

BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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PROCEEDING ON MOTION OF THE COMMISSION TO
EXAMINE REPOWERING ALTERNATIVES TO UTILITY
TRANSMISSION REINFORCEMENTS

Case 12-E-0577

**NOTICE OF
MOTION**

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PLEASE TAKE NOTICE, that Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the “Moving Parties”), hereby jointly move the New York Public Service Commission (“Commission”) pursuant to 16 NYCRR §§ 3.6 and 3.7(a) for an Order (1) granting rehearing on the Secretary’s October 9, 2013 ruling on the Moving Parties’ (i) Motion to Revoke Secretary’s Conversion and Referral of Motion for Access to Documents, and (ii) Motion for Access to Documents Submitted in This Proceeding; and (2) reversing that portion of the Ruling that constructively denies access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions requested in the Motion for Access.

Dated: New York, New York
October 17, 2013

Respectfully submitted,

_____/s/_____
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TO: Service List, Case 12-E-0577

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MOTION FOR REHEARING ON SECRETARY’S OCTOBER 9, 2013 RULING

PRELIMINARY STATEMENT

Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the “Moving Parties”), hereby moves the New York Public Service Commission (“PSC” or “Commission”) pursuant to 16 NYCRR §§ 3.6 and 3.7(a) for an Order (1) granting rehearing on the Secretary’s October 9, 2013 ruling (Filing No. 120, Oct. 10, 2013) (the “Ruling”) on the Moving Parties’ (i) Motion to Revoke Secretary’s Conversion and Referral of Motion for Access to Documents (Filing No. 111, Sept. 26, 2013) (“Motion to Revoke”), and (ii) Motion for Access to Documents Submitted in This Proceeding (Filing No. 108, Sept. 16, 2013) (“Motion for Access”); and (2) reversing that portion of the Ruling that constructively denies access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions requested in the Motion for Access.

The Ruling is legally flawed in several respects. First, although the Ruling denies that the Motion for Access has been converted into a FOIL request, prior communications from the Secretary and the PSC’s Records Access Officer (“RAO”) explicitly confirm that this is exactly

what has occurred and, for the reasons set forth in the Motion to Revoke, such a conversion is unlawful. *See* Motion to Revoke at 7-9.

Second, the Ruling fails to address (or even mention) key legal arguments raised in the Motion to Revoke and the Motion for Access, including that (1) the RAO lacks legal authority to rule on the legal issues raised by the Motion for Access; (2) the RAO lacks authority to grant or deny the relief sought in the Motion for Access; (3) the denial of access to unredacted documents submitted in this proceeding is thwarting meaningful participation by the Moving Parties in violation of the public interest standard governing this proceeding; and (4) no legal basis exists for denying the Moving Parties access to the Non-Public Submissions, Non-Public Communications, and Meeting Records.¹ *See* Motion to Revoke at 7-10; Motion for Access at 10-12, 20.

Third, the Ruling constructively denies access to hundreds of documents submitted in this proceeding – documents to which the Moving Parties are entitled under the Commission’s regulations and standards of due process.

These legal flaws require that rehearing be granted and that the Ruling be reversed and access to the requested documents be granted.

This motion for rehearing is the latest in a series of efforts by the Moving Parties to enforce their basic right to obtain access to critical documents submitted to the PSC and which presumably are being considered by the Commission in its deliberations. The potential unfairness of PSC proceedings was highlighted in a recent Moreland Commission report:

Of particular concern to the Commission is that many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks, and that of other similarly situated New Yorkers. Such deficiencies may result in certain customers or customer groups, who are not in a position to advocate for themselves and may feel marginalized

¹ These terms are defined in the Motion for Access at 3, and *infra* at 7.

when compared to utility companies and other special interest groups during proceedings before the PSC. The Commission questions the fairness of allowing one side with virtually unlimited resources total access, while the other side lacks a similar voice.

Moreland Comm'n on Utility Storm Preparation and Response, Final Report at 42 (June 22, 2013).²

Unfortunately, the unfairness identified in the Moreland Commission report has infected this proceeding. Despite being parties to this proceeding, the Moving Parties have been relegated by the Ruling to the role of outside observers, being forced to either jump through a series of procedural hoops to gain access to documents or having their right to review and comment on documents denied outright. Respectfully, this state of affairs should not be allowed to continue, and the Moving Parties should, at the very least, be afforded a level playing field.

PROCEDURAL BACKGROUND

This proceeding involves the proposed retirement of two coal-fired power plants: (1) the Dunkirk generating station located in Chautauqua County, New York, which consists of four units with a combined rating of approximately 635 megawatts (“MW”); and (2) the Cayuga facility located in Lansing, New York, which consists of two units with a combined capacity of approximately 312 MW.

On March 14, 2012, NRG Energy, Inc. (“NRG”), the owner of Dunkirk Power LLC, filed notice with the Commission of NRG’s intent to retire the Dunkirk facility by no later than September 10, 2012, on the ground that Dunkirk was not economic and was not expected to be economic.

On July 20, 2012, Cayuga Operating Company, LLC (“Cayuga”), the owner of the Cayuga facility, filed notice with the Commission of its intent to indefinitely retire the facility by no later

² Available at <http://www.governor.ny.gov/assets/documents/MACfinalreportjune22.pdf>.

than January 16, 2013. In support of its decision, Cayuga stated that current and forecasted wholesale electric prices in New York are inadequate for the Cayuga facility to operate economically.

The Commission initiated this proceeding by Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (Filing No. 3, Jan. 18, 2013) (the “January 18 Order”). The January 18 Order directed the transmission and distribution utilities National Grid and New York State Electric and Gas Corporation (“NYSEG”) to (1) file with DPS staff the projected costs of the transmission alternatives that they propose to evaluate; and (2) request bids from the owners of the Cayuga and Dunkirk plants for the level of out-of-market support each would require in order to finance the repowering of their respective facilities.

On August 13, 2013, the Ratepayer and Community Intervenors filed and served a Request for Party Status in this proceeding. The Ratepayer and Community Intervenors include four county legislators, four town supervisors, four town board members, two mayors, one city council member, four community organizations, three scientists and engineers, and fifteen individual ratepayers, all of whom are concerned about the potential rate and environmental impacts associated with repowering the Cayuga and Dunkirk facilities.

On August 26, 2013, Earthjustice filed and served a Party Representative Form providing notice that it would be representing the Ratepayer and Community Intervenors in this proceeding.

On September 12, 2013, Citizens Campaign for the Environment (CCE”) filed and served a Request for Party Status in this proceeding. CCE is a non-profit, non-partisan organization that empowers communities and advocates solutions to protect public health and the natural environment in New York State. CCE has 80,000 members in New York State and its staff work out of regional offices located in Buffalo, Syracuse, Albany, White Plains, and Farmingdale, New York.

On September 13, 2013, Environmental Advocates of New York (“EANY”) filed and served a Request for Party Status in this proceeding. EANY is a non-profit government watchdog group that

holds lawmakers and agencies accountable for enacting and enforcing laws that protect natural resources and public health. EANY has more than 13,000 individual members.

On September 16, 2013, Earthjustice filed and served the Motion for Access. The motion was filed on behalf of the Ratepayer and Community Intervenors, CCE, and EANY and sought access to complete and unredacted versions of (1) twelve identified documents previously filed in this proceeding (the “Requested Filed Documents”); (2) all documents submitted to the Commission in this proceeding by or on behalf of the Transmission and Generating Entities³ which do not appear on the PSC public docket (the “Non-Public Submissions”); (3) all communications from the Commission or Department of Public Service (“DPS”) staff to any one or more of the Transmission and Generating Entities which do not appear on the PSC public docket (the “Non-Public Communications”); (4) all records of meetings between the Commission, any quorum of the Commission, or any Commission member and any one or more of the Transmission and Generating Entities (the “Meeting Records”); and (5) all documents which are filed in this proceeding by the Transmission and Generating Entities and all communications from the Commission or DPS staff to the Transmission and Generating Entities after the date of the motion (the “Future Submissions”).

By letter dated September 23, 2013 (Filing No. 105) (the “Secretary’s September 23 Letter”), the Secretary informed the Moving Parties that she had determined that the Motion for Access was a request for access to documents governed by the Commission’s FOIL regulations and that the Motion would be handled by the RAO.

By letter dated September 23, 2013 (the “RAO’s September 23 Letter”), the RAO informed the Moving Parties that “this matter has been referred to me by Secretary Burgess and

³ The Transmission and Generating Entities are identified in the Motion for Access at 2 as Niagara Mohawk Power Corporation, NYSEG, Cayuga Operating Company, LLC, NRG Energy, Inc., and National Grid.

will be treated as a request for records pursuant to [the] Freedom of Information Law (FOIL).”

A copy of the RAO’s September 23 Letter is annexed hereto as Exhibit A.

On September 26, 2013, the Moving Parties filed the Motion to Revoke, seeking an Order (1) revoking the Secretary’s purported conversion of the Motion for Access to a FOIL request; and (2) revoking the Secretary’s referral of the Motion for Access to the RAO for decision.

On October 9, 2013, the Secretary issued the Ruling. The Ruling fails to address the legal arguments in the Motion to Revoke and the Motion for Access, and fails to grant the Moving Parties access to the documents sought in the Motion for Access.

On October 11, 2013, the RAO issued a FOIL Determination that purports to address the issues raised in the Motion for Access regarding the Requested Filed Documents.

ARGUMENT

Rehearing is Necessary Because the Ruling is Legally Flawed and Should Be Reversed

The Commission’s regulations allow any person who is interested in an order to request rehearing within 30 days of service of the order. 16 NYCRR § 3.7(a). A request for rehearing may be sought only on the grounds that the Commission committed an error of law or fact. *Id.* § 3.7(b). As discussed in detail below, the Ruling suffers from numerous errors of law and is therefore properly the subject of rehearing.

A. The Motion for Access Has Been Impermissibly Converted Into a FOIL Request and Referred to the RAO for Decision

The Ruling denies that the Motion for Access has been converted into a FOIL request, claiming that “no conversion of the Earthjustice motion took place” Ruling at 1. This claim is completely undermined by prior communications from the Secretary and the RAO and by statements in the Ruling itself. In fact, it is evident that the Motion for Access has been

converted into a FOIL request and that the RAO has been impermissibly elevated to the position of a presiding officer ruling on the motion. For the reasons set forth below and in the Motion to Revoke, this procedure is patently unlawful.

The Secretary's September 23 Letter plainly states "I have reviewed your motion, *and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1 [the Commission's FOIL regulations]. . . [T]his request for access will be handled by the [RAO] pursuant to 16 NYCRR § 6-1.3.*" Secretary's September 23 Letter at 1 (emphasis added). This is echoed by the RAO's September 23 Letter, which states, "[p]lease be advised 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.*" Exhibit A at 2 (emphasis added). Thus, contrary to the Ruling's claim, both letters make crystal clear that the Motion for Access has been impermissibly converted into a FOIL request.

Indeed, the Ruling itself undermines the claim that no conversion has taken place, because it purports to offer a legal justification for the conversion:

The [Motion to Revoke] asserts that the RAO's September 23 letter . . . does not cite any authority in support of permitting "conversion" of a motion. *While the RAO's Letter did not describe the basis for my referral of your September 16, 2013 motion, my September 23, 2013 letter provided the explanation. As stated in my September 23, 2013 letter, 16 NYCRR § 6-1.3 is the governing regulation with respect to access to trade secret information in a proceeding, if no presiding officer is assigned to the proceeding.*

Ruling at 1 (emphasis added).

Thus, the Ruling first claims that no conversion of the Motion for Access has taken place, but then proceeds to offer purported legal authority for the conversion.⁴ Any doubt as to whether

⁴ The legal authority offered by the Secretary for converting the Motion for Access into a FOIL request fails on three counts: first, the Motion for Access seeks access to several different categories of documents, including documents for which no "trade secret" claim has been or could be made. See Motion for Access at 3. Thus, even if 16 NYCRR § 6-1.3 applied (which it does not), it would not

the Motion for Access has been converted into a FOIL request is removed by the Ruling's statement that "pursuant to delegation under Public Service Law (PSL) § 8, *the RAO exercises full authority to decide whether redacted documents will be made public . . . and whether to issue protective orders to make available access to materials deemed 'trade secret.'*" Ruling at 1 (emphasis added). While the RAO may exercise full authority to rule on trade secret issues in the context of FOIL, the RAO lacks any authority to rule on motions made in the context of a PSC proceeding.⁵

In any event, the Commission's regulations make clear that only the Secretary or a duly assigned presiding officer have the authority to rule on motions made in the context of a PSC proceeding. *See* 16 NYCRR § 3.6(b). The Ruling cites no legal authority for the proposition that an RAO can rule on motions, and none exists.⁶

Additionally, as pointed out in the Motion to Revoke (and ignored in the Ruling), the interpretation adopted by the Ruling would render the discovery procedures set forth in 16 NYCRR § 5.4 (regarding requests for documents) superfluous as they apply to the Commission

authorize treatment of the non-trade secret parts of the Motion for Access as a FOIL request. Second, 16 NYCRR § 6-1.3 applies to FOIL requests, not to motions made in the context of a PSC proceeding. The Ruling's reliance on this FOIL-specific provision to justify the impermissible conversion of the Motion for Access is therefore circular. Third, 16 NYCRR § 6-1.3 does not authorize the RAO to rule on motions made in the context of a PSC proceeding, which the Secretary's referral to the RAO seeks to do.

⁵ The Ruling's reference to PSL § 8 is of questionable relevance, as it pertains only to delegations of authority to conduct an "investigation or hearing." N.Y. Pub. Serv. L. § 8. Moreover, such delegations must be supported by a certificate filed with the Commission, and no such certificate has been produced. *Id.*

⁶ The RAO's lack of authority to rule on motions is underscored by the RAO's September 23, Letter, which states that, "[w]ith regard to future submissions, agencies are not obligated to respond to requests for future filings or submissions as these records do not yet exist." Exhibit A at 2. This is exactly the point made in the Motion to Revoke – that the RAO lacks the authority to grant the relief sought by the Motion for Access. Motion to Revoke at 9-10. Moreover, the RAO's conclusion would place an unreasonable burden on the Moving Parties by requiring that they file a FOIL request for every future submission that is either not placed on the PSC's public docket or which is placed on the docket in redacted form.

or its staff, since such document discovery could simply be converted into FOIL requests.

Motion to Revoke at 7.

The Ruling creates a new legal landscape in which any motion by a party seeking access to documents submitted in a PSC proceeding can be converted by administrative fiat into a FOIL request, with the RAO elevated to the position of presiding officer with purported authority to rule on every aspect of the motion. Such an Alice in Wonderland result severely prejudices the Moving Parties and flies in the face of the Commission's regulations.⁷ For the reasons stated above and set forth in the Motion to Revoke, the purported conversion of the Motion for Access into a FOIL request and the referral of the motion to the RAO for decision is not legally permissible. The Ruling is therefore legally flawed and should be reversed.

B. The Ruling Ignores Key Legal Arguments Raised in the Motion to Revoke and the Motion for Access

The Ruling simply ignores key legal arguments made in the Motion to Revoke and the Motion for Access, including that (1) the RAO lacks legal authority to rule on the legal issues raised by the Motion for Access; (2) the RAO lacks authority to grant or deny the relief sought in the Motion for Access; (3) the denial of access to unredacted documents submitted in this proceeding is thwarting meaningful participation by the Moving Parties in violation of the public interest standard governing this proceeding; and (4) no legal basis exists for denying the Moving Parties access to the Non-Public Submissions, Non-Public Communications, and Meeting Records. *See* Motion to Revoke at 7-10; Motion for Access at 10-12, 20.

⁷ To cite one example of the absurdities created by conversion of the Motion for Access, the RAO's September 23 Letter purported to deny the request for Meeting Records on the ground that "meeting records are not filed as part of a proceeding . . ." Exhibit A at 2. But if the motion is being treated as a FOIL request, then the only inquiry is whether the record is "kept, held, filed, produced or reproduced" by the agency, N.Y. Pub. Off. L. § 86(4), not whether it was filed as part of a proceeding.

These are crucial legal issues that go to the rights of a party to a PSC proceeding and public participation in such proceedings. Because the Ruling fails to address these arguments, it is legally flawed and should be reversed.

C. The Ruling Constructively Denies the Motion's Request for Access to Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions

The Ruling fails to address the requests in the Motion for Access for all Non-Public Submissions, Non-Public Communications, Meeting Records, and Future Submissions, and those requests are therefore constructively denied. Because the Ruling provides no legal basis for refusing the Moving Parties access to these documents, it is legally flawed and should be reversed.

CONCLUSION

For the reasons set forth herein and in the Motion to Revoke and the Motion for Access, the Moving Parties request that the Commission forthwith enter an Order (1) granting rehearing on the Ruling and (2) reversing that portion of the Ruling that constructively denies access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions requested in the Motion for Access.

Dated: New York, New York
October 17, 2013

Respectfully submitted,

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