

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.

STAFF STATEMENT IN OPPOSITION OF MOTION
FOR RECONSIDERATION OF SCHEDULE

INTRODUCTION

On April 1, 2015, Alliance for a Green Economy (AGREE) and the Citizens' Environmental Coalition (CEC) (collectively, the Movants) filed a Motion for Reconsideration of the Schedule. On March 12, 2015, the Administrative Law Judges (ALJs or Judges) presiding over this matter issued a Ruling on Process and Adopting Protective Order, which included an initial schedule for the proceeding. The Ruling stated that discovery was to begin immediately, as of the effective date of the issuance. Additionally, the Judges ordered that by April 15, 2015, parties are to submit statements of material issues of fact requiring hearing. Any replies to such issue statements are to be filed by parties by April 22, 2015.

Within their motion, AGREE and CEC assert that they need additional time to conduct discovery and prepare their statements of material issues. The Movants request that the ALJs: (1) extend the public comment period beyond the statutory time set forth in the State Administrative Procedure Act;¹ (2) void the effective date of the Reliability Support Services Agreement (RSSA) without any additional process, and (3) proceed

¹ State Administrative Procedure Act §202 (2014).

in a manner giving parties an unknown additional amount of time to conduct discovery and hold the hearing sometime thereafter.

Department of Public Service Staff (Staff) objects to the Motion because the Movants did not demonstrate that the schedule adopted by the Judges in their Ruling is unreasonable, and any delay has the potential to cause significant harm to the public interest.

BACKGROUND

This matter was initiated by a petition filed on July 11, 2014, in which R.E. Ginna Nuclear Power Plant, LLC (Ginna) requested a proceeding to examine a proposal for continued operation of the R.E. Ginna Nuclear Power Plant (the Facility), a 581 MW single-unit pressurized water reactor located along the south shores of Lake Ontario, in Ontario, New York, approximately 20 miles northeast of Rochester, New York. Specifically, Ginna sought: (1) a Commission finding that continued operation of the Facility is necessary for electric service reliability; (2) a determination that its Petition satisfied notice requirements of a proposed retirement; and, (3) an Order directing Rochester Gas and Electric Corporation (RG&E) to negotiate and file an RSSA for continued operation of the Facility.

After consideration of the Petition, on November 14, 2014 the Commission issued an Order Directing Negotiation of a Reliability Support Service Agreement and Making Related Findings. The Commission found an existing reliability need that required the continued operation of the Facility. Additionally, the Commission determined that Ginna provided proper notice of retirement. Lastly, the Commission directed RG&E to participate in negotiations with Ginna, and either file an RSSA with the Commission, or if the parties could not agree

on terms, to file terms of a proposed RSSA upon which they could agree and to propose alternatives to the provisions that remained in dispute at that point in the negotiations. To date, no party has requested rehearing, and, the time for such a petition having passed, the Commission's decision is final.

In response to the Commission's November Order, on February 13, 2015, RG&E filed a petition seeking the Commission's approval of cost allocation and a cost recovery surcharge mechanism. RG&E included an executed RSSA between RG&E and Ginna as one of the exhibits to its petition. Within its petition, RG&E estimates that the rate change presented in the RSSA constitutes a "major change" under Public Service Law (PSL) §66(12)(c). Pursuant to such statute, a hearing concerning the proposed change of rate proposed is required.²

On March 10, 2015 the ALJs held a procedural conference to establish a litigation schedule, identify potential issues for evidentiary hearing, address any procedural questions, and identify parties.³ Subsequent to the conference, on March 12, 2015, the ALJs issued a Ruling on Process and Adopting Protective Order. The ALJs affirmed what they stated during the procedural conference, that discovery was to begin immediately. The Ruling does not set any formal end to discovery.⁴ Additionally, within the Ruling, the Judges ordered that by April 15, 2015, parties are to submit statements of material issues of fact requiring hearing. Any replies to parties' issue statements may be filed by April 22, 2015.

² PSL §66(12)(f).

³ Notice of Procedural Conference (issued February 24, 2015).

⁴ Ruling on Process and Adopting Protective Order (March 12, 2015) at 1.

DISCUSSION

The Movants make three requests within their Motion; each must be reviewed in turn. First, AGREE and CEC ask to extend the public comment period. The public comment period is adequate as a matter of statute. Under the State Administrative Procedure Act (SAPA), an agency must publish in the state register a notice of proposed rulemaking at least forty-five days prior to a hearing, if one is required.⁵ Here, a notice was published in the state register on March 4, 2015, and states that public comments will be received until 45 days after publication of the notice.⁶

The legislature, through its enactment of the State Administrative Procedure Act, deemed forty-five days as an appropriate amount of time for the submission of public comments. The 45 day period balances the need to provide adequate time for the public to comment and need for the rulemaking acting agency to act in a timely manner while taking the comments into account.

The Movants have not provided a compelling reason for extending the comment period. They have not demonstrated why more time is necessary in this matter compared to any other rulemaking before the Commission. The Movants do not make any attempt to explain how their request properly balances the Commission's time to act in reviewing public comments with the harm that could be done to ratepayers by unnecessarily extending the Commission's rulemaking process. The Movants' first request should be denied.

⁵ SAPA §202.

⁶ N.Y. St. Reg. PSC-09-15-00003-P. New York State Register. Vol.XXXII, Issue 9. March 4, 2015.

AGREE and CEC's second request is to void the April 1st effective date of the bilateral contract between RG&E and Ginna. The Movants do not provide any legal precedent or authority that would permit an administrative law judge to void one term of a mutually-negotiated contract between two entities without giving due process to the parties to the agreement. Before the Judges can even consider the Movant's request, they must seriously consider, under the Fifth Amendment to the U.S. Constitution, those implications of a state action voiding one term of such a contract. Additionally, even where it might be deemed acceptable, the effects of such an action on the parties to the contract and the public interest need to be considered and understood prior to voiding a single term of such contract. That relief is not appropriate upon a motion absent a thorough factual inquiry, especially when the request is made by an outside party to that agreement.

The nullification of a term of the RSSA that the Movants apparently desire, as an issue of fact, can be pursued only after hearing. There, the Movants would have to provide evidence and a compelling state interest demonstrating why the relief they request should be granted. The Movants may choose to explore the need for the April 1 effective date of the RSSA through discovery and the hearing process, but the relief requested cannot be granted upon a Motion.

The Movants have also failed to address the relationship between the April 1 date and the rest of the contract. If that date is changed, it could undermine the purpose of the contract by rendering it insufficient to support reliability. If so, the relief requested is tantamount to rejecting the entire contract. Movants may not shortcut the review of the overall contract by seeking to destroy it piecemeal through modification of a single term standing alone

from the rest of the contractual provisions, especially given the Commission's determination in its November 2014 Order that a reliability need presently exists requiring the continued operation of Ginna.

The Movants are requesting that the judges void the effective date of the RSSA, or in the alternative order RG&E to pay for costs from the effective date, without any due process and without any consideration of the impacts to ratepayers. This second request should be denied.

Third, AGREE and CEC request a "reasonable timeline" for the hearings process in this matter. However, the Movants have not demonstrated that the initial schedule provided by the ALJs is unreasonable. Again, the Movants have not considered balancing the impact of delay with the harm to ratepayers caused by such action. Delaying the payment of services under the RSSA raises a concern of rate compression. Specifically, the costs of services provided under the RSSA's terms are tracked during the delay starting on April 1, 2015, and upon Commission authorization of payment such Deferred Collection Amounts are paid (with interest at the customer provided capital rate) to Ginna in monthly installments through March 2017. A delay in this proceeding extends the deferral and compresses any eventual recovery over a shorter amount of time, which leads to higher bill impacts that adversely affect customers' interests. Thus, what the Movants conceive of as a timeline reasonable only from their perspective of their interests may not be in the interests of ratepayers, for it fails to show an appreciation of the full implications of delay. AGREE and CEC's third request should be denied.

Finally, Staff cannot ignore the Movants' statement that "Staff appears not to be taking the time to lead a thorough and comprehensive examination of the utility's filing." AGREE

and CEC disregard that they have been participants in this proceeding that began with Ginna's initial filing in July 2014. During the course of the proceeding, Staff received requests from CEC, and assisted CEC in obtaining information and explaining the rulemaking process. In return, Staff received from CEC emails expressing their gratitude. Moreover, since the inception of this proceeding, Staff has been conducting its own internal analyses, as CEC well knows from its participation as detailed above. Given that prior proceeding, Staff is well prepared to proceed expeditiously here, and if Movants are not in the same position, that is a failure of their duty to make their preparations. Attacking Staff is a not a cure for what Movants should have done in preparing for this phase of this proceeding.

CONCLUSION

Based on the foregoing, Staff opposes the motion for an extension. There is no evidence that the time provided is unreasonable. The public interest may be severely harmed by delay in the proceeding, and the impacts upon the public resulting from delay were not considered in the motion. The motion should be denied in its entirety.

Respectfully submitted,

s/ *Alan T. Michaels*

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Staff Counsel

Dated: April 8, 2015
Albany, New York