SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of

CAROL CHOCK, President, on Behalf of RATEPAYER AND COMMUNITY INTERVENORS, and SIERRA CLUB,

Petitioners,

-against-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

Respondents,

for a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules.

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Index No._____

Oral Argument Requested

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION

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PETITIONERS' MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This petition challenges a New York Public Service Commission ("Commission" or "PSC") Order compelling ratepayers to provide $155 million in subsidies to an outdated and uneconomic coal-burning power plant that Cayuga Operating Company, LLC ("Cayuga") has proposed to cease operations indefinitely. The Order approves an Agreement between Cayuga and the New York State Electric and Gas Corporation ("NYSEG") intended to keep Cayuga's plant running through June 2017 while adverse impacts to energy system reliability that could result from the plant's closure are addressed. Rather than simply achieving that important but limited goal, however, the Agreement requires ratepayers to underwrite $42 million in largely excessive and unnecessary capital investments in the aging coal plant. Yet the Agreement only

requires Cayuga to reimburse ratepayers at most half of the cost of those investments if the company elects to resume operations of the coal plant beyond June 2017. Further, the Agreement severely curtails NYSEG's ability to limit or terminate the subsidies should the underlying need for the Agreement be addressed prior to June 2017. And if NYSEG determines that one of the two units at the Cayuga plant no longer is needed for energy system reliability before June 2017, the Agreement gives Cayuga the discretion to decide which unit continues to receive subsidies, rather than requiring the cancellation of subsidies for the more costly of the two. In short, the Commission Order requires ratepayers to spend $155 million to tide the Cayuga plant through difficult economic times, while failing to minimize costs for ratepayers and providing the company with a ratepayer-financed windfall if the coal plant becomes profitable again in the future.

In contravention of Public Service Law Section 65(1), such an arrangement is neither just nor reasonable, and runs counter to the Commission's paramount duty to protect ratepayers. In addition, the Commission Order approving this Agreement is rendered invalid by an almost complete lack of supporting evidence in the record and the denial of a meaningful opportunity for public participation. In particular, the only evidentiary document in the record is a fourteen-page bullet pointed summary of NYSEG's consideration of alternatives to the Agreement. No analyses, workpapers, or other supporting documents regarding the need for, alternatives to, or the costs included in the Agreement are to be found. With such a sparse record, there was simply no way for the Commission to reach an independent and reasoned decision in approving the Agreement. The sparse record also hindered meaningful public participation, a problem that was exacerbated by the fact that twelve of the fourteen pages of NYSEG's bullet pointed summary

were fully redacted from public review until four days after the public comment period closed and four business days before the Commission issued its Order approving the Agreement.

As a result of these errors, and as explained more fully below, Petitioners request that this Court vacate the Commission's Order as arbitrary, capricious, and contrary to law.

FACTUAL BACKGROUND

In July 2012, Cayuga filed a notice with the PSC stating that it intended to indefinitely close its coal-fired Cayuga facility located in Lansing, New York (the "Cayuga plant") no later than January 16, 2013.[1] Petition, Ex. 3. Cayuga's notice stated that "current and forecasted wholesale electric prices in New York are inadequate" for the aging 1950's coal plant to "operate economically." The local transmission owner whose portion of the state electrical system is served by the Cayuga plant, NYSEG, identified potential electric system reliability concerns associated with shutting down the Cayuga plant. As a result, NYSEG and Cayuga entered into a Reliability Support Services Agreement ("RSSA") in December 2012 to temporarily continue the operation of the plant("1st Agreement"). Petition, Ex. 6. The 1st Agreement was designed to subsidize the operation of the Cayuga plant only long enough to allow NYSEG to complete transmission upgrades that would allow for the Cayuga plant to be taken offline permanently. While NYSEG anticipated that such transmission upgrades would be completed at the end of 2016, the 1st Agreement was for a one-year period, during which NYSEG was to identify and evaluate alternative reliability solutions. The cost of the 1st Agreement was shouldered by NYSEG's local ratepayers who are located in the area served in part by the Cayuga plant. The 1st Agreement was approved by the PSC on December 17, 2012, Petition, Ex. 8, and ran from January 16, 2013 to January 15, 2014.

[1] The indefinite closure of the Cayuga plant also is referred to as "mothballing."

In November 2013, NYSEG submitted a second proposed Reliability Support Services Agreement to the PSC, extending the ratepayer-subsidized operation of the Cayuga plant by more than three years, through at least June 2017 ("2nd Agreement"). Petition, Ex. 10. The 2nd Agreement also significantly increases the burden placed on NYSEG's ratepayers. Annual fixed payments increase by more than $4.2 million, and the 2nd Agreement requires ratepayers to foot the bill for approximately $42 million of capital investments in the Cayuga plant. In total, ratepayers will pay more than $155 million over the term of the 2nd Agreement, representing an average of more than $44.5 million per year in ratepayer subsidies. Moreover, the 2nd Agreement would provide Cayuga with a substantial windfall at the ratepayers' expense; if Cayuga decides to continue operating its plant after the 2nd Agreement expires, it is required to refund no more than 50% of the capital expenditures paid for by the ratepayers. Depending on how much profit Cayuga generates from the plant after the 2nd Agreement expires, NYSEG's ratepayers could receive significantly lower reimbursement.

Petitioners Sierra Club and RCI filed comments objecting to the proposed 2nd Agreement on numerous grounds, including: (1) the 2nd Agreement fails to limit recovery for capital expenditures to those that are necessary only for the continued safe and reliable operation of the Cayuga plant until the transmission upgrades are completed; (2) the 2nd Agreement improperly provides Cayuga with a windfall of at least 50% of any capital expenditures made at the Cayuga plant during its term; and (3) in the event that NYSEG determines one of the two units at the Cayuga plant is no longer needed for electric system reliability, the 2nd Agreement lets Cayuga decide which unit to stop subsidizing, rather than requiring the cancellation of subsidies for the more costly unit. Petition, Ex. 12. Petitioners also objected that the terms of the 2nd Agreement effectively would tide the Cayuga plant through difficult economic times on the backs of the

ratepayers, allowing Cayuga to operate the plant more profitably upon termination of the 2nd Agreement.

In addition, Petitioners' comments sought release by the Commission of an unredacted copy of the only evidentiary document in the record – a 14-page bullet point presentation from NYSEG that summarized the transmission reliability impacts at issue, the alternatives for addressing those impacts that NYSEG evaluated, and the results of a cost analysis of those alternatives performed by NYSEG ("NYSEG Document"). The Commission initially provided the NYSEG Document to the public in a form in which everything but the cover and first page was fully redacted. Petition, Ex. 11. Despite the fact that Petitioners requested the release of an unredacted version of this key document four weeks before the close of the public comment period on the 2nd Agreement, the Commission failed to provide a substantially less redacted version of the NYSEG Document until four days *after* the close of the public comment period. Even this version of the NYSEG Document redacted all information regarding the proposals NYSEG received as potential options for addressing grid reliability. Petition, Ex. 9.

On January 15, 2014, three days after the publication of the less-redacted version, Petitioners filed supplemental comments based on the NYSEG Document, raising concerns that the 2nd Agreement requires ratepayers to unnecessarily pay for a $12.5 million pollution control to achieve compliance with the federal Mercury and Air Toxics Standard ("MATS") when it was likely that only a $3 million control was needed. Petitioners further noted that the 2nd Agreement should have required an evaluation of whether the need for one of the Cayuga plant units could be obviated as of July 2015, which would avoid millions of dollars in ratepayer subsidies. Petition, Ex. 13.

The PSC issued an Order approving the 2nd Agreement on January 16, 2014. ("Order") Petition, Ex. 14. The Order was issued only one day after Petitioners filed their supplemental comments, and there is no indication in the Order that those comments were considered by the Commission. Within the 30-day period prescribed by Public Service Law ("PSL") Section 22, Petitioners filed a Joint Motion for a Rehearing on the Order arguing that the Order was affected by errors of law and fact and should be rescinded. ("Motion for Rehearing") Petition, Ex. 15. The Motion for Rehearing also requested that the Commission hold a public adjudicatory hearing presided over by an administrative judge and challenged the PSC's approval of the 2nd Agreement on numerous grounds, including the grounds that are being raised in the instant Article 78 proceeding.

The PSC was obligated by PSL § 22 to grant or refuse the Motion for a Rehearing within thirty days. Instead, on March 5, 2014, the PSC issued a one-page "Notice Concerning Petition for Rehearing." ("Notice") Petition, Ex. 12. Without citing to any authority or providing any explanation, the PSC in the Notice announced that a "Notice of Proposed Rule Making had been filed with the Department of State with respect to the Motion [for Rehearing]." *Id.* The Notice stated that comments on this "proposed rule" were due on May 5, 2014. To date, the Commission has taken no further action on the "rulemaking" and has not granted or refused the Motion for Rehearing.

While the PSC has failed to render a decision on the Motion for Rehearing, the 2nd Agreement has taken full force and effect. Ratepayers already are paying the subsidies approved under the 2nd Agreement. *See* Affidavit of Carol Chock, sworn to on July 16, 2014 ("Chock Aff."), Petition, Ex. 1, ¶ _, and the Cayuga plant continues to operate as a coal-burning facility subsidized by ratepayers.

ARGUMENT

I. THE PSC'S CONVERSION OF THE MOTION FOR REHEARING INTO A RULEMAKING PROCESS WAS UNSUPPORTED BY LAW AND CONSTITUTED AN EFFECTIVE DENIAL OF THE MOTION FOR REHEARING

PSL Section 22 imposes a clear duty on the Commission to either grant or deny a motion for rehearing within 30 days. PSL § 22 ("The decision of the commission *granting or refusing* the application for a rehearing *shall* be made within thirty days after the making of such application.") (emphasis added). There can be no dispute that the Commission has failed to comply with this clear statutory requirement.

The Commission's unexplained and legally unsupported attempt to convert the Motion for Rehearing into a rulemaking does not cure its failure to comply with the statutory deadline. The Notice contains no grant or refusal of the Motion for Rehearing and fails to cite to any authority to support the conversion to a rulemaking. *See* Petition, Ex. 16. The Notice also failed to provide the relief sought by Petitioners in the Motion for Rehearing and thus effectively denied Petitioners' application for a rehearing. *See N.Y. Tel. Co. v. Pub. Serv. Comm'n*, 59 A.D.2d 17, 20 (3d Dep't 1977) (holding that a suit was not premature because although the PSC had failed to rule on a motion for rehearing, the Commission issued an order subsequent to the motion for rehearing that effectively denied the relief requested in the motion). Under these circumstances, this proceeding is ripe for adjudication. *N.Y. Tel. Co.*, 59 A.D.2d at 19-20 (Commission's effective denial of rehearing motion meant that "the present proceeding was not instituted prematurely.").

II. THE 2ND AGREEMENT WILL LEAD TO UNJUST AND UNREASONABLE RATES BY IMPROPERLY AND UNNECESSARILY SUBSIDIZING THE LONG-TERM OPERATION OF AN AGED COAL PLANT

The Commission's order approving the 2nd Agreement is arbitrary, capricious, and contrary to law because it saddles NYSEG's ratepayers with costs that are neither just nor reasonable for them to bear. While an RSSA can be an appropriate tool for ensuring reliability of the electrical system, in order to protect both ratepayers and the integrity of the competitive energy market, the scope and duration of the 2nd Agreement must be limited to what is strictly necessary to ensure safe and reliable operation of the electrical system. The Commission has acknowledged as such, holding that subsidies provided under an RSSA should be "appropriately limited to ensuring the Cayuga facility can operate safely and reliably through the term of the agreement," Petition, Ex. 14 at 8, and cautioning that procedures for handling the proposed mothballing or retirement of electric generating units "should not unduly interfere with the operations of the competitive markets," PSC, Order Adopting Notice Requirements for Generation Units Retirements, Case No. 05-E-0889, 13 (Dec. 20, 2005). Similarly, the Federal Energy Regulatory Commission ("FERC") has explained that largely analogous reliability agreements at the federal level should be a "back-stop measure only" that are "limited and of short duration." FERC, Order Conditionally Accepting Tariff Revisions and Requiring Compliance Filings, Docket No. ER12-2302-000, 140 FERC P 61237 at ¶ 134 (Sept. 21, 2012).

The 2nd Agreement, however, is not so limited and, instead, serves to subsidize the continued long-term operation of the Cayuga plant in at least three ways: (1) by requiring ratepayers to fund unnecessary and overly expensive capital investments in the Cayuga plant; (2) by failing to require Cayuga to reimburse ratepayers for the full value of such capital investments if Cayuga elects to continue operating the plant after the expiration of the 2nd Agreement; and

(3) by unjustifiably constraining NYSEG's ability to limit costs to ratepayers in the event that one of the Cayuga units is no longer needed for reliability. In short, the 2nd Agreement requires ratepayers to spend $155 million to tide the Cayuga plant through difficult economic times and to finance major capital investments that will enable Cayuga to generate more profits from the plant after the 2nd Agreement expires. Such unnecessary ratepayer subsidization of an aging coal-fired plant is neither just nor reasonable and, therefore, the Commission's approval of the 2nd Agreement should be reversed and remanded so that an Agreement appropriately limited in amount and duration can be put into place.

A. The Commission failed to limit capital expenditures under the 2nd Agreement to only those necessary for the Cayuga plant to operate through the term of the agreement

The first fundamental flaw in the Commission's approval of the 2nd Agreement is that it fails to restrict the capital expenditures that ratepayers will be funding to those necessary for the Cayuga plant to operate during only the term of the agreement. As noted, the Order properly sets forth as the relevant standard "that the capital expenditures covered under the [2nd Agreement] will be appropriately limited to ensuring the Cayuga facility can operate safely and reliably through the term of the agreement." Petition, Ex. 14 at 8. But the Commission provides no basis for concluding that capital expenditures under the 2nd Agreement are so limited and, in fact, the uncontradicted evidence shows that they are not. Instead, the Commission has approved ratepayer funding of capital expenditures that likely are excessive or that would subsidize the continued operation of the Cayuga plant long after the 2nd Agreement expires.

For example, the 2nd Agreement requires ratepayers to pay for a $12.5 million mercury oxidation catalyst injection system that is intended to bring Unit 2 of the Cayuga plant into compliance with the federal MATS. *See* Petition, Ex. 10 at 36. According to the NYSEG

document, however, a $3 million activated carbon injection system would likely be sufficient to achieve MATS compliance. Petition, Ex. 9 at 10. As such, the NYSEG Document recommended testing for both the $12.5 million and the $3 million compliance options. *Id*. The record, however, does not include the results of any such testing. Instead, the Order simply approves of the 2nd Agreement with the $12.5 million mercury control system without even discussing, much less justifying, why the $3 million option would not be sufficient to allow the Cayuga plant to "operate safely and reliably through the term of the agreement." Absent a clear demonstration of the need for the more expensive system, the record does not support a requirement that ratepayers subsidize installation of a $12.5 million mercury oxidation catalyst injection system.

Similarly, the largest single portion of the capital expenditures under the 2nd Agreement — $12.68 million — comes in 2016, and includes capital investments that appear calculated to extend the life of the 59-year old Cayuga plant rather than merely ensuring the safe and reliable operation of the facility through 2017. *See* Petition, Ex. 10 at 36. To cite just two examples, the 2nd Agreement provides for the replacement of the #1 Air Heater on Unit 1 in 2016. *See id* at 30. Although no specific cost is associated with this capital project, it is likely that a complete replacement of the Unit 1 air heater in 2016 would be both costly and unnecessary to allow the Cayuga plant to operate through June 2017. Petition, Ex. 12 at 6. Likewise, the Sewage Treatment System Replacement also scheduled for 2016, Petition, Ex. 10 at 31, does not appear to be a reasonable or necessary capital expenditure for the Cayuga plant to operate through June 2017. Petition, Ex. 12 at 6. Despite the back loading of these significant capital investments only one year from the end of the term of the 2nd Agreement, the Commission did not even

address, much less justify, how such expenditures are purportedly necessary to allow the Cayuga plant to "operate safely and reliably through the term of the agreement."

In short, the available evidence shows that the 2nd Agreement includes millions of dollars of capital expenditures that would improperly subsidize the continued operation of the Cayuga plant well past June 2017. The long term continued operation of the plant is not some unlikely hypothetical, but instead, is a stated goal of Cayuga, which explained to the Commission that it intends "to take all steps within its control to avoid permanently retiring the facility by continuing to explore any and all alternatives with its suppliers and other parties, including reductions in its variable and fixed costs." Petition, Ex. 1 at 1. It is unjust and unreasonable for NYSEG ratepayers to underwrite the costs of capital expenditures that are not necessary for the plant to operate during the term of the 2nd Agreement, but that would provide significant benefit to Cayuga's hope to profitably operate the plant again after June 2017. Therefore, the Order's approval of those expenditures violates Public Service Law § 65(1). *Long Island Water Corp. v. Pub. Serv. Comm'n*, 49 A.D.2d 392, 393 (3d Dep't 1975) ("rates approved by the PSC should consist *only* of that which is just and reasonable") (emphasis added).

B. The Commission failed to require Cayuga to fully reimburse ratepayers for capital investments if the company decides to continue operating the plant after the termination of the 2nd Agreement.

A second major way that the Order fails to limit the 2nd Agreement to just and reasonable charges is by not requiring full ratepayer reimbursement of capital expenditures in the event the Cayuga plant continues operating after expiration of the 2nd Agreement. Under the 2nd Agreement, if Cayuga decides it wants to return to operating the Cayuga plant after June 2017, it is required to pay back — at most — only 50% of any capital expenditures at the plant that ratepayers have paid for. *See* Petition, Ex. 10 at § 4.3. Cayuga is allowed to stretch such

partial payback equally over five years, and in no year is it required to reimburse NYSEG's ratepayers more than the company's annual earnings before interest, taxes, depreciation, and amortization from the Cayuga plant. *Id*. In other words, the 2nd Agreement essentially requires captive ratepayers to provide a coal generator, Cayuga, with interest-free financing over five years for capital investments of which *half*, at most, would need to be paid back if the company is able to start profitably operating the plant again.

The Commission's Order does not even attempt to explain how Cayuga's ability to profitably operate the Cayuga plant after June 2017 without fully reimbursing ratepayers is just, reasonable, or necessary to allow the plant to "operate safely and reliably through the term of the agreement." Not only would the merchant operation of the Cayuga facility beyond the term of the 2nd Agreement call into question the necessity and appropriateness of the out-of-market subsidy provided by ratepayers during the course of the 2nd Agreement, it also should obligate Cayuga to fully compensate ratepayers for any long-term investments in the facility they have funded. By failing to require such full compensation, the Commission has abdicated its paramount duty to protect ratepayers and failed to ensure that such ratepayers are required to pay only just and reasonable rates.

While it appears that the question of reimbursement under an RSSA has not yet been addressed by New York courts, the Federal Energy Regulatory Commission ("FERC") has found that full reimbursement should be provided in similar circumstances. In particular, in reviewing rules regarding the treatment of pollution control investments under a type of transmission reliability agreement known as a System Support Resource ("SSR"), FERC acknowledged the "concern that SSR Agreements could be used to make significant capital improvements to resources that will ultimately retire or to allow a resource owner to inappropriately recover the

cost of long-term capital expenditures." FERC, Order Conditionally Accepting Tariff Revisions and Requiring Compliance Filings, Docket No. ER12-2302-000, 140 FERC P 61237 at ¶ 137 (Sept. 21, 2012). In order to address such concern, FERC required, among other things, that the rules "address the treatment of SSRs that later return to service, including to implement a refund provision that requires SSRs that later return to service to refund with interest all costs, less depreciation, of repairs or capital expenditures needed to meet the applicable environmental regulations." *Id*. at ¶ 138. The Commission's failure to require the same type of full reimbursement here is arbitrary, capricious, and contrary to its duty to ensure that rates are just and reasonable.

C. The Commission failed to ensure that NYSEG could limit costs to ratepayers if one of the units at the Cayuga plant is determined to no longer be needed for reliability concerns

The Order fails to protect ratepayers by unjustifiably curtailing NYSEG's ability to terminate or limit the 2nd Agreement in the event that circumstances between now and June 2017 render it no longer necessary or appropriate. In an attempt to excuse the significant cost impacts that 2nd Agreement would have on ratepayers, the Order states that "the [2nd Agreement] will provide an opportunity for a reduction in NSYEG's cost responsibility in the future." Petition, Ex. 14 at 8. While the Commission did not explain this contention further, it is apparently referring to Section 3.6(b) of the 2nd Agreement, which provides NYSEG with a limited ability to restrict the 2nd Agreement to only one of the two units at the Cayuga plant. That provision, however, fails to adequately protect ratepayers in at least two ways that the Commission never addressed.

First, NYSEG's ability to limit the 2nd Agreement to a single unit does not take effect until June 1, 2016, even if the second unit becomes unnecessary before that date, and must be

instituted by October 1, 2016, even if the second unit becomes unnecessary after that date. Petition, Ex. 10 at § 3.6(b). No justification was provided in either the 2nd Agreement or the Order for this arbitrary four-month window, or why NYSEG should not be able to limit the Agreement to a single unit *at any time* that the second unit is determined to be unneeded for reliability. Petition, Ex. 12 at 5.

Second, the 2nd Agreement and the Order fail to require or provide NYSEG the authority to limit the 2nd Agreement to the less costly of the two units, even though the available evidence suggests that one of the units faces significantly higher capital costs than the other. Petition, Ex. 12 at 7 (citing Petition, Ex. 10 at Exhibit 1). Instead, the 2nd Agreement allows Cayuga to decide which unit to operate if this circumstance arises, Petition, Ex. 10 at § 3.6(a), thereby failing to protect ratepayers from being charged for operation of a more expensive unit. Again, no justification was provided in the 2nd Agreement, and the Order failed to address Petitioners' comments on this provision at all.

III. THE COMMISSION'S FAILURE TO INDEPENDENTLY EVALUATE ALTERNATIVES TO THE 2ND AGREEMENT IS INCONSISTENT WITH ITS PRIOR FINDINGS IN THE PROCEEDING AND FAILS TO PROTECT RATEPAYERS.

The Commission's paramount duty is to protect public ratepayers. *See People ex rel. New York Tel. Co. v. Pub. Serv. Comm'n, Second Dist.*, 157 A.D. 156, 163 (3d Dep't 1913) ("The Public Service Commission is an administrative body established by the Legislature *for the paramount purpose of protecting and enforcing the rights of the public*") (emphasis added) (citing *People ex rel. Binghamton L., H. & P. Co. v. Stevens*, 203 N.Y. 7 (1911)). In this case, the Commission failed to engage in the independent and reasoned decision making necessary to protect the public interest. Instead, the Commission approved the 2nd Agreement requiring ratepayers to provide $155 million in subsidies to a merchant power company on the basis of a

single, 14-page bullet point presentation submitted by NYSEG. *See* Petition, Ex 14. As such, the Commission's approval of the 2nd Agreement lacks a rational basis in the record.

In its decision approving the one-year 1st Agreement, the Commission adopted Petitioner Sierra Club's recommendation that the Commission order a competitive bidding process to solicit alternative means of meeting reliability needs:

> Sierra Club contends that it is uncertain whether NYSEG has a plan to minimize adverse impacts to ratepayers by "expeditiously, cost-effectively and permanently eliminat[ing] the reliability need for Cayuga." In the absence of such a plan, Sierra Club urges that NYSEG engage in a competitive solicitation for generation, transmission and non-transmission alternatives, such as demand response, which could address the reliability needs created by mothballing the Cayuga Facility.

Petition, Ex. 8 at 9-10.

In adopting Sierra Club's recommendation, the Commission stated:

> We agree with Sierra Club that a competitive solicitation process is needed to determine whether any alternative solutions can meet the reliability needs arising from the mothballing of the Cayuga Facility . . . *These procedures should ensure that ratepayers pay no more than necessary to preserve reliability*, and are consistent with our policies supporting reliance on competitive markets . . . We expect DPS staff will work with NYSEG and National Grid to review any responses to the solicitation and to report to us on specific projects that may warrant our further consideration.

Id. at 16-17 (emphasis added).

Having agreed with Sierra Club that a competitive bidding process was necessary to protect ratepayers from undue costs, the Commission then inexplicably failed to independently evaluate the alternatives submitted in response to the bid solicitation. Instead, the Commission relied entirely on NYSEG — the very entity that lacks "a plan to minimize adverse impacts to ratepayers" — to evaluate alternatives to the continued operation of the Cayuga plant under the 2nd Agreement. *Id*. at 9.

That the Commission did not independently evaluate the assumptions and conclusions at issue in this proceeding is made clear by the lack of virtually any evidence in the record. Aside from the proposed agreement, NYSEG's petition, and some comment letters from interested parties, the record contains only the 14-page NYSEG Document which does nothing more than summarize, in bullet point fashion, the results of NYSEG's evaluation in support of the 2nd Agreement. Noticeably absent from the record is any supporting documentation, alternative proposals submitted in response to the competitive bidding process, computer modeling files, workpapers, or other types of information that would be needed to independently evaluate NYSEG's proposal. Without such information, the Commission's decision lacks even the minimum level of support in the record required to sustain its determination. *See N.Y. Tel Co. v. Pub. Serv. Comm'n*, 98 A.D.2d 535, 538 (3d Dep't 1984) (Commission's judgment will be set aside "if it can be shown that a rational basis and reasonable support in the record are lacking.").

Indeed, the Order makes clear that the Commission failed to review any of the alternatives to the 2nd Agreement submitted in response to the Commission-mandated bid process and, instead, relied wholly on NYSEG's conclusions regarding whether those alternatives would be more cost-effective and reliable. *See* Petition, Ex. 14 at 3 ("*NYSEG conducted a review and analysis* of the responses and identified Cayuga's proposal as *its* preferred solution . . . .") (emphasis added); *id*. at 4 ("*NYSEG has evaluated* the available alternatives *and identified Cayuga's proposal as the most cost-effective and reliable* . . . .") (emphasis added); *id.* ("*NYSEG concluded* that the other proposals presented significant implementation risks . . . .") (emphasis added); *id.* ("*NYSEG found* that Cayuga's proposal provided a lower overall cost than the other proposals") (emphasis added); *id*. at 5 ("Ultimately, *NYSEG determined* that obtaining an RSSA from Cayuga was the least-cost and least-risk

solution.") (emphasis added); *id.* at 7 ("*NYSEG has evaluated* the available alternatives and identified Cayuga's proposal as the most cost-effective . . . .") (emphasis added).

The Commission's failure to independently consider alternatives to the 2nd Agreement provided in response to the Commission-mandated bid process is wholly inconsistent with its prior determination, in the Order approving the 1st Agreement, that a competitive solicitation process was necessary to protect ratepayers. The failure of the Commission to provide an explanation for this departure from the reasoning of its prior Order constitutes sufficient ground for finding that the Commission's Order approving the 2nd Agreement is arbitrary and capricious. *See Long Island Lighting Co. v. Pub. Serv. Comm'n*, 137 A.D.2d 205, 212 (3d Dep't 1988) ("An agency is required to set forth its reasons for altering a prior course and without such an explanation, a reviewing court is unable to determine whether the agency had valid reasons for its actions.") (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 63 N.Y.2d 424, 441 (1984)).

Moreover, with only a bullet-pointed summary of assumptions and findings in the record prepared by NYSEG – one of two beneficiaries of the 2nd Agreement — there is no reasonable basis in the record for concluding that the Commission undertook an independent evaluation of the issues before it or critically scrutinized the findings submitted by NYSEG. This *prima facie* constitutes arbitrary and capricious action by the Commission. *See Home Depot USA, Inc. v. Pub. Serv. Comm'n*, 55 A.D.3d 1111, 1113-14 (3d Dep't 2008) (holding PSC decision arbitrary and capricious because it "relied exclusively" on one party's characterization of critical economic information); *Rochester Tel. Corp. v. Pub. Serv. Comm'n*, 201 A.D.2d 31, 35-36 (3d Dep't 1995) ("The PSC's broad authority to determine just and reasonable rates includes not only the right *but the duty to scrutinize transactions between a utility and its affiliates* . . . .")

(emphasis added); *Kessel v. Pub. Serv. Comm'n*, 136 A.D.2d 86, 94 (3d Dep't 1988) ("The PSC cannot . . . summarily determine a request for a major change in rates *solely on the basis of a review by the PSC and its staff of the utility's filing*.") (emphasis added).

Indeed, the Commission's unexplained reliance on NYSEG to make the crucial determination as to which alternative best protects ratepayers amounts to an abdication of its "paramount purpose of protecting and enforcing the rights of the public." *N.Y. Tel. Co.*, 157 A.D. at 163. This is particularly improper because NYSEG, the entity entrusted by the Commission with this determination, is itself a party with a strong interest in the approval of the 2nd Agreement. *See Suss v. ASPCA*, 823 F. Supp. 181, 188 (S.D.N.Y. 1993) ("For an interested party to make decisions utilizing governmental authority is anathema to due process.").

Thus, the Commission's failure to independently evaluate alternatives to the 2nd Agreement is inconsistent with its prior Order approving the 1st Agreement, and its failure to explain the basis for this inconsistent action in the Order at issue fails to protect ratepayers and is arbitrary and capricious.

IV. THE COMMISSION'S WITHOLDING OF THE ONLY EVIDENTIARY DOCUMENT UNTIL AFTER THE CLOSE OF THE PUBLIC COMMENT PERIOD FORECLOSED MEANINGFUL PUBLIC PARTICIPATION IN THE PROCEEDING AND RENDERED THE DECISION TO APPROVE THE 2ND AGREEMENT ARBITRARY AND CAPRICIOUS.

In addition to inexplicably failing to independently evaluate the alternatives to the 2nd Agreement submitted in response to its mandated competitive bidding process, the Commission denied Petitioners a meaningful opportunity to participate in the 2nd Agreement proceeding by withholding the NYSEG Document — the only document in the record that purportedly supports the decision to approve the 2nd Agreement. The public was initially provided with only a heavily redacted version of the NYSEG Document in which twelve of fourteen pages had been

completely blacked out, and only the title page and a single page of already-known background information was disclosed. Petition Ex. 11; Petition ¶ 25. While the Commission eventually provided a less redacted version of the NYSEG document, it did not do so until four days *after* the public comment period closed, and only four business days *before* the Commission approved the 2nd Agreement, thereby preventing Petitioners from submitting timely comments based on the NYSEG document.[2] Thus, in addition to failing to independently evaluate alternatives to the 2nd Agreement, the Commission's unreasonable concealment effectively foreclosed any meaningful opportunity for public review and comment on those alternatives.

Without meaningful public participation, the Commission's decision to approve the 2nd Agreement was arbitrary and capricious. The Commission's duty to "protect[ ] and enforc[e] the rights of the public," *N.Y. Tel Co.*, 157 A.D. at 163, includes the fundamental obligation to treat public interveners in a fair and equitable manner "to insure that they are able to participate in a meaningful way." *1133 Ave. of Ams. Corp. v. Pub. Serv. Comm'n*, 62 A.D.2d 787, 788 (3d Dep't 1978). In the case at bar, the Commission failed utterly to discharge its duty to protect public rights. Indeed, by denying Petitioners access to an unredacted version of a critical document until four days after the close of the public comment period, the Commission acted in a manner that affirmatively undermined the rights of the public.

As Respondents' Records Access Officer found in a related docket addressing repowering alternatives to transmission reinforcements, Case No. 12-E-0577, the fact that the documents filed by transmission operators and generators are heavily redacted makes "public

[2] Petitioners filed late comments based on the NYSEG Document three days after the close of the public comment period. However, those supplemental comments are not mentioned in the Order — which was issued one day after Petitioners' supplemental comments were submitted — and there is no indication in the Order that they were considered by the Commission. Petition ¶¶ 29-30.

comment difficult at best." RAO Determination 13-04, Case No. 12-E-0577, 11 (Oct. 11, 2013). The lack of public access to an unredacted version of the NYSEG Document was especially problematic here because that document provided the only description — albeit in summary form — of proposed alternatives to the 2nd Agreement and NYSEG's determination that the 2nd Agreement was the most cost-effective and reliable alternative.[3]

The Appellate Division, Third Department, has ruled that a party in a PSC administrative proceeding is entitled to procedures "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' *to insure that they are given a meaningful opportunity to present their case*." *1133 Ave. of Ams. Corp,* 62 A.D.2d at 788 (emphasis added) (citations omitted). Here, by withholding an unredacted version of a crucial document until after the public comment period had already closed, the Commission deprived Petitioners of a meaningful opportunity to evaluate the alternatives to the 2nd Agreement submitted by other competing entities, and the assumptions and analysis that led NYSEG to conclude that the 2nd Agreement was the most cost-effective and reliable alternative.

It is important to note that the timely provision of a largely unredacted version of the NYSEG Document would not by itself have been sufficient to allow for a meaningful opportunity for public comment. The NYSEG Document actually is just a bullet-pointed summary of NYSEG's assumptions and findings, with little explanation or supporting data

[3] The Commission's Order erroneously contends that "Sierra Club's request for additional information" was adequately addressed by the January 10, 2014 release of the less-redacted version of the NYSEG Document. Petition, Ex. 14 at 9. But the belated disclosure four days after the public comment period closed of the only document addressing the evaluation of alternatives and costs at the heart of this proceeding hardly qualifies as providing for a meaningful opportunity for the public to comment on those issues. This is especially true given that the Commission issued its Order only four business days after belatedly disclosing a less-redacted version of the NYSEG Document, and failed to respond to any of the supplemental comments that Petitioners filed only three business days after receiving the NYSEG Document.

provided. For example, the NYSEG Document identifies net present values ("NPVs") of the various alternatives that NYSEG considered, but without access to the actual workpapers or knowing what inputs and assumptions went into those NPV calculations, Petitioners (and the Commission) had no basis on which to review the accuracy of the reported NPVs.[4] A meaningful opportunity for public participation requires, at a minimum, providing public interveners with access to crucial information relevant to the issues in the proceeding. No such access was provided here, and the Commission's claim that the post-comment-period provision of a less-redacted version of the NYSEG Document somehow cures this deficiency is simply wrong as a matter of law and fact. To the contrary, the Commission's unreasonable actions deprived Petitioners of a meaningful opportunity to comment on the 2nd Agreement and, as such, rendered the Commission's decision arbitrary and capricious.

V. IN THE ALTERNATIVE, A WRIT OF MANDAMUS SHOULD BE ISSUED COMPELLING THE COMMISSION TO RULE ON PETITIONERS' MOTION FOR A REHEARING AND THIS PROCEEDING SHOULD BE TEMPORARILY STAYED PENDING THAT RULING.

In the event that the Court finds that the Motion for Rehearing was not effectively denied, Petitioners ask, in the alternative, that the Court order the Commission pursuant to CPLR § 7803(1) to forthwith issue a ruling on the Motion and that this proceeding be temporarily stayed pending that ruling.

Mandamus is an appropriate remedy where the Commission has failed to rule within the statutorily prescribed 30-day time frame on a pending motion for rehearing. *See* PSL § 22;

[4] Similarly, in approving the 2nd Agreement, the Commission relies on Cayuga's claim that the agreement is a "reasonable compromise between NYSEG and Cayuga's positions." Petition, Ex. 14 at 6, 10. But Petitioners had no opportunity to meaningfully comment on Cayuga's claim, as the record does not contain any information regarding the positions that NYSEG and Cayuga purportedly compromised over, much less a basis for evaluating whether any such compromise was reasonable.

Rochester Gas & Elec. Corp. v. Maltbie, 272 A.D. 162, 166 (3d Dep't 1947) ("If the [Public Service] Commission is dilatory in rendering its decision on the application for rehearing, the party aggrieved may resort to a mandamus order to compel a decision").

A temporary stay pending the Commission's ruling on the motion for rehearing is appropriate. *See Amerivest Partners LLC v. Pub. Serv. Comm'n*, 39 Misc.2d 1211A (Sup. Ct. Albany Co. 2013) (issuing 30-day temporary stay pending PSC ruling on pending motion for rehearing); *Herald Co. v. Frey*, 35 A.D.2d 905 (4th Dep't 1970) (reversing Supreme Court's denial of stay of action pending completion of administrative proceeding involving same issues and parties); *Rural Energy Dev. Corp. v. Penn. General Energy Corp*., 2003 WL 21297303 (Sup. Ct. Chemung Co., May 22, 2003) (stay granted pending completion of related NYSDEC administrative proceeding); *High v. Reuters America, Inc*., 7 Misc.3d 1006A (Sup. Ct. Bronx Co. 2005) (granting stay pending completion of administrative proceeding); *Sterling Nat'l Bank v. Kings Manor Estates, LLC*, 9 Misc.3d 1116A (N.Y. Civ. Ct. 2005) (granting partial stay in light of "swiftly unfolding" administrative proceedings).

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court enter judgment against Respondents for the relief demanded in the Petition.

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Respectfully submitted,

_/s/_____

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