these transmission upgrades completed many years ago.[4] There is no cause for further delay. Although the Commission earlier this year initiated a docket to consider repowering solutions as an alternative to transmission upgrades to alleviate reliability issues,[5] to date Cayuga has failed to submit a repowering proposal that meets the reliability, economic development, and environmental benefits identified by the January 18, 2013 Order at the least cost to ratepayers[6] despite nearly two and a half months of negotiations with NYSEG. And it remains unclear whether Cayuga and NYSEG *can* develop a repowering proposal that meets these criteria. Consequently, to minimize the duration of the RSSA and, by extension, the amount of time that ratepayers must subsidize the continued operation of the Cayuga plant, the Commission should ensure that the transmission upgrades identified as necessary to alleviate the reliability need continue to move forward expeditiously. Nucor has previously identified several mechanisms to incentivize the expeditious completion of the necessary transmission upgrades in its prior filing from November 13, 2012. The undersigned endorse the recommendations made by Nucor to expedite this long-overdue process.

B. The Commission Should Require that a Reliability Analysis Be Conducted for the Retirement of a Single Cayuga Unit and Ensure that this Analysis is Updated Regularly as Pieces of the Reliability Solution Are Implemented.

As previously identified in comments submitted by the Sierra Club in Case No. 12-E-0577 on June 25, 2013, given the shape of the load curve in the vicinity of the Cayuga facility, a limited amount of additional capacity could obviate the need for a single unit from the Cayuga plant.[7] To date, it is unclear whether NYSEG or NYISO has conducted the necessary analyses of single-unit operation at Cayuga. Moreover, it is unclear whether the PSC has fully analyzed the potential for Nucor, through further demand response or other modifications to its operations, to affect the need for the second Cayuga unit.

In order to ensure that ratepayers are not subsidizing the operation of extraneous units that are not needed to ensure grid reliability, the Commission should require that a

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[3] *See, e.g.*, Ltr. from Mary R. Smith, Vice President, Engineering and Asset, Iberdrola USA Mgmt. Corp., to Thomas Dvorsky, Director, Office of Electric, Gas and Water, Department of Public Service (Aug. 24, 2012) (setting forth two-phase plan to complete necessary transmission upgrades).
[4] *See, e.g.*, Order Authorizing the Process for Auctioning of Generation Plant, Case No. 96-E-0891 (Apr. 24, 1998), at 19.
[5] *See* Order Instituting Proceeding and Requiring Evaluation of Generation Repowering, Case No. 12-E-0577 (Jan. 18, 2013).
[6] *See* Notice of Filing Deadline, Case No. 12-E-0577 (Sept. 24, 2013).
[7] *See* Comments of the Sierra Club Regarding Cayuga Repowering and Transmission Alternatives, Case No. 12-E-0577 (June 25, 2012); *see also* David J. Lawrence & Ricardo J. Galarza, Review of Cayuga Repowering Options, Case No. 12-E-0577 (June 25, 2013).

reliability analysis be conducted for the retirement of a single Cayuga unit, particularly in consideration of the potential for Nucor to mitigate peak demand, in order to identify whether changes to the demand curve or a more limited set of transmission upgrades would enable the earlier retirement of either Cayuga unit. This analysis should be updated as additional developments occur that impact grid reliability.

C. The Commission Should Require that the Agreement Expressly Authorize Unilateral Termination by NYSEG upon Reasonable Notice at Any Time Once NYSEG Determines that Only a Single Unit is Needed to Maintain Reliability

As drafted, the proposed Agreement unreasonably cabins NYSEG's authority to limit the Agreement's scope to a single Cayuga unit if subsequent developments eliminate the need for two units. Pursuant to Section 3.6(b) of the Agreement, NYSEG, upon 180 days notice, has the right to limit the Agreement to a single RSS unit. However, this section goes on to provide that "NYSEG's window for a reduction from two RSS Unit operation to one RSS Unit operation shall be effective between June 1, 2016 and October 1, 2016 . . . ." Such a limitation on timing is arbitrary and risks resulting in unjust and unreasonable overpayment by ratepayers. Upon adequate notice, NYSEG should have the ability at any time to limit the RSSA Agreement to a single unit if it finds that the continued operation of two units is not required to maintain local reliability.

D. The Commission Should Require that the Agreement Expressly Authorize Unilateral Termination by NYSEG Prior to the End of the Initial Term Should Subsequent Analysis Determine that the Reliability Need for the Cayuga Facility Has Been Eliminated.

The Agreement should likewise authorize NYSEG to terminate the entire Agreement at any time once NYSEG determines that the continued operation of Cayuga is not necessary to maintain grid reliability. As drafted, the proposed Agreement authorizes early unilateral termination by NYSEG only in a very limited set of circumstances set forth in Section 2.1(b) & (c). These include the occurrence of a force majeure event, default by one party, a change in law, a change in NYISO Tariff or policy, or a court or government order. Notably, Section 2.1 does not expressly include the circumstance in which subsequent reliability analyses determine that there is no longer a reliability need for the facility. The absence of such a provision is unreasonable. To protect ratepayers consistent with Public Service Law § 65(1), it is necessary for NYSEG to have the authority to terminate the Agreement at any time before July 1, 2017 if it determines the facility is no longer needed for reliability purposes. The Commission should require that this authority be clearly granted in the Agreement.

E. The Commission Should Limit Recovery for Capital Expenditures to Those that Are Truly Necessary for the Continued Safe and Reliable Operation of the Cayuga Facility for the Initial Term.

A significant flaw in the proposed Agreement is its treatment of capital expenditures. As drafted, the proposed Agreement requires NYSEG to underwrite $20 million in capital expenditures in 2014 and more than $42 million over the three-and-a-half year initial term of the Agreement. The proposed Agreement's capital expenditure rate of over $12 million/year is almost triple the annual rate from the original 2013 agreement. Most alarmingly, it remains wholly unclear from the documentation provided that all of the capital expenditures identified in Exhibit 4 to the Agreement are actually necessary and appropriate for the continued operation of the Cayuga facility through June 2017 and June 2017 only.

It is unjust and unreasonable for ratepayers to subsidize capital expenditures that are not strictly required for the safe and reliable operation of the Cayuga facility through the end of the Initial Term of the Agreement. The purpose of the Agreement is to ensure grid reliability based on representations by Cayuga that, absent the Agreement, it would remove the facility from service. Capital expenditures that would extend the life of the Cayuga facility beyond June 2017 and thereby facilitate Cayuga's subsequent operation of the plant as merchant facility are neither just nor reasonable.

Although Exhibit 4 provides only minimal information regarding the precise nature and necessity of the capital expenditures described, at least several appear to be both expensive and not needed to safely and reliably operate the facility through the completion of the Initial Term. Of particular concern is the #1 Air Heater Replacement identified for Unit 1 in 2016. Although no specific cost is associated with this "Maintenance Improvement," it is likely that a complete replacement of the Unit 1 air heater would be both costly and unnecessary so close to the end of this unit's operating life. Rather, more limited upgrades to the existing air heater are likely to be sufficient to safely see the unit through the Agreement's Initial Term. Likewise, the Sewage Treatment System Replacement also scheduled for 2016 does not appear to be a reasonable or appropriate capital expenditure for a facility that is ostensibly going to be retired one year later. Indeed, it is notable that the amount authorized for capital expenditures in Exhibit 1 for the year 2016—the year identified for these two expenditures—is far higher than for any other year of the Agreement.

Ultimately, while some level of capital expenditures will clearly be required to safely and reliably operate the Cayuga facility through June 2017, it is unjust and wholly unreasonable for NYSEG ratepayers to underwrite the costs of capital expenditures designed to extend the life of the plant beyond 2017. The Commission should carefully scrutinize the list of expenditures identified in Exhibit 4 to ensure that each and every one of them is truly essential for NYSEG's ratepayers to underwrite as part of the Agreement.

F. The Commission Should Reject the Agreement's Unit Selection Provision and Instead Require Cayuga to Retire Whichever Unit Would Require Ratepayers to Fund Greater Capital Expenditures.

As drafted, the Unit Selection provision found in Section 3.6(a) of the Agreement appears to authorize Cayuga to select which RSS unit would remain operational if NYSEG invoked its authority under Section 3.6(b) to limit the Agreement to a single unit. This is problematic because it fails to adequately protect ratepayer interests.

Based on the 1- and 2-unit capital expenditure levels identified in Exhibit 1, it would appear that Cayuga anticipates keeping online the unit with significantly greater maintenance needs. That is, the authorized amount for capital expenditures for 2-unit operation is only slightly greater than for 1-unit operation, particularly in 2016—$12,684,000 for 2-unit operation versus $11,700,000 for one unit. Unless essentially all of the capital expenditures in 2016 were for improvements common to both units (which according to the list in Exhibit 4 does not appear to be the case), there is no reason that the capital expenditure rate for 1-unit operation should be anywhere close to the rate for 2-unit operation if Cayuga planned to retire the more expensive unit and protect ratepayer interests. Allowing Cayuga to force ratepayers to subsidize capital expenditures on its more expensive unit is unjust and unreasonable. If the Agreement was truly designed to protect interests of ratepayers, it would require that in the event of single unit operation, the unit with greater maintenance needs be retired. The Commission should require that the Agreement's unit selection provision be redrafted to reflect this requirement.

G. If the Commission Retains the Current Capital Expenditure Levels in the Agreement, It Should Mandate that Cayuga Reimburse NYSEG's Ratepayers for the Full Amount of Capital Expenditures in the Event that the Plant Continues to Operate Beyond the End of the Agreement.

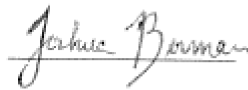
Consistent with the representation underpinning the Reliability Support Services Agreements that Cayuga would retire the facility but for out-of-market payments, if Cayuga elects to continue operations beyond the end of the Agreement, it should reimburse ratepayers for all capital expenditures they have underwritten for the facility that permit continued plant operation. As drafted, the proposed RSSA would require Cayuga to pay back at most 50% of any capital expenditures made at the facility.[8] This is unjust and unreasonable. As noted above, the list of capital expenditures in Exhibit 4 to the Agreement identifies expenditures that do not appear necessary for the safe and reliable operation of the plant through June 2017. The role of the Agreement is not to provide a windfall for Cayuga, tiding the plant through difficult economic times so that it can operate more profitably upon termination of the Agreement. Rather, the Agreement should provide sufficient compensation for Cayuga to continue operating the facility safely and reliably while the reliability need lasts, and no longer. Not only would the

[8] *See* RSSA II Section 4.3(a).

continued merchant operation of the Cayuga facility beyond the term of the Agreement call into question the necessity and appropriateness of the massive out-of-market support provided by ratepayers during the course of the Agreement, but it should also obligate Cayuga to compensate these ratepayers for any long-term investments in the facility they have funded. If the Commission retains the current excessive capital expenditure levels in the Agreement, it should require Cayuga to reimburse NYSEG's ratepayers for the full amount of these expenditures if the plant continues operating after the termination of the Agreement.

Thank you for your consideration.

Respectfully submitted,



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