

August 28, 2014

VIA ELECTRONIC FILING

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 14-E-0270 Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant

Dear Secretary Burgess:

Enclosed for filing with the Public Service Commission, please find the City of New York's Comments on the Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant.

Please contact me if you have any questions.

Respectfully submitted,

COUCH WHITE, LLP

Kevin M. Lang

Kevin M. Lang

KML/srg
Attachment
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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Petition for Initiation of Proceeding to Examine
Proposal for Continued Operation of R.E. Ginna
Nuclear Power Plant**

Case 14-E-0270

COMMENTS OF THE CITY OF NEW YORK

Dated: August 28, 2014

**Couch White, LLP
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Albany, NY 12207**

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition for Initiation of Proceeding to Examine
Proposal for Continued Operation of R.E. Ginna
Nuclear Power Plant

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COMMENTS OF THE CITY OF NEW YORK

INTRODUCTORY STATEMENT

There is a disturbing trend developing in this State regarding reliance on Reliability Support Services Agreements (“RSSA”) with generators that would otherwise retire. The Public Service Commission (“Commission”) has already approved two such agreements, and this proceeding presents a third for consideration. The trade press has observed that other plants may seek similar treatment as well. The City of New York (“City”) respectfully urges the Commission to step back and consider this matter in a broader context before deciding the pending Petition. The Commission should also take action to avoid the need for RSSAs in the future.

In Opinion No. 96-12, the Commission decided to move to a competitive generation regime to, *inter alia*, reduce electricity prices, spur economic development, and foster innovation.¹ Competition was expected to result in older plants retiring and more efficient (economically and environmentally) plants being constructed. More importantly, the move to competition was intended and expected to end vertically integrated utilities relying on captive

¹ Cases 94-E-0952, *et al.*, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996), pp. 25-28.

ratepayers and replace them with privately-owned generating facilities relying on market revenues.

At the same time, the Commission recognized that reliability of the bulk power system remained critically important.² However, investments in transmission facilities have not kept pace with system needs, as discussed in the “New York State Transmission Assessment and Reliability Study: Phase II Study Report” issued by the STARS Technical Working Group on April 30, 2012. As a result, the goals established by the Commission in Opinion No. 96-12 are being frustrated and competitive forces are being supplanted by a return to reliance on captive ratepayers.

The Commission should not allow this trend to continue.

BACKGROUND

In 2005, the Commission established a procedure to consider the implications of a generator that intends to retire or otherwise cease producing electricity.³ The purpose of this procedure is to ensure the continued reliability of the electric system and allow for measures to be undertaken to avoid a reliability problem when the generator retires. The procedure requires formal, written, public notice of the generator’s plans. The market, developers, utilities, customers, and others are all made aware of the plans. Should the utilities and/or New York Independent System Operator, Inc. (“NYISO”) identify a reliability problem arising from the retirement/shutdown, any market participant has the opportunity to offer a solution, and the utilities must address the reliability issue.

² *Id.* at 44-45.

³ Case 05-E-0889, Establishment of Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirement for Generation Unit Retirements (issued December 20, 2005) (“Retirement Notice Order”).

Between 2005 and 2012, retirement notices for more than two dozen individual units were filed. In each case, the unit was allowed to retire or cease operating as planned. Since 2012, however, at least three units have been identified as presenting reliability problems in the event they retire. As noted above, the first two instances resulted in captive ratepayer support for the “merchant” generators. This case presents the third instance.

DISCUSSION

A. Ginna’s Disregard For The Commission’s Established Procedure Is Troubling

The Retirement Notice Order was duly adopted under the Commission’s authority granted by the Public Service Law. Subsequent to its adoption, no generator or other party sought rehearing of the Order or challenged it in Court. As such, it is legally binding.⁴

Pertinent hereto, the Retirement Notice Order unequivocally requires “generators subject to PSL regulation that are sized equal to or greater than 80 MW shall provide written notice of a proposed retirement at least 180 days prior to the time the requirement is effectuated.”⁵ The notice is to be a public document available on the Commission’s web site and distributed to all participants in the New York wholesale electricity markets.⁶

Here, by its own acknowledgement, the owner of the R.E. Ginna Nuclear Power Plant (“Ginna”) failed to follow the specified procedure, and the Petition makes clear that no written notice has been submitted to the Commission’s Secretary. Private discussions with Commissioners and agency staff do not substitute for a formal notice submitted to the Commission’s Secretary, and such private discussions do not provide any notice to the public of

⁴ Public Service Law (“PSL”) §23(1).

⁵ Retirement Notice Order at 15.

⁶ *Id.* at 16.

Ginna's owner's intentions, which is one purpose of the retirement notice.⁷ Moreover, a review of the NYISO's web site reveals nothing regarding Ginna's proposed retirement.⁸

According to the Retirement Notice Order, the provision of formal written notice gives other generators, developers, and interested parties the opportunity to offer solutions to any reliability problems that are identified. Here, the improper process for Ginna is essentially preventing any such opportunity and seeking to restrict the solution only to an RSSA.

Recently, Multiple Intervenors filed a motion to dismiss this proceeding, in part for failure to comply with the Commission's established procedure.⁹ In response, Ginna's owner reaffirmed that it failed to follow that procedure. It then attempted to argue that (i) the Retirement Notice Order is a non-binding policy statement; (ii) because the Order's requirements were not contained within a statute or formal regulation, it apparently was not required to comply with the requirements; and (iii) complying with the Order would have been too disruptive to its employees and the local community.¹⁰ The response further demonstrates why the Commission should proceed cautiously and deliberately.

First, the Retirement Notice Order is not a policy statement because it has binding effect. In *Edenwald Contr. Co. v. City of New York*, 86 Misc.2d 711, 719 (Sup. Ct., N.Y. Co. 1974), *aff'd* 47 A.D.2d 610 (1st Dep't 1975), the Courts held that an agency directive that "will continue to [have a] binding effect" in agency determinations should be considered a rule. In *Matter of Energy Assn. of N.Y. v. Public Serv. Commn.*, 169 Misc.2d 924, 941 (Sup. Ct., Albany

⁷ *Id.* at 16.

⁸ In contrast, the NYISO's web site contains dozens of notices submitted in compliance with the Retirement Notice Order. See http://www.nyiso.com/public/markets_operations/services/planning/documents/index.jsp.

⁹ Case 14-E-0270, *supra*, Motion to Dismiss by Multiple Intervenors, dated July 20, 2014.

¹⁰ Case 14-E-0270, *supra*, R.E. Ginna Nuclear Power Plant LLC's Response to Motion to Dismiss by Multiple Intervenors, dated August 6, 2014.

Co. 1996), *aff'd on other grounds*, 273 A.D.2d 708 (3d Dep't 2000), the Supreme Court held that a rule under State Administrative Procedure Act § 102(2)(a)(ii) is distinguishable from a policy statement because the latter only “reflects an expectation, not a direction, of utility action,” while the former “talks in terms of the implementation or application of law” [emphasis omitted]. The first ordering clause of the Retirement Notice Order clearly demonstrates its binding effect – “All generators subject to Public Service Law jurisdiction **shall comply** with the requirements for giving notice of generation unit retirements established in the body of this Order.”¹¹ Accordingly, the assertion that the Retirement Notice Order is no more than a policy statement lacks merit.

Second, pursuant to PSL § 23(1), Commission orders have the force and effect of law. Pursuant to PSL § 25, regulated entities could be subject to daily monetary penalties for violations of Commission orders. That the notice requirements are not contained in a statute or regulations is inapposite. Ginna’s owner is required to comply with the Order in the same manner and to the same extent as if its terms and requirements were set forth in the Public Service Law or the Commission’s regulations.

Third, the claim about alleged disruptions has already been rejected by the Commission by virtue of the fact that it adopted the formal notice requirements. The Retirement Notice Order did not carve out any exceptions from compliance where provision of the notice could cause disruptions to the workforce or host community. The fact that other generators have complied with the Retirement Notice Order and submitted the requisite formal notice demonstrates that Ginna’s owner’s entreaties lack merit. Moreover, because there is no certainty that the

¹¹ Retirement Notice Order at 21 [emphasis added].

Commission will grant the relief sought in the Petition, there was no basis for Ginna's owner to assume that the alleged disruption could be avoided.

If the Commission were to countenance the behavior in this case, it would wholly undermine the process the Commission established. Generators would cease complying with the Retirement Notice Order and the opportunity to consider alternate solutions to RSSAs would be lost. The process has worked effectively, and the Petition contains no justification or good cause to deviate from it.

B. The Petition Does Not Provide A Proper Basis For The Commission To Consider An RSSA

The procedure set forth in the Retirement Notice Order applies to generators proposing to retire. The opportunity to consider alternatives, and whether relief should be provided to the retiring generator, appropriately should arise only when there is an imminent reliability problem related specifically to a generator's publicly-stated intention to retire. Here, there is no evidence that Ginna's owner has decided to retire the facility. According to the Petition, it is known only that Ginna is losing money and that Ginna's retirement is under consideration by management of its parent company.¹² Indeed, the Petition acknowledges that Ginna's management has made no recommendations to the Board of Directors of Ginna's parent regarding the retirement of the facility.¹³

In contrast, each of the formal retirement notices filed with the Commission and provided to the NYISO in accordance with the Retirement Notice Order state a clear intent to retire (or cease operating) the facility in question. In other words, the notices demonstrate that decisions have already been made. Action by the Commission to address any identified reliability need is

¹² Petition at 2.

¹³ *Id.* at 2-3.

required, therefore, because of that prior decision by the plant owner. Put another way, if a generator has not actually decided to retire, there would not be any imminent reliability problems and no need for Commission action or for a utility to spend ratepayer funds to ameliorate such problems.

In the two other cases that involved RSSAs, the generators each filed retirement notices in accordance with the Retirement Notice Order.¹⁴ Because those generators' plans were clearly stated, the Commission and utilities were required to address the reliability problems arising from the closure of the facilities. Here, however, neither the utility nor the Commission can be certain what Ginna's owner may do or when it may do something. Eliminating such uncertainty is precisely why the Commission established the notice requirement.

More importantly, until such time as Ginna's owner commits to closing Ginna, there is no reason to make any extra-market payments to Ginna. That is, there is no record evidence before the Commission that but for the RSSA payments, Ginna would close. Inasmuch as the Board of Ginna's parent has not yet considered, let alone decided, the fate of Ginna, there is no reasonable basis for the Commission to find that the RSSA payments are necessary to keep Ginna open. At some point in the future, the Board may make such a decision, and at that time, the Commission may need to take action. Until those circumstances arise, however, spending captive ratepayer funds based on speculation regarding one possible outcome would be irrational and capricious.

If the Commission were to allow Ginna to obtain an RSSA simply because its management is weighing the future plans for the facility, the Commission would be opening the

¹⁴ See Case 12-E-0136, Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (issued August 16, 2012), and Case 12-E-0400, Petition of Cayuga Operating Company, LLC to Mothball Generating Units 1 and 2, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (issued December 17, 2012).

flood gates to many generators dissatisfied with market conditions (even if the dissatisfaction is temporary). No longer would a generator need to state publicly any intentions to retire or cease operating (with attendant implications and consequences from financiers, employees, counterparties, and others). Instead, a generator would only have to whisper to a utility, Commissioner, or agency staff that it is considering retirement, then demand an RSSA. Put another way, captive ratepayers could be required to subsidize generators without even knowing that the generator would otherwise cease operating. Moreover, neither the NYISO nor the utilities could engage in proper system planning because they would not know whether particular facilities intend to close or not.

In New York City, it is possible that the loss of any baseload generating facility could cause a reliability problem. Thus, any New York City generator could hold Consolidated Edison Company of New York, Inc. (“Con Edison”), the Commission, and New York City ratepayers hostage to threats of retirement without publicly stating any intention to retire and without the Commission knowing whether the threat is real. This is not the paradigm contemplated by Opinion No. 96-12, and the Commission should not allow generators to choose the more attractive option between the market-based revenues and RSSAs supported by captive ratepayers.

The purpose of the Commission’s regulation of the energy industry is to oversee the actions of the regulated entities and protect consumers. It is not to take the place of the regulated entities and supplant their business decisions. As discussed in the Retirement Notice Order, the notice procedure the Commission established is to protect customers and system reliability once a generator has decided to exit the system. However, if the precedent sought by Ginna is established, the Commission would be placed in the untenable position of guessing whether a

generator will make a decision that has detrimental consequences. The Commission would not know whether any action is actually required because it would not have any evidence before it that a final business decision has been reached.

In rate cases, the Commission does not *sua sponte* develop the level of an increase or decrease in revenue requirement for a utility. Rather, it reviews the facts presented by the utility and other parties and issues a decision based on the evidence presented. Here, the Commission should not be put in a position to decide whether a generator will retire (*i.e.*, if the Commission determines that the generator would not retire, there would be no reason to approve an RSSA for it). Rather, the Commission should only be asked to decide whether an RSSA is appropriate to resolve a reliability need arising because a generator has already decided to retire.

C. The Increasing Use Of RSSAs Is A Concern

During the first seven years since the issuance of the Retirement Notice Order, and during the first 12-13 years of the existence of the NYISO and the competitive wholesale markets, there were no instances in which a utility was required to enter into an RSSA with a departing generator to preserve system reliability. Over the past two years, there have been three such instances, including the present case. This increasing need for RSSAs is a concern and should prompt the Commission to review the reasons for this trend and actions needed to avoid its further progression.

For many years, the State's electric system has been robust. The utilities routinely engaged in multi-year planning and expanded their infrastructure to meet present and projected needs. The STARS Report, generally, and information submitted by the City in Con Edison's last electric rate case, however, demonstrate that there are a number of weaknesses in the system

that should be addressed. The need for RSSAs because of generator retirements is further evidence of the need to strengthen the electric system infrastructure across the State.

That is, the utilities should be aware of the increasing potential for facilities to cease operating as they age, and they should be planning for such events. The Dunkirk and Cayuga Generating Stations are more than 50 years old, so it should not have been a surprise to National Grid or New York State Electric & Gas Corporation that those old coal plants would be retiring. However, it appears that neither utility was prepared for the closures, resulting in the need for RSSAs. Further, as noted in the Petition, the economic challenges confronting nuclear plants (especially single-unit facilities) is well known, so Rochester Gas & Electric Corporation should have been preparing for the closure of Ginna but apparently has not. The City is most concerned about the potential closures of baseload facilities in New York City, some of which are also more than 50 years old and many of which are more than 40 years old. While some new generating facilities and transmission lines have commenced operations within the last 10 years, it is not clear that RSSAs with the existing generators could be avoided.

The City recognizes that the Commission is presently considering new ways to provide safe and adequate service to customers in the Reforming the Energy Vision (“REV”) Proceeding.¹⁵ However, the presentations at the July 10, 2014 technical conference in that proceeding demonstrate that it will take many years to implement the Commission’s vision, and there is no certainty that the Commission’s goals can be fully achieved.

The State cannot wait to determine if and when the REV Proceeding will be successful, and the Commission should not rely solely on the REV Proceeding as the solution to the growing infrastructure needs. There should be a balanced approach, including infrastructure investments,

¹⁵ Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

new technologies, energy efficiency, demand management, and other measures, to address the electric system needs. Additionally, the Commission should ensure that all of the State's utilities are engaged in appropriate planning activities and preparing for the closure of other aging facilities.¹⁶

Given the Commission's commitment to competition, the Commission must create a proper platform for competition to succeed. RSSAs and other subsidies for merchant participants are not a proper substitute to a proper platform, and they are not sustainable over the long term. The Commission should examine why the electric system cannot absorb the loss of individual generating facilities and take the action needed to withstand the competitive forces that will continue to cause generators to enter and leave the system. Otherwise, customers will never receive the benefits intended from the move to competition in the 1990s or anticipated to arise from the REV goals.

CONCLUSION

The Commission created a formal notice process to properly evaluate the consequences of a generator seeking to cease operations. Under that process, business decisions are made, and the Commission then takes action based on such decisions as necessary to protect consumers and system reliability. Here, Ginna's owner is trying to undermine that process and force the Commission to take action before it makes any business decision. If the Commission allows such conduct in this case, it should expect other generators to follow suit. The Commission will

¹⁶ Although that City has not agreed with all of the decisions the Commission has made in Case 12-E-0503, Review of Generation Retirement Contingency Plans, it applauds the Commission for being proactive regarding planning for the future loss of the Indian Point Energy Center. The Commission should expand that proceeding to ensure that proper planning is occurring to address the eventual loss of other critically needed baseload facilities in New York City and throughout the State,

then be required to decide whether to require utilities to enter into RSSAs with generators without any certainty as to whether the generators would cease operating without such payments.

The City respectfully urges the Commission to not countenance Ginna's conduct. Moreover, the City respectfully urges the Commission to review the reasons why RSSAs are becoming more prevalent and take steps to improve the utilities' planning for the loss of generating facilities needed for reliability purposes.

Respectfully submitted,

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Dated: August 28, 2014
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Dated: August 28, 2014
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