

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 moves the New York Public Service Commission (“PSC”) pursuant to 16 N.Y.C.R.R. § 3.6 for an Order (1) revoking the Secretary’s purported conversion of the Moving Parties’ September 16, 2013 Motion for Access to Critical Documents to a request for records under the New York Freedom of Information Law; and (2) revoking the Secretary’s referral of the aforementioned Motion to the PSC Records Access Officer for decision; and (3) granting such other and further relief as the Commission deems just and proper.

Dated: New York, New York
September 26, 2013

Respectfully submitted,

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

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**MOTION TO REVOKE SECRETARY’S CONVERSION
AND REFERRAL OF MOTION FOR ACCESS TO DOCUMENTS**

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 for an Order (1) revoking the Secretary’s purported conversion of the Moving Parties’ September 16, 2013 Motion for Access to Critical Documents Submitted in This Proceeding (“Motion for Access”) to a request for records under the New York Freedom of Information Law, Pub. Off. L. §§ 85-90 (“FOIL”); and (2) revoking the Secretary’s referral of the Motion for Access to the PSC Records Access Officer (“RAO”) for decision. It is respectfully submitted that, for the reasons set forth below, the Secretary’s purported unilateral conversion of the Motion for Access into a FOIL request and the referral of the motion to the RAO for decision is procedurally and substantively improper.

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 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*, Case 12-E-0577 (Jan. 18, 2013). The 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, three town board members, two mayors, one city council member, four community organizations, three scientists and engineers, and fourteen 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 (12) documents identified in the Motion for Access which have already been filed in this proceeding by or on behalf of Niagara Mohawk Power Corporation, New York State Electric and Gas Corporation, Cayuga Operating Company, LLC, NRG Energy, Inc., and National Grid (together, the “Transmission and Generating Entities”) and which appear in redacted form on the PSC public docket;

2. All documents submitted to the Commission in this proceeding by or on behalf of the Transmission and Generating Entities which do not appear on the PSC public docket;

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;

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; 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.

By letter dated September 23, 2013, the RAO informed the Moving Parties that the Commission Secretary has referred the Motion for Access to the RAO and that the Motion “will be treated as a request for records pursuant to the Freedom of Information Law (FOIL), Public

Officers Law (POL) Article 6.” A copy of the RAO’s September 23, 2013 letter is annexed hereto as Exhibit A.

ARGUMENT

I. **There is No Statutory or Legal Basis for Converting the Motion for Access Into a FOIL Request**

The RAO’s letter cites to no statutory or regulatory authority permitting a motion made in the context of a Commission proceeding to be “converted” to a FOIL request and, indeed, none exists. Although the Motion for Access seeks documents, this fact alone does not warrant conversion of the motion into a FOIL request. Indeed, such an interpretation would render the discovery procedures set forth in 16 N.Y.C.R.R. § 5.4 (regarding requests for documents) superfluous as they apply to the Commission or its staff, since such document discovery could simply be converted into FOIL requests. This has not been the Commission’s practice, nor is it one that has been sanctioned by the courts. *See M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80, (1984) (“Unlike the right of a member of the public to inspect and copy the files of government under FOIL, a litigant has no presumptive right under the CPLR to its adversary’s files”); *De Corse v. City of Buffalo*, 239 A.D.2d 949 (4th Dep’t 1997) (“The provisions of the CPLR relating to discovery in civil actions do not apply to FOIL requests”). Accordingly, the mere fact that the Motion for Access involves documents in the possession of the Commission or its staff does not operate to automatically transform the motion into a FOIL request.

Moreover, the Secretary’s “conversion” of the Motion for Access improperly relegates the Moving Parties to the status of outside observers who must file FOIL requests to obtain access to documents submitted in this proceeding – documents that parties to the proceeding

should have unfettered access to in the first place. Having expended the time and effort to become parties, the Moving Parties are now being treated no differently than if they had stood on the sidelines. If parties to a Commission proceeding are to be treated no differently from any other member of the public, it begs the question of why any interested person or entity should seek to become a party, or what procedural or substantive benefits derive from party status in a Commission proceeding.

The inappropriateness of converting the Motion for Access into a FOIL request is underscored by the fact that the legal arguments upon which the Motion for Access is based are incapable of being addressed in the context of a FOIL response. The Motion for Access relies upon the Commission's *Order Instituting Proceeding and Requiring Evaluation of Generation Repowering*, Case 12-E-0577 (Jan. 18, 2013); Article 4 of the Public Service Law ("PSL"); PSL § 70; the Commission's *Order Adopting Unit Notice Requirements for Generation Unit Retirements* (Case 05-E-0889, Dec. 20, 2005); 16 N.Y.C.R.R. § 3.5(1); and the New York Open Meetings Law, N.Y. Pub. Off. L. §§ 101-111. None of these legal arguments can or should be addressed in the context of a FOIL response; nor, as discussed below, does the RAO have the legal authority to determine these issues.

Additionally, a FOIL response is incapable of affording the relief sought by the Moving Parties in the Motion for Access, a fact that is acknowledged in the RAO's September 23, 2013 letter. The RAO's letter states that, "[w]ith respect 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 (emphasis added). While this may be true of FOIL requests, it is emphatically not true of a motion made in the context of a Commission proceeding; the Commission clearly has authority, as part of the ruling on the Motion for Access, to issue an

order requiring that the Moving Parties be provided with complete and unredacted copies of all future submissions in this proceeding. It is wasteful and obstructive for the Moving Parties to be compelled to file a FOIL request each time a party to this proceeding submits a redacted document to the Commission or makes a submission to the Commission that does not appear on the public docket, yet that is exactly what the Secretary's action appears to decree.

While it is conceivable that a party to a Commission proceeding could voluntarily consent to have a motion treated as a FOIL request, the consent of the Moving Parties has been neither sought nor obtained, and the Moving Parties would not, in any event, consent to such a conversion. Consequently, there is no legal basis for converting the Motion for Access into a FOIL request, and the Secretary's attempt to do so must be revoked.

II. The RAO Lacks Authority to Issue a Ruling on the Motion for Access

The RAO's letter cites to no statutory or regulatory authority permitting her to issue a ruling on a motion made in the context of a Commission proceeding. *See* Exhibit A. In fact, the Commission's regulations specifically require that all motions in proceedings be filed with either the Secretary or the presiding officer, *see* 16 N.Y.C.R.R. § 3.6(b), and there is no indication that the Commission or the Secretary has delegated to the RAO the authority to rule on motions. Accordingly, the RAO lacks authority to issue a ruling on the Motion for Access and any attempt to do so would be *ultra vires*. *Bellacosa v. Classification Review Bd. of Unified Court Sys. of State of N.Y.*, 72 N.Y.2d 383, 391 (1988) (invalidating Review Board employment reclassifications because Board lacked authority to revise classifications in absence of lawful subdelegation from Chief Administrative Judge); *Garzilli v. Mills*, 250 A.D.2d 131, 137 (3rd Dep't 1998) (overturning disciplinary proceeding against teacher because school superintendent lacked authority to make "probable cause" finding initiating proceeding in absence of

subdelegation from Schools Chancellor); *Adirondack Mtn. Club v. Adirondack Park Agency*, 33 Misc.3d 383, 393 (Sup. Ct. Albany Co. 2011) (lack of lawful subdelegation from agency commissioner to designee constitutes grounds for reconsidering vote); *Munter v. Gross*, 42 Misc.2d 690 (Sup. Ct. Kings Co. 1964) (school superintendent lacked authority to request teacher retirement based on disability in absence of delegation from Board of Education).

In any event, the PSL does not authorize the quasi-judicial or decision-making functions of the Commission to be delegated to the RAO, and thus any attempted delegation of those functions to the RAO would be unlawful and void. *Kilgus v. Bd. of Estimate of City of New York*, 308 N.Y. 620, 623 (1955) (An administrative board may not delegate its quasi-judicial and discretionary function to subordinates); *Nemeroff Realty Corp. v. Kerr*, 38 A.D.2d 437 (2nd Dep't 1972), *aff'd*, 32 N.Y.2d 873 (1973) (invalidating site plan decision by director of planning on ground that town board could not delegate site plan approval authority); *Bizarre, Inc. v. State Liquor Authority*, 29 A.D.2d 500 (1st Dep't 1968), *appeal dismissed*, 22 N.Y.2d 721 (holding that power vested by law in State Liquor Authority board to make license determinations could not be delegated to deputy commissioner).

Moreover, apart from being legally impermissible, delegation would in any event be improper because, as noted above, the legal arguments relied upon by and the relief sought in the Motion for Access cannot be addressed in a FOIL response.

Thus, the RAO lacks the authority to issue a ruling on the Motion for Access and the Secretary's referral of the motion to the RAO for decision must be revoked.

CONCLUSION

For the reasons set forth herein, the Moving Parties request that the Commission forthwith enter an Order (1) revoking the Secretary's purported conversion of the Motion for Access into a FOIL request; (2) revoking the Secretary's referral of the Motion for Access to the RAO for decision; and (3) granting such other and further relief as the Commission deems just and proper.

Dated: New York, New York
September 26, 2013

Respectfully submitted,

/s/_____

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