

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 12-E-0577 - Proceeding on Motion of the Commission to
Examine Repowering Alternatives to Utility
Transmission Reinforcements.

ORDER ADDRESSING REPOWERING ISSUES AND
COST ALLOCATION AND RECOVERY

Issued and Effective: June 13, 2014

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 12, 2014

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman

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(Issued and Effective June 13, 2014)

BY THE COMMISSION:

INTRODUCTION

By Order dated January 18, 2013, Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) was directed to "examine the relative costs and benefits of repowering the [Dunkirk generating facility], and to compare those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term."¹ On February 13, 2014, National Grid filed a "Term Sheet," contemplating the addition of natural gas capability for refueling the currently coal-fired Dunkirk generating facility, and allowing National Grid to defer some transmission upgrades. The Dunkirk facility is located in

¹ Case 12-E-0577, Repowering Alternatives to Utility Transmission Reinforcements, Order Instituting Proceeding and Requiring Evaluation of Generation Repowering (issued January 18, 2013), p. 3 (January 2013 Order).

Dunkirk, New York and is owned by Dunkirk Power LLC (Dunkirk), which is a subsidiary of NRG Energy, Inc. (NRG). National Grid requests two forms of relief (the Dunkirk Proposal) -- that the Term Sheet be approved, and that the allocation and recovery from ratepayers of the costs that would be incurred under a contract between National Grid and Dunkirk implementing the Term Sheet be authorized

Moreover, pursuant to Chapter 57 of the Laws of 2013, Part Y (the Part Y legislation), enacted on March 29, 2013, the Legislature declared that "it is in the public interest to develop clean power generation near energy demand." As a result, "repowering existing power generation facilities can produce significant benefits in terms of enhanced system reliability, electric market competitiveness, and emissions reductions." Consequently, we must evaluate National Grid's actions to determine whether the Dunkirk proposal is in the public interest, as defined in the Part Y legislation.

As discussed below, the Term Sheet provisions supporting the repowering of the Dunkirk facility and the proposed allocation and recovery of the costs that will be incurred in implementing the Term Sheet are consistent with National Grid's obligations to ensure "safe and adequate service;" with the public interest objectives identified in the January 2013 Order; and, with the Part Y legislation. Accordingly, the Term Sheet repowering provisions are approved as in conformance with the Part Y legislation, and the proposed allocation and recovery of the costs that will be incurred in implementing the Term Sheet are authorized.

BACKGROUND

The January 2013 Order recognized that National Grid has entered into short-term Reliability Support Services (RSS) agreements with NRG in order to keep the Dunkirk facility available to meet local reliability needs.² The current RSS Agreement provides for National Grid to procure RSS from the Dunkirk generating station from May 31, 2013, until June 1, 2015.³ National Grid initially proposed to pursue transmission reinforcements as a long-term solution to the reliability needs created by the unavailability of the Dunkirk facility. While National Grid was urged to continue developing the transmission proposals in the January 2013 Order, it was also directed to evaluate repowering over a long-run horizon of at least ten years, as an alternative to the transmission upgrades designed to address the retirement of the Dunkirk facility.

The January 2013 Order directed National Grid to prepare a report analyzing the repowering alternatives in terms of the impacts on reliability and other factors, including: 1) the effectiveness in alleviating the identified reliability problems, and in reducing the risk of load shedding; 2) ratepayer costs; 3) environmental factors; 4) the economy (e.g., temporary and permanent jobs, economic development, and tax revenue); 5) the competitiveness of the electric market; and, 6)

² According to NRG, it intended to "mothball" the Dunkirk facility due to presently unfavorable economic conditions (i.e., lower revenue margins due to natural gas prices). "Mothballing" would remove the unit from operating, but maintain the ability to return the facility to service if economic conditions improved.

³ Case 12-E-0136, Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Order Deciding Reliability Need Issues and Addressing Cost Allocation and Recovery (issued May 20, 2013) (Dunkirk Reliability Order).

those additional factors National Grid believes should be considered in weighing the costs and benefits of the alternatives.

On March 29, 2013, the Part Y legislation was enacted. It specifically acknowledges and codifies the January 2013 Order, regarding the examination of repowering alternatives and their comparison to transmission reinforcements.

In response to the January 2013 Order, National Grid solicited bids from NRG on scenarios for repowering the Dunkirk generating facility. On April 1, 2013, NRG filed three proposed plant configurations at various cost levels addressing repowering.

On May 17, 2013, National Grid submitted a response to NRG's proposal and recommended that the transmission solutions be implemented as being less risky and less costly to ratepayers than any of NRG's proposals. National Grid proposed to develop and install three transmission projects by June 1, 2015, which avoid the need for continued reliance on the RSS agreement with Dunkirk Power, and two transmission projects to address the longer-term reliability needs that would exist after that date.⁴ National Grid indicated that these two projects could be placed into service no later than the 2018-2019 timeframe, and that it would "rely upon operational measures to address any reliability

⁴ The five projects that National Grid identified included: 1) two new 33.3 MVAR capacitor banks on the two Dunkirk 115 kV bus sections; 2) one new 75 MVAR capacitor bank at the Huntley 115 kV switchyard; 3) reconductoring of two 115kV lines between the Five Mile Road and the Homer Hill substations, each approximately 7.4 miles in length; 4) reconductoring one mile of the Niagara - Gardenville #180 115 kV line; and, 5) reconductoring 14 miles of the Packard - Erie #181 115 kV line.

issues" during the period "following completion of the first three projects...and before the completion of the [other two]."⁵

On July 15, 2013, a public information forum was held in Fredonia, New York to receive input on the options available to National Grid for addressing the electric reliability concerns associated with "mothballing" the Dunkirk facility. Following the public information forum, a public statement hearing was conducted and various public comments were received.⁶

National Grid subsequently indicated that it had revised its local transmission plans based on its periodic review of its reliability needs. NRG also reported a finding made in certain New York Independent System Operator, Inc. (NYISO) studies showing that the shutdown of the Dunkirk units had created congestion on the transmission system leading to increased costs to electric customers.

On August 23, 2013, a Notice Requiring Additional Information and Technical Conference (Notice) was issued. The Notice advised that Staff of the Department of Public Service (Staff) would coordinate with NRG, the NYISO, National Grid, New York State Electric & Gas Corporation, and the New York Power Authority to analyze the impacts of the system congestion NRG claimed to have identified. In addition, the Notice directed National Grid to file the final results of its system review and planning process analyzing the transmission and generation needed to address reliability issues. On September 5, 2013, National Grid submitted its "Transmission Reliability Report, Western Division Area Review, Needs Assessment Report (August 31, 2013)" in response to the Notice. On October 23, 2013, the

⁵ National Grid Filing May 17, 2013, p. 7.

⁶ A transcript of the comments received during the public statement hearing was posted on our website on July 22, 2013.

NYISO filed an analysis of the congestion impacts NRG had identified.

On October 31, 2013, Staff hosted a technical conference to discuss the non-confidential aspects of the information submitted by National Grid and the NYISO, and the studies conducted by a consultant, PowerGem, that NRG had retained. During the technical conference, National Grid presented its 2013 update to its western area reliability analysis, which indicated that reconductoring the #181 line was needed in order to serve increased load forecasts, regardless of whether Dunkirk was available. National Grid also advised of the need to reductor a portion of another line (#182) if Dunkirk was unavailable.

On December 15, 2013, Governor Andrew M. Cuomo announced that NRG and National Grid had developed a framework for an agreement that would permit NRG to repower the Dunkirk station. On December 23, 2013, a Notice of Filing Deadline was issued, indicating that National Grid and NRG should file, by January 30, 2014, the terms of the proposed agreement, with documentation supporting the evaluation of the costs and benefits of the repowering solution, taking into account the reliability, economic, and environmental benefits identified in the January 2013 Order. The Notice also advised that if the parties were unable to identify such a proposal by that date, they should file, either jointly or separately, their recommendations for any further action in this proceeding. The deadline for the National Grid and NRG filings was subsequently extended until February 13, 2014, when the Dunkirk Proposal was filed.

THE DUNKIRK PROPOSAL

The Term Sheet Agreement

The Term Sheet agreement filed by National Grid on February 13, 2014 provides for payments to Dunkirk of \$20.41 million per year for ten years (approximately \$150 million on a Net Present Value (NPV) basis),⁷ while Dunkirk would add approximately 435 MW of gas-fired capability to Units 2, 3, and 4 at the Dunkirk generating facility. The Term Sheet contemplates that commercial operation of the first refueled unit would commence on or about September 1, 2015. National Grid maintains that this agreement would ensure the availability of the Dunkirk generating facility for ten years and allow National Grid to continue to provide reliable electric service, while yielding positive economic and environmental benefits.⁸

According to National Grid, the agreement would afford sufficient flexibility for it to defer some transmission reinforcements, estimated to range in cost between \$33.7 million to \$68.3 million, which would otherwise be needed for reliability if the Dunkirk facility were shut down. National Grid calculates that these reinforcements would produce an approximate annual revenue requirement of \$5.6 million to \$11.4 million, or \$37.7 million to \$76.4 million on a ten-year NPV basis. Moreover, National Grid advises that the availability of the Dunkirk units would enhance the capability to dispatch hydroelectric generation from the Niagara Power Project or to import power from the Ontario control area for reliability or economic purposes.

⁷ Staff's Report, which is discussed below, estimated that the NPV of the Term Sheet was approximately \$140 million.

⁸ Refueling the Dunkirk facility is expected to reduce local plant emissions of CO₂, SO_x, and NO_x compared with burning coal.

National Grid also expects that keeping the Dunkirk facility operational would reduce transmission constraints and result in reducing congestion-related costs by between \$8.8 million and \$161.1 million in 2014, while allowing for greater production of renewable, emission-free hydroelectric energy. National Grid also suggests that certain indirect electric market benefits would accrue to its customers, including lower NYISO Installed Capacity (ICAP) costs and Locational-Based Marginal Prices (LBMP).⁹

NRG estimates that the Dunkirk Proposal will support 100 construction jobs during the construction period, and \$25 million in operation and maintenance spending annually.¹⁰ NRG estimates investing about \$300 million over the 10-year term of the agreement, while supporting over 200 jobs in the region.¹¹ In addition, NRG projects contributing \$8 million in annual property tax payments, which would assist in sustaining essential services in the local community.

National Grid indicates that closure of the Dunkirk plant would reduce the City of Dunkirk's local budget by about 42%, and the City School District's budget by 30%. This would require a property tax increase of \$1,000 for the average Dunkirk homeowner to replace the lost revenue. National Grid states that continued operation of the plant at Dunkirk helps support local and state tax revenue stability and promotes

⁹ National Grid estimates that the NPV of ICAP payments to the State would fall by \$841 million, with \$271 million accruing to National Grid customers. National Grid also notes that annual LBMP "payment" savings due to reduced congestion costs in the western New York portion of the bulk electric system were estimated in a range of \$7 million to \$161 million.

¹⁰ NRG Filing April 7, 2014, p. 5.

¹¹ Id.

economic opportunity. The net impact of this spending, it asserts, is expected to create an average of 175 jobs per year, \$31 million in additional Gross Domestic Product, and almost \$15 million in higher personal income between 2015 and 2025.¹²

Cost Allocation and Recovery

National Grid proposes that the costs incurred in implementing the Term Sheet be allocated and recovered using an approach equivalent to that used for the current RSS agreements approved in the Dunkirk Reliability Order.¹³ Specifically, all National Grid customer service classifications, except those within the Empire Zone and Excelsior Jobs Program qualifying loads, would be allocated costs based on its most recent transmission plant allocator, which, in turn, is based on the respective contribution of each service class to National Grid's coincident peak demand, as approved in its most recent rate case. The costs would then be recovered from each class on a volumetric basis (kW for demand classes and kWh for non-demand classes). Because the anticipated monthly payments under an agreement implementing the Term Sheet, at \$1.7 million per month, would be less than the monthly costs expected to be recovered in connection with the current RSS agreement, at \$2.83 million per month, National Grid states that implementing the Term Sheet will result in lower surcharges for customers than they presently incur.

THE STAFF REPORT

On May 16, 2014, following the filing of the Dunkirk Proposal, a Staff Report was issued analyzing the potential

¹² Dunkirk Proposal, p.10.

¹³ Case 12-E-0136, supra, Order Deciding Reliability Need Issues and Addressing Cost Allocation and Recovery.

costs of the Dunkirk Proposal relative to the potential impacts on reliability. In its Report, Staff estimated that the NPV of the agreement, on a ten-year basis, is about \$140 million, although these costs could be reduced based on the potential for capacity revenue sharing provided for under the Term Sheet.¹⁴ Staff also concluded that the Dunkirk Proposal offers several reliability benefits, such as fuel diversity and flexibility in the operation and maintenance of the transmission system. While Staff noted that many of these benefits could not be quantified exactly, Staff developed estimates for some, including deferred transmission investments (\$37.7 - \$76.4 million) and avoided RSS payments (\$50 million).

Staff also found that the Dunkirk Proposal would create direct economic benefits. These benefits (\$21 million for labor only and \$34 million for labor and material and service (M&S) expenditures at the plant), along with maintaining property tax payments (\$8 million), would address the significant and inordinate negative impact on the local economy that would attend the mothballing of the Dunkirk facility. In addition, Staff estimated that the Dunkirk Proposal could result in significant production cost savings (\$31 million).

Responding to NRG's analysis, Staff noted the Dunkirk Proposal would facilitate the dispatch of the Niagara generating facility, increasing the output of a renewable, zero-emission hydroelectric facility, to the benefit of the environment. Moreover, the capability of the Dunkirk facility to generate electricity using natural gas would present additional opportunities to use a fuel source with reduced emissions

¹⁴ Staff's estimate of the NPV was computed using National Grid's discount rate of 7.36%. National Grid, however, did not discount the first year of the agreement and thus overstated the NPV by \$10 million.

compared to the existing coal-fired units. Based on the combination of qualitative and quantifiable benefits, Staff recommended that the cost allocation and recovery associated with the Dunkirk Proposal be approved.

COMMENTS

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of the Dunkirk Proposal was published in the State Register on February 19, 2014. The SAPA §202(1)(a) period for submitting comments in response to the petition expired on April 7, 2014. Comments were timely filed by various interested individuals, elected officials, and municipal entities, as well as Multiple Intervenors (MI), Entergy,¹⁵ NRG, and Earthjustice and Sierra Club, on behalf of Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (collectively, Earthjustice).

Moreover, comments were solicited on the Staff Report at the time of its issuance, with a deadline for filing set at May 27, 2014. In response to that solicitation, additional comments were received from MI, Entergy, NRG, National Grid, and Earthjustice.

Multiple Intervenors

While it neither supports nor opposes the Dunkirk Proposal and the attending Term Sheet Agreement, MI nonetheless advises that it believes a shut-down of the Dunkirk generating facility would create unacceptable reliability problems. Consequently, MI believes that a regulated long-term solution

¹⁵ Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy").

would be in the public interest as a replacement for the existing RSS agreement with Dunkirk. MI notes that it is unable to determine whether the Term Sheet agreement is preferable to the alternative transmission upgrades given that it does not have access to sufficiently detailed information and was not privy to the negotiations between National Grid and Dunkirk.

MI seeks policy guidance regarding the allocation of costs for reliability solutions and regulated infrastructure projects that are likely to result in benefits beyond a single utility's service territory. MI supports a cost allocation approach based on the "beneficiaries pay" principle, and suggests that a material share of the Term Sheet costs should be allocated on a statewide basis because a majority of ICAP cost savings would accrue to ratepayers outside of National Grid's service territory. MI points to Case 12-E-0503,¹⁶ where a statewide allocation of transmission costs was justified based on economic benefits beyond a single service territory.

Lastly, in responding to the Staff Report, MI encourages the Commission to ensure that utilities are conducting appropriate transmission planning activities where they know of "at risk" generation facilities that may result in reliability concerns. MI notes that the Staff Report did not address its earlier comments and urges that a decision be issued consistent with those comments.

¹⁶ Case 12-E-0503, Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery and Denying Request For Rehearing (issued November 4, 2013) and Order Denying Request For Rehearing and Motion For Clarification (issued April 1, 2014).

Entergy

Entergy argues that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the Term Sheet agreement, and that the Commission cannot therefore act on the Term Sheet. Entergy also maintains that the Term Sheet agreement would lead to the submission of zero bids, or near zero bids, for ICAP and would lead to artificially suppressed prices that will adversely affect competitive markets.

Entergy contends that the reliability need is limited to 150 MW and that repowering a total of 435 MW would exceed that reliability need. Based on these factors, Entergy asserts that the identified transmission solutions would be less costly and that, therefore, the refueling proposal should not be pursued.

Reiterating the above contentions in response to the Staff Report, Entergy maintains the Report should have also examined the costs and benefits of National Grid's alternative transmission upgrades. According to Entergy, the record is inadequate absent this information. In addition, Entergy claims that the emissions associated with the Dunkirk Proposal should be compared to the emissions associated with a transmission alternative, rather than with the coal-fired Dunkirk facility.

NRG

NRG supports the Dunkirk Proposal and highlights various reliability, economic, and environmental benefits, including those identified in the Staff Report. NRG also emphasizes that the tax payment under the Payment-In-Lieu-of-Taxes (PILOT) agreement for the Dunkirk generating facility constitutes 18.2% of the City of Dunkirk's revenues and 29% of the Dunkirk City School District's revenues.

Earthjustice

In filing a motion for an evidentiary hearing, discussed further below, Earthjustice also presented comments on substantive issues. Earthjustice also responded to the Staff Report and reiterated its request for an evidentiary hearing on the entire record before the Commission, including the Staff Report. It argues that the transmission reinforcements represent a lower cost and more effective reliability solution than the Dunkirk Proposal. They also claim the agreement to refuel 435 MW is not justified because the capacity needed to avoid transmission upgrades is 150 MW.¹⁷

Contending that the benefits estimated by Staff are overstated, uncertain, and unsupported, and that the Dunkirk Proposal is not just and reasonable, Earthjustice disputes Staff's estimated RSS savings on the grounds that they are speculative. Earthjustice also requests that a modeling study be performed with respect to the potential production cost savings associated with dual-fuel capability, and questions the value to ratepayers of that capability during cold weather events. According to Earthjustice, it is "imprudent for a company to take actions on the assumption that circumstances such as those that existed during the polar vortex will occur again anytime soon."¹⁸

Finally, Earthjustice raises concerns with the potential environmental impacts associated with the use of coal.

¹⁷ Comments similar to those filed by Earthjustice were also submitted by Carol Chock and other members of the Ratepayer and Community Intervenors, which are represented by Earthjustice. Ms. Chock adds her concerns that the Term Sheet will lead to higher fees for homeowners and businesses, and harm the environment through the use of both natural gas and coal. She seeks a transition to renewable technologies.

¹⁸ Earthjustice Filing (filed May 27, 2014), p. 6.

Earthjustice seeks to compare the emissions impacts associated with a refueled Dunkirk facility with a shutdown of the facility and construction of the transmission upgrade alternative, rather than assuming continued operation of the facility using coal. At a minimum, Earthjustice seeks an enforceable condition that would limit the use of coal at the Dunkirk facility only to those specific time periods when it is needed as an emergency backup fuel due to the unavailability of natural gas.

National Grid

National Grid submitted comments supporting the analysis and conclusions reached in the Staff Report. National Grid also clarified that it intends to proceed with installing capacitor banks at Dunkirk and Huntley and reconductoring the Five Mile to Homer Hill 115 kV lines.

Other Public Comments

Numerous comments were submitted by residents, businesses, labor representatives, and elected officials strongly supporting the Dunkirk Proposal.¹⁹ Congressman Tom Reed noted that the Dunkirk Proposal "ensures that the facility continues to play an important role in the tax base of the county, local government and school district, provide reliability to the grid and promote efficiency and reduce emissions statewide."

State Senator Catharine M. Young indicated that the Term Sheet agreement meets the requirements of the Part Y legislation, which requires examination of various factors

¹⁹ While not opposing the Dunkirk Proposal outright, one interested individual questioned how the Dunkirk facility would fit into the NYISO marketplace, and suggested the proposal would result in ratepayers paying increased power bills and other generators seeking similar arrangements. Comments of Steve Wible, filed May 19, 2014.

associated with the issue of repowering the Dunkirk facility, including impacts on temporary and permanent jobs, economic development and tax revenue, and effects on the environment. Senator Young also points out that the Dunkirk Proposal avoids the prospect of massive property tax hikes and cuts in services and job losses.

The Chautauqua County Executive, Vincent Horrigan, cited the loss of revenue from the Dunkirk facility, which would amount to a 58% tax increase for City of Dunkirk residents, and a 42% tax increase for Dunkirk City School District residents. Mr. Horrigan's comments, and various statements from other interested members of the public, highlight strong community support for the Dunkirk Proposal to help as a means for promoting economic stability, job growth, economic development, and a cleaner environment.

DISCUSSION

Procedural Issues

A. Motion for Evidentiary Hearing

By motion dated April 7, 2014, Earthjustice seeks, pursuant to Public Service Law (PSL) §22 and 16 NYCRR §3.6 and §3.7(a), an Order directing that a "public adjudicatory hearing presided over by an administrative law judge (ALJ) be held" to determine whether the Dunkirk Proposal is just, reasonable, and in the public interest. Earthjustice requests that a schedule be established for the parties in this proceeding to conduct discovery, present testimony, and cross examine witnesses regarding the Dunkirk Proposal and that the ALJ be directed to make a recommendation to the Commission, based upon the evidence adduced, as to whether the Dunkirk Proposal is just, reasonable, and in the public interest.

1. The Earthjustice Argument

Earthjustice presents four arguments in support of its claim that an evidentiary hearing on the Dunkirk Proposal must be held in this proceeding. First, it claims that an evidentiary hearing is required as a matter of law. Earthjustice points out that PSL §66(12)(f) requires that a hearing be held for "major" rate changes, defined in PSL §66(12)(c) as a change in rates that would increase the aggregate revenues of the utility more than the greater of \$300,000 or 2.5%. According to Earthjustice, the \$20.41 million in annual costs over a period of 10 years is in excess of a "major change" as defined in the PSL. Earthjustice further maintains that the hearing is necessary to fully evaluate the Dunkirk Proposal to ensure that the "least cost option is pursued" and that the rates "...resulting from the agreement are just and reasonable".²⁰

As its second argument, Earthjustice asserts that an evidentiary hearing is also necessary to protect the public's interest in an open and transparent process. Earthjustice explains that the "abrupt" announcement of the Dunkirk Proposal presupposes a review of the issues repowering raises, consequently depriving Earthjustice and the public of an opportunity to examine the assumptions underlying the Dunkirk Proposal and to evaluate the economic, environmental, and other representations made in support of the Dunkirk Proposal. Earthjustice protests that the 45-day comment period, required pursuant to SAPA §202(1)(a) before the Dunkirk Proposal may be acted upon, does not afford a meaningful opportunity for public participation. It adds that the complex issues involved here do not lend themselves to decision by notice and comment.

²⁰ Motion at 11-12.

The SAPA notice itself, Earthjustice maintains, was deficient as no notice was provided to the parties through the Commission's electronic Document and Matter Management system (DMM). According to Earthjustice, the absence of electronic notice through DMM deprived them of adequate notice of the SAPA comment period concerning the potential action on the Dunkirk Proposal, notwithstanding that notice was published in the State Register on February 19, 2014. The electronic notice provided through DMM of the procedural and substantive decisions reached in the proceeding, Earthjustice contends, should also extend to notice of the comment period. Earthjustice also complains that because Dunkirk did not file a Full Environmental Assessment Form until April 1, 2014, the public had only four business days to review, evaluate and comment on the critical environmental issues presented. That time, it contends, was insufficient for meaningful input on the environmental review.

In its third argument, Earthjustice addresses what it characterizes as technically deficient and often conflicting analyses in the record. Those shortcomings, it argues, can only be resolved through an evidentiary hearing, where the question of whether the Dunkirk Proposal is the most cost-effective means to address the reliability impacts resulting from the closure of the Dunkirk facility could be thoroughly considered. In support of its argument, Earthjustice claims that National Grid's prior statements and studies are in conflict with the Dunkirk Proposal and its Statement in Support on the issues of: 1) the cost of transmission upgrades compared to the cost of repowering the Dunkirk facility; 2) the impact of repowering on the energy and capacity markets; and, 3) the impact of repowering on reliability and whether the same benefits could be achieved through cheaper transmission upgrades.

As its fourth and final point, Earthjustice contends the environmental impacts associated with the repowering of the plant can only be explored adequately through the evidentiary hearing. Earthjustice believes that the environmental benefits posited -- reductions to emissions of carbon dioxide, sulfur dioxide, and nitrogen oxides -- are overstated because the Dunkirk facility retains coal-burning capability notwithstanding the addition of gas-burning capability. As a result, Earthjustice protests that there is no guarantee that the plant will end its coal-burning operations. It also points out that the National Grid and Dunkirk statements in support compare emissions from a 435 MW plant that is gas-fired to emissions from the same sized coal-fired plant, yet only a single coal-fired unit is currently operating and it is scheduled to cease operations in May 2015. The proper baseline, Earthjustice insists, is to compare the repowering project to one where the plant is not operating at all.

2. Replies to the Motion

NRG and Dunkirk, together, and National Grid filed letters in opposition to Earthjustice's request for an evidentiary hearing. In opposing the Motion, both NRG and National Grid calculate that the "major changes" mandatory hearing requirement under PSL §66(12)(f) is not triggered by the Dunkirk Proposal. Citing National Grid's Annual Report filed on September 9, 2013 pursuant to PSL §66(6), NRG notes National Grid's aggregate electric revenues for 2012 were approximately \$2.7 billion. Therefore, a \$20.41 million increase in annual revenue resulting from the Dunkirk Proposal is less than 1%, and the statutory threshold for "major changes" requiring a hearing is not met.

Confirming NRG's analysis, National Grid states that it projects annual aggregate revenue for the rate year running from April 1, 2015 to March 31, 2016 of approximately \$2.55 billion.²¹ Multiplying that amount by the 2.5% figure from PSL §66(12)(f), National Grid notes, results in an annual amount of \$63,853,225. That amount, National Grid points out, is significantly more than the \$20.41 million in annual revenue needed to recover the annual costs that would be incurred under the Dunkirk Proposal.

Contending that Earthjustice has failed to identify specific material questions of fact that require an evidentiary hearing, NRG maintains that Earthjustice's mere presentation of policy arguments and unsubstantiated attacks on the credibility of National Grid's Statement in Support are insufficient to warrant examination at an evidentiary hearing. NRG argues that the process developed in this proceeding is both open and transparent and that the existing evidence on the record is adequate to support a determination on whether the Dunkirk Proposal is in the public interest.

Consistent with NRG, National Grid notes that an evidentiary hearing is not necessarily justified simply because parties may have conflicting positions. National Grid emphasizes that the process and scope of this proceeding were clearly established in the January 2013 Order. In that Order, National Grid continues, it was directed to evaluate how transmission and generation alternatives may affect reliability, customer costs, the environment, the economy (e.g., job impacts, economic development, tax revenues, etc.), electric market

²¹ Case 12-E-0201, National Grid - Electric Rates, Joint Proposal, Appendix 1, p. 17.

effects, and other potentially relevant factors.²² National Grid maintains it has fully complied with that Order and that Earthjustice has failed to support its allegations to the contrary.

According to National Grid, the parties and the public have been afforded ample opportunity to participate in the process, and there is a full record on which a determination may be based. This proceeding, National Grid recounts, has been on-going for over 14 months. Over a dozen parties have participated; thousands of pages of material have been generated, all of which is in the record; over 7,000 comments from the public have been received; and, a public statement hearing, attended by an estimated 3,000 people, has been held on the record. In addition, a technical conference has been conducted where parties were afforded the opportunity to discuss the respective analyses of National Grid, NRG, and the NYISO.

Finally, National Grid dismisses Earthjustice's assertion that a hearing is necessary to sort out what Earthjustice perceives as conflicting analyses. That perception, National Grid maintains, is inconsistent with the ample evidence on the record regarding the estimated costs of the various proposals and solutions. National Grid also characterizes as misplaced Earthjustice's argument that the Commission is constrained to selecting the lowest-cost solution presented on the record. The January 2013 Order, National Grid believes, clearly indicates that non-cost factors will be considered in evaluating the Dunkirk Proposal. As a result, it concludes, the mere fact that the Dunkirk Proposal may not

²² January 2013 Order at 3-4.

represent the lowest cost solution does not give rise to a need for an evidentiary hearing.²³

3. Discussion

We deny Earthjustice's motion for an evidentiary hearing. As an initial matter, Earthjustice's reliance on PSL §22 and 16 NYCRR §3.7(a) as the procedural vehicle for bringing their motion is misplaced. Those provisions of law address the process for requesting rehearing. Since Earthjustice does not point to a prior Order as the subject for rehearing, their filing is not a request for rehearing. Instead, it is best categorized as a motion seeking an evidentiary hearing.

As properly considered, the motion lacks merit. Contrary to Earthjustice's contention, a hearing is not required by statute. As National Grid and NRG point out, the Dunkirk Proposal would impose on National Grid's ratepayers an annual cost increase forecast at \$20.41 million. That amount falls well below the "major changes" threshold defined in PSL §66(12)(c), which, as National Grid correctly calculates, amounts to \$63,853,225 annually under these circumstances.²⁴ Thus, an evidentiary hearing is not required by law.

Consequently, the question presented by Earthjustice's motion is whether an evidentiary hearing should be held as a matter of discretion. To determine if an evidentiary hearing should be held where one is not required by law, we look to whether there are contested matters where additional facts need to be elicited or technical matters that might be better

²³ Id.

²⁴ Earthjustice presents no reasoning in support of its contention that the amount to be tested against the threshold is the 10 year cumulative payment under the Agreement instead of the annual figure traditionally used to perform the test.

developed and tested through testimony and the cross examination of witnesses.²⁵

Here, the record is sufficiently developed.²⁶ To reiterate National Grid's points, this proceeding has been on-going for over 14 months. Over a dozen parties have participated; thousands of pages of material have been generated, all of which is in the record; over 7,000 comments from the public have been received; and, a public statement hearing, attended by an estimated 3,000 people, was held on the record. Staff also hosted a technical conference where parties were afforded the opportunity to discuss the analyses that had been presented. Moreover, a Staff Report was provided on the proposed Dunkirk Proposal for comment by the parties and the public.

Contrary to Earthjustice's assertions, we are not bound to allow cost recovery for only the "lowest cost" option for addressing the Dunkirk facility's closure.²⁷ The January 2013 Order did not call for an analysis limited to only the

²⁵ Case 94-E-0098, et al., Niagara Mohawk Power Corporation, Order Denying Interlocutory Appeal (issued February 26, 1996) at 10.

²⁶ Given the extraordinary interest in the issues raised by this proceeding, nothing prevents us from adopting such additional procedures as may be appropriate to provide an opportunity for additional comment beyond that required by SAPA, such as the opportunity to submit comments on the Staff Report, notwithstanding that evidentiary hearings are not necessary or appropriate.

²⁷ Tele/Resources, Inc. v. PSC, 58 A.D.2d 406, 401 (1977), citing Matter of New York Tel. Co. v. PSC, 309 N.Y. 569 (1956); Matter of Consolidated Edison Co. of N.Y. v. PSC, 53 A.D.2d 131 (1976), mot for lv to app den, 40 N.Y.2d 803 (1976). The Commission is not bound to entertain or ignore any particular factor in discharging its primary responsibility to determine rates that are just and reasonable.

costs to ratepayers of the repowering and transmission options. Instead, the January 2013 Order sought assessments of impacts on system reliability over the long-run, ratepayer costs, the environment, the economy (e.g., temporary and permanent jobs, economic development, and tax revenue), and the operation of competitive electric markets, and consideration of any other factors that might weigh on the costs and benefits of the alternatives.²⁸ Furthermore, the Part Y legislation enacted on March 29, 2013 established a policy on repowering electric generation that values the development of clean power sited near energy demands in order to meet the needs of ratepayers, support local and state tax revenue stability, promote economic opportunity, and enhance the state's environment.

In light of those policies, the extensive proceedings already conducted, and the substantial discretion we exercise when reviewing requests that evidentiary hearings be held other than as a matter of law, Earthjustice's request that such hearings be conducted here is denied. Under these circumstances, evidentiary hearings are unlikely to elicit additional material facts regarding contested matters, better develop technical analyses, or be needed to evaluate the benefits and burdens of the Dunkirk Proposal. Earthjustice's allegations that National Grid's prior positions deviate from those it takes in the Dunkirk Proposal do not justify evidentiary hearings, when the facts relevant to both the positions themselves and the change in position are already on the record. Therefore, National Grid's change in position is

²⁸ January 2013 Order at 3-4.

not, standing alone, a sufficient justification for requiring evidentiary hearings.²⁹

Earthjustice's other arguments similarly lack merit. Earthjustice claims a hearing is necessary because notice of the statutory deadline for submitting comments under SAPA was not given electronically through the DMM document system. SAPA, however, does not require the posting of a notice on DMM. Moreover, given that Earthjustice is a sophisticated entity represented by counsel, the claim that SAPA was unfairly applied to them also cannot be sustained. The same result adheres to the implication that, because notice of decisions is supplied through DMM, notice of the comment deadline should have been furnished as well.

Earthjustice's argument that it had insufficient time to comment on the Environmental Assessment Form (EAF) was filed on April 1, 2014 is similarly unavailing. Notwithstanding Dunkirk's submission of an EAF, Earthjustice is incorrect to suggest that the State Environmental Quality Review Act (SEQRA) requires the solicitation of comments on the EAF. Finally, we note that Earthjustice does not claim that the record on the environmental impacts of the proposed refueling is insufficient. It merely claims that the arguments of National Grid and NRG concerning the environmental benefits of refueling are "flawed." Indeed, nothing prevented Earthjustice from presenting this argument, which it could appropriately have done on the existing notice and comment record. Therefore, Earthjustice's argument is unpersuasive.

For the above reasons, the evidentiary hearing Earthjustice requests is neither legally required nor would it result in material contributions to the existing and already

²⁹ Case 94-E-0098, supra, at 8.

adequate record. Therefore, Earthjustice's motion for an evidentiary hearing is denied in its entirety.

B. Motion for Severance

1. The Motion

On April 21, 2014, Earthjustice filed a motion pursuant to 16 NYCRR §3.6, seeking an order severing this proceeding for the purpose of "separately and independently evaluat[ing] transmission and repowering alternatives at the Cayuga and Dunkirk plants."³⁰ According to Earthjustice, evaluating both plants in the same proceeding "leads to a muddled public docket and creates confusion among the public."³¹ Earthjustice claims that evaluating the Cayuga and Dunkirk facilities in the same proceeding increases the size and complexity of the public docket.

2. Discussion

Notwithstanding that the record in this proceeding is extensive, including documentation concerning both the Dunkirk and Cayuga facilities, severance is unnecessary and unwarranted at this time. With the review of the Dunkirk Proposal decided here, the evidentiary record as to it is complete and few, if any, filings that would expand the evidence on that record are expected. Thus, there is no reason to assign a new case number at this point to the Dunkirk Proposal,³² and the Cayuga process may continue under that docket without undue confusion. Accordingly, Earthjustice's motion to sever the Cayuga and Dunkirk matters into separate proceedings is denied.

³⁰ Dunkirk Motion, p. 3 (filed April 21, 2014).

³¹ Id.

³² Regardless of whether a new case is established, the evaluations of the Dunkirk and Cayuga repowering/refueling proposals are independent from each other and will be decided on a case-by-case basis.

The Dunkirk Proposal

As stated in the January 2013 Order, “[r]epowering existing generation facilities can produce significant benefits in terms of enhanced system reliability, electric market competitiveness, and emissions reductions.”³³ These potential benefits have been embodied in the Part Y legislation, which declares that “it is in the public interest to develop clean power generation near energy demand to meet the needs of ratepayers, support local and state tax revenue stability, promote economic opportunity, and enhance the state’s environment.”³⁴ The Dunkirk Proposal properly implements these principles in response to the impacts on reliability posed by the proposed mothballing of the Dunkirk facility.

The January 2013 Order was designed to ensure that adequate consideration is given to repowering alternatives for ensuring reliability. As noted above, the January 2013 Order sought a filing from National Grid analyzing various factors, including: 1) the effectiveness in alleviating the identified reliability problems, and in reducing the risk of load shedding; 2) the ratepayer costs; 3) environmental factors; 4) the economy (e.g., temporary and permanent jobs, economic development, and tax revenue); 5) the competitiveness of the electric market; and, 6) other factors National Grid believes should be considered in weighing the costs and benefits of the alternatives.

In its filing of the Dunkirk Proposal prepared in response to the January 2013 Order, National Grid has undertaken the consideration of Dunkirk facility repowering alternatives and has addressed the factors identified above. The Dunkirk

³³ January 2013 Order, p. 1.

³⁴ Part Y legislation, §3.

Proposal raises two issues -- approval of the Term Sheet provisions supporting the repowering of the Dunkirk facility and the authorization of the allocation and recovery of the Term Sheet costs.

A. Environmental Quality Review

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 NYCRR §617 and 16 NYCRR §7), we must determine whether the actions we approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional state or local permits are required, so a coordinated review under SEQRA is not needed. We will assume Lead Agency status under SEQRA and conduct an environmental review.

The proposed action does not meet the definition of Type I or Type II actions listed in 6 NYCRR §§617.4, 617.5 and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. SEQRA requires applicants to submit a complete EAF describing and disclosing the likely impacts of the actions they propose.³⁵ Dunkirk has submitted a narrative and a long-form EAF Part 1 that substantially comply with this requirement. Staff has completed the long-form EAF Part 2.

As our first action, after review of the EAF, we conclude, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that our approval of the Term Sheet supporting the repowering of the Dunkirk facility will have no significant adverse environmental impacts. We therefore adopt a negative declaration pursuant to SEQRA.

The information provided in the EAF supports this conclusion. The proposed refueling involves minor physical

³⁵ 6 NYCRR §617.6(a)(3).

alterations at the existing plant site, which has been operated as a coal powered power plant for over fifty years, and some disturbances related to the construction of the gas fuel pipeline, which we will review pursuant to Article VII of the PSL and its exemption from SEQRA. The work at the plant site will not involve any change in land use or impacts to surface or groundwater or any other environmental receptors.

While SEQRA does not require us to find specific benefits to an action, we note that the option of refueling the facility with gas offers potential environmental enhancements, as opposed to countering the effects of mothballing through transmission upgrades or continued coal-fueled operation of the plant. Retaining generation at the Dunkirk location mitigates the impacts that would attend constructing additional transmission, opens existing transmission capacity to greater generation from renewable-fueled hydro facilities at Niagara Falls and in the Province of Ontario, and allows for greater flexibility in operating the transmission system in ways that are more efficient.

Besides meeting reliability needs, reducing emissions, and relieving transmission congestion in western New York, the Term Sheet reduces costs for consumers, assists in retaining local jobs, creates temporary construction jobs, stabilizes the local property base, and improves the local economy. Notwithstanding that coal capability will be retained as a source of a back-up fuel, the capability to use gas generally will reduce use of coal, thereby replacing it with a cleaner, more environmentally-beneficial fuel. Finally, the Term Sheet stabilizes the grid, facilitating planning for upgrading it over a period of years and eliminating the need to complete multiple

projects in a compressed period, which would adversely affect the environment.

As Lead Agency, we determine that the proposed action will not have a significant adverse impact on the environment and adopt a negative declaration pursuant to SEQRA. A Notice of Negative Declaration concerning this unlisted action is attached. The completed EAF will be retained in our files.

As our second action, we authorize National Grid to recover the costs of the Term Sheet in rates. National Grid proposes that the allocation and recovery of costs under the Term Sheet be accomplished under Rule 50 (Reliability Support Services (RSS) Surcharge) of its retail tariff for RSS contracts. This is listed as a Type II action pursuant to SEQRA.³⁶ Type II actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8.³⁷ Therefore, no further review under SEQRA of the rate recovery authorization is required.³⁸

B. Reliability Needs

In conformance with the January 2013 Order, National Grid has properly evaluated reliability impacts and the effect of the Dunkirk Proposal in alleviating those impacts. In its initial response to NRG's proposed mothballing of the Dunkirk facility, National Grid identified adverse reliability consequences associated with the potential action, and accordingly entered into an RSS agreement with Dunkirk in order

³⁶ 16 NYCRR §7.2(b).

³⁷ 6 NYCRR §617.5.

³⁸ To the extent an application may come before us in order to supply the natural gas needed to refuel the Dunkirk facility, such applications pursuant to PSL Article VII are not subject to review under SEQRA. 6 NYCRR §617.5(c)(35).

to keep the facility available during an interim period to ensure safe and adequate service.³⁹

National Grid's decision to implement the Term Sheet for refueling the Dunkirk facility would ensure the continued availability of that facility over the long-term, while obviating some transmission upgrades. Adding natural gas fueling capability at the facility while supporting its continued operation resolves the adverse reliability impacts that would be experienced if the plant were mothballed. As National Grid states, "refueling the Dunkirk facility units mitigates [the] potential reliability risk that may arise between 2015 and 2017 such as reliability impacts that may result from other generator shutdowns in the region."⁴⁰ Further, the availability of the Dunkirk facility will "provide greater operational flexibility at the Niagara Power Project and allow for more power imports from the Ontario control area (IESO), which would provide the NYISO increased opportunity to call on these resources for economic or emergency energy during high load conditions."⁴¹ These reliability assessments are supported by the record in this proceeding.

Having the Dunkirk units available will provide for increased flexibility and reliability in responding to transmission maintenance outages, and will guard against long-term outages of transmission lines and transmission level transformers. Further, installing dual-fuel capability at the facility will enhance reliability because coal can act as a

³⁹ Letter from C.E. Root, National Grid Sr. V.P., Network Strategy to T.G. Dvorsky, DPS Director, Office of Electric, Gas and Water, dated March 30, 2012.

⁴⁰ Dunkirk Proposal, p. 8.

⁴¹ Id.

back-up fuel source during limited periods when natural gas may be unavailable or in short supply. As pointed out in the Staff Paper, this enhanced capability has significant value during periods when high natural gas demands result in gas pipeline constraints and gas unavailability for electric generators. During these periods, reducing natural gas consumption at the Dunkirk facility should also increase the availability of natural gas for residential heating purposes.

National Grid stated that the estimated total costs of the deferred transmission projects range between \$33.7 million to \$68.3 million, which equates to a ten-year NPV of approximately \$37.7 million to \$76.4 million. Although National Grid subsequently indicated that it intends to pursue some of the projects it included in these estimates, the need for those transmission projects it proposes has not been sufficiently justified. Additional analysis on the need for these projects is therefore required. It is expected that National Grid will prepare an updated reliability analysis in support of its continued development of these transmission projects, in light of the continued operation of the Dunkirk facility over the longer term. The recovery of any transmission project costs can then be addressed in the next National Grid rate proceeding.

While the existing RSS Agreement expires May 31, 2015, National Grid concedes that the longer term transmission upgrades it plans to implement to ensure reliability in the absence of the Dunkirk facility would not have been completed until 2017. As a result, without the Term Sheet, it would have been necessary to extend the existing RSS Agreement to at least September 30, 2017. While National Grid did not reflect the value of these avoided RSS payments in its report, Staff estimates the value at approximately \$50 million.

C. Economics and Economic Development

The National Grid Report identifies various economic development and other economic benefits of the Term Sheet agreement, which we are encouraged to consider under the Part Y legislation. These economic development and other economic benefits are significant and lend support to making a finding that the Dunkirk Proposal is in the public interest.

The Term Sheet results in net positive impacts to the local economy between September 2015 and 2019. The direct benefits of labor and materials and service (M&S) spending to the Dunkirk area, during September 2015 to the middle of 2019 period, from the income and benefits received by labor and some or all of the M&S payments is estimated to range between \$21 million (for labor only) and \$34 million (for labor and M&S) on an NPV basis.⁴² In addition, the plant will continue its property tax payments of approximately \$8 million per year to the Dunkirk area, which is inordinately dependent on the plant for tax revenues.

While National Grid calculates the electric market impact benefits of the refueled Dunkirk facility, a better estimate of the benefits utilizes the "production cost savings" associated with relieving congestion in western parts of the State provided by the availability of the Dunkirk facility, especially when congestion could block the flows from NYPA's Niagara Hydroelectric plant and imports from Ontario. NYISO and NRG both presented production cost estimates at the Staff-

⁴² These benefits were estimated by Staff using the pro forma specifications for various upstate NY generator types filed at FERC by the NYISO. Attachment I - C. Class Average Avoidable Costs, Annual Report in Docket ER01-3001 and ER03-647, filed at FERC 12/20/2011, p. 36. "Class G, Steam Electric, Natural Gas" is the relevant column for this purpose.

sponsored technical conference on October 31, 2103. NYISO's estimate of annual production cost savings for 2019 and 2022 are \$1.6 million and \$8.6 million, respectively. On the other hand, NRG presented annual production cost savings of \$40.4 million by 2023. These results were produced using different computer software modeling tools, with NYISO using General Electric's MAPS software and NRG using PowerGem's PROBE market model tool. Although both models produced different quantitative results, qualitatively they showed similar trends in increased production cost savings over time. To place these modeling results on a comparable basis, Staff devised a methodology that indicated a ten year NPV in the range of \$31 million to \$81 million.

D. Environmental Factors

National Grid describes the environmental benefits of refueling the Dunkirk facility. In particular, refueling Dunkirk Units 2, 3, and 4 would create additional opportunities to avoid adverse environmental impacts by reducing the local emission of CO₂, SO_x and NO_x from the plant compared to burning coal. Although statewide emissions of these pollutants are expected to remain relatively unchanged, local emissions from the plant itself are expected to be significantly reduced.⁴³

In addition, the NYISO found that the availability of generation at the Dunkirk facility would relieve certain system constraints in western New York that otherwise limit the output from the Niagara Power Project. With some relaxation of the system constraints, a greater proportion of the energy produced in NYISO Zone A would be renewable, emissions-free hydropower than would be the case if the Dunkirk facility were not operating.⁴⁴

⁴³ Dunkirk Proposal, p. 12.

⁴⁴ Dunkirk Proposal, pp. 12-13.

While we share Earthjustice's concern with the air emissions associated with the use of coal, we expect the future use of coal at the Dunkirk facility will be limited to periods of natural gas shortage or unavailability, which will be the times when the plant's dual-fuel capability will help relieve the natural gas shortage and help avoid potential curtailments of firm gas customers. Moreover, the use of coal will be subject to the limitations specified in Dunkirk's air emissions permits.

Accordingly, the Dunkirk Proposal and its attendant Term Sheet meet the objectives and policies established in the Part Y legislation and the January 2013 Order. National Grid has appropriately balanced the factors it was required to evaluate under the legislation and the Order, and has arrived at a result that furthers the policies established therein. Therefore, we approve the Term Sheet supporting the repowering project as in the public interest.

E. Cost Allocation and Recovery

Without the Dunkirk facility, National Grid would have incurred costs to reinforce its transmission system to meet its reliability needs. Moreover, the Term Sheet is intended to ensure that National Grid continues to deliver reliable electric service to its customers. As a result, the allocation and recovery of the costs incurred to implement the Term Sheet should be done in a manner consistent with the other approaches for allocating costs associated with maintaining reliability, such as the cost of necessary transmission upgrades.

The existing RSS surcharge tariff mechanism is therefore an appropriate cost recovery mechanism. Under the RSS Surcharge, costs are allocated to service classifications based on National Grid's most recent transmission plant allocator and

are recovered from each class on either a kWh basis for non-demand classes or a kW basis from demand classes.

MI's suggestion that the costs of the Term Sheet should be allocated statewide, given the potential ICAP savings, is rejected. Those market savings are uncertain and difficult to quantify. Accordingly, they are an inadequate basis for determining with the necessary specificity costs that should be recovered, or for allocating those costs to ratepayers outside of the responsible transmission owners' service territory. Our rationale in approving the allocation and recovery of costs associated with the refueling is similar to the approach we take with respect to RSS agreements, since both those costs and the Term Sheet costs were to solve a local transmission security reliability violation, as identified by the host utility on its transmission system. We presume that the reliability benefits fall predominately, if not exclusively, to the host utility, while also providing local economic and tax benefits in the host utility's franchise territory.

F. PSL Statutory Authority

For the purpose of cost recovery, Entergy argues that we lack authority to take action with respect to the Term Sheet and are preempted by FERC. Entergy's arguments are rejected. We find that sufficient authority exists under the PSL to establish a retail cost allocation and recovery mechanism related to the Term Sheet.

Authority exists under the PSL to require National Grid to consider alternatives. In particular, PSL §5(2) provides authority to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with

economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.”⁴⁵ The broad language of PSL §5(2) encompasses the authority to direct electric utilities, which include National Grid, to study various alternatives to meeting future electric system needs, including transmission, generation and/or demand-side management options. That broad authority, as it applies to repowering efforts, was specifically recognized in the Part Y legislation.

Moreover, PSL §65(i) provides that “[a]ll charges made or demanded by any...electric corporation or municipality for...electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission.”⁴⁶ Accordingly, we may develop retail rate recovery mechanisms that provide for jurisdictional utilities to collect payments from their ratepayers for needed infrastructure.

G. Federal Preemption

We disagree with Entergy’s argument that the FPA precludes us from accepting the Term Sheet and authorizing

⁴⁵ Section 5(2) of the PSL has been held to confer “broad discretion” to promote energy conservation. See Multiple Intervenors v. NYPSC, 166 A.D.2d 140 (3rd Dept. 1991). Furthermore, PSL §5(2) was determined to provide the Commission with jurisdiction to require utilities to file plans outlining how they would adapt to a competitive electric industry. See Energy Association of New York State v. NYPSC, 169 Misc. 2d 924 (Supreme Ct. 1996) (noting that PSL §5(2) transformed “the traditional role of the Commission from that of an instrument for a simple case-by-case consideration of rates requested by utilities to one charged with the duty of long-range planning for the public benefit”).

⁴⁶ PSL §65(1).

National Grid to recover its costs from retail ratepayers.⁴⁷ The import of Entergy's argument is that the FPA precludes us from accepting utility agreements with generators for the purpose of preserving system reliability. But ensuring the safety and adequacy of electric service is a core function under the Public Service Law. The FPA expressly preserves such State authority from federal intrusion.

As the FPA states, FERC's authority to establish reliability standards "shall [not] be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any [FERC-approved] reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the [FERC-approved] reliability standards."⁴⁸ Since the Dunkirk Proposal defines measures needed to ensure safety, adequacy, and reliability, and can result in greater reliability in New York than would otherwise exist under the FERC-approved reliability standards, the Proposal falls within the ambit of the FPA provisions.

⁴⁷ Entergy's argument is at odds with its own actions in entering into contracts whose costs are recovered from ratepayers, when such contracts further its pecuniary interests. See, e.g., Case 01-E-0040, Consolidated Edison Company of New York, Inc., Order Authorizing Asset Transfer (issued August 31, 2001) (approval of contract for Entergy's sale of capacity and energy).

⁴⁸ 16 U.S.C. §824o(i) (3). FERC's reliability jurisdiction expressly reserves state authority to "order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services." 16 U.S.C. §824o(i) (2).

Contrary to Entergy's arguments, our authorization to recover costs related to the Term Sheet is not preempted by FERC's authority over wholesale rates. The Proposal does not provide for the setting of wholesale rates, but for payments to protect and ultimately enhance reliability. Moreover, the Term Sheet agreement does not contemplate entry into a power purchase agreement and does not provide for National Grid's acquisition of energy, capacity, or any other NYISO market products that may come under FERC's exclusive jurisdiction. Instead, National Grid is paying Dunkirk to add gas fueling capability to its existing generation facility. By allocating and recovering among retail consumers the costs of that reliability improvement, flowing from National Grid's implementation of the Term Sheet, we are not setting, directly or indirectly, the rate for any wholesale sales regulated by FERC. Nor does the Term Sheet require or otherwise provide for any sale of electricity products in interstate commerce. As a result, Entergy's argument -- that the Term Sheet is "field" preempted as an impermissible intrusion upon exclusive federal authority -- fails.

Entergy's analogy to circumstances where states have attempted to direct pricing or participation in wholesale markets is inapposite here. Nothing in the Term Sheet compels, directs, or influences Dunkirk's discretion to make wholesale sales subject to FERC oversight. Entergy's preemption analysis amounts to little more than a claim that the Term Sheet might affect wholesale markets indirectly. Such an indirect effect is insufficient to empower FERC to exercise authority over State-jurisdictional retail rates like our approval here of recovery

of the costs of implementing the Term Sheet, as the courts have recently found.⁴⁹

CONCLUSION

The Term Sheet for refueling the Dunkirk facility is approved as in the public interest and consistent with the Part Y legislation. The costs associated with implementing the Term Sheet are just and reasonable and we authorize the proposed allocation and recovery of those costs

The Commission orders:

1. The Dunkirk Proposal and Term Sheet filed by Niagara Mohawk Power Corporation d/b/a National Grid and described in the body of this Order is approved as in conformance with the Chapter 57 of the Laws of 2013 (Part Y).
2. Niagara Mohawk Power Corporation d/b/a National Grid is authorized to recover the costs described in the body of this Order.
3. The motion for an evidentiary hearing, made by Earthjustice and Sierra Club, on behalf of Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York, is denied.
4. The motion for severance, made by Earthjustice and Sierra Club, on behalf of Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York, is denied.

⁴⁹ Electric Power Supply Association v. Federal Energy Regulatory Commission, No. 11-1486 (D.C. Cir., May 23, 2014).

5. This proceeding is continued.

By the Commission,

KATHLEEN H. BURGESS
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 12-E-0577 - Proceeding on Motion of the Commission to
Examine Repowering Alternatives to Utility
Transmission Reinforcements.

NOTICE OF DETERMINATION OF
NON-SIGNIFICANCE

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission of the Term Sheet proposed by Niagara Mohawk Power Corporation d/b/a National Grid for the addition of natural gas capability for refueling the currently coal-fired Dunkirk generating facility, and allowing for the deferral of some transmission upgrades, based on our determination, in accordance with Article VIII of the Environmental Conservation Law, that such action will not have a significant adverse affect on the environment. The exercise of this approval constitutes an "unlisted" action, as is defined in 6 NYCRR §617.2(ak).

Based on our review of the record, we find that The approval of the Term Sheet for refueling the Dunkirk facility with natural gas results in environmental benefits as opposed to countering the effects of mothballing through transmission upgrades or coal-fueled operation. Retaining generation at the Dunkirk location mitigates the impacts that would attend constructing additional transmission, opens existing transmission space to greater generation from renewable-fueled hydro facilities, and allows for greater flexibility in operating the transmission system in ways that are more efficient. Moreover, refueling the facility with gas diminishes the possibility that it will be returned to service as a coal-fueled plant either to mitigate the effects of mothballing or if economic considerations were to warrant, thereby substituting a

cleaner, more environmentally-beneficial fuel than was previously used.

The address of the Public Service Commission, the Lead Agency for the purposes of the environmental quality review of this project, is Three Empire State Plaza, Albany, New York 12223-1350. Questions may be directed to Dean Long at (518) 474-9870 or at the address above.

KATHLEEN H. BURGESS
Secretary