

November 19, 2015

**VIA ELECTRONIC FILING**

Hon. Kathleen H. Burgess  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

Re: 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

Dear Secretary Burgess:

Attached for filing in the above-referenced proceeding is the Statement of Multiple  
Intervenors in Support of Joint Proposal. Copies of the attached Statement are being served  
herewith on the active parties to this proceeding.

Respectfully submitted,

COUCH WHITE, LLP

*Michael B. Mager*

Michael B. Mager

MBM/dap  
Attachment

cc: Judge Sean Mullany (via E-Mail; w/att.)  
Active Parties (via E-Mail; w/att.)

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**STATE OF NEW YORK  
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**

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**Case 14-E-0270**

**STATEMENT OF MULTIPLE INTERVENORS  
IN SUPPORT OF JOINT PROPOSAL**

**Dated: November 19, 2015**

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## PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the Rochester Gas and Electric Corporation (“RG&E”) service territory, hereby submits its Statement in Support of the Joint Proposal that was filed with the New York State Public Service Commission (“Commission”) on October 21, 2015, in Case 14-E-0270.<sup>1</sup> The Joint Proposal was executed by RG&E, R.E. Ginna Nuclear Power Plant, LLC (“Ginna”), Department of Public Service Staff (“Staff”), the Department of State’s Utility Intervention Unit (“UIU”), and Multiple Intervenors (collectively, the “Signatory Parties”).<sup>2</sup>

Multiple Intervenors’ Statement in Support is submitted in accordance with the *Ruling on Revised Schedule* and the *Ruling Adopting Revised Schedule* issued herein on September 9 and November 3, 2015, respectively. For the reasons set forth herein, Multiple Intervenors urges the Commission to adopt the Joint Proposal without modification.

This proceeding pertains to the execution and the implementation of, and cost recovery and ratemaking treatment associated with, a Reliability Support Services Agreement (“RSSA”) between RG&E and Ginna, owner of the R.E. Ginna Nuclear Power Plant (the “Facility”). The RSSA originally was entered into by RG&E and Ginna on or about February 13,

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<sup>1</sup> 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*.

<sup>2</sup> On October 21, 2015, a Settlement Agreement and Offer of Settlement (“Settlement Agreement”) was filed with the Federal Energy Regulatory Commission (“FERC”) in a docket addressing similar issues as this proceeding. Docket No. ER15-1047-000, *R.E. Ginna Nuclear Power Plant, LLC*. The signatories to the Settlement Agreement are RG&E, Ginna, the Commission, UIU, and Multiple Intervenors. The Joint Proposal and the Settlement Agreement essentially reflect the same, comprehensive resolution of the Commission and FERC proceedings.

2015 (hereinafter, the “Original RSSA”). Multiple Intervenors opposed the Original RSSA on numerous grounds.<sup>3</sup> The RSSA subsequently was revised a number of times, the last being on October 20, 2015, which version reflects the Signatory Parties’ negotiated, comprehensive resolution of the outstanding issues (hereinafter, the “Revised RSSA”).<sup>4</sup>

Multiple Intervenors will not attempt to summarize in this Statement the entire Revised RSSA, or all of the revisions to the Original RSSA that were negotiated by the Signatory Parties. Multiple Intervenors anticipates that RG&E, Ginna and/or Staff may include such summaries in their respective statements in support. Instead, Multiple Intervenors focuses here on the most important modifications to the Original RSSA from its perspective, which modifications ultimately led to Multiple Intervenors’ decision to execute and support the Joint Proposal.

In evaluating the Joint Proposal, the Commission should consider, *inter alia*, the fact that it represents a negotiated, comprehensive resolution of the outstanding issues by parties with very diverse – and often adverse – interests. For instance, the Signatory Parties include the utility (*i.e.*, RG&E), the owner of the Facility in question (*i.e.*, Ginna), Staff, the State’s representative of residential and small commercial customers (*i.e.*, UIU), and a representative of large industrial, commercial and institutional customers (*i.e.*, Multiple Intervenors).

Additionally, it is Multiple Intervenors’ understanding that several other parties active in this proceeding do not oppose the Joint Proposal. Those non-opposing parties include,

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<sup>3</sup> See, e.g., Case 14-E-0270, *supra*, Issues Statement of Multiple Intervenors (dated April 22, 2015) (hereinafter, “MI Issues Statement”).

<sup>4</sup> The Revised RSSA, entered into by RG&E and Ginna as of October 20, 2015, but effective as of February 13, 2015, is annexed to the Joint Proposal as Attachment A thereto. A red-lined version of the Revised RSSA, highlighting the modifications made to the Initial RSSA, is annexed to the Joint Proposal as Attachment B thereto.

upon information and belief, the Entergy Entities, FirstEnergy Solutions Corp. (“FirstEnergy”), and the NRG Companies.<sup>5</sup> To Multiple Intervenors’ knowledge, the only parties that may oppose the Joint Proposal are Alliance for a Green Economy (“AGREE”) and Citizens’ Environmental Coalition (“CEC”), and their opposition may be limited in scope.<sup>6</sup>

Multiple Intervenors’ Statement in Support is organized into two points. In Point I, Multiple Intervenors explains why the Joint Proposal is in the public interest and should be adopted in this proceeding. In Point II, Multiple Intervenors explains why the Joint Proposal satisfies – and is consistent with – the Commission’s Settlement Guidelines.<sup>7</sup>

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<sup>5</sup> For purposes of this proceeding, (i) the Entergy Entities are comprised of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc., and (ii) the NRG Companies are comprised of NRG Marketing LLC, GenOn Energy Management, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, NRG Bowline LLC and Oswego Harbor Power LLC, Energy Curtailment Specialists, Inc., Energy Plus Holdings, LLC, Green Mountain Energy Company, and Reliant Energy Northeast, LLC. *See, e.g.,* Case 14-E-0270, *supra*, *Response of the Entergy Entities to Rochester Gas & Electric Corporation’s Interlocutory Appeal of Ruling on Scope of Issues for Hearing* (dated June 8, 2015) at 2, n.7 (describing the Entergy Entities), and *Response of the NRG Companies to Motion of New York State Department of Public Service Staff’s Motion for Reconsideration and to Revoke Party Status* (dated May 14, 2015) at 1, n.11 (describing the NRG Companies).

<sup>6</sup> Throughout this proceeding, AGREE and CEC have acted jointly as a single entity. *See, e.g.,* Case 14-E-0270, *supra*, *Alliance for a Green Economy (AGREE) and Citizens’ Environmental Coalition (CEC) Comments on Proposal for Possible Consolidation of Ginna Case with RG & E Rate Case* (dated July 17, 2015), *Interlocutory Appeal of Ruling on Scope of Issues for Hearing by Alliance for a Green Economy and Citizens’ Environmental Coalition* (dated May 29, 2015), and *Joint Motion Response* (dated May 14, 2015).

<sup>7</sup> *See* Cases 90-M-0255, *Proceeding on Motion of the Commission Concerning its Procedures for Settlement and Stipulation Agreements*, filed in C 11175, and 92-M-0138, *In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR, Chapter I, Rules of Procedure – Proposed Amendments to Subchapter A, General, Part 2, Hearings and Rehearings by the Addition of a New Section 2.6, Settlement Procedures*, filed in C 11175, Opinion No. 92-2, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines (issued March 24, 1992).

## ARGUMENT

### POINT I

#### **THE JOINT PROPOSAL IS IN THE PUBLIC INTEREST AND SHOULD BE ADOPTED IN THIS PROCEEDING**

On April 22, 2015, Multiple Intervenors filed the MI Issues Statement in this proceeding. The MI Issues Statement identified and described many of Multiple Intervenors' issues and concerns with respect to the Original RSSA that was filed with the Commission on February 13, 2015. The Joint Proposal, coupled with the Revised RSSA dated October 20, 2015, reflect a comprehensive, negotiated resolution of the issues in this proceeding (and the related FERC docket) that addresses many of Multiple Intervenors' issues and concerns in an acceptable manner. Multiple Intervenors contends that the Joint Proposal is in the public interest and, therefore, it should be adopted without modification in this proceeding.<sup>8</sup>

Rather than detailing every provision of the Joint Proposal and/or the Revised RSSA, Multiple Intervenors focuses here on the negotiated resolution of issues that convinced it to execute and support the Joint Proposal. In Multiple Intervenors' opinion, each provision described below improves materially upon a less favorable treatment contained in the Original

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<sup>8</sup> This is not to suggest that Multiple Intervenors considers the Joint Proposal to be especially favorable to customers, either large or small. For instance, if the Joint Proposal is adopted as advocated by Multiple Intervenors, RG&E's customers still would be required to pay a staggering amount of money (via surcharges and the use of existing customer credits) in out-of-market payments to Ginna to continue operating the Facility in the near-term. Rather, Multiple Intervenors considers the Joint Proposal to represent the most equitable outcome achievable in settlement negotiations under the circumstances presented. Those circumstances – which include (i) the Commission's unfortunate decision to direct RG&E to negotiate an RSSA with Ginna notwithstanding the absence of a formal, written retirement notice pertaining to the Facility, and (ii) the decision by RG&E and Ginna to negotiate the Original RSSA without any customer participation or input – created a situation whereby customer representatives such as the UIU and Multiple Intervenors were placed at a material disadvantage from the very beginning.

RSSA. Collectively, these more equitable provisions rendered the Joint Proposal, and the Revised RSSA, acceptable to Multiple Intervenors under the circumstances presented.

**A. The Term**

For Multiple Intervenors, one of the biggest issues and concerns related to the Original RSSA was its proposed term, which ran from April 1, 2015 through September 30, 2018 – a period of 42 months. (Original RSSA at § 2.2(a).)<sup>9</sup> In contrast, the term of the Revised RSSA is scheduled to run from April 1, 2015 through March 31, 2017 – a period of 24 months. (Revised RSSA at § 2.2(a).) Multiple Intervenors contends that the shortened duration of the Revised RSSA represents a material improvement over the Original RSSA.

The Commission ruled previously that Ginna was entitled to an RSSA because its threatened retirement of the Facility would have triggered a reliability problem within RG&E's service territory.<sup>10</sup> RG&E's proposed solution to that potential reliability problem is a multi-part transmission project referred to as the Ginna Retirement Transmission Alternative ("GRTA"). Importantly, earlier in this proceeding, RG&E indicated that the expected in-service date for the GRTA is between December 2016 and June 2017. (RG&E Response to Multiple Intervenors Information Request No. 5.) Given that schedule, it appeared that the term proposed in the Original RSSA (running through September 30, 2018) was grossly excessive and would have subjected RG&E and its customers to unnecessary costs.<sup>11</sup>

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<sup>9</sup> See Case 14-E-0270, *supra*, MI Issues Statement at 8-9.

<sup>10</sup> Case 14-E-0270, *supra*, Order Directing Negotiation of a Reliability Support Services Agreement and Making Related Findings (issued November 14, 2014) (hereinafter, "RSSA Order") at 15.

<sup>11</sup> There also is evidence that the reliability problem related to the threatened retirement of Ginna exists only when RG&E's system demand exceeds 1,430 MW. (RG&E Response to Entergy Entities Information Request No. 3.) That threshold historically only has been exceeded

In contrast, the term of the Revised RSSA is much more appropriate, and better reflects the planned completion of the GRTA. This is important for two reasons. First, the duration of out-of-market payments being forced onto the backs of RG&E's customers is reduced. Second, to the extent the Revised RSSA impacts the State's wholesale electricity markets, the duration of such impacts would be less than those potentially stemming from the Original RSSA.

Multiple Intervenors also notes that the Joint Proposal contains provisions that, *inter alia*, require (i) RG&E to conduct an updated reliability study taking the GRTA into account (Joint Proposal at § 4.1.1), (ii) RG&E to solicit proposals to provide additional reliability support services in the event a reliability need exists after March 31, 2017 (*e.g.*, if the GRTA is not completed on schedule) (*id.* at § 4.1.2), (iii) Ginna to participate in such solicitation (*id.* at § 4.1.3), (iv) RG&E to use commercially reasonable efforts to construct and place the GRTA in-service as soon as practicable (*id.* at § 4.1.4), and (v) RG&E to comply with numerous reporting requirements as to the status of the GRTA (*id.* at § 4.1.6). Thus, there are ample protections to ensure that reliability will be maintained, even if RG&E fails to complete the GRTA on schedule.<sup>12</sup>

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during summer months. (*Id.*) Additionally, there is the possibility – if not the likelihood – that the reliability problem also can be averted when some, but not all, of the GRTA has been placed into service. (*See generally id.*) These factors also contributed to contentions by Multiple Intervenors and other parties that the proposed term of the Original RSSA was grossly excessive.

<sup>12</sup> With respect to this last point, Multiple Intervenors notes that although the numerous integrated compromises and concessions that form the Joint Proposal resolve certain issues with respect to RG&E's prudence, such resolution does not include RG&E's actions and omissions related to the development and the installation of the GRTA subsequent to the Commission's issuance of the RSSA Order. (*Id.* at 3.1.2.) Thus, should RG&E fail to complete the GRTA on schedule, resulting in the incurrence of additional costs above and beyond those anticipated by the Revised RSSA, other Signatory Parties would not be precluded from pursuing imprudence claims against the utility.

## **B. The Cost**

Earlier in this proceeding, Multiple Intervenors raised numerous concerns regarding the proposed cost of the Original RSSA.<sup>13</sup> In comparison to the Original RSSA, the cost of the Revised RSSA should be considerably less, thereby representing a material improvement.<sup>14</sup>

Pursuant to the Original RSSA, RG&E was required to make fixed monthly payments to Ginna of \$17,504,118.25 during the term, with those payments being offset by RG&E's share of 85% of the Energy Revenues and Capacity Revenues and 100% of the Ancillary Services Revenues realized by the Facility. (*See* Original RSSA at §§ 1.1(e), 1.1(ff), 3.2.) In contrast, the Revised RSSA requires RG&E to make fixed monthly payments to Ginna of \$15,420,000.00 during the term, with those payments being offset by RG&E's share of 70% of the Energy Revenues and Capacity Revenues and 100% of the Ancillary Services Revenues realized by the Facility. (*See* Revised RSSA at §§ 1.1(e), 1.1(hh), 3.2.) In Multiple Intervenors' opinion, the payment terms contained in the Revised RSSA are preferable to those in the Original RSSA in two material respects.

First, although the cost of the Revised RSSA is not believed to differ materially from that of the Original RSSA on a monthly basis, the total cost to customers should be considerably less, due primarily to the shortened duration of the term. For instance, the Original RSSA called for fixed monthly payments of \$735,172,966.50 (*i.e.*, \$17,504,118.25 per month x

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<sup>13</sup> *See* Case 14-E-0270, *supra*, MI Issues Statement at 12-14.

<sup>14</sup> Multiple Intervenors cautions, however, that the Revised RSSA still is expected to be very expensive for RG&E's customers. Thus, while Multiple Intervenors contends that the Joint Proposal and the Revised RSSA are in the public interest under the circumstances presented and should be adopted without modification in this proceeding, there is no cause for celebration.

42 months), while the Revised RSSA calls for fixed monthly payments of \$370,080,000 (*i.e.*, \$15,420,000 per month x 24 months) – a reduction of almost 50%.<sup>15</sup>

Second, the payment structure of the Revised RSSA allocates additional market price risk to Ginna, which Multiple Intervenors considers appropriate under the circumstances. As described above, compared to the Original RSSA, the Revised RSSA provides for reduced fixed monthly payments (*i.e.*, \$15,420,000 versus \$17,504,118.25) in exchange for a larger share of wholesale market revenues (30% of Energy Revenues and Capacity Revenues versus 15% of Energy Revenues and Capacity Revenues). The net effect of these revisions is to shift a modest amount of the market price risk back to Ginna and away from customers. Inasmuch as Ginna chose to expose itself to such risk when it purchased the Facility from RG&E roughly a decade ago, Multiple Intervenors contends that it is appropriate for Ginna to continue to bear at least some material portion of said risk under an RSSA (as opposed to customers bearing all or almost all of such risk). Moreover, because Ginna now would be authorized to retain 30% of Energy Revenues and Capacity Revenues, as opposed to 15% of such revenues, it should possess an even stronger incentive to ensure that the Facility continues to operate reliably during the term of the Revised RSSA, thereby maximizing market revenues which not only redound to Ginna's benefit, but also act as an offset against fixed monthly payments.

Thus, Multiple Intervenors considers the payment terms of the Revised RSSA to represent a material improvement compared to similar terms that were included in the Original RSSA.

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<sup>15</sup> Multiple Intervenors recognizes that the total compensation paid to Ginna is subject to a Settlement Cap Amount and Settlement Floor Amount. (Revised RSSA at § 4.3.) Multiple Intervenors interprets these provisions of the Revised RSSA to be necessary to ensure that the Revised RSSA provides revenues to Ginna that are at least equal to its going forward costs, but no greater than its full cost of service, with respect to the continued operation of the Facility.

### C. Customer Rate Impacts

Previously in this proceeding, Multiple Intervenors raised numerous concerns regarding the exorbitant customer rate impacts that would result from the Original RSSA and RG&E's cost recovery proposal associated therewith.<sup>16</sup> For instance, based on RG&E's initial projections, S.C. 8 customers were facing immediate 2015 delivery rate impacts ranging from 23.1% to 50.5%, with even higher potential impacts for certain standby service customers whose otherwise applicable service classification is S.C. 8.<sup>17</sup> Because those rate impacts were based on RG&E's prior market price projections, they almost certainly understate the actual rate impacts confronted by customers.<sup>18</sup> Moreover, notwithstanding the fact that RG&E is in possession of more than \$155 million of customer funds that are being held solely for the benefit of electric customers, the utility proposed to utilize exactly zero dollars of that amount to moderate customer rate impacts associated with the Original RSSA. (*See* RG&E Responses to Multiple Intervenors Information Request Nos. 39-41 and Staff Information Request No. 1.)

The Joint Proposal addresses Multiple Intervenors' concerns regarding customer rate impacts in a satisfactory manner. Pursuant to the Joint Proposal, deferred customer credits shall be used to offset: (a) all amounts due under the Revised RSSA dating back to April 1, 2015; and (b) prospective amounts due under the Revised RSSA that exceed \$2.25 million per month.

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<sup>16</sup> *See, e.g.*, Case 14-E-0270, *supra*, MI Issues Statement at 5-6, 16-17.

<sup>17</sup> *Id.* at 5-6; *see also* RG&E Response to Multiple Intervenors Information Request Nos. 35 and 36 (Attachment 2 at 7-12).

<sup>18</sup> RG&E's market price projections were made prior to the proposed April 1, 2015 effective date of the Original RSSA (and the Revised RSSA). Since that time, actual wholesale energy prices have been less than anticipated, which has the effect of increasing the total cost of the RSSA and the associated rate impacts (*i.e.*, because the wholesale market revenues that are used to offset the fixed monthly payments are less).

(Joint Proposal at § 3.2.2.) The use of deferred credits in this manner would be capped at \$110 million, and Signatory Parties would be precluded from advocating that more than \$10 million in remaining credits be used during the first rate year of RG&E's pending electric rate proceeding. (*Id.*)<sup>19</sup>

Multiple Intervenors contends that this represents a reasonable resolution of issues pertaining to the use of customer funds to moderate RSSA costs. The need for RG&E to enter into an RSSA with Ginna is an extraordinary, one-time event, and, therefore, it is appropriate to utilize one-time customer credits to moderate the associated rate impacts on customers. Moreover, given the magnitude of the rate impacts projected in this proceeding, it is necessary and appropriate to utilize a material portion of the available customer funds for moderation purposes. In response to cash flow and related concerns by RG&E (*see* RG&E Response to Staff Information Request No. 1), the use of customer funds is capped, as is the ability of the Signatory Parties to advocate for their use during the first rate year addressed in the utility's pending electric rate proceeding.<sup>20</sup> Given all of the relevant considerations, Multiple Intervenors believes the targeted \$2.5 million per month cap on customer rate impacts associated with the Revised RSSA is reasonable.<sup>21</sup>

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<sup>19</sup> *See generally* Case 15-E-0285, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service*.

<sup>20</sup> The aforementioned \$10 million constraint does not apply to RG&E's electric rate proceeding beyond the first rate year, or its pending gas rate proceeding. *See generally* Case 15-G-0286, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Gas Service*.

<sup>21</sup> In evaluating these provisions, the Commission should recognize that while they clearly are in the public interest, the resolution of customer rate impact concerns also is no cause for celebration. A large amount of customer funds that otherwise would be available to moderate future rate impacts would be utilized here to address an extraordinary and exorbitant cost. RG&E's customers essentially would be paying themselves, and still would bear 100% of the costs of the Revised RSSA. From Multiple Intervenors' perspective, the Signatory Parties have succeeded in

Accordingly, the provisions of the Joint Proposal pertaining to the use of deferred customer funds to moderate costs associated with the Revised RSSA should be adopted without modification.

**D. Capital Recovery Balance**

The Original RSSA provided that if the Facility delivered energy to the NYISO's transmission system or makes available capacity to the NYISO's markets after 75 days following the end of its term, Ginna would be required to pay RG&E the Capital Recovery Balance, as quantified therein. (Original RSSA at § 4.3 and Exhibit 5.) Depending on the amount, the Capital Recovery Balance would have been paid in installments over 24 or 28 quarters (*i.e.*, 6-7 years). (Original RSSA at § 4.3.)

The Capital Recovery Balance is a very important component of the Original RSSA and the Revised RSSA that serves two primary purposes. First, an RSSA purportedly is necessary in this instance because Ginna threatened to retire the Facility and the Commission found such threat to be credible. The fixed monthly payments reflect (*i.e.*, include unspecified funds for) all capital expenditures needed to operate the Facility. (*See, e.g., id.* at § 4.2.) Thus, if, *arguendo*, Ginna elects to continue operating the Facility following expiration of the RSSA, it should – and equity would dictate that it – reimburse RG&E for payments made toward capital expenditures that, given the decision to continue operating the Facility, should be the responsibility of Ginna, not RG&E.

Second, payment of the Capital Recovery Balance serves as a critical anti-toggling mechanism. RSSAs call for out-of-market payments, and are indicative of a market failure.

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transforming a disastrous and wholly untenable situation into one that marginally is acceptable under the circumstances presented.

RSSAs only should be utilized where (i) a merchant generator makes a definitive decision to deactivate (*i.e.*, retire or mothball) and provides adequate notice of such decision, (ii) the continued operation of the facility in question is needed to maintain system reliability, and (iii) there are no solutions to the reliability problem(s) caused by the facility's planned deactivation within the relevant notice period. Generators should not be allowed or encouraged to feign a planned deactivation to procure a customer-subsidized RSSA when market revenues are comparatively low, and then "toggle" back to merchant service when market revenues improve.

In requiring the NYISO to establish Reliability Must Run ("RMR") tariff provisions, FERC directed the NYISO to include proposed rules that address this "toggling" issue:

NYISO's proposal should also include rules to eliminate, or at least minimize, incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same units. The Commission appreciates that uneconomic units could become economic for a number of reasons, including changing market conditions and the need for and timing of capital investments. However, the Commission is concerned that any proposed provisions not provide an incentive for a generation resource to propose to deactivate earlier than it otherwise would have in expectation of being needed for reliability and, therefore, be able to receive more revenues under an RMR service agreement than by remaining in the market.<sup>22</sup>

The Revised RSSA improves upon the adequacy of the anti-toggling incentive contained within the Capital Recovery Balance provisions. Subject to possible adjustment, the Capital Recovery Balance reflected in the Revised RSSA is \$20,140,090.97. (Revised RSSA at § 2.4.1.) That is the same amount provided for in the Original RSSA, were that Agreement to have expired or terminated in March 2017 (*i.e.*, the termination date of the Revised RSSA). (*See*

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<sup>22</sup> Docket No. EL15-37-000, *New York Independent System Operator, Inc.*, 150 FERC ¶ 61,116, Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions (issued February 19, 2015) at ¶ 21.

Original RSSA at Exhibit 5.) Importantly, however, unlike the 6-7 year payment period provided for in the Original RSSA, the Revised RSSA requires that Ginna pay the Capital Recovery Balance to RG&E, if triggered, within two years. (Revised RSSA at § 2.4.1.)

The change in the payment period for the Capital Recovery Balance is a material improvement of the Revised RSSA compared to the Original RSSA. In Multiple Intervenors' opinion, according Ginna between six and seven years to pay the Capital Recovery Balance to RG&E would have been excessive, and provided an inadequate incentive against toggling. Reducing that payment period to two years is far more appropriate under the circumstances.

For the foregoing reasons, the Joint Proposal is in the public interest and should be adopted, without modification, in this proceeding.

## **POINT II**

### **THE JOINT PROPOSAL SATISFIES – AND IS CONSISTENT WITH – THE COMMISSION'S SETTLEMENT GUIDELINES**

In addition to being in the public interest (*see* Point I, *supra*), the Joint Proposal satisfies – and is consistent with – the Commission's Settlement Guidelines. Accordingly, the Joint Proposal should be adopted, without modification, in this proceeding.

The Commission previously has determined that in evaluating settlements such as the Joint Proposal, it will consider the following factors:

- (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;
- (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.<sup>23</sup>

Each of these factors is satisfied here, as detailed below.

Initially, the Joint Proposal is consistent “with law and with the regulatory, economic, social, and environmental policies of the Commission and the State.” The Commission previously directed RG&E to negotiate an RSSA with Ginna – over the opposition of Multiple Intervenors and other parties – and the Revised RSSA satisfies that Commission directive. It also promotes the economic policies of the Commission and the State – given the circumstances presented – by reducing costs to customers, and the associated rate impacts, as compared to the Original RSSA. Compared to the Original RSSA, the Revised RSSA also is less intrusive on the State’s wholesale competitive markets by (i) utilizing a term that is shorter in duration and better aligned with the reliability need being addressed, and (ii) allocating additional market price risk to the Facility’s owner. Multiple Intervenors does not believe that the Revised RSSA impacts social policies. It arguably does further environmental policies by utilizing a shorter term that should allow Ginna to retire the Facility much earlier than likely would have been the case under the Original RSSA.<sup>24</sup>

Multiple Intervenors contends that the Joint Proposal, incorporating the Revised RSSA, “compares favorably with the likely result of full litigation and is within the range of

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<sup>23</sup> Cases 90-M-0255 and 92-M-0138, *supra*, Opinion No. 92-2 at 30.

<sup>24</sup> As detailed, *supra*, the term of the Revised RSSA is 24 months, as compared to the 42-month term of the Original RSSA. While the Original RSSA did allow for an early termination by RG&E, such election was subject to (i) a settlement payment potentially as large as \$55.2 million and (ii) a 12-month notice requirement (which may have caused RG&E to allow the full term of the Original RSSA to run, or exercise the early termination option materially later than the scheduled March 31, 2017 end date of the Revised RSSA). (*See* Original RSSA at § 2.2(c) and Exhibit 1.)

reasonable outcomes.” Absent the Joint Proposal, Multiple Intervenors and other parties would have continued to challenge the Original RSSA and RG&E’s proposed implementation of same in numerous respects.<sup>25</sup> The Revised RSSA reflects movement, and compromise, on many of the key issues in the proceeding. While it is impossible to predict with accuracy how the Commission might have resolved the numerous issues in dispute had the Joint Proposal not been negotiated, Multiple Intervenors contends that the Joint Proposal is well within a range of reasonable outcomes given the circumstances presented.

The Joint Proposal also “strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility.” Satisfaction of this factor is evidenced by the composition of the Signatory Parties. For instance, in addition to Ginna, RG&E is supporting the Joint Proposal. Thus, RG&E obviously has determined that the Joint Proposal constitutes a satisfactory outcome for “investors and the long-term soundness of the utility.” Such determination also is bolstered by the fact that customers are bearing the full costs of the Revised RSSA, notwithstanding arguments that could be advanced in support of some level of cost sharing by the utility. Additionally, given the circumstances presented, the Joint Proposal also appears fair to ratepayers, as reflected by the decisions of Staff, UIU and Multiple Intervenors to support the settlement. As detailed above, compared to the Original RSSA, the Revised RSSA should be less costly to customers, less intrusive to the State’s wholesale electricity markets, and the Joint

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<sup>25</sup> Such challenges would have addressed, *inter alia*, (i) the term, particularly in relation to the schedule for the GRTA, (ii) the magnitude of fixed monthly payments, (iii) the lack of market price risk being borne by Ginna, (iv) other cost provisions, such as the proposed Settlement Payment and Capital Recovery Balance (including the amount of time allotted to Ginna to pay the latter were it to return to merchant status), (v) RG&E’s position that none of the more than \$155 million in customer credits be utilized to moderate customer rate impacts, and (vi) RG&E’s prudence (or lack thereof) in planning its electric system and the time required to design and commence development of the GRTA. *See generally* MI Issues Statement.

Proposal also provides for the use of \$110 million in customer credits to moderate rate impacts. Given the circumstances presented, including the Commission's unfortunate decision to require RG&E to negotiate an RSSA with Ginna in the absence of any formal retirement notice, the Joint Proposal strikes a fair balance among the interests of Ginna, RG&E and customers.<sup>26</sup>

There also is a "rational basis for [the] decision" to adopt the Joint Proposal in this proceeding. There has been considerable activity in this proceeding. In addition to the filing of issues statements and various motions and interlocutory appeals, there has been considerable discovery undertaken by all parties, not merely the Signatory Parties. That discovery, and the development of litigation positions by individual parties, informed the settlement negotiations, which were quite extensive. The Commission previously directed RG&E to negotiate an RSSA with Ginna to ensure that the Facility would remain available in light of a concern that its planned retirement would create a reliability problem. The Joint Proposal preserves this outcome, via the Revised RSSA, and improves upon the Original RSSA in numerous respects that benefit customers and the public interest (*e.g.*, utilizing a more appropriate term that is consistent with the schedule for the GRTA, reducing costs to customers, moderating customer rate impacts through the use of existing credits). Thus, to the extent the Commission possessed a rational basis for directing RG&E to negotiate an RSSA with Ginna, the Joint Proposal preserves and improves upon that outcome in a manner consistent with the public interest.

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<sup>26</sup> In Opinion No. 92-2, the Commission indicated that in evaluating a settlement, it "shall give weight to the fact that a settlement reflects the agreement by normally adversarial parties." Cases 90-M-0255 and 92-M-0138, *supra*, Opinion No. 92-2, Appendix B, Procedural Guidelines for Settlements (1992) at 8. In terms of the Joint Proposal and the Revised RSSA, Ginna and RG&E arguably are adversarial parties to each other, and the parties representing consumer interests – *e.g.*, UIU and Multiple Intervenors – all possess interests that are adversarial to those of Ginna and RG&E in this proceeding.

The factor pertaining to the “completeness of the record” also is satisfied here. As discussed in the preceding paragraph, parties have filed numerous pleadings in this proceeding (as well as the companion FERC proceeding) and also have engaged in extensive discovery and settlement negotiations. The parties’ litigation positions and discovery informed the settlement negotiations and contributed to the development of the Joint Proposal and the Revised RSSA. In addition, the record still is being supplemented by procedures adopted subsequent to the Signatory Parties’ agreement, such as (i) the filing of statements in support of and opposition to the Joint Proposal, (ii) the scheduled evidentiary hearing, and (iii) the possible submission of post-hearing briefs. Thus, at the conclusion of such procedures, there should be no serious doubt that the Commission will possess a complete record upon which to rule on the Joint Proposal.

The final factor to be considered here is “whether the settlement is contested.” With respect to that factor, it appears that: (a) the Joint Proposal is actively supported by the Signatory Parties, comprised of the generator and the utility in question, Staff, and representatives of residential and small non-residential customers (*i.e.*, the UIU) and large non-residential customers (*i.e.*, Multiple Intervenors), (b) there are several active parties, representing generation owners other than Ginna (*e.g.*, the Entergy Entities, FirstEnergy and the NRG Companies), that apparently are not opposed to the Joint Proposal; and (c) there are two parties representing environmental interests (*i.e.*, AGREE and CEC) that have indicated an intent to oppose the Joint Proposal on limited grounds.<sup>27</sup> While all parties should be accorded due process and the opportunity to raise

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<sup>27</sup> In a pleading submitted in the companion FERC docket, AGREE and CEC jointly opposed the Joint Proposal, in part, on the limited ground that the disincentive to prevent “togglng” from the RSSA back to merchant status (*i.e.*, repayment of \$20,140,090.97, as may be adjusted, over a two-year period [Joint Proposal at § 2.4.1]) allegedly is inadequate. *See* Docket No. ER15-1047-000, *R.E. Ginna Nuclear Power Plant, LLC*, Comments Opposing in Part and Seeking Partial Modification of Settlement Agreement (dated November 10, 2015) (submitted jointly by AGREE and CEC).

arguments in opposition to the Joint Proposal – and Multiple Intervenors will refrain from prejudging opposing arguments that have yet to be advanced formally in this proceeding – it does appear that opposition to the Joint Proposal will be limited, both in terms of number of parties and the scope of the opposition. Considering the amounts at stake, and the diverse – and often adverse – interests of the active parties hereto, the relative lack of opposition to the Joint Proposal should be viewed as a strength, not a weakness, of the settlement that was negotiated. Thus, while the Commission should evaluate arguments in support of and in opposition to the Joint Proposal on their merits, the mere fact that the Joint Proposal might not be entirely uncontested should hardly be construed as grounds for declining to adopt it in this proceeding.

For the foregoing reasons, the Joint Proposal satisfies – and is consistent with – the Commission’s Settlement Guidelines.

## CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to adopt the Joint Proposal in its entirety, without modification, in this proceeding. The Joint Proposal is in the public interest and satisfies – and is consistent with – the Commission’s Settlement Guidelines.

Dated: November 19, 2015  
Albany, New York

Respectfully submitted,

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