



**Public Service
Commission**

Public Service Commission
Audrey Zibelman
Chair

Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman
Commissioners

Kimberly A. Harriman
General Counsel
Kathleen H. Burgess
Secretary

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

May 14, 2015

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. ER15-1047-000 - R.E. Ginna Nuclear
Power Plant, LLC

Dear Secretary Bose:

For filing, please find the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 474-1585.

Very truly yours,

Alan T. Michaels
Assistant Counsel

Attachment
cc: Service List

The NYPSC seeks rehearing of the April 2015 Order pursuant to Section 313 of the Federal Power Act (16 U.S.C. §8251) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713),³ because FERC ignores the fact that the NYPSC has an obligation under State law to ensure the availability of adequate generation facilities needed for reliability, and is currently exercising its authority in reviewing the Ginna RSSA.⁴ The Commission's assertion of jurisdiction over the underlying terms of the RSSA would interfere with the NYPSC's authority, and represents an impermissible overreach of the Commission's jurisdiction.⁵

³ The NYPSC filed a Notice of Intervention and Comments on April 10, 2015. The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

⁴ Case 14-E-0270, Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant, Order Directing Negotiation of a Reliability Support Service Agreement and Making Related Findings, (issued November 14, 2014).

⁵ The NYPSC raised similar arguments in response to the Commission's recent order directing the New York Independent System Operator, Inc. to implement "Reliability Must-Run" contract provisions, which are incorporated here by reference. See, Docket No. EL15-37-000, New York Independent System Operator, Inc., NYPSC Request for Rehearing (filed March 23, 2015); see also, Docket No. ER14-543-000, New York Independent System Operator, Inc.; Niagara Mohawk Power Corporation, NYPSC Request for Clarification and, in the Alternative, Request for Rehearing (filed April 20, 2015).

BACKGROUND

The planning and procurement of generation resources have been traditional subjects of the states' police powers from the earliest days of the electric power industry. Congress preserved this authority in the Federal Power Act, which constrains the Commission's jurisdiction to facilities used for interstate transmission of electricity and wholesale power rates,⁶ while at the same time preserving state jurisdiction over generation and local distribution.⁷ When it attempts to regulate a subject area traditionally occupied by the states, the Commission cannot lawfully presume that the states' historic police powers have been superseded unless Congress clearly specified an intent to do so.⁸

For these reasons, questions of generation resource adequacy remain a state issue, one where the federal government

⁶ 16 U.S.C. §824(b)(1). ("The provisions of this part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, ... The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy...")

⁷ Id. ("The Commission ... shall not have jurisdiction ... over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.")

⁸ See, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), citing, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

lacks the knowledge of local conditions prerequisite for the proper oversight of electric reliability. Vesting this authority with the states is also necessary to promote new and renewable technologies, ensure the adequacy of electric supply and demand side resources, and develop alternative fuels. States have been effective in carrying out these duties. Further, stricter federal environmental regulations compel additional local planning to achieve compliance,⁹ raising another matter that falls within state authority under the Federal Power Act.

The NYPSC exercises its jurisdiction over resource planning and generation when reviewing and approving RSSAs. The NYPSC maintains jurisdiction over "electric corporations," which include the owners and operators of electric transmission, distribution, and generation facilities.¹⁰ Part of the NYPSC's responsibility includes ensuring such electric corporations provide reliable, safe, and adequate service.¹¹ Since the NYPSC first authorized a lightened ratemaking regime for the new owners of generation facilities purchased from New York's

⁹ Docket No. EPA-HQ-OAR-2013-0602, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 34829 (June 18, 2014).

¹⁰ PSL §2(13).

¹¹ PSL §65(1), (2), (3); §66(1), (2), (5).

vertically integrated utilities, the NYPSC has pursued a policy of preserving its authority to address reliability matters.¹²

FERC acknowledged NYPSC's longstanding authority when it approved the New York Independent System Operator, Inc. (NYISO) tariff. The NYISO's tariff recognizes the NYPSC's authority to approve RSSAs. Pursuant to Attachment Y of the NYISO tariff, if the NYISO determines that market-based proposals and regulated proposals will not satisfy a reliability need, the NYISO will determine, in its Comprehensive Reliability Plan, that a Gap Solution is necessary. Gap Solutions may include generation, transmission, or demand side resources. If there is an imminent threat to the reliability of the New York State Power System, a Gap Solution may be presented outside of the normal planning cycle for consideration by the NYISO and the New York Department of Public Service (NYDPS).¹³ Furthermore, the NYISO tariff expressly provides that the "costs related to regulated non-transmission reliability projects will be recovered by Responsible Transmission Owners, Transmission

¹² See, Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P., Order Providing For Lightened Regulation (issued April 23, 1999) (holding that generators subject to lightened ratemaking remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement).

¹³ NYISO OATT, Attachment Y, §31.2.10.

Owners and Other Developers in accordance with the provisions of New York Public Service Law, New York Public Authorities Law, or other applicable state law."¹⁴ In approving the NYISO's tariff, the Commission correctly recognized the state's jurisdiction to provide for the recovery of the costs of a generation solution needed to resolve a reliability deficiency.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUE

Whether the Commission erred by interfering with the NYPSC's on-going exercise of its authority to make resource adequacy determinations and approve RSSAs with generating facilities needed for reliability.¹⁵

II. DISCUSSION

The Commission Should Grant Rehearing To Ensure The April 2015 Order Does Not Interfere With the NYPSC's Continuing Exercise of Authority Over Matters Affecting Generation Facilities, Resource Adequacy, and Reliability, and Approval of RSSAs

The NYPSC seeks rehearing of the Commission's April 2015 Order because FERC has unlawfully claimed jurisdiction over the rates to be charged to retail customers for the retention

¹⁴ NYISO OATT, Attachment Y, §31.5.1.6.

¹⁵ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706.

of a generation facility. FERC provides no basis in law for such a dramatic re-interpretation of its authority.

The Commission builds its assertion of jurisdiction on its own recent statements in other proceedings. First, the Commission cites the notion that many parties in this matter "acknowledge" that the Commission has directed the NYISO to establish provisions in its tariff governing the retention of and compensation to generating units required for reliability, including rates, terms and conditions for RMR service.¹⁶ Such a general "acknowledgment" cannot serve as the legal basis for the Commission's jurisdiction.

Second, FERC asserts that an RSSA constitutes an agreement for RMR service, and therefore, without further explanation, it claims jurisdiction. To bolster the claim, FERC cites itself, stating that "RMR service helps to ensure the continued reliable and efficient operation of the grid, and of NYISO's markets, and, as such, is subject to the Commission's FPA jurisdiction."¹⁷ Such an expansion of jurisdiction ignores the express limits of the FPA and interferes with the NYPSC's authority to determine the mix of resources that are needed to ensure adequate service within New York State.

¹⁶ The April 2015 Order at 20.

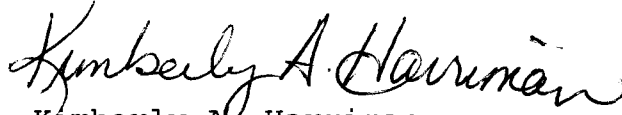
¹⁷ *Id.*, citing, NYISO RMR Order, 150 FERC ¶61,116 at P 3 & n.8, and P 9 & n.19. While reliability is a public good, the fact that some activity may have a relationship to reliability does not by itself establish a basis for federal jurisdiction.

As noted above, the NYPSC possesses the requisite authority to ensure generating facilities do not cease operations prematurely and has long exercised its jurisdiction to prevent such an abandonment of a public service.¹⁸ The Commission should not impermissibly intrude upon the NYPSC's actions to approve RSSAs necessary to preserve reliability when faced with the potential for a generator retirement that would adversely affect the public health, safety, and welfare.

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant rehearing of its April 2015 Order.

Respectfully submitted,



Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York
By: Alan T. Michaels
Assistant Counsel
3 Empire State Plaza, 17th Fl.
Albany, NY 12223-1350
(518) 474-1585

Dated: May 14, 2015
Albany, New York

¹⁸ Case 28316, Rochester Gas and Electric Corporation, Opinion and Order Concerning Steam Service and Determining Revenue Requirement, Opinion No. 84-19 (issued July 11, 1984).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York
May 14, 2015

Handwritten signature of Alan T. Michaels in black ink, written in a cursive style.

Alan T. Michaels
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1350
(518) 474-1585