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July 30, 2012

**VIA ELECTRONIC FILING**

Hon. Jaclyn A. Brillling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

Re: Case 12-E-0136 – Petition of Dunkirk Power LLC and NRG Energy, Inc. for  
Waiver of Generator Retirement Requirements

Dear Secretary Brillling:

Attached for filing in the above-referenced proceeding are the Comments in Partial Opposition of Multiple Intervenors. This submission is made in accordance with the Notice Directing Filings and Soliciting Comments, issued by the New York State Public Service Commission on July 18, 2012 in the above-referenced proceeding. Copies of the attached submission are being served herewith on the active parties in the proceeding.

Respectfully submitted,

COUCH WHITE, LLP

*Michael B. Mager*

Michael B. Mager

MBM/cgw  
Attachment

cc: Active Parties (via E-Mail; w/attachment)  
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**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**Petition of Dunkirk Power LLC and NRG Energy,  
Inc. For Waiver of Generator Retirement  
Requirements**

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**Case 12-E-0136**

**COMMENTS IN PARTIAL OPPOSITION  
OF  
MULTIPLE INTERVENORS**

**Dated: July 30, 2012**

**COUCH WHITE, LLP  
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## PRELIMINARY STATEMENT

Pursuant to the Notice Directing Filings and Soliciting Comments (“Notice”) issued by the New York State Public Service Commission (“Commission”) on July 18, 2012, Multiple Intervenors hereby submits its Comments in Partial Opposition in Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. For Waiver of Generator Retirement Requirements*. Multiple Intervenors is an unincorporated association of over 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the Niagara Mohawk Power Corporation d/b/a National Grid (“Niagara Mohawk”) service territory.

Multiple Intervenors’ Comments respond to the July 20, 2012 submission by Niagara Mohawk in this proceeding. That submission is comprised of: (a) the utility’s filing letter dated June 20, 2012 (hereinafter, “Filing Letter”); (b) a “Binding Term Sheet for Bilateral Agreement for Dunkirk Power Generating Units” between Niagara Mohawk and NRG Power Marketing LLC (“NRG”) on behalf of Dunkirk Power LLC (hereinafter, “Term Sheet”); and (c) a tariff amendment and related documentation advancing Niagara Mohawk’s proposal to defer initially, and then recover from customers via a proposed surcharge, all costs incurred in procuring reliability support services (“RSS”) from the Dunkirk generating station (“Dunkirk”) (hereinafter, “Tariff Amendment”).

As detailed herein, although Multiple Intervenors has some concerns regarding the Term Sheet, it neither supports nor opposes the overall level of compensation that would be paid to NRG for continuing to operate two of the four Dunkirk units beyond their proposed mothballing date. Quite frankly, the expedited process and the exclusionary settlement negotiations utilized in this proceeding have prevented Multiple Intervenors from being in a

position to evaluate the reasonableness of the compensation offered to NRG in an informed manner.

Multiple Intervenors, however, does oppose the Tariff Amendment proposed herein by Niagara Mohawk. The RSS surcharge advanced by the utility – although allocated among and within individual customer classes in a seemingly-appropriate manner – is exorbitant and wholly unnecessary. For the reasons detailed, *infra*, the proposed surcharge should be eliminated. If, *arguendo*, the Commission authorizes implementation of an RSS surcharge, the amounts proposed to be recovered thereunder should be reduced substantially.<sup>1</sup> Additionally, Niagara Mohawk’s Tariff Amendment is highly inequitable because, as proposed, it would recover 100% of RSS costs from the utility’s retail customers, notwithstanding the fact that Niagara Mohawk’s wholesale customers, and the customers of certain other utilities, would benefit similarly from the avoidance of any reliability problems that would be caused by the planned mothballing of Dunkirk.

Finally, given the expedited filing deadlines and the suboptimal (and, arguably, prejudicial) process that was utilized (detailed *infra*), no precedential value should attach to the Commission’s resolution of the issues in this this proceeding. Rather, the Commission should rule explicitly that its conclusions are (i) limited to the facts and circumstances presented herein, and (ii) not controlling in other proceedings.

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<sup>1</sup> Alternatively, the Commission should consider referring issues pertaining to the recovery of RSS costs from Niagara Mohawk’s retail customers to the utility’s pending electric rate case. *See generally* Case 12-E-0201, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service*.

## STATEMENT OF FACTS

Dunkirk consists of four electric generating units located within the Niagara Mohawk service territory. (Filing Letter at 1.) On March 14, 2012, NRG, as owner of Dunkirk, advised the Commission of its intent to mothball the Dunkirk facility no later than September 10, 2012. (*Id.*)<sup>2</sup> In a letter dated March 30, 2012, Niagara Mohawk advised New York State Department of Public Service Staff (“DPS Staff”) that “the proposed mothballing of Dunkirk units 1-4 will result in significant impacts to transmission system reliability in western NY.” (Filing Letter at 1-2 and n.2.)

Niagara Mohawk subsequently determined that because the transmission system investments needed to address the reliability issues created by the proposed mothballing of the Dunkirk units cannot be implemented in full by the September 10, 2012 effective date of NRG’s mothballing notice, “some portion of the Dunkirk generation resources must remain available to maintain transmission system reliability.” (*Id.* at 2.)<sup>3</sup> Niagara Mohawk currently anticipates that: (a) two of the Dunkirk units can be mothballed; (b) one unit needs to remain operational

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<sup>2</sup> The September 10, 2012 date presumably was chosen because it is the earliest date compliant with the Commission’s existing 180-day notice requirement applicable to the retirement or mothballing of generation facilities sized equal to or greater than 80 MW. *See* Case 05-E-0889, *Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Retirements*, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005) at 15. Each of the four Dunkirk units have nameplate ratings equal to at least 100 MW. (Filing Letter at 1.)

<sup>3</sup> Reliability studies performed by Niagara Mohawk pertaining to the proposed mothballing of Dunkirk are considered confidential by the utility and, consequently, were not produced in response to Multiple Intervenors’ request. (Niagara Mohawk Response to Multiple Intervenors Information Request No. 12.) Because no evidence supporting the claimed “significant impacts to transmission system reliability” was made available to it, Multiple Intervenors neither supports nor opposes Niagara Mohawk’s conclusion that NRG should be compensated to keep two Dunkirk units operational beyond September 10, 2012. That being noted, Multiple Intervenors members depend on a reliable electric system and, therefore, support the general principle that reliability must be maintained.

through May, 2013; and (c) one unit needs to remain operational until certain transmission system reinforcements are completed, estimated to occur around May, 2015. (*Id.*)

On June 11, 2012, the General Counsel of the Commission sent a letter to Niagara Mohawk and NRG advising, *inter alia*, that: (a) DPS Staff intends to recommend that the Commission exercise its authority “to ensure adequate generation facilities have been procured to meet local reliability needs”; (b) those parties should pursue an agreement that would ensure adequate generation resources during the proposed mothballing period; (c) those parties had until July 12, 2012 (subsequently modified to July 20, 2012) to advise the Commission that such an agreement was negotiated or, alternatively, submit proposed term sheets individually for the Commission’s consideration; and (d) negotiations between Niagara Mohawk and NRG would not be subject to the Commission’s settlement guidelines, but, rather, should “be regarded as occurring outside this docket.”<sup>4</sup> Because the negotiations between Niagara Mohawk and NRG were not deemed subject to the Commission’s settlement guidelines, Multiple Intervenors – and, presumably, other intervenor parties – received no notice of any settlement meetings and essentially was excluded from participating in the negotiations.<sup>5</sup>

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<sup>4</sup> Case 12-E-0136, *supra*, Letter from Peter McGowan to Daniel Galaburda and Elizabeth Quick-Hendry (dated June 11, 2012) (hereinafter, the “June 11<sup>th</sup> Letter”). The Commission’s settlement guidelines are set forth in Part 3.9 of the its Rules and Regulations. *See* 16 N.Y.C.R.R. § 3.9. Inasmuch as the subject of the June 11<sup>th</sup> Letter was identified (in the subject line on the first page) as Case 12-E-0136 (*i.e.*, this proceeding), and the referenced negotiations were intended to address the primary issue or issues herein, it is not clear why such negotiations should “be regarded as occurring outside this docket.” (*See* June 11<sup>th</sup> Letter at 3.)

<sup>5</sup> Pursuant to the Commission’s settlement guidelines, negotiations involving large utilities (*e.g.*, Niagara Mohawk) must be on notice to other parties in the proceeding. *See* 16 N.Y.C.R.R. § 3.9(a)(1). Additionally, pursuant to those guidelines, an administrative law judge ordinarily would be assigned “to ensure all persons who reasonably should have been notified of the pendency of the negotiations have been afforded a reasonable opportunity to participate.” *Id.* at § 3.9(a)(2). That did not happen in this proceeding.

On July 12, 2012, NRG made a filing with the Federal Energy Regulatory Commission (“FERC”) submitting an unexecuted agreement pursuant to which it proposed to provide reliability must-run (“RMR”) service to Niagara Mohawk from two of the Dunkirk units.<sup>6</sup> The filing reflected what, at that time, was the absence of any agreement between Niagara Mohawk and NRG with respect to compensation associated with Dunkirk.<sup>7</sup> In its filing, NRG proposed a “Monthly Fixed-Cost Charge” of \$5,607,513 for RMR service. Under a proposed “Variable Cost Reimbursement Mechanism,” NRG also would recover its fuel, emissions, and other variable expenses for providing electric service, but any net revenues (*i.e.*, total revenues less variable costs) associated with energy and ancillary services sales would be credited against the Monthly Fixed-Cost Charge.<sup>8</sup>

On July 18, 2012, the Commission issued the Notice, wherein it directed that: (a) Niagara Mohawk and NRG had until July 20, 2012 to submit either an agreement with respect to the continued operation of Dunkirk and associated compensation, or proposed terms recommended by each party for Commission consideration; (b) comments from interested parties in response to the July 20<sup>th</sup> submissions are due by July 30, 2012; and (c) the Commission may act upon the submissions herein at its upcoming August 16, 2012 session. (Notice at 1-2.)

On July 20, 2012, Niagara Mohawk submitted the Filing Letter, the Term Sheet, and the Tariff Amendment to the Commission in response to the Notice. The utility’s submission reflects an agreement with NRG regarding the continued operation of two of the

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<sup>6</sup> See Docket No. ER12-2237-000, *Dunkirk Power LLC* (July 12, 2012).

<sup>7</sup> It is not clear to Multiple Intervenors whether there is any substantive difference between the RSS that NRG would provide under the Term Sheet and the RMR service it proposed to provide in the FERC Docket.

<sup>8</sup> See *id.*, Filing Letter (to FERC) at 5.

Dunkirk units and its proposal to recover all costs flowing from such agreement from its retail customers. Pursuant to the Term Sheet, Niagara Mohawk and NRG agreed on a Monthly Fixed-Price Charge of \$2,924,324 for the nine-month period September 1, 2012 through May 31, 2013. (Term Sheet at 5.)<sup>9</sup> In addition, Niagara Mohawk agreed to (i) a “Property Tax True-Up” that may add a maximum of \$6,681,084 in compensation to NRG, and (ii) a “Take or Pay Coal Contract True-Up” that imposes an additional maximum obligation of \$4,342,985 (*i.e.*, 868,597 tons times \$5.00/ton). (*Id.*, Niagara Mohawk Response to Multiple Intervenors Information Request No. 3.) Other relevant provisions of the parties’ agreement, as reflected in the Term Sheet, include: (a) partial refunds of the Monthly Fixed-Price Charge if a Dunkirk unit experiences a forced outage and is not able to provide RSS; (b) NRG retains all energy and ancillary services revenues; (c) capacity revenues are credited to Niagara Mohawk; and (d) NRG must refund certain revenues if it exceeds certain thresholds with respect to Earnings Before Interest, Taxes, Depreciation and Amortization. (*Id.* at 2, 4-6.)

In terms of RSS costs, Niagara Mohawk is seeking complete recovery from its retail customers. (*See, e.g.*, Tariff Amendment, Draft Tariff Leaf No. 235.0.1.) The utility is not seeking any contribution from other utilities (*e.g.*, municipal electric utilities) that will benefit from eliminating the potential “significant impacts to transmission system reliability in western NY.” (Niagara Mohawk Response to Multiple Intervenors Information Request No. 7.) Furthermore, Niagara Mohawk also is not seeking any cost recovery from wholesale customers (Niagara Mohawk Response to Multiple Intervenors Information Request No. 9), notwithstanding the fact that retail and wholesale customers would experience the same reliability-related benefits in this instance.

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<sup>9</sup> Niagara Mohawk and NRG plan to enter into settlement negotiations on an extension of their agreement beyond May 31, 2013, if needed. (*See id.* at 1-2.)

Niagara Mohawk proposes to allocate RSS costs “based on the respective contribution of each service class to the Company’s coincident peak demand” and “recover costs from each service class on a volumetric basis (kW for demand classes and kWh for non-demand classes).” (Filing Letter at 4-5.)<sup>10</sup> The utility proposes further to: (a) defer all RSS costs incurred between September 1, 2012 and April 1, 2013, with carrying charges at the applicable other customer deposit rate; and (b) commence recovery of RSS costs from customers, on a present basis, effective April 1, 2013. (*Id.* at 5; Tariff Amendment, Draft Tariff Leaf No. 235.0.1.)<sup>11</sup> With respect to the deferred RSS costs, Niagara Mohawk apparently is seeking a 12-month recovery period commencing April 1, 2013. (*See* Niagara Mohawk Response to Multiple Intervenors Information Request No. 4.) For large customers taking electric delivery service under S.C. 3 (Large General) and S.C. 3-A (Large General Time-of-Use), the projected RSS surcharge rate is significant, varying between \$0.28 and \$0.41 per kW. (Tariff Amendment, Schedule 1.)

### **SUMMARY OF MULTIPLE INTERVENORS’ POSITIONS**

Multiple Intervenors’ Comments in Partial Opposition are organized into three points. In Point I, Multiple Intervenors demonstrates why Niagara Mohawk’s proposed Tariff Amendment should be rejected. There is no need to authorize the implementation of an RSS surcharge on Niagara Mohawk’s customers at this time. The proposed surcharge is unnecessary

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<sup>10</sup> As detailed, *infra*, to the extent RSS costs are to be recovered from Niagara Mohawk’s retail delivery customers, the utility’s proposed allocation and recovery methodology (*i.e.*, based on each service class’s contribution to coincident peak demand and on a per kW basis within demand-metered classes) appears reasonable.

<sup>11</sup> Niagara Mohawk estimates that the amounts to be deferred between September 1, 2012 and April 1, 2013 will total approximately \$25.8 million. (Tariff Amendment, Schedule 2.)

and, in any event, is grossly excessive. The surcharge also is inequitable because it would apply solely to Niagara Mohawk retail customers, notwithstanding the fact that wholesale customers, and the customers of other utilities, also would benefit by eliminating any reliability problems caused by NRG's proposed mothballing of Dunkirk.

In Point II, Multiple Intervenors raises limited concerns regarding the Term Sheet that was negotiated by Niagara Mohawk and NRG. As detailed, *supra*, because the Term Sheet apparently was finalized only a short time ago, and Multiple Intervenors was excluded from the parties' settlement negotiations, it is not possible for Multiple Intervenors to evaluate the reasonableness of the compensation offered to NRG in the very limited amount of time allotted.

Finally, in Point III, Multiple Intervenors advocates that the Commission should rule explicitly that the outcome of this proceeding not be considered precedential in other, similar proceedings. The process utilized herein is suboptimal, at best. Accordingly, the Commission should refrain from attaching any precedential value to the outcome of a flawed – and, arguably, prejudicial – process. Moreover, the Commission's limited jurisdiction over all entities benefitting from elimination of any Dunkirk-related reliability problems also warrants adoption of a very cautious approach to the establishment of any controlling policies.

## ARGUMENT

### POINT I

#### **NIAGARA MOHAWK'S PROPOSED TARIFF AMENDMENT SHOULD BE REJECTED**

Multiple Intervenors opposes Niagara Mohawk's proposed Tariff Amendment for numerous reasons and urges the Commission to reject it in this proceeding. First, the proposed RSS surcharge contained therein is exorbitant and wholly unnecessary in this instance. Second, even if, *arguendo*, the Commission is inclined to authorize an RSS surcharge, the amounts sought to be recovered by Niagara Mohawk commencing on April 1, 2013 are grossly excessive. Third, the Tariff Amendment is highly inequitable because it seeks to recover all RSS costs from Niagara Mohawk's retail customers, notwithstanding the indisputable fact that the utility's wholesale customers, and the customers of certain other utilities, would benefit similarly from the elimination of any reliability problem caused by the proposed mothballing of Dunkirk.

Before advancing its objections to the proposed Tariff Amendment, certain clarifications are in order to eliminate any possibility of confusion with respect to Multiple Intervenors' positions. Multiple Intervenors is a strong proponent of a reliable electric transmission system. To the extent NRG's proposed mothballing of Dunkirk would jeopardize electric reliability in New York State, Multiple Intervenors supports efforts to maintain reliability, including the decision to keep some portion of the Dunkirk facility operational for a limited period of time. Multiple Intervenors does not challenge NRG's entitlement to compensation – at some cost-based level – for keeping one or more of the Dunkirk units

operational beyond the date upon which those units could be mothballed.<sup>12</sup> Finally, Multiple Intervenors does not challenge Niagara Mohawk’s right to cost recovery for RSS costs incurred prudently to maintain electric reliability within its service territory.<sup>13</sup>

**A. The Proposed RSS Surcharge Is Exorbitant and Wholly Unnecessary**

Niagara Mohawk’s proposed RSS surcharge is exorbitant. As detailed below, for S.C. 3 and S.C. 3-A customers, imposition of the proposed surcharge would increase existing demand charges by between 4.37% and 12.74%, not including the delivery rate increases being sought by the utility in its currently-pending electric rate case:

<b>Service Class</b>	<b>Existing Demand Charge (per kW)<sup>14</sup></b>	<b>Proposed RSS Surcharge (per kW)<sup>15</sup></b>	<b>Percent Increase to Demand Charge</b>
S.C. 3-A Transmission	\$2.59	\$0.33	12.74%
S.C. 3-A Sub-transmission	\$3.20	\$0.38	11.88%
S.C. 3-A Primary & Secondary	\$8.38	\$0.41	4.89%
S.C. 3 Transmission & Sub-Transmission	\$2.44	\$0.28	11.48%
S.C. 3 Primary	\$7.44	\$0.38	5.11%
S.C. 3 Secondary	\$9.16	\$0.40	4.37%

The percentage increase to existing demand charges would be even greater for New York Power Authority customers with grandfathered allocations of Replacement Power (“RP”) and

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<sup>12</sup> As addressed, *supra* and *infra*, Multiple Intervenors currently is not in position to evaluate whether the compensation offered to NRG by Niagara Mohawk, as reflected in the Term Sheet, is reasonable or excessive.

<sup>13</sup> As detailed, *infra*, although Multiple Intervenors opposes Niagara Mohawk’s proposed RSS surcharge as unnecessary, excessive and inequitable, it does not challenge the utility’s general right to recover its fair share of prudently-incurred RSS costs from customers, if done so in an equitable manner.

<sup>14</sup> See Niagara Mohawk Tariff, P.S.C. No. 220 – Electricity, Tariff Leaf Nos. 379, 391.

<sup>15</sup> See Cost Recovery Proposal, Schedule 1.

Expansion Power (“EP”), whose delivery rates are less than – but currently are in the process of being transitioned to – full tariff rates.<sup>16</sup>

The proposed imposition of an RSS surcharge is wholly unnecessary at this time. Niagara Mohawk proposes to implement the RSS surcharge effective April 1, 2013. (Filing Letter at 4.)<sup>17</sup> Importantly, however, in its current rate case, Niagara Mohawk has acknowledged that, effective March 31, 2013, *the utility expects to owe approximately \$128.349 million in deferrals to electric customers.* (Case 12-E-0201, Testimony of the Revenue Requirements Panel at 96-97.) This debt to customers could – and should – be used to pay for RSS costs incurred by Niagara Mohawk to keep the two Dunkirk units operational. Such an approach would obviate any need whatsoever to institute an RSS surcharge.

As detailed, *supra*, Niagara Mohawk agreed in the Term Sheet to pay to NRG: (a) \$2,924,324 per month for the nine-month period September 1, 2012 through May 31, 2013 (totaling \$26,318,916); (b) a maximum “Property Tax True-Up” of \$6,681,084; and (c) a

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<sup>16</sup> See, e.g., Niagara Mohawk Tariff, P.S.C. No. 220 – Electricity, Tariff Leaf Nos. 408.2-408.3. For instance, the demand charge currently applicable to customers with grandfathered RP and/or EP allocations whose parent class is S.C. 3-A transmission voltage is \$2.0720 per kW, or 20% less than the full tariff rate. (*Id.*, Leaf No. 408.2.) Thus, for such a customer, imposition of a new surcharge equal to \$0.33 per kW would result in a 15.93% increase in its demand charge.

<sup>17</sup> Niagara Mohawk claims that: “Because the rate proposal in Case 12-E-0201 calls for a substantial rate decrease beginning April 1, 2013, deferring cost recovery until that time would help promote rate stability for customers.” (*Id.*) Such claim is not accurate. In Case 12-E-0201, Niagara Mohawk is proposing to *increase* electric delivery rates effective April 1, 2013 by \$145.422 million. (Case 12-E-0201, Corrections and Updates Testimony of the Revenue Requirements Panel at 3.) What Niagara Mohawk apparently is referring to is the scheduled March 31, 2012 expiration of the Temporary Deferral Recovery Surcharge (“TDRS”), which, during its 15-month term, will have recovered from customers approximately \$240.9 million in deferred costs. See Niagara Mohawk Tariff, P.S.C. No. 220 – Electricity, Tariff Leaf No. 263.7. Significantly, however, the fact that the TDRS, which was established in Case 10-E-0050 (*i.e.*, Niagara Mohawk’s prior electric rate case) is expiring under its own terms should *not* be construed as a “substantial rate decrease” proposal by Niagara Mohawk.

maximum “Take or Pay Coal Contract True-Up” of \$4,342,985. (Term Sheet at 5.) Putting aside Multiple Intervenors’ concerns, *infra*, that Niagara Mohawk’s retail customers should not bear 100% of the RSS costs incurred associated with the Dunkirk facility, the utility’s financial exposure under the Term Sheet, at least through May 31, 2013, appears capped at approximately \$37.343 million, which is *less than 30%* of the amount that Niagara Mohawk admits it will owe to customers in deferrals by March 31, 2013. Accordingly, the accumulated deferrals due and owing to customers easily could be used to offset prudently-incurred RSS costs, thereby eliminating any need to implement a new RSS surcharge. Moreover, such an approach still would leave a considerable amount of customer money (*i.e.*, over \$90 million) available for rate moderation purposes in Case 12-E-0201 and/or to fund continued payments to NRG beyond May 31, 2013, if necessary.

Multiple Intervenors also contends that it is appropriate to use one-time deferral balances – such as that owed to customers by Niagara Mohawk – to offset one-time costs, such as short-term payments to NRG to keep two Dunkirk units operational until other solutions that would ensure reliability can be implemented. It would be entirely wrong-headed, and contrary to the public interest, to institute a new, exorbitant surcharge on customers to recover an apparent maximum of \$37.343 million through May 31, 2013 when Niagara Mohawk concedes that as of the proposed effective date of the surcharge, it will owe approximately \$128.349 million in deferrals to electric customers.

**B. The Proposed RSS Surcharge Is Grossly Excessive**

For the reasons detailed, *supra*, Multiple Intervenors opposes the proposed implementation of an RSS surcharge as wholly unnecessary. If, *arguendo*, the Commission nevertheless elects to authorize the imposition of such a surcharge, the amounts proposed to be

recovered from customers starting on April 1, 2013 is grossly excessive and should be reduced substantially.

Niagara Mohawk is seeking to defer RSS costs incurred from September 1, 2012 through March 31, 2013 for future recovery from customers. (Tariff Amendment, Draft Tariff Leaf No. 235.0.1.) Commencing on April 1, 2013, Niagara Mohawk proposes to start recovering RSS costs on a real-time basis. (*Id.*) Additionally, also commencing on April 1, 2013, Niagara Mohawk proposes to recover all deferred RSS costs – estimated to be \$25,789,636 as of March 31, 2013 – over a 12-month period. (*Id.*, Schedule 2; Niagara Mohawk Response to Multiple Intervenors Information Request No. 4.) Significantly, however, there simply is no justifiable reason for Niagara Mohawk to recover RSS costs from customers on such an expedited basis.

The incurrence of RSS costs by a New York utility is exceedingly rare. In fact, upon information and belief, when the Term Sheet is memorialized into a binding agreement between Niagara Mohawk and NRG, it will represent the first RMR contract in the State. Importantly, had a solution to the reliability problem caused by NRG’s proposed mothballing been implemented earlier, thereby avoiding the need for Niagara Mohawk to incur RSS costs, such solution presumably would have been in the form of one or more transmission system investments. Indeed, Niagara Mohawk now intends to address that reliability problem through the implementation of “certain transmission reinforcements.” (Filing Letter at 2.)

Importantly, the costs of transmission system investments typically are recovered over the projected life of such investments, which often can result in multi-decade recovery periods. If the Commission elects to authorize implementation of a surcharge for RSS costs – notwithstanding a projected \$128.349 million in estimated deferrals owed to electric customers – then RSS costs should be recovered over a time period consistent with transmission system

investments. The fact that reliability issues caused by the proposed mothballing of Dunkirk are being addressed initially by contract, and then through transmission system investments, merely is an issue of timing. The purposes of such expenditures – the maintenance of transmission system reliability – are exactly the same. Under such circumstances, if an RSS surcharge is approved, cost recovery should be implemented on a much more gradual basis than that proposed by Niagara Mohawk.

For the foregoing reasons, the proposed recovery of RSS costs on a present basis, coupled with an extremely-short, projected 12-month recovery period of deferred RSS costs, would result in excessive collections from customers in the near-term. As demonstrated, *supra*, the surcharge amounts estimated by Niagara Mohawk are exorbitant, and largely are a function of an unnecessarily-expedited cost recovery period. Treating RSS costs in a manner comparable to transmission system investments for amortization and recovery purposes (assuming, *arguendo*, an RSS surcharge even is deemed necessary) would reduce the amount of the surcharge, and its impact on customers, significantly and beneficially.<sup>18</sup>

**C. The Proposed Tariff Amendment Is Inequitable Because It Would Limit the Recovery of RSS Costs to Niagara Mohawk's Retail Customers**

Niagara Mohawk's Tariff Amendment is inequitable because, as proposed, it would limit the recovery of RSS costs to the utility's retail customers. Such limitation, which may be reflective of the boundaries of the Commission's jurisdiction, is unfair to retail customers

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<sup>18</sup> Alternatively, the Commission could refer all issues associated with RSS cost recovery to Case 12-E-0201, Niagara Mohawk's pending electric rate case. At a minimum, such a decision would allow for customer impact concerns associated with the utility's proposed electric delivery rate increases and the Tariff Amendment proposed herein to be evaluated in a single proceeding.

because there apparently would be no contribution by other beneficiaries of the continued operation of Dunkirk.

The proposed mothballing of NRG's Dunkirk units apparently would jeopardize the reliability of electric transmission service in Western New York, impacting, *inter alia*, Niagara Mohawk's service territory. (Filing Letter at 1-2.) The utility asserts that the reliability concerns related to Dunkirk would affect service to its retail customers. (See Niagara Mohawk Response to Multiple Intervenors Information Request Nos. 6, 8.) Importantly, that reliability concern also would affect service to Niagara Mohawk's wholesale customers. (Niagara Mohawk Response to Multiple Intervenors Information Request No. 9.) Thus, an equitable cost recovery mechanism would procure contributions to RSS costs from retail and wholesale customers alike.

Niagara Mohawk has advised Multiple Intervenors, however, that: "The proposed RSS cost recovery mechanism is under the Company's Tariff, P.S.C. No. 220 Electricity, and does not provide for recovery from wholesale transmission customers taking service under the NYISO OATT." (*Id.*) Multiple Intervenors recognizes that the boundaries of the Commission's jurisdiction apparently do not extend to the recovery of RSS costs from wholesale customers. Significantly, however, the fact that Commission may not be able to authorize the recovery of RSS costs from wholesale customers *does not mean it should authorize recovery of wholesale customers' fair share of RSS costs from Niagara Mohawk's retail customers.*

Furthermore, in addition to Niagara Mohawk, the reliability problem caused by the proposed mothballing of Dunkirk and the potential solution thereto impacts the service territories of one other New York investor-owned utility and numerous municipal utilities. (Niagara Mohawk Response to Multiple Intervenors Information Request No. 7.)<sup>19</sup> Significantly, however, the utility advised Multiple Intervenors that: “At this time, Niagara Mohawk has made no proposal to seek compensation from other utilities that would benefit from two of NRG’s Dunkirk units remaining in operation.” (*Id.*) To the extent the Tariff Amendment, as proposed, would require Niagara Mohawk’s retail customers to not only bear their fair share of RSS costs associated with Dunkirk, but also other utilities’ fair shares of those costs, it is inequitable.

Accordingly, the proposed Tariff Amendment is inequitable because, if approved, it would authorize recovery of 100% of RSS costs associated with Dunkirk from Niagara Mohawk’s retail customers, thereby providing a “free pass” to wholesale customers and other utilities (*e.g.*, municipal electric utilities) that would benefit similarly from the contractual arrangement with NRG.

For the foregoing reasons, Multiple Intervenors contends that the proposed Tariff Amendment is not equitable. That being noted, if, *arguendo*, the Commission elects to authorize the imposition of an RSS surcharge of some magnitude, then Multiple Intervenors supports the allocation and recovery methodology proposed by Niagara Mohawk. It appears appropriate to allocate RSS costs to service classes based on their contribution to coincident peak demand. RSS costs are being incurred to maintain transmission system reliability, and transmission costs

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<sup>19</sup> It is not clear whether the issues raised herein also impact any investor-owned utilities located outside of New York State.

typically are incurred to meet peak demand. Accordingly, it would be inappropriate, for instance, to allocate RSS costs to service classes on a volumetric basis.<sup>20</sup> For similar reasons, it also appears reasonable to recover RSS costs on a per kW basis – as opposed to a per kWh basis – from demand-metered customers after such costs are allocated to the various service classes.

## POINT II

### **MULTIPLE INTERVENORS' PRELIMINARY CONCERNS REGARDING THE PROPOSED TERM SHEET**

For reasons outside of its control, Multiple Intervenors is not in a position to evaluate the compensation offered to NRG in the Term Sheet on an informed basis. Accordingly, Multiple Intervenors neither supports nor opposes the amount of financial compensation that would be paid to NRG to keep two of the Dunkirk units operational beyond the applicable 180-day notice period established by the Commission. That being noted, Multiple Intervenors does have several concerns regarding the Term Sheet. Inasmuch as the Commission has indicated in its Notice that it may rule in this proceeding at its August 16, 2012 session, Multiple Intervenors has no choice but to raise its concerns, even on a preliminary basis, in this submission.

Initially, it bears repeating that the process utilized in this proceeding precluded Multiple Intervenors – and, presumably, other intervener parties – from having any meaningful role in the negotiation and/or the evaluation of the Term Sheet. As detailed, *supra*, the Commission's General Counsel directed Niagara Mohawk and NRG that their settlement

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<sup>20</sup> Multiple Intervenors also notes that the vast majority of the compensation proposed to be paid to NRG is in the form of a Monthly Fixed-Price Charge (*see* Term Sheet at 5) that will not vary based on delivery volumes.

negotiations in this proceeding should not be regarded as being subject to the Commission's settlement guidelines.<sup>21</sup> Consequently, Multiple Intervenors was not notified of any settlement negotiations between Niagara Mohawk and NRG and had no opportunity to participate in the negotiations that led to the Term Sheet.

Thereafter, the Term Sheet was filed on July 20, 2012. The deadline for comments on the Term Sheet, pursuant to the Commission's Notice, was July 30, 2012, a mere ten days later. Although Multiple Intervenors was able to serve a set of limited information requests on Niagara Mohawk regarding its July 20<sup>th</sup> filing, and the utility was very accommodating in responding to those requests in an expeditious manner, it simply is not possible for Multiple Intervenors to evaluate the level of compensation offered to NRG on an informed basis in such a limited time period. This is particularly true when, upon information and belief, the facts and data upon which Niagara Mohawk relied upon in negotiating the Term Sheet were not made available to intervener parties.<sup>22</sup>

Notwithstanding the foregoing, Multiple Intervenors has a few concerns regarding the Term Sheet. First, Multiple Intervenors opposes the proposed September 1, 2012 commencement date for compensation to be paid to NRG. (*See* Term Sheet at 1.) Pursuant to the Commission's notice requirements applicable to the retirement and mothballing of electric generation facilities, NRG is precluded from mothballing Dunkirk until at least September 10,

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<sup>21</sup> Case 12-E-0136, *supra*, June 11<sup>th</sup> Letter at 3.

<sup>22</sup> Even if, *arguendo*, some of the information relied upon by Niagara Mohawk herein eventually was made available to intervener parties, the timing of such disclosure was markedly different. For instance, in order to negotiate the Term Sheet, Niagara Mohawk presumably was in receipt of considerable cost-of-service information related to the Dunkirk facility prior to NRG's July 12, 2012 FERC filing. Moreover, the mere fact that the compensation offered in the Term Sheet appears to be less than what NRG was seeking from FERC prior to reaching agreement with Niagara Mohawk herein does not, in and of itself, speak to the reasonableness of the compensation reflected in the Term Sheet.

2012 – a fact that NRG does not appear to dispute. (*See, e.g.*, Filing Letter at 1-2 [referencing NRG’s proposed September 10<sup>th</sup> effective date for the mothballing of Dunkirk].)

Inasmuch as NRG is precluded, by Commission order, from mothballing Dunkirk prior to September 10, 2012, it is not entitled to any out-of-market compensation prior to that date. When asked about its decision to start compensating NRG effective September 1, 2012, Niagara Mohawk indicated that: “The September 1, 2012 start date was agreed to as part of the overall compromise resolution that produced the Term Sheet Agreement.” (Niagara Mohawk Response to Multiple Intervenors Information Request No. 2.) In Multiple Intervenors’ opinion, such explanation does not justify the decision to incur RSS costs earlier than necessary.<sup>23</sup>

Second, Multiple Intervenors is concerned about the treatment of forced outages in the Term Sheet. As detailed, *supra*, the Term Sheet calls for Niagara Mohawk to pay, *inter alia*, a Monthly Fixed-Price Charge of \$2,924,324 per month as compensation for Dunkirk remaining in operation instead of being mothballed. (Term Sheet at 5.) Significantly, however, the amount of the Monthly Fixed-Price Charge refunded to Niagara Mohawk if one or both Dunkirk units are unavailable due to a forced outage appears unreasonably low to Multiple Intervenors. For instance, if there is a forced outage that causes a Dunkirk unit to be unavailable for 90% or more during any month, the Monthly Fixed-Price Charge only is reduced by \$500,000 for each unit that meets that criteria. (*Id.* at 2.) Thus, if Dunkirk experiences a forced outage, causing both units to be unavailable for a two-month period, then, pursuant to the Term Sheet: (a) Niagara Mohawk would pay to NRG \$2,924,324 each month (totaling \$5,848,648);

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<sup>23</sup> If, *arguendo*, the Commission elects to approve this aspect of the Term Sheet, such possibility is another reason why its ruling should be limited to the facts and circumstances herein and not be considered controlling in other proceedings. There is no reason for the Commission to establish a policy favoring the payment of out-of-market compensation to generation owners during the established 180-day notice period for retirements and mothballing.

and (b) NRG would refund to Niagara Mohawk \$1,000,000 each month (totaling \$2,000,000). Thus, under such scenario, Niagara Mohawk (and, presumably, its customers) would have spent \$3,848,648 for those two months and received no RSS whatsoever during that period.

Finally, Niagara Mohawk has utterly failed to justify the compensation levels being offered to NRG to keep the two Dunkirk units operational, at least in publicly-available documents. In its July 20, 2012 filing, Niagara Mohawk summarizes the Term Sheet. (*See* Filing Letter at 3-4.) Significantly, however, such summary is virtually devoid of any justification regarding the amount of compensation that was negotiated.

With respect to compensation, Niagara Mohawk states that:

Approval of the Term Sheet Agreement would ensure the reliability of the transmission system in western New York for an interim period as National Grid implements system reinforcements and alternative reliability services solutions are considered. The costs under the Term Sheet Agreement are substantially lower than the full cost of service costs reflected in NRG's filing at the FERC. The Term Sheet Agreement represents a reasonable resolution of the issues presented, and is fair, equitable and in the public interest.

(*Id.* at 4.) Thus, the only justification proffered by Niagara Mohawk for the level of compensation embodied in the Term Sheet is that such compensation is "substantially lower" than that proposed by NRG to FERC. Significantly, however, NRG's FERC submission is untested and, therefore, the mere fact that the Term Sheet appears to provide less compensation to NRG does not, in and of itself, prove anything with respect to the reasonableness of the compensation that was negotiated. Niagara Mohawk's submission, for instance, contains no cost-based analysis whatsoever.

It is not clear from Niagara Mohawk's submission that customer interests are being protected adequately in this proceeding. For instance, customer representatives effectively were excluded from Niagara Mohawk's negotiations with NRG. Additionally, Niagara Mohawk

apparently views the compensation amounts agreed to as a complete pass-through expense to be paid for by customers. Without any of Niagara Mohawk's own "skin in the game," the Commission should not simply assume that the utility has protected customers' interests adequately without any cost-based justification being advanced.<sup>24</sup>

For the foregoing reasons, Multiple Intervenors urges the Commission to evaluate the Term Sheet carefully to ensure that its approval is in the public interest.

### **POINT III**

#### **THE COMMISSION SHOULD ATTACH NO PRECEDENTIAL VALUE TO ITS RULING IN THIS PROCEEDING**

Upon information and belief, this is the first time that the evaluation of an RMR contract and associated cost recovery is before the Commission. Significantly, however, the Commission may be asked to rule on other RMR-type contracts in the future. For numerous reasons, detailed below, the Commission should refrain from attaching any precedential value to its ruling in this proceeding. In fact, Multiple Intervenors urges the Commission to state explicitly that its ruling herein is limited to the facts and circumstances of this proceeding, and is not intended to be controlling in future proceedings.

Initially, as demonstrated, *supra*, the process utilized in this proceeding was suboptimal, at best. Niagara Mohawk and NRG negotiated the Term Sheet in the proverbial "back room" and intervener parties, such as Multiple Intervenors, were not notified of any settlement negotiations and effectively were excluded from the negotiations. Thereafter,

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<sup>24</sup> The absence of any cost-based justification provides yet another reason why the Commission's ruling in this proceeding should be accorded no precedential value.

comments were solicited on the Term Sheet on an extremely-expedited basis, thereby essentially foreclosing any detailed, cost-based analysis of the agreement that was negotiated.

Additionally, due, in part, to apparent limitations in the Commission's jurisdiction, a cost recovery proposal was advanced herein by Niagara Mohawk that simply is not equitable. Although the transmission reliability problem occasioned by NRG's proposed mothballing of Dunkirk and the solution thereof impact Niagara Mohawk's retail and wholesale customers alike, as well as certain other utilities (such as municipal electric utilities), Niagara Mohawk is proposing to recover all RSS costs from its retail customers. For the reasons set forth in Point I, *supra*, the Tariff Amendment proposed by Niagara Mohawk is not equitable, and the Commission can provide an appropriate level of cost recovery to Niagara Mohawk, from its retail customers, without approving the RSS surcharge (*e.g.*, by using deferrals due and owing to customers). If, *arguendo*, the Commission nevertheless approves all or some of Niagara Mohawk's cost recovery proposals, it should do so based solely on facts and considerations related to this proceeding, and not seek to establish generic policies.

Additionally, the Term Sheet submitted herein is the product of "back room" negotiations between Niagara Mohawk and NRG. Presumably, compromises and concessions were made on certain issues in exchange for consideration on other issues. Indeed, Niagara Mohawk attempts to justify compensating NRG prior to expiration of the applicable 180-day notice period based on the existence of such compromises. (*See* Niagara Mohawk Response to Multiple Intervenors Information Request No. 2.) Accordingly, the Term Sheet reflects, at best, a private settlement agreement between two parties, with no meaningful involvement by intervener parties. Under such circumstances, the Commission should refrain from establishing policies that would be controlling in other instances involving other parties.

For the foregoing reasons, the Commission should attach no precedential value to its ruling in this proceeding. Additionally, the Commission can best limit future controversy pertaining to its ruling herein by indicating explicitly that said ruling is: (i) limited to the facts and circumstances of this proceeding, and (ii) not intended to be precedential in future proceedings.

**CONCLUSION**

For the reasons set forth herein, Multiple Intervenors urges the Commission to adopt its positions in this proceeding. In particular, the RSS surcharge proposed by Niagara Mohawk should be rejected or reduced substantially.

Dated: July 30, 2012  
Albany, New York

Respectfully submitted,

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