

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 14-E-0270 - Petition Requesting Initiation of a Proceeding
to Examine a Proposal for Continued Operation
of the R.E. Ginna Nuclear Power Plant, LLC.

RULING ON MOTION FOR RECONSIDERATION OF SCHEDULE

(Issued April 13, 2015)

SEAN MULLANY and
DAVID PRESTEMON, Administrative Law Judges

By motion conveyed in a letter dated April 1, 2015, the Alliance for Green Energy (AGREE) and the Citizens Environmental Coalition (CEC) (collectively, Movants) requested that we reconsider the schedule we established in the "Ruling on Process and Adopting Protective Order" that we issued on March 12, 2015. Specifically, AGREE and CEC ask that the deadline for submission of statements of material issues of fact requiring hearing ("issue statements") be extended from April 15, 2015, to May 15, 2015, and for replies to those submissions from April 22, 2015, to May 29, 2015.¹

As grounds for their request, AGREE and CEC argue that the current schedule does not allow adequate time to conduct discovery and to properly analyze responses. They note that in a "typical" major rate proceeding, discovery may take three to four months. Here, they suggest, DPS Staff may not be undertaking a sufficiently thorough investigation of the Rochester Gas and Electric Corporation (RG&E) filing, and this places an extra burden on resource-constrained parties like AGREE and CEC to try to "fill the gap." That problem is exacerbated, they say, by what they see as a "high bar" that we

¹ AGREE and CEC also requested that the deadline for comments established by the Notice of Proposed Rulemaking published in the New York State Register on March 4, 2015, be extended. That request, however, was directed, appropriately, to the Secretary, and we do not consider it in this ruling.

have set for the parties to demonstrate the existence of material factual issues requiring hearing.

Finally, AGREE and CEC argue that the schedule for this proceeding is largely being driven by a provision of the Reliability Support Services Agreement (RSSA) entered into between RG&E and R.E. Ginna Nuclear Power Plant, LLC (Ginna) that would allow recovery of costs from ratepayers effective April 1, 2015, if the agreement is approved. It is manifestly unfair to ratepayers, they contend, to allow this provision to dictate a truncated schedule that effectively denies parties representing those same ratepayers a fair opportunity to present their case.²

Because of the relatively short period between the receipt of the AGREE/CEC letter and the deadline for submission of issue statements, we issued a ruling by e-mail on April 1, 2015, requiring that any responses to the motion for reconsideration of the schedule be filed no later than noon on April 8, 2015. Responses were received from the Department of Public Service Staff (Staff), RG&E, Ginna, Multiple Intervenors (MI), and the Utility Intervention Unit of the Department of State (UIU).³

Staff opposes the motion. Initially, Staff devotes considerable discussion to AGREE and CEC's requests for an extension of the time for public comment and for a voiding of the effective date of the RSSA. As we note in footnotes 1

² AGREE and CEC also urge that the April 1, 2015, effective date of the RSSA be voided. Such a request goes to the ultimate merits of this case and is not an appropriate consideration in this procedural ruling. We therefore do not address it here.

³ MI also filed a reply to Staff's response. Pursuant to 16 NYCRR §3.6(d)(3), such replies are permitted only in extraordinary circumstances, which we do not find to exist here.

and 2, these are not requests that we will be considering. With respect to the extension of the schedule for the filing of issue statements, Staff says AGREE and CEC have failed to demonstrate that the existing schedule is unreasonable and have not appropriately taken into account the potential harm to ratepayers that would ensue from additional delay. Prior to approval of the RSSA, Staff notes, the cost of services provided by Ginna in accordance with the terms of the RSSA is being tracked from April 1, 2015, and accumulated (with interest) as a Deferred Collection Amount that will be recovered from ratepayers if the RSSA is ultimately accepted by the Commission. The longer a Commission decision is delayed, the greater the Deferred Collection Amount and the shorter the time over which it can be collected, a situation known as "rate compression" which can mean increased bill impacts that adversely affect ratepayers. In addition, Staff disputes AGREE and CEC's contention that Staff is not conducting a thorough examination of the filing in this case. It says that it has been conducting internal analyses since the inception of the proceeding and is prepared to proceed expeditiously. If AGREE and CEC are not in the same position, Staff suggests, that is a failure of preparation on their part, which cannot be blamed on Staff.

RG&E also opposes the motion. First, it says, the petition it filed in February 2015 discussed the major terms of the RSSA, described RG&E's proposed surcharge mechanism and potential bill impacts, and included a full copy of the RSSA (minus one exhibit) and the relevant tariff leaves. Therefore, RG&E argues, the parties have been aware of the general parameters of this proceeding since that filing. In addition, RG&E notes, the parties spent considerable time discussing potential issues at the procedural conference on March 10, 2015, and were given an additional five weeks to further develop those

issues. This, RG&E suggests, should be sufficient without further extension.

RG&E also points out that Ginna has stated in public filings that approval of the RSSA is essential to provide the plant with the revenue stream necessary to keep operating. No obligation to provide that revenue stream accrues under the RSSA until the Commission has approved the cost recovery mechanism proposed by RG&E. Moreover, RG&E notes that, if the RSSA has not received necessary regulatory approvals by July 1, 2015, Ginna will have the right to terminate the agreement. Because the requested extension of the litigation schedule could delay a Commission decision, it should be denied, RG&E asserts.

Ginna also urges that the motion be denied. It argues that five weeks has been ample time for parties to conduct discovery, and notes that AGREE and CEC provide no specific justification for the requested extension, but rather generally assert that additional time is necessary for discovery and analysis of responses. It suggests that any inability on the part of the parties to timely analyze responses is attributable to the numerous, overly broad information requests they have proffered, not the inadequacy of the schedule. Ginna also notes the potential for rate compression if there is additional delay, and the fact that such delay could leave the Commission with inadequate time to issue an order prior to July 1, 2015, which would entitle Ginna to terminate the RSSA if it chose to do so.

Multiple Intervenors supports an extension of the time for submission of issue statements from April 15, 2015, to May 15, 2015. First, it says, given the numerous, complex issues raised by the RSSA, it would be inequitable and prejudicial to expect intervenor parties to develop and advocate positions in the short time period allotted by the current schedule. Second, MI argues, the magnitude of the costs to be recovered from

ratepayers under the terms of the RSSA is so great that it would not be in the public interest for this matter to be considered on an overly expedited basis. Third, MI notes that it had no opportunity to participate in RSSA negotiations and, unlike the process in a standard rate proceeding, RG&E has not filed any testimony in support of its proposal. Thus, MI and other parties are forced to discern the facts related to the RSSA through discovery. Finally, MI points out, RG&E and Ginna failed to negotiate an RSSA by the deadline originally established by the Commission and were ultimately granted two extensions totaling nearly a month. That, MI says, is no more than parties are asking for in this motion. RG&E and Ginna knew, or certainly should have known, when they filed the RSSA on February 13, 2015, that it could not have been approved by the Commission before its effective date of April 1, 2015, even with an expedited process, much less with a fair and equitable schedule. MI contends that the parties should not now be forced into an unduly expedited proceeding by circumstances that were largely created by RG&E and Ginna.

UIU also supports the AGREE/CEC motion with respect to the extension of the schedule for the filing of issue statements. It says that the current schedule does not afford UIU sufficient time to formulate information requests and analyze responses in sufficient depth to permit it to articulate issues requiring hearing, particularly given the breadth and complexity of the issues that have been uncovered through discovery to date. UIU also agrees with AGREE and CEC that the April 1, 2015, effective date of the RSSA, "which was arrived at without the benefit of the Parties' input," should not be used as justification for constraining the parties' opportunities to participate effectively in this proceeding. The possibility of rate compression is a situation created by RG&E and Ginna,

without ratepayer input. Furthermore, it is not inevitable. The Commission, UIU argues, can and should explore alternatives to reduce or offset customer bill impacts.

DISCUSSION

As mentioned above, the Movants' request for an extension of the comment period under SAPA is properly directed to the Commission's Secretary, and we will not address that question. In addition, as noted above, Movants' request that the April 1, 2015 effective date of the RSSA be voided goes to the merits and we will not address it in this procedural ruling.

With respect to the Movants' request for a one month extension of the deadline to file issue statements and an additional week for the filing of response to issue statements, we have considered the arguments presented in support of and in opposition to the motion and we now decide the motion should be denied, for the reasons described below.

We acknowledge the time constraints presented by RG&E's filing, which are reflected in the schedule established in the ruling issued on March 12, 2015. However, none of the parties has offered any information or arguments that go materially beyond what was known and discussed at the procedural conference on March 10, 2015. The concerns about rate compression and the need for discovery were discussed then. In their motion, AGREE and CEC analogized to the time allowed for discovery in a typical major rate filing, but this too was mentioned at the March 10, 2015 procedural conference and was considered at the time the March 12, 2015 ruling was prepared.

It should also be noted that the relief sought in this case is distinguishable from that which is sought in a typical major rate filing. For example, RG&E's filing was made in response to a Commission order issued November 14, 2014 which materially delimited the scope of the relief sought by

Petitioners in the present phase of this proceeding. As a result, the procedures otherwise applicable in a typical major rate filing do not fully inform our judgment on this procedural question.

In support of their request, AGREE and CEC also claimed the March 12, 2015 ruling set a "high bar" for raising a material issue of fact, thereby justifying additional time for discovery and preparation of issue statements. They have not offered anything, however, to support that characterization of the standard established for demonstrating the existence of a material issue of fact. The standard we articulated was consistent with established practice, and is necessarily designed to avoid speculative and unfounded litigation.

The need to focus on material factual issues and maintain procedural economy is evident in this particular matter. The impending summer peak demand, the reliability need for continued operation of the Ginna plant (previously recognized by the Commission in its November 14, 2014 order), the rate compression effects of the April 1, 2015 effective date in the RSSA, and the risk that Ginna may cancel the RSSA if the needed governmental approvals are not obtained by July 1, 2015 are factors underscoring the need to present this matter to the Commission in a timely manner.

The Movants' motion and the response of the other parties have not established a basis for us to conclude that an extension of the deadline for submitting issue statements is necessary. The motion itself offered no specifics, and MI's filing indicated, at p. 4, that MI "may" seek to conduct "additional limited discovery" depending upon the responses received to outstanding discovery requests. There is simply not enough to justify an extension, particularly when weighed against the need to act expeditiously. To the extent parties

argued that the breadth and complexity of the issues covered in discovery requests thus far supports the requested extension of time, we note that the issue statements have not yet been filed, and the scope of the evidentiary hearing is yet to be decided.⁴

We must fashion procedures that strike a balance between the need to ensure all active parties a full and fair opportunity to participate consistent with principles of due process, the need to create a record allowing reasoned Commission decisions based on substantial evidence, and the need to present this matter to the Commission in a timely fashion.

It is the Commission, not the Administrative Law Judges, that will decide whether to grant or deny, in whole or part, the relief sought by RG&E. We must establish a schedule that preserves the full range of possible outcomes for Commission review and decision, without, in practical effect, deciding substantive issues. For example, as to the rate compression concerns related to the April 1, 2015 effective date under the RSSA, we cannot presume how the Commission might decide the substance of this matter, yet that particular term of the contract makes timely Commission action critical. Additionally, we cannot know whether Ginna will choose to terminate the RSSA if the Acceptance Date does not take place prior to July 1, 2015. Those possibilities, however, create a need for prompt Commission review, especially in light of the reliability need already recognized by the Commission. The schedule must allow for the possibility of the issuance of a Commission decision prior to July 1, 2015.

The parameters of the matter before us (which include the matters already decided by the Commission, the particular

⁴ We note, also, that while issue statements must still be filed by April 15, 2015, we are not at this time setting any formal date for closure of discovery.

relief sought, and the specific terms and conditions of the RSSA), as well as the need to preserve for Commission review the full range of choices available, outweigh the arguments advanced in support of an extension of the schedule.

For these reasons the motion is denied.

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