

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
CITIZENS CAMPAIGN FOR THE ENVIRONMENT,

Petitioners,

VERIFIED PETITION

-against-

Index No.

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

**ORAL ARGUMENT
REQUESTED**

Respondents,

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

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I. PRELIMINARY STATEMENT

1. Petitioners Carol Chock, President, on behalf of Ratepayer and Community Intervenors, and Citizens Campaign for the Environment (“Petitioners”) bring this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) seeking a judgment (i) annulling and vacating a November 13, 2013 Ruling issued by Respondents New York Public Service Commission (“PSC” or “Commission”) and the New York State Department of Public Service (“DPS”) which denied or constructively denied Petitioners’ request for access to critical documents submitted in and relating to a Commission proceeding to which Petitioners are parties; and (ii) compelling Respondents to comply with their nondiscretionary duty to provide Petitioners with access to critical documents relating to the

Commission proceeding or, in the alternative, to post those documents on the Public Docket for the proceeding.

2. Petitioners are parties to the Commission's Proceeding on Motion by the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Case 12-E-0577 (the "Proceeding"). The purpose of the Proceeding is to evaluate whether electricity reliability issues allegedly raised by the proposed "mothballing" of two coal-fired power plants in western New York State should be addressed through transmission line upgrades or by repowering the plants with natural gas.

3. Despite having party status, Petitioners have been denied access to documents submitted by and/or exchanged between other parties to the Proceeding, including (i) documents submitted to the Commission or DPS staff by the plant owners and transmission utilities; (ii) records of communications between DPS staff and the plant owners and transmission utilities; and (iii) records of meetings between Commission members and the plant owners and transmission utilities.

4. Upon information and belief, the documents to which Petitioners seek access address core issues in the Proceeding, including the potential rate and environmental impacts of the various transmission upgrade and repowering options under consideration, and document *ex parte* communications between the Commission and the plant owners and transmission utilities. Consequently, the withheld documents are indispensable to Petitioners' ability to evaluate and comment on the various transmission upgrade and repowering options, and Respondents' failure and refusal to grant access to those documents is preventing Petitioners' meaningful participation in the Proceeding.

5. Petitioners have repeatedly sought access to the requested records via motions filed in accordance with the procedures set forth in the regulations governing Commission proceedings. Respondents' November 13, 2013 Ruling denied or constructively denied those motions in violation of the disclosure and procedural requirements of the New York Public Service Law ("PSL"), Respondents' regulations, and two previous Orders issued by the Commission. Moreover, despite the fact that the utilities and plant owners have conducted discovery in the Proceeding, Respondents' November 13, 2013 Ruling denied Petitioners the right to seek discovery, thereby creating a double standard under which the utilities and plant owners are granted access to critical information while Petitioners are denied access to that information. For all of these reasons, the November 13, 2013 ruling is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

6. Petitioners seek to lift the veil of secrecy that has cloaked the Proceeding, to compel Respondents to follow their own regulations governing Commission proceedings, to eliminate the double standard in the Proceeding that favors utilities and plant owners over public intervenors, and to shed light on the *ex parte*, secret backroom negotiations that have, upon information and belief, occurred regarding key issues in the Proceeding.

7. Petitioners seek a judgment (i) pursuant to CPLR Article 7803(3) annulling and vacating Respondents' November 13 Ruling as being in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and enjoining Respondents to provide Petitioners with access to the requested documents by a date certain; (ii) pursuant to CPLR 7803(1) enjoining Respondents to perform their nondiscretionary duty to provide Petitioners with the requested documents by a date certain or, in the alternative, to post

those documents on the Public Docket for the Proceeding by a date certain; and (iii) pursuant to CPLR 7803(1) enjoining Respondents to perform their nondiscretionary duty to provide Petitioners with any similar future documents or, in the alternative, to post such documents on the Public Docket for the Proceeding.

8. In the alternative, Petitioners seek judgment (i) pursuant to CPLR Article 78 that Respondents have failed to comply with the requirements of the New York Freedom of Information Law (“FOIL”), N.Y. Pub. Off. L. §§ 84 -90, and enjoining Respondents to provide Petitioners with the requested documents by a date certain; and (ii) pursuant to N.Y. Pub. Off. Law § 89(4)(c) awarding Petitioners reasonable attorneys’ fees and litigation costs.

II. PARTIES

9. Petitioner Carol Chock is a member of the Tompkins County Legislature who serves as President of Ratepayer and Community Intervenors (“RCI”), and brings this action on RCI’s behalf. *See* Affidavit of Carol Chock, Tompkins County Legislator, sworn to on December 17, 2013 (“Chock Aff.”) ¶¶ 1-2. RCI is an unincorporated association that includes among its members 15 elected officials from Cayuga, Cortland, Erie, Ontario, Seneca, Steuben, Tioga and Tompkins counties; three non-profit organizations based in Tompkins County, and 19 individual ratepayers from Chatauqua, Chemung, Tioga, and Tompkins counties. *Id.* ¶ 3. All the members of RCI will bear the rate and environmental impacts of a decision by the Commission on the Cayuga plant and Dunkirk plant repowering proposals. *Id.* ¶¶ 2-5. RCI sought party status in order to protect the public interest, assist in the development of a complete record, and analyze the information submitted in the Proceeding to develop a response to the proposals being considered by the Commission. *Id.* ¶ 6.

10. Petitioner Citizens Campaign for the Environment (“CCE”) is a non-profit, non-partisan organization that empowers communities and advocates solutions to protect public health and the natural environment in New York State. *See* Affidavit of Brian Smith, sworn to on December 17, 2013 (“Smith Aff.”) ¶ 8. CCE has 80,000 members in New York State including in Tompkins County, where the Cayuga plant is located, and Chautauqua County, where the Dunkirk plant is located. *Id.* ¶ 9. CCE’s members will be affected by the rate and environmental impacts of the decision whether to repower the Cayuga and Dunkirk plants. *Id.* ¶¶ 10-15. CCE filed as a party in the Proceeding to protect the public interest, represent the interests of its members and the public, assist in development of a complete record, and analyze and submit comments regarding the various transmission upgrade and repowering options being considered. CCE’s goals are to protect public health and the environment, ensure process transparency, and protect ratepayer interests. *Id.* ¶ 5.

11. Respondent PSC is a state commission that is part of the DPS. The Commission’s five members are appointed by the Governor with the advice and consent of the Senate. The PSC is charged by statute with responsibility for, *inter alia*, ensuring that any proposed retirement of a power plant is in the interest of the public and ratepayers, and ensuring that rate charges associated with the generation and distribution of electricity are just and reasonable.

12. Respondent DPS is an administrative agency of the State of New York that is responsible for, *inter alia*, analyzing the rate and environmental impacts associated with the generation and distribution of electricity.

III. FACTS

13. The Proceeding involves the proposed mothballing of two coal-fired power plants: (1) the Dunkirk generating station (“Dunkirk Plant”) located in Chautauqua County, New

York, which consists of four units with a combined capacity of approximately 635 megawatts (“MW”); and (2) the Cayuga generating station (“Cayuga plant”) located in Tompkins County, New York, which consists of two units with a combined capacity of approximately 312 MW.

14. On March 14, 2012, NRG Energy, Inc. (“NRG”) filed notice with the Commission of NRG’s intent to retire the Dunkirk Plant by no later than September 10, 2012, on the ground that the Dunkirk Plant was not economic and was not expected to be economic.

15. Subsequently, National Grid, the transmission utility responsible for ensuring reliability of electricity in that geographic area, entered into a Reliability Support Services Agreement (“RSSA”) with NRG to continue the Dunkirk plant’s operation in order to avoid potential reliability issues associated with the shutdown of the plant.

16. NRG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Dunkirk plant would be addressed by reinforcements to the transmission system.

17. On July 20, 2012, Cayuga Operating Company, LLC (“Cayuga”) filed notice with the Commission of its intent to retire the Cayuga Plant by no later than January 16, 2013 on the ground that current and forecasted wholesale electric prices in New York are inadequate for the Cayuga Plant to operate economically.

18. Subsequently, New York State Electric and Gas Company, Inc. (“NYSEG”), the transmission utility responsible for ensuring reliability of electricity in that geographic area, entered into an RSSA with Cayuga to continue the Cayuga plant’s operation in order to avoid potential reliability issues associated with the shutdown of the plant.

19. NYSEG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Cayuga plant would be addressed by reinforcements to the transmission system.

20. The Commission initiated the Proceeding by Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (Case 12-E-0577 Filing No. 3, Jan. 18, 2013) (the “January 18 Order”). A copy of the January 18 Order is annexed to this Petition as Exhibit A. The January 18 Order directed the transmission and distribution utilities “to evaluate repowering [with natural gas] as an alternative outcome for these two retirements over a long-run horizon of at least ten years.” Exhibit A at 3.

21. The January 18 Order directed National Grid and NYSEG to (1) file with DPS staff the projected costs of the transmission alternatives that they proposed to evaluate; and (2) request bids from the owners of the Cayuga and Dunkirk plants for the level of out-of-market support each would require in order to finance the repowering of their respective facilities. See Exhibit A at 3.

22. The January 18 Order further directed that reports analyzing the repowering alternatives be prepared and submitted to the Commission, and the reports analyze each alternative for (1) effectiveness in addressing potential reliability issues, (2) impacts on costs to ratepayers, (3) environmental impacts, (4) local economic impacts, (5) electric market competitiveness, and (6) any other factors the utilities believed should be considered. Exhibit A at 3-4.

23. The Proceeding was initiated by the Commission pursuant to its general authority under Article 4 of the New York Public Service Law (“PSL”) and, more specifically, pursuant to

PSL § 70 and the Commission's *Order Adopting Unit Notice Requirements for Generation Unit Retirements* (Case 05-E-0889, Dec. 20, 2005) ("Retirement Order"). A copy of the Retirement Order is annexed hereto as Exhibit B.

24. At or about the time the January 18 Order was issued, the Commission established a public docket for the Proceeding on the Commission's website for the purported purpose of providing parties to the Proceeding and the public with access to documents, motions, letters, reports, comments, and other written materials submitted in connection with the Proceeding ("Public Docket"). The Public Docket is located at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-e-0577&submit=Search+by+Case+Number>.

25. On August 13, 2013, Petitioner RCI filed and served a Request for Party Status in the Proceeding. Chock Aff. ¶ 6.

26. Shortly after filing for party status, Petitioner RCI's members discovered that critical documents filed in the Proceeding by or on behalf of NRG, Cayuga, National Grid, NYSEG and Niagara Mohawk Power Corporation (together, the "Transmission and Generating Entities") were posted on the Public Docket in severely redacted versions that concealed critical economic and environmental information relating to the various transmission upgrade and repowering options under consideration in the Proceeding. The redactions were so pervasive and numerous that the documents were rendered essentially useless for purposes of meaningful review and comment by RCI.

27. On August 16, 2013, representatives of RCI met with then-Acting Commission Secretary Jeffrey Cohen. *See* Affirmation of Christopher Amato, Esq., sworn to on December

17, 2013 (“Amato Aff.”) ¶ 18. The purpose of the meeting was to request that the PSC post unredacted versions of critical documents on the Public Docket or, alternatively, to provide Petitioner RCI with unredacted versions of those documents. *Id.*

28. Acting Secretary Cohen stated at the meeting that unredacted versions of the documents could not be released or provided due to trade secret claims made by the Transmission and Generating Entities concerning the redacted portions of the documents. Amato Aff. ¶ 19.

29. Acting Secretary Cohen also stated at the meeting that the Commission had received submissions from the Transmission and Generating Entities concerning issues in the Proceeding that were not posted on the Public Docket. Amato Aff. ¶ 19.

30. Acting Secretary Cohen further stated that DPS staff had engaged in communications with the Transmission and Generating Entities concerning issues in the Proceeding. Amato Aff. ¶ 20. Those communications do not appear on the Public Docket. *Id.*

31. Acting Secretary Cohen also acknowledged that Commission members may have met with representatives of the Transmission and Generating Entities, and stated that the Commission is not subject to the prohibition against *ex parte* communications set forth in the New York State Administrative Procedure Act. Amato Aff. ¶ 21.

32. August 26, 2013, Earthjustice filed and served a Party Representative Form providing notice that it would be representing Petitioner in the Proceeding.

33. On September 12, 2013, Petitioner CCE filed and served a Request for Party Status in the Proceeding.

34. On September 16, 2013, Earthjustice filed and served on behalf of Petitioners a Motion for Access to Critical Documents Submitted in This Proceeding (Case 12-E-0577, Filing No. 108, Sept. 16, 2013) (“Motion for Access”). The Motion for Access was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought complete and unredacted versions of:

(1) twelve identified documents previously filed in the Proceeding by the Transmission and Generating Entities (the “Requested Filed Documents”);

(2) all documents submitted to the Commission in the Proceeding by or on behalf of the Transmission and Generating Entities which do not appear on the Public Docket (the “Non-Public Submissions”);

(3) all communications from the Commission or DPS staff to any one or more of the Transmission and Generating Entities which do not appear on the Public Docket (the “Non-Public Communications”);

(4) all records of meetings between the Commission, any quorum of the Commission, or any Commission member and any one or more of the Transmission and Generating Entities (the “Meeting Records”); and

(5) all documents which are filed in the Proceeding by the Transmission and Generating Entities and all communications from the Commission or DPS staff to the Transmission and Generating Entities after the date of the motion (the “Future Submissions”).

A copy of the Motion for Access is annexed to this Petition as Exhibit C.

35. By letter dated September 23, 2013, the PSC Secretary informed Petitioners that “I have reviewed your motion and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1 . . . [and] this request for access will be handled by the [PSC]’s Records Access Officer.” Letter from Kathleen H. Burgess, Secretary, N.Y. Public

Serv. Comm'n to Christopher Amato, Esq., Earthjustice (Case 12-E-0577 Filing No. 105, Sept. 23, 2013) (the "Secretary's September 23 Letter"). A copy of the Secretary's September 23 Letter is annexed to this Petition as Exhibit D.

36. By letter dated that same day, the PSC Records Access Officer ("RAO") informed Petitioners that "this matter has been referred to me by Secretary Burgess and will be treated as a request for records pursuant to [the] Freedom of Information Law (FOIL)." Letter from Donna M. Giliberto, Records Access Officer, N.Y. Public Serv. Comm'n to Christopher Amato, Esq., Earthjustice (Sept. 23, 2013) (the "RAO's September 23 Letter"). A copy of the RAO's September 23 Letter is annexed to this Petition as Exhibit E.

37. The RAO's September 23 Letter went to state:

This letter has a two-fold purpose. First, I hereby acknowledge [Petitioners]' request of September 16, 2013 for the record(s) described above, pursuant to FOIL, POL Article 6. Access to the 12 records identified in footnote 1 will be determined in accordance with POL § 89(5). The non-public submissions and the non-public communications are un-redacted copies of the above-entitled records that are submitted to the [RAO] with a request for protection from disclosure under [POL] § 87(2)(d) and (f), § 89(5)(a)(1-a), and 16 NYCRR 6-1.3. Meeting records are not filed as part of a proceeding instead, certain meetings among senior staff in active cases are tracked under Project Sunlight. With regard to future submissions, agencies are not obligated to respond to requests for future filings or submissions as these records do not yet exist.

Exhibit E at 2.

38. The RAO's September 23 Letter is flawed in several significant respects. First, the Non-Public Submissions and Non-Public Communications sought by the Motion for Access are not, as claimed by the RAO, unredacted copies of the Requested Filed Documents. To the

contrary, they are distinct submissions and communications that are separately identified in the Motion for Access.

39. Second, although purporting to treat the Motion for Access as a FOIL request, the RAO then went on to constructively deny access to the Meeting Records sought in the Motion for Access by claiming that such records “are not filed as part of a proceeding.” Exhibit E at 2. If, as claimed by the RAO, Petitioners’ motion was being treated as a FOIL request, then those records were required to be provided to Petitioners regardless of whether they were filed in the Proceeding.

40. Third, the RAO’s claim that the Commission was under no obligation to provide access to future submissions highlights the inappropriateness of converting the Motion for Access into a FOIL request. The Commission clearly has the authority in its own proceeding to require that future submissions be served on all parties, and could have done so in the Proceeding by ruling on the Motion for Access.

41. On September 26, 2013, Petitioners filed a Motion to Revoke Secretary’s Conversion and Referral of Motion for Access to Documents (Case 12-E-0577 Filing No. 111, Sept. 26, 2013) (“Motion to Revoke”). The Motion to Revoke was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought an Order (1) revoking the Secretary’s purported conversion of the Motion for Access into a FOIL request; and (2) revoking the Secretary’s referral of the Motion for Access to the RAO for decision. A copy of the Motion to Revoke is annexed to this Petition as Exhibit F.

42. The grounds for the Motion to Revoke were that (i) neither the Secretary’s September 23 Letter nor the RAO’s September 23 Letter cited any legal authority for converting

the Motion for Access into a FOIL request and no such authority exists; and (ii) the RAO lacks authority to rule on a motion filed in a Commission proceeding.

43. On October 9, 2013, the Commission Secretary issued a ruling on Petitioners' Motion to Revoke. The ruling stated:

I write to clarify *that no conversion of [Petitioners'] motion took place* and that 16 NYCRR § 6-1.3 governs production of “trade secret” information in a notice and comment proceeding when no “presiding officer” is assigned. I further clarify that, pursuant to delegation under [PSL] § 8, the RAO exercises full authority to decide whether redacted documents will be made public pursuant to 16 NYCRR § 6-1.3 and whether to issue protective orders to make available access to materials deemed “trade secret.”

Letter from Kathleen H. Burgess, Secretary, N.Y. Public Serv. Comm'n, to Christopher Amato, Esq., Earthjustice (Oct. 9, 2013) (“Secretary’s October 9 Ruling”) (emphasis added). A copy of the Secretary’s October 9 Ruling is annexed to this Petition as Exhibit G.

44. The Secretary’s October 9 Ruling, stating that “no conversion of [Petitioners’] motion took place” directly contradicted the Secretary’s September 23 Letter, which stated “I have reviewed your motion and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1 . . . [and] this request for access will be handled by the [PSC]’s Records Access Officer.” *See* Exhibit D. The Secretary’s October 9 Ruling also directly contradicted the RAO’s September 23, Letter, which stated that “this matter has been referred to me by Secretary Burgess and will be treated as a request for records pursuant to [the] Freedom of Information Law (FOIL).” *See* Exhibit E.

45. Additionally, the Secretary’s October 9 Ruling dealt exclusively with trade secret issues which, upon information and belief, are relevant only to the Requested Filed Documents sought by the Motion for Access. The Secretary’s October 9 Ruling failed to address or even

mention the Non-Public Submissions, the Non-Public Communications, the Meeting Records, and the Future Submissions sought by the Motion for Access. The October 9 Ruling also fails to adequately respond to or address the legal arguments raised by Petitioners in their Motion to Revoke.

46. The Secretary's October 9 Ruling was not placed on the Public Docket.

47. By letter dated October, 3, 2013, the RAO issued a FOIL Determination which, *inter alia*, rejected trade secret claims asserted by the Transmission and Generating Entities regarding certain of the Requested Filed Documents. Letter from Donna M. Giliberto, Records Access Officer, N.Y. Public Serv. Comm'n to Helen Holden Slottje, Esq; Community Environmental Defense Council, Inc., (Oct. 3, 2013) (Case 12-E-0577 Filing No. 114, Oct. 3, 2013) ("RAO October 3 FOIL Determination"). A copy of the RAO October 3 FOIL Determination is annexed to this Petition as Exhibit H.

48. The RAO's October 3 FOIL Determination stated that "[t]here are nearly 400 documents filed in this case." Exhibit H at 3 (emphasis added).

49. To date, only 154 of the documents filed in the Proceeding have been placed on the Public Docket.

50. Thus, upon information and belief, *nearly 250 documents* filed in the Proceeding constitute Non-Public Submissions that are being withheld from Petitioners.

51. By letter dated October 11, 2013, the RAO issued a FOIL Determination rejecting the trade secret claims asserted by Cayuga regarding the remainder of the Requested Filed Documents. Letter from Donna M. Giliberto, Records Access Officer, N.Y. Public Serv. Comm'n to Christopher Amato, Esq., Earthjustice (Oct. 11, 2013) (Case 12-E-0577 Filing No.

139, Oct. 11, 2013) (“RAO October 11 FOIL Determination”). A copy of the RAO’s October 11, 2013 FOIL Determination is annexed to this Petition as Exhibit I.

52. The RAO’s October 11 FOIL Determination addressed only the Requested Filed Documents sought in the Motion for Access, and did not address, or even mention, the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access. *See* Exhibit I.

53. Thus, neither the Secretary’s October 9 Ruling nor the RAO’s October 11 FOIL Determination address or even mention the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access.

54. On October 17, 2013, Petitioners filed a Motion for Rehearing on the Secretary’s October 9, 2013 Ruling (Case 12-E-0577 Filing No. 128, Oct. 17, 2013) (“Motion for Rehearing”). The Motion was filed pursuant to the regulations governing Commission proceedings, 16 N.Y.C.R.R. §§ 3.6 and 3.7(a), and sought an Order (i) granting rehearing on the Secretary’s October 9 Ruling and (ii) reversing that portion of the Ruling that constructively denied access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access. A copy of the Motion for Rehearing is annexed to this Petition as Exhibit J.

55. On November 13, 2013, the Commission Secretary issued a ruling on Petitioners’ Motion for Rehearing. The ruling stated:

The Public Service Law (PSL) and Commission regulations do not provide for Rehearing for documents other than Commission orders. PSL §22 provides that only an order of the Commission is subject to rehearing; 16 NYCRR §3.7(a) is to the same effect. The Motion for Rehearing filed by [Petitioner] seeks review of a procedural determination by the Secretary, not an order of the

Commission. As such, I decline to review the instant Motion on its merits.

Letter from Kathleen H. Burgess, Secretary, N.Y. Public Serv. Comm'n, to Christopher Amato, Esq., Earthjustice (Case 12-E-0577 Filing No. 146, Nov. 13, 2013) (“Secretary’s November 13 Ruling”). A copy of the Secretary’s November 13 Ruling is annexed to this Petition as Exhibit K.

56. The Secretary’s November 13 Ruling also stated that “the handling of access to information in this case by the Records Access Officer (RAO) pursuant to 16 NYCRR §6-1.3 *does not deny access, constructively or otherwise, to materials in this notice and comment proceeding.*” Exhibit K (emphasis added).

57. Despite claiming that Petitioners have not been constructively denied access to any documents, the Secretary’s November 13 Ruling fails to address, or even mention, the Non-Public Submissions, Non-Public Communications, and Meeting Records sought by the Motion for Access and, to date, Petitioners have not been granted access to those documents.

58. Furthermore, the Secretary’s November 13 Ruling relegates Petitioners to the position of bystanders instead of parties to the Proceeding by explicitly suggesting that Future Submissions requested in the Motion for Access should be obtained through FOIL because “the RAO has full authority to issue protective orders to ensure such access to materials deemed “trade secret” pursuant to delegation under PSL §8.” *See* Exhibit K. This proposed solution, however, ignores the fact that many of the documents sought by Petitioners do not involve trade secrets or claims of confidentiality and that Section 3.5(e)(1) of the Commission’s regulations requires that all parties be served with every document filed in a Commission proceeding. 16 N.Y.C.R.R. § 3.5(e)(1).

59. The Secretary's November 13 Ruling further states:

Referral of the original motion for access to the RAO was also appropriate, *because [Petitioners do] not have a right to discovery under 16 NYCRR §5.4. Part 5 of the Commission's rules envisions a "presiding officer" to administer discovery. Absent such an officer, this notice and comment proceeding is not a "formal" proceeding in which discovery is possible, under 16 NYCRR §5.1.*

See Exhibit K at 2 (emphasis added).

60. The Secretary's Ruling misconstrues Petitioners' Motion for Access and the regulations governing Commission proceedings. Petitioners' Motion for Access was not seeking discovery, but was seeking to enforce Petitioners' rights, as parties to the Proceeding, to be served with all documents that were submitted by, or exchanged among, other parties to the Proceeding as required by the Commission's regulations, 16 NYCRR § 3.5(e)(1).

61. Section 3.5(e)(1) of the Commission regulations requires that "[a] party who presents a document for filing in a proceeding in which there are other parties *shall at the same time serve the document on each such party.*" (Emphasis added). Part 3 of Title 16 is entitled, "Procedures Applicable to All Proceedings," and the procedures specified in that part are thus applicable to all Commission proceedings, including "notice and comment" proceedings. Thus, as parties to the Proceeding Petitioners have a legal right to be served with every document filed by another party, and are not (and should not be) required to serve a discovery request to obtain those documents.

62. Even if Petitioners' Motion for Access was seeking discovery as claimed by the Secretary, the assertion in the Secretary's November 13 Ruling that no discovery is available in the Proceeding is incorrect. In fact, discovery *has* occurred between other parties to the

Proceeding, a point that other parties have referred to in their submissions and that the Secretary has plainly acknowledged in at least one other ruling in the Proceeding.

63. Specifically, in its appeal of the RAO's October 3 FOIL Determination, NRG identified categories of documents for which it was asserting confidentiality claims as including "[t]he first set of Information Requests to NRG and Dunkirk from National Grid dated 4/1/13 and NRG's responses thereto," and "[t]he second set of Information Requests to NRG and Dunkirk dated 4/1/13 and NRG's responses thereto." Letter from Elizabeth Quirk-Hendry, Esq., General Counsel, NRG Energy, Inc., to Hon. Kathleen H. Burgess, Secretary, N.Y. Public Serv. Comm'n (Oct. 15, 2013) ("NRG Letter"). It is clear that the "information requests" referred to in the NRG Letter constitute discovery. A copy of the NRG Letter is annexed to this Petition as Exhibit L.

64. The discovery requests and responses referenced in the NRG Letter were explicitly referenced in the Secretary's October 29, 2013 Determination on Appeal of Record Access Officer's Determination (Filing No. 136, Oct. 29, 2013), n. 9 at 3. A copy of the Secretary's October 29, 2013 Appeal Determination is annexed to this Petition as Exhibit M.

65. Thus, two weeks after the Secretary explicitly referred to discovery requests and responses in a ruling issued in the Proceeding, the Secretary's November 13 Ruling claimed that Petitioners are not entitled to any discovery in the Proceeding and further claimed that discovery is impermissible in the Proceeding under the Commission's regulations.

66. The Secretary's November 13 Ruling thus establishes a double standard in the Proceeding under which Transmission and Generating Entities are able to obtain documents through discovery but Petitioners are not.

67. In the more than three months that have elapsed since Petitioners first requested access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions, Respondents have simply ignored Petitioners' repeated requests for those documents in violation of its own regulations and procedures or, in the alternative, in violation of FOIL.

68. As a result of Respondents' unreasonable and unlawful refusal to grant Petitioners access to the requested documents, Petitioners have been deprived of the opportunity to meaningfully participate in the Proceeding.

69. The Secretary's November 13 Ruling constituted a denial or constructive denial of Petitioners' Motion for Access, Motion to Revoke and Motion for Rehearing.

70. The Secretary's November 13 Ruling constituted a final agency action reviewable under CPLR Article 78.

AS AND FOR A FIRST CAUSE OF ACTION

71. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 70 as though fully set forth herein.

72. Respondents impermissibly converted Petitioners' Motion for Access into a FOIL request and impermissibly referred the Motion for Access to the RAO for decision.

73. Petitioners' Motion for Access was properly made pursuant to the regulations governing Commission proceedings, 16 N.Y.C.R.R. Part 3.

74. Section 3.6(b) of the Commission's regulations, 16 N.Y.C.R.R. § 3.6(b), provides that, where no presiding officer has been assigned, motions are to be filed with the Secretary.

75. Thus, where no presiding officer has been assigned, the Secretary assumes the function of a presiding officer in ruling on all motions.

76. No presiding officer has been assigned in the Proceeding.

77. Petitioners properly filed its Motion for Access with the Secretary, as provided for by 16 N.Y.C.R.R. § 3.6(b).

78. Pursuant to the regulations governing Commission proceedings, the Secretary possessed sole authority to rule on Petitioners' Motion for Access. 16 N.Y.C.R.R. § 3.6(b).

79. There is no legal authority for a motion in a proceeding before the Commission seeking access to non-trade secret documents to be converted into a FOIL request.

80. There is no legal authority for a motion made in a proceeding before the Commission seeking access to non-trade secret documents to be referred to the RAO for decision.

81. The RAO lacks authority to rule on a motion filed in a proceeding before the Commission.

82. Respondents' conversion of Petitioners' Motion for Access into a FOIL request and their referral of the Motion for Access to the RAO for decision violated the regulations governing Commission proceedings, 16 N.Y.C.R.R. Part 3.

83. The Secretary's November 13 Ruling affirmed the improper conversion of Petitioners' Motion for Access into a FOIL request and the referral of the motion to the RAO for decision.

84. Respondents' conversion of Petitioners' Motion for Access into a FOIL request and their referral of the Motion for Access to the RAO for decision was in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A SECOND CAUSE OF ACTION

85. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 84 as though fully set forth herein.

86. The Secretary's November 13 Ruling that Petitioners do not have a right to discovery and that no discovery is available to Petitioners in the Proceeding because no presiding officer has been assigned was in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion because the Transmission and Generating Entities have served and received discovery requests and responses in the Proceeding.

87. The Secretary's November 13 Ruling establishes an impermissible, unjust and unlawful double standard under which Transmission and Generating Entities are allowed to obtain critical information in the Proceeding through discovery, but Petitioners are not.

88. The Secretary's November 13 Ruling violates the regulations governing Commission proceedings, including 16 N.Y.C.R.R. Parts 3 and 5.

89. The Secretary's November 13 Ruling was in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A THIRD CAUSE OF ACTION

90. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 89 as though fully set forth herein.

91. The Proceeding was initiated by the Commission pursuant to its general authority under PSL Article 4, PSL § 70, the January 18 Order and the Retirement Order. *See* Exhibits A and B.

92. Proceedings under PSL § 70 are intended to protect against “generator retirement that could *harm the public interest.*” Exhibit B at 15 (emphasis added).

93. The January 18 Order describes the purpose of the Proceeding as:

to examine the relative costs and benefits of repowering the plants at their existing sites, and to compare those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term. The benefits to be evaluated must include, but may not be limited to, the reliability, *environmental,* and *customer impacts* associated with the repowering and transmission solutions.

Exhibit A at 3; (emphasis added).

94. Because this is a public proceeding, the January 18 Order clearly contemplated that the public, including Petitioners, would participate in examining “the relative costs and benefits of repowering,” comparing “those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term,” and evaluating the “environmental and customer impacts” of the repowering and transmission options. Exhibit A at 3.

95. Respondents’ failure and refusal to provide Petitioner with access to the Non-Public Submissions, Non-Public Communications and Meeting Records have thwarted and continue to thwart Petitioners’ meaningful participation in the Proceeding.

96. Respondents’ failure and refusal to provide Petitioners with access to the Non-Public Submissions, Non-Public Communications and Meeting Records violates the requirement of PSL § 70, the January 18 Order and the Retirement Order that the Proceeding be public, include public participation, and protect the public interest.

97. By denying or constructively denying Petitioners' Motion for Access, Motion to Revoke and Motion for Rehearing and refusing to grant Petitioner access to the Non-Public Submissions, Non-Public Communications and Meeting Records, the Secretary's November 13 Ruling violates PSL § 70, the January 18 Order and the Retirement Order.

98. Respondents' failure and refusal to provide Petitioners with access to the Non-Public Submissions, Non-Public Communications and Meeting Records is in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A FOURTH CAUSE OF ACTION

99. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 98 as though fully set forth herein.

100. Pursuant to 16 N.Y.C.R.R. § 3.5(e)(1), all documents filed in the Proceeding must be served on each and every party to the Proceeding.

101. Upon information and belief, the Transmission and Generating Entities have filed documents, including letters, reports, analyses, comments, and other written materials, in the Proceeding without serving Petitioners with those documents, in violation of 16 N.Y.C.R.R. § 3.5(e)(1).

102. Upon information and belief, Respondents knew or should have known that the Transmission and Generating Entities have filed documents, including letters, reports, analyses, comments, and other written materials, in the Proceeding without serving Petitioners with those documents, in violation of 16 N.Y.C.R.R. § 3.5(e)(1).

103. Upon information and belief, Respondents have failed to post all submissions they have received from the Transmission and Generating Entities on the Public Docket.

104. According to Respondents, nearly 400 documents have been filed in the Proceeding. *See* Exhibit H at 3.

105. To date, only 154 documents filed in the Proceeding have been placed on the Public Docket.

106. Thus, nearly 250 documents filed in the Proceeding constitute Non-Public Submissions to which Petitioners have been denied access.

107. Upon information and belief, the Non-Public Submissions include information that addresses core issues in the Proceeding and that is indispensable to evaluating and commenting on the various transmission and repowering options under consideration in the Proceeding.

108. Petitioners have repeatedly sought access to the Non-Public Submissions through motions filed in accordance with the regulations governing Commission proceedings, including Petitioners' Motion for Access, Motion to Revoke, and Motion for Rehearing. *See* Exhibits C, F and J.

109. The Secretary's November 13 Ruling fails to address, or even mention, those portions of Petitioners' Motion for Access that seek access to the Non-Public Submissions and thus constitutes a denial or constructive denial of Petitioners' Motion for Access relating to those documents.

110. The Secretary's November 13 Ruling violates 16 N.Y.C.R.R. Part 3 by failing to address those portions of Petitioners' Motion for Access that seek access to the Non-Public Submissions.

111. Respondents' failure and refusal to require that Petitioners be served with all documents filed in the Proceeding is in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A FIFTH CAUSE OF ACTION

112. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 111 as though fully set forth herein.

113. Upon information and belief, Respondents Commission and/or DPS staff have engaged in communications with one or more of the Transmission and Generating Entities and those communications have not been served on all parties to the Proceeding.

114. Upon information and belief, Respondents have failed to post all communications between the Commission and/or DPS staff and the Transmission and Generating Entities on the Public Docket.

115. Upon information and belief, the Non-Public Communications address core issues in the Proceeding, and are indispensable to evaluating and commenting on the various transmission and repowering options under consideration in the Proceeding.

116. Petitioners have repeatedly sought access to the Non-Public Communications through motions filed in accordance with PSC regulations governing Commission proceedings, 16 N.Y.C.R.R. Part 3, including Petitioners' Motion for Access, Motion to Revoke, and Motion for Rehearing. *See* Exhibits C, F and J.

117. The Secretary's November 13 Ruling fails to address, or even mention, those portions of Petitioners' Motion for Access that seek access to the Non-Public Communications

and thus constitutes a denial or constructive denial of Petitioners' Motion for Access relating to those documents..

118. The Secretary's November 13 Ruling violates 16 N.Y.C.R.R. Part 3 by failing to address those portions of Petitioners' Motion for Access that seek access to the Non-Public Communications.

119. Respondents' failure and refusal to provide Petitioners with all Non-Public Communications is in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A SIXTH CAUSE OF ACTION

120. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 119 as though fully set forth herein.

121. Upon information and belief, the Commission, a quorum of the Commission, and/or one or more individual Commission members attended meetings with one or more of the Transmission and Generating Entities at which issues concerning the Proceeding were discussed.

122. Upon information and belief, records concerning the aforementioned meetings are in the possession of Respondents.

123. Upon information and belief, Respondents have failed to post records of the aforementioned meetings on the Public Docket.

124. Upon information and belief, the records of the aforementioned meetings document *ex parte* communications between the Commission and the Transmission and Generating Entities regarding the subject matter of the Proceeding.

125. Petitioners have repeatedly sought access to the Meeting Records through motions filed in accordance with the regulations governing Commission proceedings, 16 N.Y.C.R.R. Part 3, including Petitioners' Motion for Access, Motion to Revoke, and Motion for Rehearing. *See* Exhibits C, F and J.

126. The Secretary's November 13 Ruling fails to address, or even mention, those portions of Petitioners' Motion for Access that seek access to the Meeting Records and thus constitutes a denial or constructive denial of Petitioners' Motion for Access relating to those documents.

127. The Secretary's November 13 Ruling violates 16 N.Y.C.R.R. Part 3 by failing to address those portions of Petitioners' Motion for Access that seek access to the Meeting Records.

128. Respondents' failure and refusal to provide Petitioners with all Meeting Records is in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

AS AND FOR A SEVENTH CAUSE OF ACTION

129. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 128 as though fully set forth herein.

130. Pursuant to the PSL, the regulations governing Commission proceedings, and the Commission's own Orders, including but not limited to PSL § 70, 16 N.Y.C.R.R. § 3.5(e)(1), the January 18 Order, and the Retirement Order, Respondents have a nondiscretionary duty to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records or, in the alternative, to post each of the aforementioned documents on the Public Docket.

131. By failing to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records or, in the alternative, posting each of the aforementioned documents on the Public Docket, Respondents have failed to perform a duty enjoined upon them by law.

AS AND FOR AN EIGHTH CAUSE OF ACTION

132. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 131 as though fully set forth herein.

133. Upon information and belief, and based upon the practices engaged in to date by Respondents in the Proceeding, submissions will continue to be made by the Transmission and Generating Entities that are not served on all other parties to the Proceeding and that are not posted on the Public Docket.

134. Upon information and belief, and based upon the practices engaged in to date by Respondents in the Proceeding, there will continue to be communications between the Commission and/or DPS staff and the Transmission and Generating Entities that are not served on all other parties to the proceeding and that are not posted on the Public Docket.

135. Upon information and belief, and based upon the practices engaged in to date by Respondents in the Proceeding, there will continue to be meetings between the Commission and/or individual Commission members and one or more of the Transmission and Generating Entities regarding the subject matter of the Proceeding, and records of those meetings will not be served on all other parties to the Proceeding and will not be posted on the Public Docket.

136. Pursuant to the PSL, the regulations governing Commission proceedings, and the Commission's own Orders, including but not limited to PSL § 70, 16 N.Y.C.R.R. § 3.5(e)(1), the

January 18 Order, and the Retirement Order, Respondents have a continuing nondiscretionary duty enjoined upon them by law to provide Petitioners with all future submissions from the Transmitting and Generating Entities, all future communications between Respondents and the Transmission and Generating Entities, and all records of future meetings between Respondents and the Transmission and Generating Entities or, in the alternative, to post all such documents on the Public Docket.

AS AND FOR A NINTH CAUSE OF ACTION

137. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 136 as though fully set forth herein.

138. In the alternative, even if Petitioners' Motion for Access was properly converted into a FOIL request by Respondents, Respondents' failure and refusal to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records violates FOIL.

139. N.Y. Pub. Off. Law § 89 and the Commission's regulations, 16 N.Y.C.R.R. § 6-1.1, require that, within five business days of the receipt of a written request for a record reasonably described, the agency shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.

140. Neither the Secretary's September 23 Letter nor the RAO's September 23 Letter comply with these statutory and regulatory requirements. *See* Exhibits D and E.

141. N.Y. Pub. Off. Law § 89 and the Commission's regulations, 16 NYCRR § 6-1.1, further provide that if an agency determines to grant a request in whole or in part, and if

circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

142. Neither the Secretary's September 23 Letter nor the RAO's September 23 Letter comply with these statutory and regulatory requirements. *See* Exhibits D and E.

143. Petitioners' request for access to the Non-Public Submissions, Non-Public Communications, and Meeting Records was neither granted nor denied within a reasonable time after the date of acknowledgment of receipt of a request, and Respondents failed to conform to the provisions of section 89(3) of the Public Officers Law.

144. As a result, Petitioners have been constructively denied access to the requested records.

145. Respondents had no reasonable grounds for denying Petitioners access to the Non-Public Submissions, Non-Public Communications, and Meeting Records.

146. Respondents failed to respond to Petitioners' request or appeal within the statutory time frame.

147. Respondents' failure and refusal to provide Petitioners with access to the Non-Public Submissions, Non-Public Communications, and Meeting Records is in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

WHEREFORE, Petitioners respectfully request that this Court enter Judgment against Respondents as follows:

1. As relief for the First through Sixth Causes of Action, annulling and vacating the Secretary's November 13 Ruling as being in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and enjoining Respondents to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records by a date certain;
2. As relief for the Seventh Cause of Action, enjoining Respondents to perform their nondiscretionary duty to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records by a date certain or, in the alternative, to post those documents on the Public Docket for the Proceeding by a date certain;
3. As relief for the Eighth Cause of Action, enjoining Respondents to perform their nondiscretionary duty to provide Petitioners with copies of all future submissions by, communications with, and meeting records concerning the Transmission and Generating Entities or, in the alternative, enjoining Respondents to post the aforementioned documents on the Public Docket for the Proceeding;
4. As relief for the Ninth Cause of Action, enjoining Respondents to provide Petitioners with copies of all Non-Public Submissions, Non-Public Communications, and Meeting Records by a date certain, and awarding Petitioners reasonable attorneys' fees and litigation costs as provided for by Public Officers Law § 89(4)(c); and
5. Granting Petitioners such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 18, 2013

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*Counsel for Petitioners Ratepayer and Community
Intervenors and Citizens Campaign for the
Environment*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

In the Matter of the Application of
CAROL CHOCK, President, on Behalf of
RATEPAYER AND COMMUNITY INTERVENORS and
CITIZENS CAMPAIGN FOR THE ENVIRONMENT,

,

Petitioners,

VERIFICATION

-against-

Index No.

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

Respondents,

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

-----X

STATE OF NEW YORK)
)SS.:
COUNTY OF TOMPKINS)

CAROL CHOCK, being duly sworn, deposes and says:

I am a member of the Tompkins County Legislature and am President of Petitioner Ratepayers and Community Intervenors. I have reviewed the annexed Verified Petition and know its contents. The Verified Petition is true to my knowledge, except as to matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

CAROL CHOCK

Sworn to Before Me
This ___ Day of December, 2013

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

In the Matter of the Application of
CAROL CHOCK, President, on Behalf of
RATEPAYER AND COMMUNITY INTERVENORS and
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-against-

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PUBLIC SERVICE COMMISSION OF THE STATE OF
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OF PUBLIC SERVICE,

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Law and Rules.

-----X

PETITIONERS' MEMORANDUM OF LAW

Preliminary Statement

Petitioners Carol Chock, President, on behalf of Ratepayer and Community Intervenors (“RCI”), and Citizens Campaign for the Environment (“CCE”) (collectively, “Petitioners”) bring this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) seeking judgment (i) annulling and vacating a November 13, 2013 Ruling issued by Respondents New York Public Service Commission (“PSC” or “Commission”) and the New York State Department of Public Service (“DPS”) which denied or constructively denied Petitioners’ request for access to critical documents submitted in and relating to a Commission proceeding to which Petitioners are parties; and (ii) compelling Respondents to comply with their nondiscretionary duty to provide Petitioners with access to critical documents relating to the

Commission proceeding or, in the alternative, to post those documents on the Public Docket for the proceeding (“Public Docket”).

Petitioners are parties to the Commission’s Proceeding on Motion by the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Case 12-E-0577 (the “Proceeding”). The purpose of the Proceeding is to evaluate whether electricity reliability issues allegedly raised by the proposed “mothballing” of two coal-fired power plants in western New York State should be addressed through transmission line upgrades or by repowering the plants with natural gas.

Despite having party status, Petitioners have been denied access to documents submitted by and/or exchanged between other parties to the Proceeding, including (i) documents submitted to the Commission or DPS staff by the plant owners and transmission utilities; (ii) records of communications between DPS staff and the plant owners and transmission utilities; and (iii) records of meetings between Commission members and the plant owners and transmission utilities.

Upon information and belief, the documents to which Petitioners seek access address core issues in the Proceeding, including the potential rate and environmental impacts of the various transmission upgrade and repowering options under consideration, and document *ex parte* communications between the Commission and the plant owners and transmission utilities. Consequently, the withheld documents are indispensable to Petitioners’ ability to evaluate and comment on the various transmission upgrade and repowering options and to respond to arguments or claims made in the course of *ex parte* communications. Respondents’ failure and refusal to grant access to those documents is thus preventing Petitioners’ meaningful participation in the Proceeding.

Petitioners have repeatedly sought access to the requested records via motions filed in accordance with the procedures set forth in the regulations governing Commission proceedings. Respondents' November 13, 2013 Ruling denied or constructively denied those motions in violation of the disclosure and procedural requirements of the New York Public Service Law ("PSL"), Respondents' regulations, and two previous Orders issued by the Commission. Moreover, despite the fact that the utilities and plant owners have conducted discovery in the Proceeding, Respondents' November 13, 2013 Ruling denied Petitioners the right to seek discovery, thereby creating a double standard under which the utilities and plant owners are granted access to critical information while Petitioners are denied access to that information. For all of these reasons, the November 13, 2013 Ruling is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion.

Petitioners seek to lift the veil of secrecy that has cloaked the Proceeding, to compel Respondents to follow their own regulations governing Commission proceedings, to eliminate the double standard in the Proceeding that favors utilities and plant owners over public intervenors, and to shed light on the *ex parte*, secret backroom negotiations that have, upon information and belief, occurred regarding key issues in the Proceeding.

Petitioners seek a judgment (i) pursuant to CPLR Article 7803(3) annulling and vacating Respondents' November 13 Ruling as being in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and enjoining Respondents to provide Petitioners with access to the requested documents by a date certain; (ii) pursuant to CPLR 7803(1) enjoining Respondents to perform their nondiscretionary duty to provide Petitioner with the requested documents by a date certain or, in the alternative, to post those documents on the Public Docket by a date certain; and (iii) pursuant to CPLR 7803(1) enjoining

Respondents to perform their nondiscretionary duty to provide Petitioners with any similar future documents or, in the alternative, to post such documents on the Public Docket.

In the alternative, Petitioners seek judgment (i) pursuant to CPLR Article 78 that Respondents have failed to comply with the requirements of the New York Freedom of Information Law (“FOIL”), N.Y. Pub. Off. Law §§ 84 -90, and enjoining Respondents to provide Petitioners with the requested documents by a date certain; and (ii) pursuant to N.Y. Pub. Off. Law § 89(4)(c) awarding Petitioners reasonable attorneys’ fees and litigation costs.

FACTS

The Proceeding involves the proposed mothballing of two coal-fired power plants: (1) the Dunkirk generating station (“Dunkirk Plant”) located in Chautauqua County, New York, and (2) the Cayuga generating station (“Cayuga Plant”) located in Tompkins County, New York. *See* Verified Petition (“Petition”) ¶ 13. On March 14, 2012, NRG Energy, Inc. (“NRG”) filed notice with the Commission of NRG’s intent to retire the Dunkirk Plant by no later than September 10, 2012, on the ground that the plant was not economic and was not expected to be economic. *Id.* ¶ 14. Subsequently, National Grid, the transmission utility responsible for ensuring reliability of electricity in that geographic area, entered into a Reliability Support Services Agreement (“RSSA”) with NRG to continue the Dunkirk plant’s operation in order to avoid potential reliability issues associated with the shutdown of the plant. *Id.* ¶ 15. NRG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Dunkirk plant would be addressed by reinforcements to the transmission system. *Id.* ¶ 16.

On July 20, 2012, Cayuga Operating Company, LLC (“Cayuga”) filed notice with the Commission of its intent to retire the Cayuga Plant by no later than January 16, 2013 on the ground that the plant was unable to operate economically. Petition ¶ 17. Subsequently, New York State Electric and Gas Company, Inc. (“NYSEG”), the transmission utility responsible for

ensuring reliability of electricity in that geographic area, entered into an RSSA with Cayuga to continue the Cayuga plant's operation in order to avoid potential reliability issues associated with the shutdown of the plant. *Id.* ¶ 18. NYSEG also submitted a proposal to Respondents whereby potential reliability issues associated with retirement of the Cayuga plant would be addressed by reinforcements to the transmission system. *Id.* ¶ 19.

The Commission initiated the Proceeding by Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (Case 12-E-0577 Filing No. 3, Jan. 18, 2013) (the "January 18 Order"), Exhibit A to Petition.¹ The January 18 Order directed the transmission and distribution utilities "to evaluate repowering [with natural gas] as an alternative outcome for these two retirements over a long-run horizon of at least ten years." Exhibit A at 3.

As part of that evaluation, National Grid and NYSEG were directed to (1) file with DPS staff the projected costs of the transmission alternatives that they propose to evaluate; and (2) request bids from the owners of the Cayuga and Dunkirk plants for the level of out-of-market support each would require in order to finance the repowering of their respective facilities. *Id.*

At or about the time the January 18 Order was issued, the Commission established the Public Docket for the Proceeding on the Commission's website for the purported purpose of providing parties to the Proceeding and the public at large with access to documents, motions, letters, reports, comments, and other written materials submitted in connection with the Proceeding. Petition ¶ 24.

On August 13, 2013, Petitioner RCI filed and served a Request for Party Status in the Proceeding. Affidavit of Carol Chock, sworn to on December 17, 2013 ("Chock Aff.") ¶ 7. Shortly after filing for party status, Petitioner's members discovered that critical documents filed

¹ Hereinafter, all references to Exhibits are to the exhibits annexed to the Verified Petition.

in the Proceeding by or on behalf of NRG, Cayuga, National Grid, NYSEG and Niagara Mohawk Power Corporation (together, the “Transmission and Generating Entities”) were posted on the Public Docket in severely redacted versions that concealed critical economic and environmental information relating to the various transmission upgrade and repowering options under consideration in the Proceeding. The redactions were so pervasive and numerous that the documents were rendered essentially useless for purposes of meaningful review and comment by Petitioner. Petition ¶ 26.

On August 16, 2013, representatives of Petitioner RCI met with then-Acting Commission Secretary Jeffrey Cohen. Affirmation of Christopher Amato, Esq., sworn to on December 17, 2013 (“Amato Aff.”) ¶ 18. The purpose of the meeting was to request that the PSC post unredacted versions of the critical documents on the Public Docket or, alternatively, provide Petitioner with unredacted versions of those documents. *Id.*

Acting Secretary Cohen stated at the meeting that unredacted versions of the documents could not be released or provided due to trade secret claims made by the Transmission and Generating Entities concerning the redacted portions of the documents. Amato Aff. ¶ 19. He also stated that the Commission had received submissions from the Transmission and Generating Entities concerning issues in the Proceeding that were not posted on the Public Docket, but gave no reason why some submissions were posted on the Public Docket while others were not. Acting Secretary Cohen also stated that DPS staff had engaged in communications with the Transmission and Generating Entities concerning issues in the Proceeding, and acknowledged that Commission members may have met with representatives of the Transmission and Generating Entities. *Id.* ¶¶ 19-21.

Concerned that key documents on the Public Docket were severely redacted, that some undetermined number of submissions from the Transmission and Generating Entities did not appear on the Public Docket, and that records of communications and meetings between the Commission and/or DPS staff and the Transmission and Generating Entities were not being made public, Petitioners RCI and CCE² filed and served on September 16, 2013 a Motion for Access to Critical Documents Submitted in This Proceeding (“Motion for Access”). The Motion for Access was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought:

- (1) unredacted versions of twelve identified documents previously filed in the Proceeding by the Transmission and Generating Entities (the “Requested Filed Documents”);
- (2) all documents submitted to the Commission in the Proceeding by or on behalf of the Transmission and Generating Entities which did not appear on the Public Docket (the “Non-Public Submissions”);
- (3) all communications from the Commission or DPS staff to any one or more of the Transmission and Generating Entities which did not appear on the Public Docket (the “Non-Public Communications”);
- (4) all records of meetings between the Commission, any quorum of the Commission, or any Commission member and any one or more of the Transmission and Generating Entities (the “Meeting Records”); and
- (5) all documents filed in the Proceeding by the Transmission and Generating Entities and all communications from the Commission or DPS staff to the Transmission and Generating Entities after the date of the motion (the “Future Submissions”).

See Motion for Access, Exhibit C. The Motion for Access argued that Petitioners were entitled to all five categories of requested documents pursuant to PSL § 70, the Commission’s January 18

² Petitioner CCE filed for party status in the Proceeding on September 12, 2013. *See* Smith Aff. ¶ 4.

Order and Retirement Order, the regulations governing Commission proceedings, and the New York Open Meetings Law, N.Y. Pub. Off. Law §§ 101-111. *Id.*

Rather than issuing a ruling on Petitioners' Motion for Access, the Commission Secretary informed Petitioners on September 23, 2013 that "I have reviewed your motion and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1 . . . [and] this request for access will be handled by the [PSC]'s Records Access Officer." *See* the Secretary's September 23 Letter, Exhibit D. By letter dated that same day, the PSC Records Access Officer ("RAO") informed Petitioners that "this matter has been referred to me by Secretary Burgess and will be treated as a request for records pursuant to [the] Freedom of Information Law (FOIL)." *See* the RAO's September 23 Letter, Exhibit E. Thus, Respondents made clear that they were converting Petitioners' Motion for Access into a simple FOIL request.

On September 26, 2013, Petitioners filed a Motion to Revoke Secretary's Conversion and Referral of Motion for Access to Documents ("Motion to Revoke"). The Motion to Revoke was filed pursuant to the regulations governing proceedings before the Commission, 16 N.Y.C.R.R. § 3.6, and sought an Order (1) revoking the Secretary's purported conversion of the Motion for Access into a FOIL request; and (2) revoking the Secretary's referral of the Motion for Access to the RAO for decision. *See* Motion to Revoke, Exhibit F. The grounds for the Motion to Revoke were that (i) neither the Secretary's September 23 Letter nor the RAO's September 23 Letter cited any legal authority for converting the Motion for Access into a FOIL request and no such authority exists; and (ii) the RAO lacks authority to rule on a motion filed in a Commission proceeding.

On October 9, 2013, the Commission Secretary issued a ruling on Petitioners' Motion to Revoke. Remarkably, the ruling flatly denied that the Motion for Access had been converted to a FOIL request, but then sought to justify the RAO's authority to issue a ruling on the Motion:

I write to clarify *that no conversion of [Petitioners'] motion took place* and that 16 NYCRR § 6-1.3 governs production of "trade secret" information in a notice and comment proceeding when no "presiding officer" is assigned. I further clarify that, pursuant to delegation under [PSL] § 8, the RAO exercises full authority to decide whether redacted documents will be made public pursuant to 16 NYCRR § 6-1.3 and whether to issue protective orders to make available access to materials deemed "trade secret."

See the Secretary's October 9 Ruling, Exhibit G.

The Secretary's October 9 Ruling dealt exclusively with trade secret issues which, upon information and belief, are relevant only to the Requested Filed Documents sought by the Motion for Access. The Secretary's October 9 Ruling failed to address – or even mention – the Non-Public Submissions, the Non-Public Communications, the Meeting Records, and the Future Submissions sought by the Motion for Access. This omission is significant, as Respondents have acknowledged that "[t]here are nearly 400 documents filed in this case." See RAO October 3 FOIL Determination, Exhibit H at 3 (emphasis added). To date, only 154 of the documents filed in the Proceeding have been placed on the Public Docket. Petition ¶¶ 48-50. Thus, upon information and belief, *nearly 250 documents* filed in the Proceeding are being withheld from Petitioners. *Id.*

Because the Secretary's October 9 Ruling failed to address the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access, Petitioners filed and served on October 17, 2013, a Motion for Rehearing on the Secretary's October 9, 2013 Ruling ("Motion for Rehearing"). The Motion was filed pursuant to the regulations governing Commission proceedings, 16 N.Y.C.R.R. §§ 3.6 and 3.7(a), and sought

an Order (i) granting rehearing on the Secretary's October 9 Ruling and (ii) reversing that portion of the Ruling that constructively denied access to the Non-Public Submissions, Non-Public Communications, Meeting Records and Future Submissions sought by the Motion for Access. *See* Motion for Rehearing, Exhibit J.

On November 13, 2013, the Commission Secretary issued a ruling on Petitioner's Motion for Rehearing claiming that Petitioner had not been denied access, "constructively or otherwise," to any documents. *See* the Secretary's November 13 Ruling, Exhibit K. The Ruling also affirmed the conversion of the Motion for Access into a FOIL request and the referral of that Motion to the RAO for decision. *Id.*

ARGUMENT

POINT I

THE SECRETARY'S NOVEMBER 13 RULING WAS IN VIOLATION OF LAWFUL PROCEDURE, AFFECTED BY AN ERROR OF LAW, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION

The Secretary's November 13 Ruling affirming conversion of Petitioner's Motion for Access into a FOIL request, affirming referral of Petitioner's Motion for Access to the RAO for decision, and denying or constructively denying document requests violates the disclosure and procedural requirements of the New York Public Service Law ("PSL"), Respondents' regulations, and two previous Orders issued by the Commission. It is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion, and this Court should issue an Order annulling and vacating the Ruling.

A. The Secretary’s November 13 Ruling Violates the Respondents’ Regulations Governing Commission Proceedings By Affirming Respondents’ Unlawful Conversion of Petitioner’s Motion for Access Into a FOIL Request and Their Improper Referral of the Motion to the RAO for Decision

Respondents’ handling of Petitioners’ Motion for Access has been a model of bureaucratic obfuscation and delay. The Commission Secretary first informed Petitioners that “I have reviewed your motion *and determined that it is a request for access to documents governed by 16 NYCRR Subpart 6-1* [Respondents’ FOIL regulations]. . . [and] *this request for access will be handled by the [PSC]’s Records Access Officer.*” See Exhibit D (emphasis added). However, after Petitioners filed their Motion to Revoke challenging the legality of Respondents’ conversion of the Motion for Access into a FOIL request and the RAO’s lack of authority to rule on a motion made in a Commission proceeding, see Exhibit F, the Secretary flatly denied that the Motion had been converted into a FOIL request. See Exhibit G (“I write to clarify *that no conversion of [Petitioners’] motion took place . . .*”) (emphasis added). The Secretary flip-flopped once again in the November 13 Ruling stating, “I write to clarify . . . that *the handling of access to information in this case by the Records Access Officer (RAO) pursuant to 16 NYCRR §6-1.3 does not deny access, constructively or otherwise, to materials in this notice and comment proceeding. The RAO possesses full power under 16 NYCRR § 6-1.3 to grant the access [Petitioner] seeks . . .*” See Exhibit. K (emphasis added).

Regardless of Respondents’ conflicting claims, the plain fact is that Respondents did convert Petitioners’ Motion for Access into a simple FOIL request, and referred the Motion to the RAO for decision. This was done in flagrant disregard of the regulations governing Commission proceedings. Moreover, contrary to Respondents’ claim, the RAO has no authority to rule on Petitioners’ motion – or on any motion filed in a Commission proceeding.

1. There is No Legal Authority Permitting Respondents to Convert a Motion Made in a Commission Proceeding into a FOIL Request

The Secretary's November 13, 2013 Ruling cites to no statutory or regulatory authority permitting a motion made in the context of a Commission proceeding to be "converted" to a FOIL request and, indeed, none exists. *See* Exhibit K. Although the Motion for Access seeks documents, this fact alone does not warrant conversion of the motion into a FOIL request. Indeed, such an interpretation would render the discovery procedures set forth in 16 N.Y.C.R.R. § 5.4 (regarding requests for documents) superfluous as to the Commission or its staff, since such document discovery would simply be converted into FOIL requests. This has not been the Commission's practice, nor is it one that has been sanctioned by the courts. *See M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 80, (1984) (drawing a distinction between the discovery rights of litigants under the CPLR and FOIL requests); *De Corse v. City of Buffalo*, 239 A.D.2d 949 (4th Dep't 1997) ("The provisions of the CPLR relating to discovery in civil actions do not apply to FOIL requests"). Accordingly, the mere fact that the Motion for Access involves documents in the possession of the Commission or its staff does not operate to automatically transform the motion into a FOIL request.

Moreover, the Secretary's "conversion" of the Motion for Access improperly relegates Petitioners to the status of outside observers who must file FOIL requests to obtain access to documents submitted in the Proceeding – documents that parties to the Proceeding should have unfettered access to in the first place. Having expended the time and effort to achieve party status, Petitioners are now being treated no differently than bystanders with no stake or involvement in the Proceeding. Thus, the Secretary's conversion of the Motion for Access creates the absurd result that interested public intervenors derive no procedural or substantive benefits from seeking party status in a Commission proceeding.

The inappropriateness of converting the Motion for Access into a FOIL request is underscored by the fact that the legal arguments upon which the Motion is based are incapable of being addressed in the context of a FOIL response – and in fact the RAO’s FOIL response utterly fails to address or respond to those arguments. *See* Exhibit E. The Motion for Access is grounded upon PSL § 70, the Commission’s January 18 Order and Retirement Order, the regulations governing Commission proceedings, and the New York Open Meetings Law, N.Y. Pub. Off. L. §§ 101-111. *See* Exhibit C. None of these legal grounds have any relevance to a FOIL request, but they are critical to Petitioners’ rights as parties to a Commission proceeding. Yet these core legal grounds supporting Petitioners’ claim for access are not even cited – much less addressed – in the RAO’s response. *See* Exhibit E.

Additionally, a FOIL response is incapable of affording the relief sought by Petitioners in the Motion for Access, a fact that is acknowledged in the RAO’s September 23, 2013 letter. *See* Exhibit E at 2 (“[w]ith regard to future submissions, *agencies are not obligated to respond to requests for future filings or submissions as these records do not yet exist*”) (emphasis added). While this may be true of FOIL requests, it is emphatically not true of a motion made in the context of a Commission proceeding; the Commission clearly has authority to issue an order requiring that Petitioners be provided with copies of all future submissions in the Proceeding. *See, e.g.*, PSL §§ 19-23 (Commission has power to issue orders, grant immunity to witnesses, and issue subpoenas in proceedings).

It is wasteful and obstructive for Petitioners to be compelled to file a FOIL request each time a party to this proceeding submits a document to the Commission that, for whatever reason, the Commission chooses not to place on the Public Docket, yet that is exactly what the Secretary’s November 13 Ruling decrees.

2. The RAO Lacks Authority to Rule on Motions Made in Commission Proceedings

There is no statutory or regulatory authority permitting the RAO to rule on a motion made in the context of a Commission proceeding. The Secretary's November 13 Ruling cites 16 NYCRR § 6-1.3 as providing the RAO "full power" to act on Petitioners' motion, *see* Exhibit K, but that regulation does no such thing. Section 6-1.3 is part of Respondents' FOIL regulations and simply specifies procedures to be followed regarding claims of confidentiality; it does not confer *carte blanche* authority on the RAO to rule on motions made in the context of Commission proceedings. In any event, the hundreds of documents sought by Petitioners are not, upon information and belief, subject to any claim of confidentiality, and Section 6-1.3 is therefore inapposite.

In fact, the Commission's regulations specifically require that all motions in proceedings be filed with either the Secretary or the presiding officer, *see* 16 N.Y.C.R.R. § 3.6(b), and neither the Commission nor the Secretary has delegated to the RAO the authority to rule on motions. Accordingly, the RAO lacks authority to issue a ruling on the Motion for Access and any attempt to do so would be *ultra vires*. *Bellacosa v. Classification Review Bd. of Unified Court Sys. of State of N.Y.*, 72 N.Y.2d 383, 391 (1988) (invalidating Review Board employment reclassifications because Board lacked authority to revise classifications in absence of lawful subdelegation from Chief Administrative Judge); *Garzilli v. Mills*, 250 A.D.2d 131, 137 (3rd Dep't 1998) (overturning disciplinary proceeding against teacher because school superintendent lacked authority to make "probable cause" finding initiating proceeding in absence of subdelegation from Schools Chancellor); *Adirondack Mtn. Club v. Adirondack Park Agency*, 33 Misc.3d 383, 393 (Sup. Ct. Albany Co. 2011) (lack of lawful subdelegation from agency commissioner to designee constitutes grounds for reconsidering vote); *Munter v. Gross*, 42

Misc.2d 690 (Sup. Ct. Kings Co. 1964) (school superintendent lacked authority to request teacher retirement based on disability in absence of delegation from Board of Education).

B. The Secretary's November 13 Ruling is Unlawful Because it Denies Petitioners Procedural Rights Afforded Other Parties to the Proceeding

The Secretary's November 13 Ruling claims that Petitioners are not entitled to any discovery in the Proceeding and that discovery is impermissible in the Proceeding under the Commission's regulations. *See* Exhibit K. The Secretary's Ruling misconstrues Petitioners' Motion for Access and the regulations governing Commission proceedings. First, the Motion for Access was not seeking discovery, but was seeking to enforce Petitioners' rights as parties to the Proceeding to be served with all documents submitted by, or exchanged among, other parties to the Proceeding as required by the Commission's regulations. *See* 16 N.Y.C.R.R. § 3.5(e)(1) (“[a] party who presents a document for filing in a proceeding in which there are other parties *shall at the same time serve the document on each such party*”) (emphasis added). Part 3 of Title 16 is entitled, “Procedures Applicable to All Proceedings,” and the procedures specified in that part are thus applicable to all Commission proceedings, including “notice and comment” proceedings. Thus, as parties to the Proceeding Petitioners have a legal right to be served with every document filed by another party, and are not (and should not be) required to serve a discovery request to obtain those documents.

Second, even if the Motion for Access was properly considered a discovery request, the claim in the Secretary's November 13 Ruling that no discovery is available in the Proceeding is clearly incorrect. Discovery has been served and responded to by the Transmission and Generating Entities in the Proceeding – a fact of which Respondents are well aware. In its appeal of the RAO's October 3 FOIL Determination, NRG identified categories of documents for which it was asserting confidentiality claims as including discovery requests and responses.

See Exhibit L (asserting confidentiality claims regarding “[t]he first set of Information Requests to NRG and Dunkirk from National Grid dated 4/1/13 and NRG’s responses thereto,” and “[t]he second set of Information Requests to NRG and Dunkirk dated 4/1/13 and NRG’s responses thereto.”). Those discovery requests and responses were explicitly referenced by the Secretary in a subsequent ruling on NRG’s appeal. See Exhibit M. Thus, two weeks after the Secretary explicitly referred to discovery requests and responses in a ruling issued in the Proceeding, the Secretary’s November 13 Ruling claimed that Petitioners are not entitled to any discovery and that discovery is impermissible in the Proceeding under the Commission’s regulations.

The Secretary’s November 13 Ruling thus establishes an impermissible, unjust and unlawful double standard under which Transmission and Generating Entities are allowed to obtain critical information in the Proceeding through discovery, but Petitioners are not. This violates the regulations governing Commission proceedings, including 16 N.Y.C.R.R. Parts 3 and 5. Moreover, allowing some but not other parties to have access to discovery in the Proceeding is impermissible and violates the concept of fundamental fairness. See *Seligson v. Fid. & Cas. Co. of New York*, 29 N.Y.2d 828, 830 (1971) (unanimously affirming the decision to require the Attorney General to make requested transcripts available to all parties in a private action and holding that allowing only one party to the proceeding to have access to the transcripts would “constitute denial of equal protection and violate concepts of fundamental fairness.”).

C. The Secretary’s November 13 Ruling Violates the Regulations Governing Commission Proceedings by Denying or Constructively Denying Petitioners’ Motion for Access

The regulations governing Commission proceedings specify that (“[a] party who presents a document for filing in a proceeding in which there are other parties *shall at the same time serve*

the document on each such party”) 16 N.Y.C.R.R. § 3.5(e)(1) (emphasis added). Respondents concede that there have been approximately 400 filings in the Proceeding, yet for reasons known only to them only a fraction of those filings have been posted on the Public Docket. *See* Petition ¶¶ 48-50. In fact, nearly 250 filings in the Proceeding have yet to be revealed to the public. *Id.* Regardless of whether these Non-Public Submissions were filed before or after Petitioners became parties to the Proceeding, once they became parties Petitioners were plainly entitled to those submissions upon request, and Respondents’ refusal to provide those documents violates the Commission’s regulations. *See* 16 N.Y.C.R.R. § 3.5(e)(1).

Moreover, Respondents have provided no legal justification for their refusal to grant Petitioners access to the Non-Public Submissions, Non-Public Communications and Meeting Records. This fact alone is sufficient for this Court to find that Respondents have acted arbitrarily and capriciously. Indeed, even though Petitioners have not been provided with a single requested document to date, Respondents nevertheless claim that Petitioners have not been denied access, “constructive or otherwise,” to those documents. *See* Exhibit K. It is difficult to conceive of a more unreasonable or arbitrary response to Petitioners’ legitimate document demands.

POINT II

THE PUBLIC INTEREST STANDARD THAT GOVERNS THE PROCEEDING IMPOSES A NONDISCRETIONARY DUTY ON RESPONDENTS TO PROVIDE PUBLIC INTERVENORS LIKE PETITIONERS WITH COPIES OF CRITICAL DOCUMENTS RELATING TO THE PROCEEDING

Respondent Commission is “an administrative body established by the Legislature *for the paramount purpose of protecting and enforcing the rights of the public.*” *People ex rel. New York Tel. Co. v. Pub. Serv. Comm’n, Second Dist.*, 157 A.D. 156, 163, 141 N.Y.S. 1018, 1023 (1913) (emphasis added); *see also Smith v. Orange & Rockland Utilities, Inc.*, N.Y.S.2d 278, 281

(Sup. Ct. , Rockland County, 1994). The Commission’s duty to protect and enforce the rights of the public necessarily includes the fundamental obligation to ensure that its proceedings are conducted in a fair and equitable manner that ensures the right of the public to participate. In the case at bar, the Commission has utterly failed to discharge its duty to protect public rights. Indeed, by denying Petitioners access to critical documents and establishing a double standard under which the Transmission and Generating Entities are able to seek discovery and Petitioners are not, the Commission has acted in a manner that affirmatively undermines the rights of the public.

The public interest is particularly pivotal in decisions involving the proposed retirement of a power plant under PSL § 70. Proceedings under PSL § 70 are intended to protect against “generator retirement that could *harm the public interest.*” *Id.* at 15 (emphasis added). As the New York Court of Appeals has recognized, approval of a proposed retirement must “satisfy[] *the public interest requirement of Public Service Law § 70*” *Luyster Creek, LLC v. New York State Pub. Serv. Comm'n*, 18 N.Y.3d 977, 978 (2012) (emphasis added). It is respectfully submitted that the public interest requirement of PSL § 70 imposes a nondiscretionary duty on Respondents to provide documents to public intervenors in a Commission proceeding when those documents are indispensable to the intervenors’ ability to meaningfully participate in the proceeding. This is particularly true where, as here, the documents at issue have been exchanged between Respondents and the Transmission and Generating Entities. *See* Petition ¶¶ 62-65.

A nondiscretionary duty is a positive one, where the right to that duty’s performance must “be free of reasonable doubt or controversy.” Siegel, N.Y. Prac. § 558 (5th ed.) (citing *Petz v. Property Clerk of the 68th Squad*, 149 N.Y.S.2d 179 (Sup. Ct., Kings County, 1956)). There is no room for “reasonable doubt or controversy” that the Commission has a duty to ensure that

all parties to a Commission proceeding are treated equally and fairly, and that documents exchanged between the Commission and some parties be made available to all parties to the proceeding.

Moreover, the Commission's prior Orders make clear that Respondents' overarching duty is to ensure meaningful public participation in a proceeding where key public issues – potential costs to ratepayers and environmental impacts – are at stake. The January 18 Order describes the purpose of the Proceeding as:

to examine the relative costs and benefits of repowering the plants at their existing sites, and to compare those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term. The benefits to be evaluated must include, but may not be limited to, the reliability, *environmental*, and *customer impacts* associated with the repowering and transmission solutions.

Exhibit A at 3 (emphasis added).

Upon information and belief, the documents to which Petitioners seek access address core issues in the Proceeding, including the potential rate and environmental impacts of the various transmission upgrade and repowering options under consideration, and document *ex parte* communications between the Commission and the plant owners and transmission utilities. Consequently, the withheld documents are indispensable to Petitioners' ability to evaluate and comment on the various transmission upgrade and repowering options and to respond to arguments or claims made in the course of *ex parte* communications. Respondents' refusal to grant access to those documents is preventing Petitioners' meaningful participation in the Proceeding by thwarting Petitioners' ability to provide public input on “the relative costs and benefits of repowering,” comparing “those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term,” and evaluating the “environmental and customer impacts” of the repowering and transmission options. Exhibit A at 3. This is in

complete disregard of the Commission's duty to protect and enforce the rights of the public. *People ex rel. New York Tel. Co. v. Pub. Serv. Comm'n, Second Dist.*, 157 A.D. at 163, 141 N.Y.S. at 1023.

The concealment from the public of critical information also violates the Commission's Retirement Order, which provides that, "[t]o the extent that devising a solution to a reliability detriment becomes necessary . . . *other parties may be allowed to offer solutions.*" Exhibit B at 16 (emphasis added). By concealing critical information from Petitioners, Respondents are thwarting any opportunity for Petitioner to offer solutions to the alleged reliability issues in contravention of the Retirement Order.

If nothing else, the public interest standard governing the Proceeding requires that, at a bare minimum, the Commission ensure a level playing field by according public intervenors like Petitioners the same procedural rights as the Transmission and Generating Entities. Yet, as noted above, the Commission has adopted a double standard in the Proceeding whereby the Transmission and Generating Entities are entitled to discovery while Petitioners are not. *See* Petition ¶¶ 62-65. Such crass favoritism clearly violates the Commission's duty to protect the public interest as required by PSL § 70 and *Luyster Creek*.

Indeed, the Commission's favoritism toward the power industry and its failure to disclose important information to the public was explicitly criticized in the recent Moreland Commission report:

The Commission learned during the course of its investigation that it is statutorily permissible *and common practice for utility company executives, lobbyists and other paid representatives of interested parties to have unfettered access to the PSC Chair and Commissioners without having to disclose details of these conversations, presentation materials or other specifics to the other parties participating in cases before the PSC* Of particular concern to the Commission is that many ratepayers lack the necessary resources to express their opinions and concerns on matters that impact their lives and their pocketbooks,

and that of other similarly situated New Yorkers. Such deficiencies may result in certain customers or customer groups, who are not in a position to advocate for themselves and may feel marginalized when compared to utility companies and other special interest groups during proceedings before the PSC. *The Commission questions the fairness of allowing one side with virtually unlimited resources total access, while the other side lacks a similar voice*

Perhaps one of the most important mandates of the PSC is to protect and enforce the rights of the public. The rules that govern New York's regulatory environment are complex and require specific acumen to navigate. *The public expects, and indeed deserves, to be afforded full disclosure of PSC and DPS interactions with the parties involved in its proceedings.*

Moreland Commission on Utility Storm Preparation and Response, Final Report (June 22, 2013) at 42, 44 (emphasis added).

While it may be statutory permissible (at least for the time being) for the Commission to engage in *ex parte* communications and meetings with the Transmission and Generating Entities, Respondents are violating their legal duty to protect the public interest by concealing the records of such communications and meetings from Petitioners, and the Court should order disclosure of those records in the public interest.

POINT III

IN THE ALTERNATIVE, RESPONDENTS' FAILURE AND REFUSAL TO GRANT PETITIONERS ACCESS TO THE REQUESTED DOCUMENTS VIOLATES FOIL

In the alternative, even if Petitioners' Motion for Access was properly converted into a FOIL request by Respondents, which it was not, Respondents' failure and refusal to provide Petitioners with all Non-Public Submissions, Non-Public Communications and Meeting Records violates FOIL and Respondents' own regulations governing document disclosure. *See* N.Y. Pub. Off. Law § 89; 16 N.Y.C.R.R. § 6-1.1.

Both FOIL and Respondents' regulations require that, within five business days of the receipt of a written request for a record reasonably described, the agency shall (1) grant the

request and make the document available, (2) deny the request in writing, or (3) furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied. N.Y. Pub. Off. Law § 89(3); 16 N.Y.C.R.R. § 6-1.1(b). Neither the Secretary's September 23 Letter nor the RAO's September 23 Letter fulfilled this obligation for all the records requested by the Petitioner. The Secretary's September 23 Letter merely stated that the request for access would be referred to and handled by the RAO. *See* Exhibit D. The RAO's September 23 Letter completely ignored Petitioners' request for three of the four categories of records: the Non-Public Submissions, Non-Public Communications, and Meeting Records. Instead, the RAO's September 23 Letter focused exclusively on the first category of records Petitioners sought: the 12 redacted records that already were part of the Commission's Public Docket. *See* Exhibit E. Neither letter provided Petitioners with a decision on all of the requested records or an approximate date when such a decision would be provided.

Respondents also failed to avail themselves of the option under FOIL and their own regulations to grant Petitioners' request in whole or in part and delay disclosure of any record(s) that circumstances prevented them from immediately producing. Had they chosen this path, Respondents would have been required within twenty business days of the acknowledgement of the receipt of the request to "state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." N.Y. Pub. Off. Law § 89(3); 16 NYCRR § 6-1.1. Nothing in either the Secretary's September 23 letter or the RAO's September 23 letter – or any subsequent communication with Petitioners – meets this requirement. *See* Exhibits D and E.

Respondents' refusal to respond to Petitioners' request for all Non-Public Submissions, Non-Public Communications, and Meeting Records and failure to comply with the procedural requirements of Section 89(3) of the Public Officers Law constitute a constructive denial of access to the requested records. *See* N.Y. Pub. Off. Law § 89(4); *see also* *Legal Aid Soc'y v. New York State Dep't of Corr. & Cmty. Supervision*, 962 N.Y.S.2d 773, 775 (2013).³

Respondents further violated FOIL by failing to articulate the reasons for its denial of Petitioners' request in writing. N.Y. Pub. Off. Law § 89(4)(a). Respondents have the burden of demonstrating that their refusal to disclose the requested documents is because the records fall within one of FOIL's enumerated exemptions – a burden they have failed to sustain. *Id.*

Without explanation or following the required procedure, Respondents have failed to provide Petitioners with access to or a determination on the request for all Non-Public Submissions, Non-Public Communications, and Meeting Records. Respondents' constructive denial of Petitioners' request is therefore in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

³ The Secretary's November 13 Ruling on Petitioners' Motion for Rehearing refusing to reconsider the denial of access to all Non-Public Submissions, Non-Public Communications and Meeting Records constitutes a denial of Petitioners' appeal of the initial constructive denial of Petitioners' request for records. *See* Exhibits J and K.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Court enter judgment against Respondents and in favor of Petitioners and grant the relief sought in the Petition.

Dated: New York, New York
December 18, 2013

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