BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK

Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements.	)	Case No. 12-E-0577

NRG ENERGY, INC.'S COMMENTS IN OPPOSITION TO SIERRA CLUB AND EARTHJUSTICE'S REQUEST FOR REHEARING

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NRG Energy, Inc. and its subsidiary Dunkirk Power LLC (collectively, "NRG") submit these comments in opposition to the Joint Petition of Sierra Club and Earthjustice acting on behalf of the Ratepayer and Community Intervenors (collectively, the "Petitioners") for Rehearing of the Commission's Order Addressing Repowering Issues and Cost Allocation and Recovery, dated June 13, 2014. (Filing No. 208) ("Order").

INTRODUCTION AND SUMMARY OF POSITION

On February 13, 2014, a Proposal and Term Sheet to refuel the Dunkirk Power coal-fired generating facility (the "Facility) with 435 MW of natural gas ("repowering agreement") was submitted to the Commission. By Order dated June 13, 2014, the Commission approved the Dunkirk Proposal and Term Sheet, finding the refueling of the Dunkirk Facility to be in the public interest and consistent with the Part Y legislation that established the State's policy to develop clean energy near energy demand.[1] The Commission authorized the proposed allocation

[1] N.Y. L. 2013, ch. 57, Part Y (Mar. 29, 2013).

and recovery of associated costs, finding the costs just and reasonable.[2] The Commission's Order also denied the Petitioners'[3] motion for severance as well as their motion for an evidentiary hearing finding that such a hearing was "neither legally required nor would it result in material contributions to the existing and already adequate record."[4]

Attached to the Order was the Commission's "Notice of Determination of Non-Significance" ("Negative Declaration"). Pursuant to the State Environmental Quality Review Act ("SEQRA"), the Commission, as lead agency, found that the Dunkirk Proposal would not have a significant adverse affect on the environment. The Order itself also discussed potential environmental impacts including environmental enhancements.[5]

Petitioners now seek rehearing of the Commission's decision to approve the Dunkirk Proposal and Term Sheet on several grounds, each of which lacks merit. Petitioners fail to demonstrate an error or law or fact, or new circumstances sufficient to trigger rehearing or that would warrant a different determination. Instead, the Petitioners merely repeat the same claims they made in prior filings in this proceeding, which the Commission has already considered and rejected. Their Petition for Rehearing, therefore, should be denied.

RELEVANT FACTS

In July 2012, Niagara Mohawk Power Corporation d/b/a/ National Grid ("National Grid") and NRG agreed to enter into a Reliability Support Services Agreement ("RSSA") to continue

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[2] Case 12-E-0577, *Repowering Alternatives to Utility Transmission Reinforcements*, Order Addressing Repowering Issues and Cost Allocation and Recovery, 40 (Issued June 13, 2014) ("Order").

[3] The Motion for Procedural Order for an evidentiary hearing was submitted by the Petitioners as well as Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York, who do not appear to be parties to the Petition for Rehearing. *See* Case 12-E-0577, Earthjustice *et al.*, *Notice of Motion for Procedural Orde*r, Filing No. 189 (May 7, 2014) ("Motion").

[4] Order, at 25-26.

[5] Order, at 29.

operation of the Facility in order to meet local reliability needs.[6] In January 2013, the Commission ordered National Grid to evaluate repowering alternatives in lieu of transmission system upgrades in order to address potential generation retirements.[7] On March 29, 2013, Chapter 57 of the Laws of 2013, Part Y was enacted, specifically codifying the January 2013 Order. National Grid subsequently solicited bids from NRG for various refueling scenarios, and on December 15, 2013, Governor Cuomo announced that NRG and National Grid had reached an agreement. On February 13, 2014, the Dunkirk repowering Proposal and Term Sheet was filed with the Commission.[8]

On April 1, 2014, NRG submitted a full environmental assessment form ("EAF") for the addition of gas burning capability at the Dunkirk Station Units 2, 3, and 4, and installation of a natural gas pipeline spur ("Part 1"). In addition to Part 1 of the EAF, NRG submitted significant supplemental information on the project details and potential environmental impacts.[9]

On May 16, 2014, the Department of Public Service ("DPS" or "Staff") issued its Staff Report for the Dunkirk Refueling Proposal.[10] The Staff Report discussed the environmental impacts of the project, including the anticipated air emissions. It was noted that while the overall statewide emissions would likely remain relatively unchanged, local air emissions were expected to be significantly reduced.[11] The Staff Report also discussed that the operation of the Facility

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6 Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements*, Statement of Niagara Mohawk Power Corporation d/b/a National Grid in Support of Term Sheet Agreement and RSS Tariff Amendment (July 30, 2012).

7 Case 12-E-0577, *Repowering Alternatives to Utility Transmission Reinforcements*, Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (Issued and Effective Jan. 18, 2013).

8 Case 12-E-0577, National Grid, *Statement of Niagara Mohawk Power Corporation d/b/a National Grid In Support of Term Sheet Agreement*, Filing No. 173 (Feb. 13, 2014) ("Proposal").

9 Both the Part 1 EAF and Supplemental information were submitted to the PSC as one filing on April 1, 2014. *See* Dunkirk Power LLC, *Full Environmental Assessment Form*, Filing No. 185 (Apr. 1, 2014).

10 Case 12-E-0577, Dep't of Pub. Serv., *Staff Report on Dunkirk Refueling*, Filing No. 199 (May 16, 2014) ("Staff Report").

11 Staff Report, at 27.

would allow for a greater portion of energy to be delivered from renewable, emissions free hydroelectric power generated by the Niagara Power Project.[12]

On June 11, 2014, DPS issued its completed Part 2 EAF on the Identification of Potential Project Impacts. The Part 2 EAF identified four items that could have a moderate to large impact: (1) air emissions of more than 1,000 tons per year of carbon dioxide [6.a.i.]; (2) air emissions of more than 3.5 tons per year of nitrous oxide [6.a.ii.]; (3) the potential to reach 50% of any of the listed air emission thresholds [6.d]; and (4) the creation or extension of an energy transmission or supply system to serve more than 50 single or two-family residences or to serve a commercial or industrial use [14.b.].[13] The remaining items had either no or small impact, or were not applicable to the project.

The full EAF (Part 1 and Part 2) and Supplement provided by NRG were reviewed by the Commission against the criteria listed in 6 N.Y.C.R.R. § 617.7(c) to determine if the project would have a significant adverse environmental impact.[14] Finding that the project would not, the Commission then issued its Order and Negative Declaration.

ANALYSIS

I. APPLICABLE STANDARD

Under 16 N.Y.C.R.R. § 3.7(b), "[r]ehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination." 16 N.Y.C.R.R. § 3.7(b). The petition for rehearing must identify, explain, "and support each alleged error or new circumstance said to warrant rehearing." *Id.*

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[12] *Id.*

[13] Case 12-E-0577, Dep't of Pub. Serv., *Dunkirk Full EAF*, Filing No. 206, at 4,8 (Jun. 11, 2014) ("Part 2 EAF").

[14] Order, at 28.

Here, the Petitioners have failed to present substantial evidence to support their contentions that the Commission committed an error of law or fact, or that any new circumstances exist. Regarding their claims of purported errors of law, the Petitioners' rehearing request is bereft of any law establishing such errors. And, as for their claims of errors of fact, the Petitioners merely articulate their disagreement with the Commission's analysis and conclusions, reasserting arguments that have already been considered and rejected by the Commission. This, in and of itself, is patently insufficient to merit rehearing.[15] The Petitioners' Motion for Rehearing, therefore, must be denied.

II. THE COMMISSION'S ENVIRONMENTAL REVIEW COMPLIES WITH SEQRA

Petitioners maintain that the Order "suffers from errors of law and fact regarding the environmental impacts of the agreement."[16] Specifically, Petitioners contend that the Negative Declaration fails to meet SEQRA's minimum standards because it is "cursory" and contains only conclusory statements. Petitioners also argue that the environmental review was "flawed" because a hypothetical zero-emissions baseline was not used as the basis for review and because the Commission did not impose a limit on coal burning. Finally, they take issue with the accuracy and completeness of the EAF. Each of these arguments, which are addressed in seriatim below, lacks merit.[17] There has been no violation of SEQRA and thus, no error of law to warrant rehearing.

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[15] *See* Case 95-C-0657, *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against* New *York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Opinion and Order Concerning Petitions for Rehearing of Opinion No. 97-2, at 38 (Issued and Effective Sept. 22, 1997) (finding that reiteration of arguments already made and rejected does not provide a basis for rehearing).

[16] Petition, at 9.

[17] The Petitioners' claim that the Negative Declaration was deficient because the EAF was "flawed" is merely a rehashing of the same theories dispelled herein. It, therefore, is not addressed separately.

A. The Commission's Negative Declaration Complies with SEQRA

Petitioners incorrectly assume that a short or conclusory negative declaration is insufficient to show that the Commission took a hard look at the potential environmental impacts and made a reasoned elaboration of its findings. Petitioners also allege that the Commission did not appropriately identify and review potential environmental impacts. These claims lack merit and do not warrant rehearing.

The "[l]egislature in SEQRA has left the agencies with considerable latitude," and it is well-settled that "[n]othing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice." *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986); *see also Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) ("agencies have considerable latitude [when] evaluating environmental effects"). The sufficiency of an agency's determination under SEQRA is governed by a rule of reason. *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996).

This "'rule of reason' is applicable not only to an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation." *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 308 (2009) (internal citation omitted; also stating that "an agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant."). Moreover, "some common sense in determining the extent of [an agency's SEQRA review] is essential . . . [because] SEQRA proceedings can generate interminable delay." *Id.* (quotation omitted). Indeed, courts are cautioned that not every conceivable environmental impact must be identified and addressed, and that "the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration." *Gernatt*, 87

N.Y.2d at 688 (internal citation omitted); *Jackson*, 67 N.Y.2d at 421 ("[SEQRA] thus contemplate[s] that the agency will employ a rule of reason in identifying and discussing 'the essential issues to be decided'") (citing 6 NYCRR § 617.14 (b)).

And particularly apt here, it is well settled that a short explanation in a negative declaration meets the standards required for SEQRA. *See Prospect Park E. Network v. N.Y. Homes & Comm. Renewal*, Docket No. 101695/13, 2014 N.Y. Misc. LEXIS 2815, *14-16 (N.Y. Sup. Ct., New York Co., June 18, 2014) ("While the negative declaration is terse, it does sift the potential environmental impacts of the Project."); *see also Reed v. Village of Philmont Planning Bd.*, 34 A.D.3d 1034, 1037 (3d Dep't 2006) (appeal denied, 8 N.Y.3d 807 (2007) (upholding a negative declaration despite that it was "terse").

Here, it is undisputed that the Commission, as lead agency, correctly determined that the proposed action was properly classified as an "Unlisted" action under SEQRA. The crux of the Petitioners' argument is that the Commission's Negative Declaration is too short and cursory to meet SEQRA's mandates. However, a review of the record confirms that the Commission thoroughly considered all of the potential environmental impacts of the project and merely summarized its findings in fewer words than the Petitioners would have desired, and reached a conclusion that the Petitioners disagree with. This, however, does not violate SEQRA.

Given the nature of the action under consideration and its attendant environmental benefits, the Commission's SEQRA analysis here was proper. It is clear from documents in the record, including the EAF, Supplemental information, DPS Staff Report, and environmental quality review discussion in the Order, that the Commission identified relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its Negative Declaration.

B. The Baseline was Appropriate for an Existing, Operational Facility

The Petitioners further assert that the Order and Negative Declaration are defective because they are based on an incorrect environmental baseline against which the Project's potential air impacts were measured. Specifically, they assert that the proper baseline for analysis is the Facility's proposed emissions with gas capability compared to a mothballed plant with zero emissions. On multiple grounds, the Petitioners' argument fails.

Indeed, the Petitioners are simply wrong as to the applicable law. While they properly cite 6 NYCRR § 617.7(c)(1)(i), which requires that to determine significance, a reviewing agency must consider whether the proposed action will result in "a substantial adverse change in *existing* air quality [,]" they assert that a baseline other than one based on existing air quality should be used. 6 NYCRR § 617.7 (emphasis added). They then go on to rely solely on cases outside of New York, all of which address the appropriate baseline under the National Environmental Policy Act ("NEPA"), not SEQRA. The absence of any cited New York case law is telling, and confirms the inaccuracy of the Petitioners' assertion that the Commission committed an error of law. Indeed, it would have been wholly incorrect to use a baseline based on an inactive facility with zero emissions. 6 NYCRR § 617.7 (c)(1) ("impacts that may be reasonably expected to result from the proposed action must be compared against the criteria [in Part 617.7(c)(1)]" including whether there is "a substantial adverse change in *existing* air quality") (emphasis added)); *Cf. Owl Energy Resources* (N.Y. Dep't of Envtl. Conserv. Oct. 30, 1992) (finding that the correct baseline under SEQR was zero emissions because there were no current emissions, the facility had shutdown and ceased operations, and the facility did not hold any current air permits).

Here, it is irrefutable that the Facility never ceased coal-burning operations and never relinquished its air permits. That it might do so in the future is irrelevant. *See Chinese Staff & Workers' Assn. v. Burden*, 88 A.D.3d 425, 433 (1st Dep't 2011) (finding no violation when the lead agency ignored speculative conditions or consequences that might arise in the future).

Given the foregoing, the Petitioners' arguments regarding the appropriateness of the environmental baseline must fail. Not only have they misstated the law, they attempt to rely on the remote possibility of future operating scenarios that defy the continued and fully permitted operation of the Facility as a coal-fired power plant.

C. Limitations on Coal Burning are Not Required in the Negative Declaration

Petitioners allege that the Negative Declaration has no basis on the record because it lacks an enforceable limitation on coal burning. However, such contention is clearly erroneous as a matter of law as SEQRA does not contemplate or set enforceable limitations. Instead, as noted in the Order, "the use of coal will be subject to the limitations specified in Dunkirk's air emissions permits"[18] as authorized and implemented by the New York State Department of Environmental Conservation under its air permitting program.

Petitioners complain that without a specified limit on coal burning, emissions will not be significantly reduced. However, the Commission has already addressed this issue in its Order stating that "[n]otwithstanding that coal capability will be retained as a source of a back-up fuel, the capability to use gas generally will reduce use of coal, thereby replacing it with a cleaner, more environmentally-beneficial fuel."[19] The Order also notes that "[w]hile we share Earthjustice's concern with the air emissions associated with the use of coal, we expect the future use of coal at the Dunkirk facility will be limited to periods of natural gas shortage or

[18] Order, at 35.

[19] Order, at 29.

unavailability, which will be the times when the plant's dual-fuel capability will help relieve the natural gas shortage and help avoid potential curtailments of firm gas customers."[20]

Accordingly, there can be no doubt that the Commission considered the issue, took the appropriate hard look, and merely reached a different conclusion than the Petitioners would have liked. This does not rise to the level of an error of law, nor does it merit rehearing.

In sum, the Petitioners failed to show an error of law or fact in the Commission's environmental assessment or Negative Declaration. They merely recite arguments previously considered and rejected by the Commission. The Negative Declaration was based on a thorough review of the EAF, Supplemental documents, and the extensive record. In full compliance with SEQRA, the Commission provided a reasoned elaboration in the Negative Declaration and the Order to explain its rationale and attendant environmental benefits of the refueling proposal. There being no new circumstances, the Petition for Rehearing should be denied.

III. THERE ARE NO ERRORS OF FACT OR LAW REGARDING ECONOMIC IMPACTS TO WARRANT REHEARING

Petitioners claim that the Commission committed errors of fact in assessing the project's economic benefits because the Commission relied on "flawed conclusions" of the DPS Staff Report.[21] While the Petitioners' arguments are couched in terms of "errors of fact," the alleged issues are not of a factual nature.

Having established that the record is sufficient as to the project's economic impacts, the Commission fully considered and evaluated the alleged "errors" raised by the Petitioners in rendering its decision and Order. That the Petitioners disagree with the Commission's ultimate conclusions and decision does not create an error of fact. As such, rehearing is unwarranted.

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[20] Order, at 35.

[21] Petition, at 18.

IV. THERE IS NO BASIS FOR REHEARING FOR THE PETITIONERS' REPEATED AND FLAWED ARGUMENT REGARDING AN 150MW FACILITY ALTERNATIVE

Petitioners maintain that because the Commission only acknowledged and did not specifically reject or address their argument, as well as that of the Entergy Entities, that 150 MW of capacity would be sufficient, that the Order is "flawed" and a rehearing should be granted.

Petitioners' concession that the Commission acknowledged their argument refutes their challenge here. The mere fact that the Commission acknowledged the argument that the Agreement might exceed the reliability need at the Facility refutes the Petitioners' assertion here. While the Petitioners assume that the Commission did not sufficiently consider their arguments, the Order's acknowledgment and implicit rejection of them refutes their position on rehearing.

Besides bald assertions, the Petitioners cite no legal authority for their position. Perhaps this is because the Commission is not required to specifically reject or address each and every item in the laundry list of issues the Petitioners concoct. *See Long Island Lighting Co.*, Case 27563, Op. No. 85-23, 1985 N.Y. PUC LEXIS 40, at *134-35 (N.Y. Pub. Serv. Comm'n, Dec. 16, 1985) ("In a recommended decision concerning a record as extensive as this, it is unrealistic to expect the Judges to consider every argument or fact presented by the parties.").

Given the foregoing, there are no errors of fact or law, or new circumstances to justify rehearing with respect to a 150 MW Facility.

V. THE COMMISSION ALREADY DISMISSED AND ADDRESSED PETITIONERS' ARGUMENTS REGARDING THE REQUEST FOR AN EVIDENTIARY HEARING

Petitioners previously submitted a Motion for a Procedural Order claiming that an evidentiary hearing was required.[22] The Commission's June 2014 Order responded to and denied the motion. In responding to the motion, the Commission discussed at length that the

[22] Earthjustice *et al.*, *Notice of Motion for Procedural Ord*er, Filing No. 189 (May 7, 2014).

existing record is adequate and that an evidentiary hearing would not elicit additional facts that would be material or helpful or compel testimony that would develop or lead to a different result.

Here, the Petitioners' Petition for Rehearing regurgitates the same arguments from their prior motion, which the Commission has fully and specifically addressed. No error of law or fact is alleged as to the Commission's decision to deny the motion, and no new circumstances are presented. As a result, the Petitioners' request for a rehearing should be denied.

CONCLUSION

WHEREFORE, for the above-stated reasons, the Request for Rehearing has failed to meet the heavy standard set forth in the Commission's regulations. The Commission's June 13, 2014 Order in this proceeding was proper in all respects. As a result, NRG respectfully submits that the Petitioners' Request for Rehearing should be denied.

Respectfully submitted,

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