



December 24, 2013

Hon. Kathleen H. Burgess
Secretary
State of New York Public Service Commission
Office of the Secretary
Three Empire State Plaza
Albany, NY 12223-1350

**Re: Case No. 12-E-0577 – Proceeding on Motion of the Commission to Examine
Repowering Alternatives to Utility Transmission Reinforcements:
Opposition to Request for Extension of Filing Deadline**

Dear Secretary Burgess:

Earthjustice submits this letter on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the “Moving Parties”) concerning the second Motion for Access to Documents filed by the Moving Parties in the above-captioned proceeding on November 12, 2013 (“Second Motion for Access”).

To date, the Commission has failed to issue a ruling or provide any other response to the Second Motion for Access. Rather, by letter dated November 19, 2013, the Department of Public Service (“DPS”) Records Access Officer (“RAO”) informed the Moving Parties that “this matter has been referred to me by Secretary Burgess and will be treated as a request for records pursuant to the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6.”

As fully set forth in the Moving Parties’ prior Motion to Revoke Secretary’s Conversion and Referral of Motion for Access to Documents, dated September 26, 2013, and Motion for Rehearing on Secretary’s October 9, 2013 Ruling, dated October 17, 2013, there is no legal authority for a motion in a Commission proceeding to be converted into a FOIL request, and the RAO has no authority to rule on motions made in the context of a Commission proceeding. The Moving Parties hereby renew the arguments made in those prior motions, and request that the referral of the Second Motion for Access to the RAO be revoked.

Even if the Commission declines to revoke the referral and persists in treating the motion as a FOIL request, the Commission and DPS are failing to comply with the requirements of FOIL and the Commission’s own implementing regulations. By letter dated December 18, 2013, the RAO informed the Moving Parties that “we estimate that it will take several months to collect and review the records you seek, and most of the documents may be exempt from disclosure in whole or in part. We will provide any disclosable to you as they become available. We will update you with the status of your request by April 18, 2014.” This response fails to comply with either FOIL or the Commission’s implementing regulations.

Both FOIL and the Commission's regulations require that, within five business days of the receipt of a written request for a record reasonably described, the agency shall (1) grant the request and make the document available, (2) deny the request in writing, or (3) furnish a written acknowledgement of the receipt of such request "and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied." N.Y. Pub. Off. Law § 89(3); 16 N.Y.C.R.R. § 6-1.1(b) (emphasis added). The RAO's December 18 letter fails to provide an approximate date by which the request will be granted or denied. It states only that an "update" on the "status" of the request will be provided by April 18, 2013. Thus, even if the Second Motion for Access was properly converted into a FOIL request (which it was not), the Commission has failed to comply with FOIL's requirements.

In any event, the RAO's claim that it will take "several months" to collect and review the documents sought by the Second Motion for Access is neither credible nor reasonable. The RAO's letter suggests "narrowing the scope of your request" by providing a "specific date range" or providing "specific subject matter with regard to your requests." Yet, the Second Motion for Access already does that. First, all of the document requests are time limited because they seek documents related to this proceeding, which was commenced on January 18, 2013, or documents relating to the Commission's Notice of Filing Deadline, which was filed on September 24, 2013. Thus, the requests are already limited by a specific date range. *See* Second Motion for Access at 2-4.

Second, the subject matter of the requests are specifically identified in the Second Motion for Access. For example, the Motion seeks "analyses prepared by or on behalf of [DPS] staff regarding potential impacts to ratepayers of the proposed repowering of the Cayuga plant," analyses prepared by or on behalf of DPS staff regarding potential environmental impacts of the proposed repowering of the Cayuga plant," documents concerning "the conclusion by DPS staff that 'a revised repowering solution could be consistent with the best interests of the public and ratepayers,'" and "analyses prepared by or behalf of DPS staff of alleged reliability issues resulting from the proposed mothballing of the Dunkirk plant." *See* Second Motion for Access at 2-4.

Thus, because the time period is limited to twelve months (or less) and the specific subject matter of the requests have been identified, the RAO's claim that it will take several months to respond – purportedly because of the lack of a specified time period and subject matter – is baseless. This, combined with the fact that no date has been provided by which the request will be granted or denied constitutes a constructive denial of the request. *See* N.Y. Pub. Off. Law § 89(4); *see also Legal Aid Soc'y v. New York State Dep't of Corr. & Cmty. Supervision*, 962 N.Y.S.2d 773, 775 (2013).

Moreover, the RAO's proposed timeline for providing responsive documents – stretching months into the future – ignores the expedited time frame governing this proceeding. As you know, the Commission stated at its September 19, 2013 meeting its intention to issue a decision

on repowering the Cayuga plant at the December meeting. Although a revised repowering proposal for Cayuga has not yet been submitted, it seems clear the Commission intends to expedite review of any revised proposal. Additionally, On December 15, 2013, Governor Cuomo announced that an agreement had been reached to repower the Dunkirk plant, thus short-circuiting the Commission's consideration of that proposal. Consequently, it is imperative that a response to the Second Motion for Access be provided as early as possible so that the Moving Parties can provide public input on the rate and environmental impacts of these two proposals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Amato". The signature is fluid and cursive, with a large initial "C" and "A".

Christopher Amato
Staff Attorney