



July 30, 2012

VIA ELECTRONIC MAIL

Hon. Jaclyn A. Brillig
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350
Secretary@dps.ny.gov

RE: Case No. 12-E-0136; Petition of Dunkirk Power LLC and NRG Energy Inc. for Waiver of Generator Retirement Requirements—Comments of Sierra Club Regarding Proposed Term Sheet Agreement

Dear Secretary Brillig:

In accordance with the July 18, 2012 Notice Directing Filings and Soliciting Comments, the Sierra Club submits the following comments regarding the proposed Binding Term Sheet for Bilateral Agreement for Dunkirk Power Generating Units (“Term Sheet Agreement” or “Agreement”) submitted by Niagara Mohawk Power Corporation d/b/a National Grid (“National Grid”) on July 20, 2012. For the reasons set forth below, to ensure that the provisions of the Agreement are just and reasonable, the Sierra Club supports minimizing the duration of the proposed Agreement to the period of presently demonstrated need: September 10, 2012 to May 31, 2013; encourages the Public Service Commission (“PSC”) to facilitate a process for soliciting competitive bids to provide any needed voltage support beyond the termination of the Agreement; and encourages the PSC to require Dunkirk Power, LLC (“Dunkirk”) to compensate National Grid for profits received as a product of the Term Sheet Agreement should Dunkirk voluntarily elect to operate *any* of its units beyond the Agreements’ termination, not merely if Dunkirk maintains certain pre-determined levels of profitability. Additionally, in light of the recent bankruptcies, mothball requests, and signaled retirement plans for upstate New York coal plants, the Sierra Club requests that the PSC commission detailed reliability analyses for *all* of the aging upstate New York coal plants to prioritize any needed transmission upgrades and circumvent any occasion for future out-of-market reliability payments from New York ratepayers.

I. FACTUAL BACKGROUND

Dunkirk operates a four-unit 635 MW coal-fired power plant in Chautauqua County, New York. Units 1 and 2—each with a nameplate capacity of 100 MW (115 kV)—were constructed in 1949 and 1950, respectively.¹ Units 3 and 4, each with nameplate capacity 217.6 MW (230 kV), were constructed a decade later in 1959 and 1960.²

On March 14, 2012, Dunkirk submitted a petition to the PSC requesting permission to mothball indefinitely all four units no later than September 10, 2012.³ As Dunkirk explained in its petition, “[d]ue to the current and forecasted wholesale electric prices in Western New York and the underlying cost of operation, the Dunkirk facility is, and would continue to be, operating at a net loss.”⁴ Thus, Dunkirk concluded that “the facility is not currently economic and is not expect to be economic” and indicated that it “intends to mothball the units until such time as market conditions improve.”⁵

Subsequent to the filing of the mothball notice, analyses were conducted by National Grid to determine the system reliability impacts of permanently removing all four Dunkirk units from the grid.⁶ National Grid initially believed, based on its preliminary analyses, that three Dunkirk units—one 230 kV unit and two 115 kV units—would be required to meet reliability needs, with two of these three units required year round, and the third operating in the summer season.⁷ National Grid subsequently revised this assessment downward. On June 29, 2012, National Grid wrote to NRG, the corporate parent of Dunkirk, explaining that only two 115 kV units were required from September 2012 until critical substation and line projects are completed by June 1, 2013, and that at most a single unit would be required from June 1, 2013 until June 1, 2015.⁸ National Grid noted that it was continuing to “examine whether it is possible to avoid the need for any units after June 1, 2013.”⁹ National Grid expects to complete its final reliability analyses by the end of September.¹⁰

On July 12, 2012, NRG filed with the Federal Energy Regulatory Commission (“FERC”) a proposed unexecuted reliability must run (“RMR”) agreement. The RMR

¹ Air Title V Facility Permit, Facility DEC ID: 9060300021 (Jan. 30, 2009), at 1.

² *Id.*

³ NRG Energy, Inc., Notice of Request to Mothball Dunkirk Units 1, 2, 3 and 4 (Mar. 14, 2012), at 1.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ Ltr. from Christopher E. Root, Senior VP, Network Strategy, National Grid, to Thomas G. Dvorsky, Director, Office of Electric, Gas and Water, Department of Public Service (Mar. 30, 2012), at 1.

⁷ Ltr. from Carol A. Sedewitz, Director, Transmission Planning, National Grid to Tammy Mitchell, Chief – Bulk Electric Systems, New York Department of Public Service (May 30, 2012), at 1 [“May 30 Letter”].

⁸ Ltr. from William Malee, Director, Transmission Commercial, FERC – Regulated Businesses, National Grid to Brad Kranz, Director, Regulatory & Market Affairs – NY, NRG Energy Inc. (June 29, 2012), at 1 [“June 29 Letter”].

⁹ *Id.*

¹⁰ May 30 Letter at 1.

applied to Units 1 and 2 for the period ending May 31, 2012 and to one of these two units for an additional two-year period ending June 1, 2015.¹¹ Pursuant to the RMR, National Grid would compensate NRG through a monthly fixed-cost charge of \$5,607,513 for keeping Units 1 and 2 in service, and \$4,450,332/month to keep a single unit in service between June 1, 2013 and June 1, 2015.¹²

On July 20, 2012, National Grid filed with the PSC a proposed Term Sheet Agreement intended to supersede the RMR filed with FERC.¹³ The Term Sheet Agreement covered the period from September 1, 2012 until May 31, 2013, and provides that it may be extended for no more than an additional 90 days beyond May 31.¹⁴ Under the agreement, National Grid would pay Dunkirk a monthly fixed-price charge of \$2,924,324.¹⁵ National Grid has subsequently filed a motion with FERC to hold the RMR proceeding in abeyance for 30 days pending possible approval by the PSC of the proposed Term Sheet Agreement.

II. LEGAL STANDARD

The New York Public Service Law provides that “[a]ll charges made or demanded” by any electric corporation for electricity or any service “shall be just and reasonable.”¹⁶ “Every unjust or unreasonable charge made or demanded for . . . electricity or any such service . . . is prohibited.”¹⁷ Under applicable lightened regulation, the PSC retains jurisdiction over “matters such as enforcement, investigation, safety, reliability, and system improvement.”¹⁸ Because retirement of units can significantly impact system reliability and thereby deprive ratepayers of acceptably reliable electric service, the PSC’s authority extends to unit retirements.¹⁹ Because the Term Sheet Agreement seeks to address an identified reliability need that would occur in the wake of the proposed mothball of the Dunkirk units, the PSC has jurisdiction to review the provisions of the proposed Term Sheet Agreement. The PSC’s review encompasses whether the provisions of the proposed Term Sheet Agreement are “just and reasonable.”

¹¹ Proposed RMR, ¶ 2.1.

¹² *Id.*

¹³ True to the July 20 filing, Dunkirk has subsequently moved FERC to hold its proceeding in abeyance pending a determination by the PSC at its August 16, 2012 session regarding approval of the Term Sheet Agreement. *See* Dunkirk Power LLC Motion to Hold Proceeding in Abeyance, Case No. ER12-2237-000 (FERC July 25, 2012).

¹⁴ Term Sheet Agreement at 1.

¹⁵ *Id.* at 5.

¹⁶ Pub. Serv. Law § 65(1).

¹⁷ *Id.*

¹⁸ Instituting Order, Case No. 05-E-0889, at 3 (July 27, 2005).

¹⁹ *Id.* at 4.

III. ARGUMENT

A. To Ensure the Reasonableness of Impacts to Ratepayers, the PSC Should Limit the Duration of the Term Sheet Agreement to the Period for Which a Reliability Need Has Been Demonstrated: September 10, 2012 to May 31, 2013.

The proposed Term Sheet Agreement operates in the manner of an RMR. Pursuant to the agreement, Dunkirk receives monthly out-of-market compensation to keep its units available to operate. National Grid ratepayers foot the bill in exchange for certainty that adequate generation will be available if needed, until a more permanent reliability solution can be implemented that will render the Dunkirk units obsolete. Because the Term Sheet Agreement imposes a substantial burden on National Grid ratepayers, the reasonableness of the agreement hinges on limiting its length to the period for which a reliability need has been truly demonstrated.

FERC has identified the threats that RMRs pose to markets, which have direct implications for the justness and reasonableness of resulting rates. As explained in FERC's *Devon Power* order, "RMR contracts suppress market-clearing prices, increase uplift payments, and make it difficult for new generators to profitably enter the market."²⁰ As a consequence, "expensive generators under RMR contracts receive greater revenues than new entrants, who would receive lower revenues from the suppressed spot market price."²¹ The result is that "extensive use of RMR contracts undermines effective market performance" and these "suppressed market clearing prices further erode the ability of other generators to earn competitive revenues in the market and increase the likelihood that additional units will also require RMR agreements to remain profitable."²² To ensure that rates remain just and reasonable, the market distorting effects of RMRs must be minimized.

In order to minimize the market distorting effects of the Term Sheet Agreement, the agreement should be limited in duration to the period for which a reliability need has been demonstrated. Since reliability concerns were initially identified in March, successive analyses by National Grid have limited the magnitude of this need, both in terms of the number of units required and the time frame.²³ Although National Grid's analyses are ongoing and anticipated to require an additional two months complete, to the extent that an agreement must be finalized in advance of Dunkirk's September 10, 2012 mothball deadline, the agreement should cover only the period for which there is a presently demonstrated need for the Dunkirk units.

²⁰ Order, *Devon Power, LCC*, 103 FERC ¶ 61,082 at 9 ¶ 29 (FERC Apr. 25, 2003).

²¹ *Id.*

²² *Id.*

²³ Compare May 30 Letter (identifying indefinite need for three units) to June 29 Letter (identifying 9-month need for two 115 kV units only and possible need for one of these units for a limited time beyond June 1, 2013).

As of the June 29 Letter, the period of demonstrated need for Dunkirk units was from September 10, 2012 until May 31, 2013 (at which time critical substation and line projects are completed).²⁴ The Term Sheet Agreement should not be permitted to begin before September 10, 2012 and should be required to terminate when critical substation and line projects are completed by June 1, 2013.

B. To Minimize Adverse Impacts to Ratepayers and Ensure the Reasonableness of Out-of-Market Costs to National Grid Customers, the PSC Should Facilitate a Process for Soliciting Competitive Bids to Provide Any Needed Voltage Support Beyond June 1, 2013.

Based on the reliability analyses conducted to date, there is a need for voltage support between June 1, 2013 and June 1, 2015. However, although this support could be provided by one of the Dunkirk 115 kV units, it also appears that this support could be provided by sources other than Dunkirk.²⁵ To minimize adverse impacts to National Grid customers, and ensure that they are not forced to make unjust or unreasonable payments to Dunkirk beyond June 1, 2013 for reliability service that could otherwise be provided less expensively, the Sierra Club encourages the PSC to facilitate a process of soliciting competitive bids for any needed voltage support as soon as National Grid has completed its reliability analyses and finalized its determination of need. The Sierra Club notes that even if alternative voltage support were not available immediately on June 1, 2013 but were nevertheless available prior to June 1, 2015, such alternative support would still be beneficial to National Grid customers because it could limit the duration of any subsequent agreement between Dunkirk and National Grid following the termination of the present Term Sheet Agreement.

C. To Ensure the Term Sheet Agreement Has a Just and Reasonable Impact on National Grid Ratepayers, Dunkirk Should Be Required to Compensate National Grid Ratepayers If It Elects to Operate Any of Its Units Beyond the Termination of the Agreement.

As drafted, the Term Sheet Agreement requires Dunkirk to compensate National Grid for a portion of the \$4.2 million debt-related allowance included in the calculation of the Agreement's monthly fixed-price payment *only if* Dunkirk attests to meeting certain levels of profitability.²⁶ This is not just and reasonable for National Grid customers. Dunkirk's obligation to compensate ratepayers should be triggered by *any* future operation of the plant such that Dunkirk does not obtain a profit at the expense of National Grid customers by entering into the agreement.

National Grid customers are subsidizing the continued availability of the Dunkirk plant to insure against a contingency in which the plant is needed for system reliability.

²⁴ June 29 Letter at 1.

²⁵ See June 29 Letter.

²⁶ Term Sheet Agreement at 5-6.

As explained above, the premise for the compensation is that the Dunkirk plant would not remain operational voluntarily beyond September 10, 2012, but instead requires payments on top of those provided by the energy and capacity markets²⁷ to cover its ongoing costs. Having received these out-of-market payments to keep the plant in operation beyond the requested mothball date, the Term Sheet Agreement should not be an opportunity for Dunkirk to obtain a windfall to the detriment of National Grid customers. Such a result would be neither just nor reasonable. Consequently, if the result of the Term Sheet Agreement is a net gain to Dunkirk, any profits should be disgorged to National Grid ratepayers should Dunkirk elect to operate beyond the termination of the agreement *regardless* of the profitability of the plant in those years.

D. Commissioning a Detailed Reliability Analysis for Each of the Aging Upstate New York Coal Plants to Proactively Identify Needed Transmission Upgrades Will Help Obviate the Need for Future Out-of-Market Reliability Payments and Protect New York Ratepayers from Unjust and Unreasonable Rate Increases.

Within the past year, the owners of three upstate New York plants—Cayuga, Somerset, and Danskammer—have filed for bankruptcy, and the owner of the S.A. Carlson plant has released an integrated resource plan recommending the shutdown of its coal plant. Within the past four months, both Dunkirk and Cayuga have publicly acknowledged that continued operation under present market conditions is uneconomical and have filed petitions with the New York Public Service Commission to indefinitely mothball the plants. And within the past five days, the PSC has sent a letter to the New York Independent Service Operator and New York State Electric and Gas requesting that these entities conduct a reliability analysis for the Cayuga plant in response to its July 20 mothball request.²⁸ Given the persistent signals that the upstate New York coal plants are in economic jeopardy, the PSC should act now to head off future requests for out-of-market reliability payments, which would inevitably fall upon New York ratepayers. Commissioning a detailed reliability analysis now the S.A. Carlson, Huntley, Dunkirk, Somerset, Cayuga and Danskammer plants will enable to PSC to identify needed transmission upgrades and protect ratepayers from unjust and unreasonable increases in their rates.

IV. CONCLUSION

For the foregoing reasons to minimize adverse impacts to ratepayers and ensure just and reasonable rates, the PSC should limit the duration of the Term Sheet Agreement to the period of demonstrated need, facilitate a process for soliciting competitive bids to provide any voltage support determined to be required beyond June 1, 2013, and require

²⁷ Although pursuant to the Term Sheet Agreement these are remitted to National Grid. *See id.* at 5.

²⁸ Ltr. from Thomas G. Dvorsky, Office of Electric, Gas and Water, New York Public Service Commission to Richard Gonzalez, Chief Operating Officer, NYISO and Mary Smith, Vice President of Planning and Operations, New York State Electric and Gas (July 25, 2012).

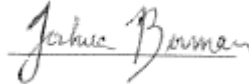
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Dunkirk to compensate National Grid customers should it electively operate any of the Dunkirk units beyond the termination of the agreement. In addition, the PSC should commission a detailed reliability analysis for all of the aging upstate New York coal plants to proactively address any reliability needs and avoid replicating the present situation in which ratepayers must subsidize the continued operation of an uneconomical power plant.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joshua Berman".

Joshua Berman

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