

# AGREE New York

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November 19, 2015

## VIA ELECTRONIC MAIL

The Honorable Kathleen H. Burgess  
Secretary  
New York State Public Service Commission  
Empire State Plaza, Agency Bldg. 3  
Albany, NY 12223-1350

Re : Case #14-E-0270: Statement in Opposition of the Joint Settlement

Dear Secretary Burgess:

Alliance for a Green Economy ("AGREE") and Citizens' Environmental Coalition ("CEC") are nonprofit organizations intervening in this case from a public interest, environmental, and consumer perspective. We hereby submit our Statement in Opposition to the proposed Joint Proposal filed on October 21 by Rochester Gas & Electric ("RG&E") in the above referenced proceeding. This statement is submitted in accordance with the November 3, 2015 Ruling Adopting Revised Schedule issued by Administrative Law Judge Sean Mullany as well as subsequent guidance that ALJ Mullany provided by email to all parties on November 4, 2015.

Respectfully submitted,

/s/  
Jessica Azulay Chasnoff  
Alliance for a Green Economy

/s/  
Barbara J. Warren  
Citizens Environmental Coalition

NEW YORK STATE  
PUBLIC SERVICE COMMISSION

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

Case 14-E-0270

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STATEMENT IN OPPOSITION OF JOINT PROPOSAL  
By ALLIANCE FOR A GREEN ECONOMY and  
CITIZENS' ENVIRONMENTAL COALITION

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**Dated:** November 19, 2015

NEW YORK STATE  
PUBLIC SERVICE COMMISSION

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Alliance for a Green Economy (“AGREE”) and Citizens’ Environmental Coalition (“CEC”) are nonprofit organizations intervening in this case from a public interest, environmental, and consumer perspective. We hereby submit our Statement in Opposition to the proposed Joint Proposal filed on October 21 by Rochester Gas & Electric (“RG&E”) in the above referenced proceeding.<sup>1</sup> This statement is submitted in accordance with the November 3, 2015 Ruling Adopting Revised Schedule<sup>2</sup> issued by Administrative Law Judge Sean Mullany as well as subsequent guidance that ALJ Mullany provided by email to all parties on November 4, 2015.

**Introduction**

AGREE and CEC intervened in this case opposed to the prospect of a Reliability Support Services Agreement (“RSSA”) for the Ginna nuclear reactor and unconvinced that an adequate reliability study or search for alternatives had been done to justify an RSSA. We were and are critical of the precedent the

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<sup>1</sup> Ginna Joint Proposal. October 21. Filed by RG&E.  
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={DF406288-FB6B-4540-BB0C-2EF3CC0ECD6}>

<sup>2</sup> Ruling Adopting Revised Schedule. November 3. Issued by ALJ Sean Mullany.  
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0B64F2CB-4E86-479D-B2D1-A60BEA7916EC}>

Commission set by allowing Ginna to seek an RSSA before declaring a clear intention to retire. Additionally, our position was that the retirement of Ginna was predictable as early as 2013 and that only through planning failures on the part of RG&E and multiple state agencies could a costly RSSA be on the table. Given those failures, we believe it is unjust to require ratepayers to bear the financial burden of an RSSA.

In the event that an RSSA is granted, we have argued that Ginna should be ordered to close once it is no longer needed, in order to disincentivize frivolous requests for RSSAs in the future and to ensure an orderly and predictable wholesale market in New York. We advocate for RG&E to bear the costs of the RSSA because of the utility's imprudence in planning and seeking alternatives. And, finally, we have urged the Commission and other state agencies to tackle the question of decommissioning as part of this case because it is in the public interest, ratepayer funds were collected for this purpose, and this case should be aligned with state decommissioning policy.

AGREE and CEC have participated extensively in all phases of this proceeding, going toe to toe with experienced attorneys, even though we were denied requested intervenor funds and had no lawyers ourselves. We are appreciative of the Administrative Law Judges in this case and of other parties for their patience as we learned the process and for the helpful guidance we received. Nevertheless, we must raise a concern of due process in that we have not been allowed to conduct discovery or develop the record around some of our key issues in this case because our issues were ruled to be outside the scope of the evidentiary phase of the case, with very little justification. We have appealed that ruling, but the Commission has delayed a decision for months on our Interlocutory Appeal.<sup>3</sup> This put us at a disadvantage in negotiations with other parties around issues that were most important to us in this case and we believe are also of utmost importance to the public interest.

We do not fully support the Joint Proposal because it represents only a modest improvement over the originally proposed Reliability Support Service Agreement ("RSSA") between RG&E and R.E. Ginna Nuclear Power Plant, LLC ("Ginna"). There are some benefits to consumers as a result of the negotiated settlement, however the Joint Proposal does not go far enough in resolving some of the most important issues in the case.

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<sup>3</sup> AGREE and CEC Interlocutory Appeal on Scope of Issues. Filed June 1, 2015.  
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E3947352-6021-46F5-8F75-E4BE9571C39A}>

Specifically, the Joint Proposal places the entire cost burden of the RSSA on consumers, despite RG&E's failure to prudently plan for Ginna's predicted retirement. The Joint Proposal also fails to preserve the state's interest in a safe and responsible decommissioning process at Ginna, as discussed in the 2015 New York State Energy Plan and the May 20, 2004 Commission Order approving the sale of Ginna from RG&E to Constellation.

By failing to hold RG&E accountable for its planning failures, the Joint Proposal also puts consumers at risk of an extended RSSA beginning in 2017 if RG&E does not finish its Ginna Retirement Transmission Alternative ("GRTA") on time, or develop other available alternatives. The consequences of such an extension could be catastrophically expensive for RG&E ratepayers, as it would likely put them on the hook for subsidizing another year and a half of Ginna's operations, even if the need was only to bridge a few months of delay.

For these reasons, which we will elaborate below, we contest the Joint Proposal, despite some of the improvements won through the settlement negotiations. Though the Joint Settlement has some positive aspects as compared to the originally proposed RSSA, it still falls short of meeting the public interest criteria, as outlined in the Commission's 1992 "Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines" ("Settlement Guidelines").<sup>4</sup>

### **The Joint Proposal is Not in the Public Interest**

According to the Settlement Guidelines, the Joint Proposal should be evaluated based on the following criteria:

- (1) the settlement's consistency with law and with the regulatory, economic, social, and environmental policies of the Commission and the State;
- (2) whether the result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes;

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<sup>4</sup> New York State Public Service Commission. "Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines." March 24, 1992. <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4DC4475E-AD4D-4A07-AC26-B7AAE863CEA7}>

- (3) whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility;
- (4) the existence of a rational basis for decision;
- (5) the completeness of the record; and
- (6) whether the settlement is contested.

We will address each of these in turn below.

**(1) The settlement's consistency with law and with the regulatory, economic, social, and environmental policies of the Commission and the State**

By failing to address the important decommissioning issues in this case, the proposal is not consistent with the regulatory, economic, social, and environmental policies of the Commission and the State of New York.

Specifically, by not requiring any commitments from Ginna around how decommissioning will be pursued, the settlement will pave the way for Ginna to pursue the SAFSTOR decommissioning option in contravention of a policy opposing SAFSTOR, as articulated in the New York State Energy Plan of 2015.<sup>5</sup> SAFSTOR decommissioning would allow Ginna to delay cleanup and dismantlement of the site for decades. The Joint Proposal could also allow Ginna to pursue exemptions from the Nuclear Regulatory Commission to use the decommissioning fund for purposes other than it was intended for, an outcome that would violate the spirit and intension of a Commission Order from 2004.

The Energy Plan States clearly:

“New York opposes the use of SAFESTOR because there is a strong possibility that it will not leave sufficient non-radiological decommissioning funds for future use. The funds will need to cover future security, maintenance, and utilities for storing the spent fuel, and the funding has shown vulnerability to economic turmoil, increasing the likelihood of a funding shortage with an economic downturn.”

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<sup>5</sup> 2015 New York State Energy Plan. Volume 2. Sources. Page 25  
<http://energyplan.ny.gov/-/media/nysenergyplan/2014stateenergyplan-documents/2015-nysep-vol2-sources.pdf>

“Additionally, the State has no control over the spending of decommissioning funds and no say in what constitutes non-radiological decommissioning and site restoration. The State has no authority to determine that decommissioning and restoration have been conducted satisfactorily.

Furthermore, since funding for radiological and nonradiological cleanup and site restoration of nuclear decommissioning is commingled, and because non-radiological decommissioning and site restoration are the last steps in the decommissioning process, removal of structures and completion of site restoration following decommissioning may not occur if insufficient funds remain. Without separation of decommissioning funds, overruns in radiological decommissioning will reduce or eliminate available funding for site restoration.”

As correctly discussed in the State Energy Plan, there is a strong public interest in avoiding SAFSTOR as a decommissioning option. Decommissioning is unreasonably delayed in a SAFSTOR option, resulting in increased risk to the local community. New York taxpayers could ultimately be forced to pay the bill. And the local community can be harmed by the inability to reuse the site for other economic development.

The State Energy Plan also rightly discusses the problem that states generally have little to no authority over how a nuclear reactor is decommissioned. However, as we have argued repeatedly, this case offers an opportunity for New York State to gain some influence regarding how Ginna pursues decommissioning of this reactor. The State of Vermont seized a similar opportunity in the closure of Vermont Yankee. Because Entergy needed the state's approval to continue operating Vermont Yankee, the state was able to negotiate a settlement that included terms covering the decommissioning of the plant, which not only set forth a timeframe for initiation of decommissioning, but also provided economic development funds to the community and established a community oversight board for the decommissioning process.<sup>6</sup>

We have been continuously frustrated that we have been prevented from even developing the record around this issue, despite the clear public interest implications.

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<sup>6</sup> Order of the State of Vermont Public Service Board. March 28, 2014.  
<http://ago.vermont.gov/assets/files/Environmental/7862%20Final%20Order.pdf>  
Memorandum of Understanding among Entergy, the Department and ANR, filed with the Board on December 23, 2013  
[http://psb.vermont.gov/sites/psb/files/docket/7862Relicensing6/Docket\\_7862\\_MOU.pdf](http://psb.vermont.gov/sites/psb/files/docket/7862Relicensing6/Docket_7862_MOU.pdf)

The Joint Proposal should at the least preserve the Commission's ability to ensure that the Decommissioning Trust Fund is used for the purposes for which it was intended when that fund was passed from RG&E to Constellation in the sale of Ginna. Yet, it does not. The Joint Proposal states that unless Ginna is needed for reliability and selected for a new RSSA by RG&E by June 30, 2016, "then Ginna shall not be required to obtain further authorization from the Commission in order to retire within 75 days of March 31, 2017."<sup>7</sup>

This clause in the Joint Proposal, if approved by the Commission, would remove any further ability by the Commission to consider closure-related issues such as decommissioning beyond this case. Thus, we argue that the Commission has the obligation to ensure that the Joint Proposal does not contravene or supersede previous Commission Orders related to decommissioning of Ginna and the ratepayer funds for decommissioning that were transferred from RG&E to Ginna in the sale of the reactor.

On May 20, 2004, the Commission issued an order approving RG&E's sale of the Ginna reactor to Constellation.<sup>8</sup> That Order explicitly discusses the transfer of ratepayer funds that had been set aside for decommissioning and makes clear the intention that those funds should be used only for radiological decommissioning purposes and for following through on Constellation's commitment in the sale to fully remediate the Ginna site at the end of its useful life and return it to a "greenfield condition." The Commission took care in that process to ensure that Constellation received no more ratepayer funds than necessary for meeting the NRC's decommissioning requirements and that, in the event the plan for decommissioning changed, Constellation would be obligated to return unused decommissioning funds to ratepayers.

Recent trends nationwide have revealed a propensity among nuclear owners to underfund their Decommissioning Trust Funds, causing shortfalls and extraordinary and unreasonable delays in cleanup and restoring sites to original conditions.<sup>9</sup> Further, nuclear companies have been asking for and receiving exemptions from the Nuclear Regulatory Commission to use decommissioning funds for purposes other than what they are intended – such as paying property taxes or moving radioactive

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<sup>7</sup> Joint Proposal. Pg. 15.

<sup>8</sup> Public Service Commission "Order Approving Transfer, subject to a Modification." May 20, 2004. New York Public Service Commission Case # 03-E-1231 <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B3FD61B5-DC60-4366-9F40-F5EF8F3F37AA}>

<sup>9</sup> US Government Accountability Office. April 5, 2012 . "NRC's Oversight of Nuclear Power Reactors' Decommissioning Funds Could Be Further Strengthened" <http://www.gao.gov/products/GAO-12-258>

waste from fuel pools to dry cask storage. This causes further delay and underfunding of decommissioning accounts.

Since the ratepayer decommissioning funds were transferred in the sale, it does not appear as if any of Ginna's owners have invested any of their own company funds into the decommissioning trust fund. We suspect that the decommissioning trust fund remains entirely a ratepayer-funded account, relying solely on investment returns for its continued growth and remaining exposed to the risks of stock market volatility.<sup>10</sup> We do know that the fund does not currently have enough money to meet the Nuclear Regulatory Commission's minimum requirement for decommissioning. The minimum required by the Nuclear Regulatory Commission for decommissioning Ginna is \$459,746, but as of Exelon's last report in March 2015, the fund had \$403,940.<sup>11</sup>

The Commission has an interest in holding Ginna's owners to the representations that Constellation made in the 2003 "Petition to Transfer by Auction Sale the R.E. Ginna Nuclear Generating Station and Related Assets and for Related Approvals,"<sup>12</sup> which formed the basis for the Commission's Order approving the sale. In our view, this would require the Commission to, at the very least, order that the Joint Proposal doesn't supersede those commitments and that the decommissioning trust fund must only be used for its intended purposes and not for any exemptions that Ginna might seek.

The public interest requires that the closure of Ginna and the subsequent decommissioning process comport with the representations made by Constellation when it assumed ownership and the intention of the Commission when it approved the sale. It also requires that the Commission use all its inherent authority in this case to ensure that:

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<sup>10</sup> On June 1, 2015, AGREE submitted a series of interrogatories to Ginna inquiring as to whether any of the companies in Ginna's ownership structure have contributed money to the decommissioning trust fund and seeking some preliminary details about Ginna's intentions regarding the decommissioning process. Ginna refused to answer the questions, objecting on the grounds that the interrogatory was out of the scope of the proceeding. See:

[http://www.allianceforagreenecconomy.org/sites/default/files/Ginna\\_discovery/GNPP-responses-to-AGREE-9-12.PDF](http://www.allianceforagreenecconomy.org/sites/default/files/Ginna_discovery/GNPP-responses-to-AGREE-9-12.PDF)

<sup>11</sup> Exelon Generation. March 31, 2015. "Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installations" Attachment 25. [http://allianceforagreenecconomy.org/sites/default/files/Exelon\\_2015\\_CENG-included.pdf](http://allianceforagreenecconomy.org/sites/default/files/Exelon_2015_CENG-included.pdf)

<sup>12</sup> "Revised Petition to Transfer by Auction Sale the R.E. Ginna Nuclear Generating Station and Related Assets and for Related Approvals." December 23, 2003. New York Public Service Commission Case # 03-E-1231 <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6817F29B-8597-4D8D-AA4F-E6C5AD83A743}>

- A. New York's consumers and/or taxpayers are not left holding the bag for the decommissioning of Ginna. The reactor's owners should be required to true up the decommissioning fund to at least the Nuclear Regulatory Commission's minimum requirement.
- B. That the Ginna site is returned to a greenfield state as quickly and safely as possible in order to prevent further radiological contamination and harm to public health or the environment.
- C. That Ginna's owners are not allowed to violate the spirit and intention of the Commission's 2004 Order by using the ratepayer-funded decommissioning trust fund for non-decommissioning costs, further depleting an underfunded account and unreasonably delaying cleanup.

The environmental, public health, and economic harm that could result from failure to address these decommissioning concerns proactively in this case cannot be understated and are not protected against in the Joint Proposal.

**(2) Whether the result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes**

We have no comment at this time as we have no way to predict the outcome of full litigation. We oppose the Joint Proposal because it is not just and reasonable for consumers and the local community, due to the issues we have raised in this and previous filings.

**(3) Whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility**

The Joint Proposal does not strike the required fair balance among the interests of ratepayers and investors. Instead, it places the entire financial burden of the newly negotiated RSSA on ratepayers. The utility and its shareholders are asked to bear none of the costs, despite having failed to proactively plan for Ginna's predicted retirement, to conduct a clear process for seeking alternatives, or to develop

transmission solutions in a timely manner. As a result, according to the latest data provided by RG&E, the cost to its customers will be approximately \$167 million over the two-year term of the RSSA.<sup>13</sup>

The Joint Proposal does offer a somewhat better deal for consumers than the original proposed RSSA, and we recognize the improvements that resulted from negotiation. For instance, the 2-year term is now better matched to the in-service date for RG&E's planned transmission alternative. Yet, we do not consider this a huge victory for intervening parties because it merely brings the RSSA in line with what should have been proposed in the first place. There was no record or reliability justification to support the initial 3.5-year term. In fact, one could argue there is no reliability argument to support a term beyond October 2016 since the reliability concerns are largely confined to summer peak demand periods.<sup>14</sup>

To the extent that \$110 million of RG&E's hoard of customer credits would be used under the joint proposal to offset the bill impacts of the Joint Proposal, this will provide short-term, though largely illusory, relief for customers. The customer credits belong to ratepayers and the credits used as a result of the Joint Proposal in this case will become unavailable for use in future cases. This means the rate impact of this case will merely be deferred and absorbed in the future by customers, while RG&E shareholders absorb no costs.

RG&E did know about predictions in early 2013 that Ginna might retire and the utility had the opportunity to prepare better for Ginna's potential closure. But it chose not to.<sup>15</sup> In our view, RG&E's negligence in this regard rises to the level of imprudence and therefore it is not in the public interest to place the costs of that lack of preparation entirely on ratepayers.

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<sup>13</sup> RG&E response to AGREE-36. [www.allianceforagreenecconomy.org/sites/default/files/GNP-15-205-AGREE-36.pdf](http://www.allianceforagreenecconomy.org/sites/default/files/GNP-15-205-AGREE-36.pdf) and [www.allianceforagreenecconomy.org/sites/default/files/GNP-15-205-AGREE-31-Attachment-1.xlsx](http://www.allianceforagreenecconomy.org/sites/default/files/GNP-15-205-AGREE-31-Attachment-1.xlsx)

It should be noted here that the preliminary cost estimate from RG&E for the initially proposed 3.5-year term of the RSSA was \$175.4 million. Now, despite the Joint Proposal cutting off 1.5 years from the term, the costs are still nearly the same for a much shorter term. On a monthly basis this amounts to \$4.18 million per month for the 3.5 year term and \$6.96 million per month for the 2-year term. The increase in estimated cost can largely be attributed to lower market rate projections.

<sup>14</sup> RG&E response to discovery GNP-15-074. (Entergy 3)

[http://www.allianceforagreenecconomy.org/sites/default/files/Ginna\\_discovery/GNP-15-074-Entergy-3.pdf](http://www.allianceforagreenecconomy.org/sites/default/files/Ginna_discovery/GNP-15-074-Entergy-3.pdf)

RG&E response to discovery GNP-15-009. (MI-9)

[http://www.allianceforagreenecconomy.org/sites/default/files/Ginna\\_discovery/GNP-15-009-MI-9.pdf](http://www.allianceforagreenecconomy.org/sites/default/files/Ginna_discovery/GNP-15-009-MI-9.pdf)

<sup>15</sup> RG&E response to discovery GNP-15-004 (MI-4)

[www.allianceforagreenecconomy.org/sites/default/files/Ginna\\_discovery/GNP-15-004-MI-4.pdf](http://www.allianceforagreenecconomy.org/sites/default/files/Ginna_discovery/GNP-15-004-MI-4.pdf)

Furthermore, the Joint Proposal provides for a possibility that a new RSSA or a Reliability Must Run (“RMR”) contract could be negotiated with Ginna if the GRTA or other alternatives are not put into place before the 2017 peak summer season, and the entire burden for such an RSSA or RMR would be again put onto ratepayers. The prospect that ratepayers could have to pay to refuel Ginna again in 2017 is unacceptable. While the reliability need in that event would likely be for only a few months until RG&E finishes the GRTA, the nature of the nuclear fuel cycle would mean that the expense could be enormous. Ginna could argue that even if it’s asked to run for a few months, that it is entitled to cost recovery for the entire fuel cycle of 1.5 years. If a new RSSA were approved at the same cost as the RSSA in the Joint Proposal, the result would be a cost of approximately \$125 million just to fill a few hours’ need during the summer of 2017.

We are already concerned by the Request for Proposals (“RFP”) issued by RG&E as a result of the Joint Proposal, which repeats many of the same mistakes we saw with the first RFP in this case. In the RFP, RG&E again provides very little detail for potential bidders, uses demand figures that are not fully supported and seem unjustified, and designed to line up Ginna as the only option.

There is absolutely no excuse for RG&E to need another contract with Ginna in 2017, given how much warning the company has had that Ginna might retire. At some point, the burden of cost must shift to RG&E for its failure to implement a transmission solution, pursue demand reductions, or find less costly alternatives. We believe that time has long past, but we think that at the least, RG&E should pay in 2017 if Ginna is awarded another contract. Such a contract should come at RG&E’s expense, not at the expense of ratepayers. Yet the Joint Proposal does not place even one cent of the financial burden of an extension on RG&E where it belongs.

The Joint Proposal does set up reporting requirements for RG&E to report progress of the GRTA to Department of Public Service Staff and other parties.<sup>16</sup> We support this requirement, but we note that it fails to require that RG&E commit to a timeline for completing various components of the GRTA or completing the GRTA as a whole on time to avoid another RSSA. In our perspective, this is a mistake and puts consumers at risk. So far, RG&E has not even provided detailed engineering work related to the

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<sup>16</sup> Joint Proposal. Pg. 18

GRTA. The settlement itself does not require that this work be completed by a specific date—only that the reliability study be updated within 15 days of the completion of the engineering work.

#### **(4) The existence of a rational basis for decision**

We believe it is incumbent upon the parties who have submitted and signed the Joint Proposal to provide a rational basis for its adoption by the Commission. The settling parties have not yet offered any testimony or evidence as to the rational basis for their proposal.

#### **(5) The completeness of the record**

The docket in this case is largely devoid of evidence to date, though the proceeding has now been ongoing for more than a year. The utility has opposed efforts to develop the record around all the related issues in this case and has avoided placing onto the record much justification for its position in the case or details about its proposed transmission alternative, the GRTA. It is clear that the Commission in its November 2014 ruling expected that more analysis would be prepared by RG&E and submitted for the case.

Though the parties have engaged in extensive discovery, very little of the information and evidence developed through discovery has yet to be placed into the public record. The original process under which parties were preparing expert testimony and exhibits for the record was upended by settlement negotiations.

Without a complete record it will be hard for the Commission to approve the Joint Proposal and for the public to be assured that the outcome in the case is truly in their interest. The Settlement Guidelines state that “the less developed the record, the greater the burden on the settlement's proponents to show that the result compares favorably to the likely result of full litigation.” Therefore, we look forward to the settling parties either developing the record more completely or thoroughly explaining how the settlement compares to the litigation outcomes in this case.

**(6) Whether the settlement is contested.**

As we have outlined in our opposition above, the Joint Proposal is clearly contested by at least two parties in this case.

**Conclusion**

For the reasons stated above, AGREE and CEC oppose the proposed Joint Settlement. Though the Joint Settlement represents an improvement over the originally proposed RSSA, we do not believe these improvements go far enough to address the major public interest concerns in this case.