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FEDERAL AND STATE REGULATORY UPDATE

September 4, 2013

Federal Matters

1. Federal Courts

A. United States Court of Appeals for the District of Columbia Circuit

1. *In Re: Aikin County (D.C. Cir., Aug. 13, 2013)*

At issue in this case was the U.S. Nuclear Regulatory Commission ("NRC's") decision to shut down its review of the U.S. Department of Energy ("DOE's") application for a license to store nuclear waste at Yucca Mountain. According to the terms of the Nuclear Waste Policy Act ("NWPA"), the NRC "shall consider" the DOE's application and, once the application has been submitted, "shall issue a final decision approving or disapproving" that application within three years. The DOE submitted its license application to the NRC in June 2008, but the NRC had since shut down its review of the application and expressed its intention not to comply with the terms of the NWPA. Petitioners from states where nuclear waste is stored in the absence of a long-term storage site such as Yucca Mountain brought suit to compel the NRC to complete its review.

The D.C. Circuit granted mandamus and ultimately held that the Executive Branch of government must adhere to statutory mandates "so long as there is appropriated money available and the President has no constitutional objection to the statute." In the case of a constitutional objection, the President may decline to follow the law unless and until a court order dictates otherwise. The court dismissed as unpersuasive the NRC's argument that Congress had not appropriated sufficient funds to complete the study, holding rather that, because Congress often appropriates funds for long-term projects on a step-by-step basis, it must continue to fulfill its obligations under the relevant statute until no appropriated funds remain.

The court's holding clarifies that although the Executive Branch of the U.S. government retains a degree of discretion in how to prosecute the laws promulgated by the legislature, "prosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch." The court relied heavily on the checks and balances inherent in the U.S. Constitution's separation of powers, stating that "[o]ur decision today rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here."

B. United States Court of Appeals for the Second Circuit

1. *Entergy Nuclear Vermont Yankee v. Shumlin (2d Cir., Aug. 14, 2013)*

On August 14, 2013, the U.S. Court of Appeals for the Second Circuit issued its decision in the ongoing case between Entergy Corp., owner of the Vermont Yankee Nuclear Power Station, and the State of Vermont.

On April 18, 2011, Entergy brought suit asserting three claims against Vermont: first, that three recently enacted state statutes concerned issues of radiological safety and were therefore

preempted by the federal Atomic Energy Act ("AEA"); second, that Vermont's attempt to condition its grant of permission to operate the nuclear plant on Entergy's execution of a power purchase agreement favoring in-state retail consumers was preempted by the Federal Power Act ("FPA"); and third, that Vermont's actions violated the dormant Commerce Clause of the US Constitution.

On January 19, 2012, the US District Court for the District of Vermont concluded that, on the first claim, both the language of the acts in question and their legislative history demonstrated that the acts were passed in response to radiological safety concerns and were therefore facially preempted under the AEA. In doing so, the court found the State of Vermont's arguments that the laws in question were actually rooted in economics unconvincing. On the second claim, the district court considered the scope of FERC authority under the FPA, as well as the "filed-rate doctrine," which holds that "state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the federal filed rate." The district court held that although Vermont Yankee's market-based tariff requires that the plant only enter into "freely negotiated contracts with purchasers," not those set according a prescribed rate. The court declined to enjoin Vermont from conditioning operation on the execution of a favorable power purchase agreement on FPA grounds, holding that "it is not clear what preemptive effect the [FPA] has to prevent [Vermont] from refusing to consider continued operation without such an agreement." Nevertheless, the district court ultimately did enjoin the state from conditioning the continued operation of the plant on the execution of a favorable power purchase agreement based on Entergy's third claim, finding that Vermont's imposing the condition violated the dormant Commerce Clause.

The Second Circuit agreed with the district court's analysis concerning the preemption of the local state laws by the AEA. The court held that the legislative record contained "references, almost too numerous to count, [that] reveal legislators' radiological safety motivations and reflect their wish to empower the legislature to address their constituents' fear of radiological risk, and [the legislators'] beliefs that the plant was too unsafe to operate, in deciding a petition for continued operation." The court relied heavily on its precedent in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission* (the "*Pacific Gas*" case), which held that laws grounded in radiological safety concerns are preempted by the AEA.

On both the question of preemption under the FPA and the dormant Commerce Clause issue, the Second Circuit found that in the absence of a completed power purchase agreement, the court could not properly consider whether the terms of that agreement would have a direct impact on the commerce of states other than Vermont. In addition to the fact that such an agreement had not yet been executed, the Second Circuit held that, once the agreement was in place, Entergy would need to seek a determination from FERC as to whether the terms of the agreement violated its market-based tariff. The court found that Entergy's dormant Commerce Clause claim was not "purely legal" and could not therefore be decided without further factual development. As such, the court dismissed both Entergy's FPA preemption and dormant Commerce Clause claims as not yet ripe for hearing.

ENTERGY ANNOUNCES RETIREMENT OF VERMONT YANKEE

Entergy Corp. announced on August 27, 2013, that it intends to decommission the Vermont Yankee plant at the end of its current fuel cycle in late 2014. In its statement, Entergy stressed that the plant's closure was due to economic factors, specifically citing "artificially low" energy and capacity prices. ISO-NE subsequently noted that the low price of natural gas had

helped cause wholesale electricity prices to fall in New England by over 22% to their lowest levels since the launching of competitive markets.

With the decision to decommission the Vermont Yankee plant, any further appeal of the case in *Entergy Vermont Yankee v. Shumlin* is likely mooted.

C. United States Court of Appeals for the Third Circuit

1. *Commonwealth of Pennsylvania, Dept. of Envtl Protection v. EME Homer City Generation (3d Cir., Aug. 21, 2013)*

On August 21, 2013, the U.S. Circuit Court of Appeals for the Third Circuit issued its decision in the case of the *Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") v. EME Homer Generation, L.P.* The U.S. Environmental Protection Agency ("EPA") brought the case against the current owners of a coal-burning power plant in Indiana County, Pennsylvania, in 2011, claiming that the current owners were liable for violations of the Clean Air Act ("CAA") because they continued to operate the plant after the former owners had failed to receive a permit under the Prevention of Significant Deterioration ("PSD") program before modifying the plant in the 1990s.

Congress amended the CAA in 1990 by enacting Title V, which requires all "major sources of air pollution" to obtain operating permits that consolidate into a single document—the Title V permit—all of the CAA's requirements applicable to a particular source of air pollution. The PSD program grandfathered- in pre-existing sources of pollution, and did not require permitting "until those sources were modified in a way that increases pollution." From 1991-1996, the former owners of the plant made a number of modifications that increased the plant's net emissions of sulfur dioxide and particulate matter, but did not apply for a PSD permit. The former owners believed the modifications in question were "routine maintenance," exempt from the PSD program, whereas the EPA alleged that they constituted "major modifications,"

triggering PSD requirements. The former owners did submit a Title V application, but omitted the modifications in question. In 1999, the former owners sold the plant to EME Homer City Generation (although the court named EME Homer City as the "current operator," NRG Energy Inc. has since taken over the operation and maintenance of the plant). In 2004, the Pennsylvania DEP approved the plant's Title V permit application.

The EPA brought suit in 2011, claiming that (1) the former owners had violated the PSD program by modifying the plant without a permit; (2) the former owners had violated Title V by submitting an incomplete application omitting those modifications; (3) the current owners had violated the PSD program by operating the plant after its modification; and (4) the current owners had violated Title V by operating the plant in accordance with their "facially valid but inadequate" Title V permit.

The Third Circuit upheld the decision of the District Court for the Western District of Pennsylvania, which dismissed the EPA's case for failure to state an actionable claim, holding that the statute imposes pre-requisites only on construction and modification, not operation, and that because the current owners had not modified the plant they could not be liable for violating those pre-requisites. The District Court also held that Title V does not transform PSD requirements into operating duties and does not permit a collateral attack on a facially valid permit. The Third Circuit held that the CAA "unambiguously prohibits only constructing or modifying a facility without meeting PSD requirements," neither of which the current owners had done. The Third Circuit also upheld the District Court's dismissal of the claims against the former owners, noting that "in the forty-plus years of the Clean Air Act, no court has ever approved such an injunction against former owners," and that to do so in this case would not be appropriate.

Ultimately, the Third Circuit's decision deferred greatly to congressional intent as embodied in the text of the statute. "[W]e cannot adjust the statute," the court stated. "[I]f [it represents] an intentional choice reflecting a compromise, we cannot adjust the bargain Congress has struck; if an oversight, we cannot usurp legislative authority to fix the omission."

D. United States Court of Appeals for the Fifth Circuit

1. *Illinois Generating v. Illinois Union Insurance Co. (5th Cir., May 15, 2013)*

On May 15, 2013, the U.S. Circuit Court of Appeals for the Fifth Circuit issued its decision in the case of *Illinois Generating v. Illinois Union Insurance Co.* That case addressed whether a generator's insurance company had a duty to defend the generator in a suit brought by the EPA alleging violations of the CAA.

In 2005 and 2006, the EPA issued notices of violation ("NOVs") alleging that certain major modifications at NRG's Big Cajun II, a coal-fired electric steam generating plant, had caused net emissions increases in violation of the CAA. In January 2009, NRG purchased a pollution liability insurance policy to cover several of its facilities, including the Big Cajun II plant.

On February 18, 2009, the EPA filed suit, claiming violations of the CAA and Louisiana environmental laws. As in the Third Circuit *Homer City Generation* case, above, the plant's previous owners made a number of modifications that increased the plant's net emissions without applying for a PSD permit or employing the best available control technology ("BACT") to control those emissions. The threshold issue in the present case, though, was whether the relief sought by the EPA was covered by the pollution liability insurance policy.

The District Court for the Middle District of Louisiana held that the insurance company did, in fact, have a duty to defend the generator in the underlying suit. The Fifth Circuit agreed

and upheld the District Court's decision. The Fifth Circuit noted that the policy stated that its terms were to be interpreted in accordance with New York law. In New York, whether an insurer has a duty to defend is determined "by comparing the allegations in the underlying complaint to the terms of the policy." The court noted that in New York an insurer's duty to defend is "exceedingly broad[,] and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage."

The Fifth Circuit then went on to identify provisions in the insurance policy which stated that it was to provide coverage for "[c]laims, remediation costs, and associated legal defense expenses . . . as a result of a pollution condition" at a covered location. The court found that these provisions clearly created a duty in the insurer to defend the generator, and dismissed the insurer's argument that the EPA's "claim" had actually accrued when it issued the NOVs prior to the effective date of the policy.

E. United States Court of Appeals for the Seventh Circuit

1. *United States of America v. Midwest Generation, LLC (7th Cir., July 8, 2013)*

On July 8, 2013, the U.S. Circuit Court of Appeals for the Seventh Circuit issued its decision in the case of *United States of America v. Midwest Generation, LLC*. Like the Third Circuit *Homer City Generation* case and the *Illinois Generating* case, above, the *Midwest Generating* case dealt with the modification of coal-fired power plants in the 1990s and the requirements of the CAA relevant to those modifications. Here, Commonwealth Edison Co. ("Com Ed") modified five such plants between 1994 and 1999 and, like the former owners in *Homer Generation*, determined that those modifications were "routine maintenance" not necessitating a PSD permit. Com Ed subsequently sold the plants to *Midwest Generation*.

The Seventh Circuit upheld the ruling of the District Court for the Northern District of Illinois. The District Court dismissed the government's claim because the statute of limitations explicitly provided for a five year window beginning from a claim's accrual and the government did not bring its case until 2009, a full ten years after the last modification. The Seventh Circuit, like the Third, found unavailing the argument that a continuing injury stemming from a failure to get a pre-construction permit overrides the statute of limitations and makes even a suit brought after its expiration timely. In so doing, it relied on precedent stating that "enduring consequences of acts that precede the statute of limitations are not independently wrongful." The government cannot enforce an old violation for which the statute of limitations has run on the grounds that its ongoing consequences—increased emissions—are themselves wrongful, and therefore constitute a continuing violation. As the court put it, "[o]nce the statute of limitations expired, [Com Ed] was entitled to proceed as if it possessed all required construction permits."

2. New York Independent System Operator

A. *NYISO's Order No. 1000 Compliance Filing*

On April 18, 2013, FERC issued its ruling partially accepting the Order 1000 compliance filing jointly submitted by the NYISO and New York transmission owners (collectively, the "Filing Parties"). Among other things, Order 1000 required each system operator to amend its Open Access Transmission Tariff ("OATT"): (1) to ensure that the transmission provider participates in a regional transmission planning process that produces a regional transmission plan; and (2) to describe procedures that provide for the consideration of transmission needs driven by public policy requirements ("PPRs") in the local and regional planning processes.

FERC directed the Filing Parties to submit a further compliance filing responding to the issues it rejected within 120 days of its order.

FERC ordered the Filing Parties, in their subsequent compliance filing, to (1) eliminate provisions in the reliability transmission planning process allowing the state to select transmission solutions for purposes of cost allocation; (2) include in the reliability transmission planning evaluation/selection a process whereby NYISO selects the more efficient or cost-effective solution that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation; (3) provide for comparable treatment of non-transmission alternatives in the consideration of transmission needs driven by public policy requirements; and (4) provide a cost allocation methodology that explains in sufficient detail how costs are allocated in accordance with estimated benefits and ensures that those that receive no benefit from transmission facilities are not involuntarily allocated the costs of those facilities.

The deadline for the NYISO's subsequent compliance filing was originally set to be August 16, 2013. On July 17, 2013, the NYISO petitioned FERC to extend the deadline for its subsequent compliance filing to October 15, 2013, stating that FERC's April order "raise[d] complex compliance issues and require[s] the development of an extensive number of new or revised procedures."

B. ***FERC Approves new NYISO Capacity Zone (August 13, 2013)***

On August 13, 2013, the Federal Energy Regulatory Commission ("FERC") issued an order accepting the New York Independent System Operator's ("NYISO") filing creating a new capacity zone ("NCZ"), which will encompass the existing Load Zones of G, H, I and J. The NCZ is therefore to be known as the G-J locality. Zone J will remain as its own locality, meaning it will be contained within the larger G-J locality, retain its own separate locational capacity requirements, and will have its capacity contribute to the locational capacity requirements of the NCZ. This order means that the NCZ will be in place and have a new set of demand curves for summer 2014. Additionally, FERC directed its Staff to

hold a technical conference, in a separate proceeding, to discuss with interested parties whether or not to model Load Zone K as an export-constrained zone for a future Demand Curve reset proceeding.

FERC agreed that the NYISO complied with its tariff in identifying a need for and proposing a new capacity zone based on the NYISO's NCZ Study identifying a Highway deliverability constraint, and thereby dismissed the New York Public Service Commission's argument that transmission upgrades expected to be built in the near future will alleviate congestion and eliminate the need for the new zone. FERC stated that the new zones must be created considering existing conditions, not prospective future conditions. Any price differential created as a result of the new zone should only serve as more incentive for the upgrades to be built or for new generation to be developed. FERC also disagreed with pleadings that called for a phase-in of the new zone to alleviate some of the potential price impacts, stating that "creating a new capacity zone is necessary to provide more accurate price signals over the long run[.]"

Finally, although FERC accepted the NYISO's decision not to include Zone K in the NCZ, it ordered a technical conference to explore the modeling of Zone K in another proceeding.

STATE MATTERS

1. New York Courts

A. Court of Appeals - *Norse Energy v. Dryden* & *Cooperstown Holstein v. Middlefield*

On August 29, 2013, the Court of Appeals announced that it will review appeals in two cases involving the ban of the practice of high volume hydraulic fracturing ("HVHF") by municipalities. Both cases, *Norse Energy Corp. v. Town of Dryden* and *Cooperstown Holstein Corp. v. Town of Middlefield*, were brought by parties with an interest in the development of gas resources on property within the towns, either as extractors or property owners.

In August of 2011, the Town of Dryden amended its zoning ordinances to ban all activities "related to the exploration for, and the production or storage of, natural gas and petroleum." In June 2011, the Town of Middlefield enacted a similar prohibition through its

zoning law. Anschutz Exploration Corp., Norse Energy's predecessor-in-interest, and Cooperstown Holstein Corp. owned oil and gas leases for various parcels of land subject to the prohibitions and therefore brought Article 78 actions to have the bans invalidated on the grounds that local laws relating to oil and gas drilling are preempted by New York's Oil, Gas, and Solution Mining Law ("OGSML"). In February 2012, the lower courts in both cases decided in favor of the towns and ruled that the OGSML did not preempt the zoning ordinance.

On appeal, the Third Department affirmed the lower court's ruling and held that the OGSML does not preempt local governments from regulating land use. The court relied on the delegation to local governments of the power to regulate land use through zoning laws as "[o]ne of the most significant functions of a local government." Although it pointed out that the legislature can preempt a local government's home rule powers either expressly or impliedly, the court found that the OGSML did not do either.

The OGSML contains a supersession clause which states that the statute's provisions "shall supersede all local laws or ordinances relating to the regulation of the oil, gas[,] and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the Real Property Tax Law [RPTL]." The court noted that the statute does not define the term "regulation," and cited an online dictionary definition of the term as referring to "'an authoritative rule dealing with details or procedure.'" The court found that the ordinance at issue did not seek to regulate the details or procedure of the oil or gas mining industry, but rather sought only to regulate land use generally. Further, the court held that conflict with the OGSML did not cause local zoning ordinances to be preempted because regulation of the extraction industry's technical operations may "harmoniously coexist" with local zoning laws. The court stated that local zoning laws "will dictate in which, if any, districts

zoning may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts."

The plaintiffs requested appeal of the matter by New York's highest court, the Court of Appeals. Because the opinion of the Appellate Division's panel was unanimous and had not over-turned a lower court, many commentators had predicted that the Court of Appeals was unlikely to hear further appeal of the two fracking cases. The fact that the Court ultimately selected the case for hearing despite a lack of conflict in the lower courts may indicate that the Court believes the case may represent a novel legal issue of statewide significance.

2. New York State Public Service Commission (PSC)

A. *Case 12-T-0502 – Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades*

A technical conference open to the public took place on Tuesday, May 14, 2013, at which DPS Staff explained the process set out in the PSC's order of April 22, 2013. In its April order the PSC established procedures for the joint review of proposed projects intended to upgrade New York's alternating current ("A/C") transmission system. The review stems from the PSC's request in November, 2012, for proposals to alleviate congestion by increasing A/C transmission from upstate to downstate by 1000 MW. The specific transmission corridors being targeted transverse the Mohawk Valley Region, the Capital Region, and the Lower Hudson Valley, including facilities connected to the Marcy, New Scotland, Leeds, and Pleasant Valley substations, as well as the Central East and UPNY/SENY interfaces.

In the initial stage of the Commission's review, the NYISO was requested to screen the 16 proposed projects to determine which would address the goals of increasing system reliability, flexibility, and efficiency, allowing for easier entrance and exit of generation sources, increasing the diversity of supply, enabling the development of lower cost upstate generation resources,

fostering economic development and job growth, and reducing emissions. The NYISO found that north-south proposals offered multiple options along the Hudson Valley and Marcy South routes that would address congestion issues.

For the next phase of review, the PSC will work within the existing Article VII structure to consider competing proposals—assuming Article VII applications are filed—on a combined record. The April Order established a common deadline of October 1, 2013, for all initial applications. Initial applications must provide the information required by certain sections of the Public Service Law ("PSL") and corresponding regulations, including, inter alia, the appropriate intervenor funding fee; notice that the System Impact Study ("SIS") and the System Reliability Impact Study ("SRIS") are in progress; and a scoping statement and schedule detailing how and when the applicant will comply with the remaining sections of the PSL and regulations. Applicants must provide proof of service and notice to affected communities on or before the October 1 deadline, and the Order advises developers to make diligent efforts "to identify and avoid or minimize impacts on areas of concern identified through this early outreach."

The goals of the scoping phase are to make sure that the proposed scopes meet the requirements of Article VII and to establish an overall schedule for the remainder of the proceeding, including a common deadline for the completion of all individual applications. Each application is to be filed as an Article VII case with its own case number, but all of the applications will be reviewed on a common record and evaluated comparatively.

On July 10, 2013, the Commission released a notice soliciting comments on the straw proposal DPS Staff developed to address issues of cost allocation, cost recovery, and risk allocation. The straw proposal provides a basis for the Commission to define a Public Policy Requirement ("PPR"), and recognizes that developers may choose to pursue cost recovery

pursuant to the NYISO tariff. The straw proposal recognizes that current mechanisms for cost recovery are not designed to compensate non-incumbent developers without designated customers, and therefore states that its principal aims are (1) to allocate risks between developers and ratepayers; (2) to allocate the costs of preferred solutions among utilities; and (3) to recover costs from the utilities' customers. Comments on the straw proposal were due to the Commission by August 26, 2013.

B. *Case 12-E-0503 – Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans*

On November 30, 2012, the PSC issued an Order calling for the development of a reliability contingency plan to address concerns relating to the potential closure of IPEC after the expiration of its Nuclear Regulatory Commission ("NRC") licenses in 2015. Stating that "[t]he potential retirement of a significant generating facility, such as [IPEC], requires significant advanced planning," the PSC ordered Consolidated Edison of New York, Inc. ("Con Edison"), in consultation with the New York Power Authority ("NYPA"), to develop a contingency plan in the form of a Request for Proposals ("RFP") that would address system reliability needs by the summer of 2016 (the In-Service Deadline). The PSC ordered that the contingency plan take into account "the status of proposed plants and AC and DC transmission projects, as well as the potential impacts of energy efficiency, distributed renewable generation, demand response, and combined heat and power projects," and that it include halting mechanisms in the event IPEC remains operational.

On February 1, 2013, Con Edison and NYPA filed a plan in response to the PSC's November Order ("Contingency Plan"). In the proposed Contingency Plan, Con Edison and NYPA proposed the immediate implementation of—and cost recovery for—their own $300 million energy efficiency and demand reduction ("EE/DR") program, and adjusted the base case

under the assumption that the EE/DR program would be implemented fully. The Contingency Plan then proposed a two-pronged, multi-step approach. First, the Plan proposed that the PSC issue an order in March 2013 requesting that NYPA issue an RFP to solicit 1350 MW of new incremental generation and transmission proposals that could be in place by the In-Service Deadline. Second, the Plan proposed that the PSC issue an order in April 2013 directing Con Edison (and New York State Electric and Gas Corporation ("NYSEG") with respect to one transmission solution) and request NYPA to immediately begin development of, and authorize cost recovery for, three Transmission Owner Transmission Solutions ("TOTS") so that they can be in place by the In-Service Deadline.

On March 15, 2013, the PSC issued an Order approving the RFP portions of the Contingency Plan, subject to certain modifications. The PSC ordered NYPA to provide the revised RFP for Staff review prior to its issuance, and required that responses to the RFP be submitted to the Commission at the same time they are submitted to NYPA. NYPA issued the RFP on April 04, 2013, and the due date for response is May 20, 2013. On April 18, 2013, the PSC issued an Order approving the second part of the Contingency Plan. The Order authorized cost recovery for preliminary development activities associated with the TOTS, but capped the costs recoverable at $10 million to limit the financial exposure of ratepayers prior to September 2013.

On June 4, 2013, DPS Staff released a straw proposal that allocates the costs of all transmission, generation, and demand-side solutions selected to address the potential closure of the Indian Point Energy Center ("IPEC") to retail ratepayers according to beneficiaries-pay principles. DPS Staff were directed to develop such a proposal by the PSC in April 2013. The PSC received comments on the straw proposal, and DPS Staff held technical conferences to

discuss the terms of the proposal on June 21, 2013, and July 15, 2013. Initial comments on the straw proposal were due by July 22, 2013, with reply comments due by August 5, 2013.

The PSC indicated that the cost allocation and cost recovery methodologies to be used in the IPEC Contingency Plan case "will be decided by the Commission at a later date." The PSC reserved the right to adopt one or more of the elements of the straw proposal, modify any of its elements, or introduce new elements based on DPS Staff's analysis or proposals made by interested parties.

In September, the PSC anticipates issuing another order that will determine, based on DPS Staff's evaluation of their relative costs and benefits, which project(s) from among the TOTS and RFP responses will be selected.

C. ***Case 12-E-0577 – Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements***

On March 14, 2012, NRG Energy, Inc. ("NRG"), owner of Dunkirk Power LLC ("Dunkirk"), filed notice with the Commission of its intention to mothball the Dunkirk facility on or before September 10, 2012. On July 20, 2012, Cayuga Operating Company, LLC ("Cayuga") filed written notice with the Commission of its intention to mothball the Cayuga Generating Facility no later than January 16, 2013. On January 18, 2013, the PSC issued an order instituting the above-named proceeding and requiring the evaluation of repowering existing generation facilities as an alternative to transmission system upgrades. In the Order, the PSC noted that the planned retirements of the coal-fired Dunkirk and Cayuga plants raised reliability concerns, making them appropriate candidates for a study of the repowering alternative.

National Grid and NYSEG, the utilities responsible for providing retail service in each of the respective areas affected by the Dunkirk and Cayuga retirements, identified short-term

reliability needs that would impact system reliability before permanent solutions could be implemented. With the Commission's approval, the utilities therefore entered into non-market-based Reliability Support Service ("RSS") contracts with Dunkirk and Cayuga to continue to supply generation.

The Order directed the utilities to conduct an "informed evaluation" detailing the methods used to compare the alternatives, not only as they relate to reliability impacts, but also addressing ratepayer costs, the environment, the economy, and the competitiveness of the electric market. National Grid and NYSEG filed their reports comparing transmission reinforcements with alternative repowering options on May 17, 2013. National Grid argued that the proposed transmission upgrades would "address the reliability needs at the lowest overall cost, least risk to customers, and with minimum impact on competitive markets," and also noted that the regulated nature of the transmission upgrades would provide for greater transparency and oversight, providing the best assurance of just and reasonable costs to customers. Similarly, NYSEG asserted that the transmission reinforcement option "provides the most certainty to customers with regard to cost, schedule and operational risk."

On August 23, 2013, the Commission issued a notice that both NRG and National Grid had filed supplemental information pertaining to the July 2013 heat wave and new 2013 base case information, necessitating supplemental procedures. The Commission directed National Grid to file the final results of its system review and planning process by August 30, 2013, for review and evaluation by DPS Staff. Staff is then to convene a technical conference to review the results with interested parties no later than October 15, 2013.

D. *Case 13-E-0199 – In the Matter of Electric Vehicle Policies*

On May 22, 2013, the PSC issued a notice announcing the new proceeding and seeking comments "to ensure that its regulations and policies promote the continuing evolution of the

market for plug-in electric vehicles ("PEVs") and for supporting services, while maintaining the safety and reliability of New York's electric grid." The issues on which the PSC solicited comments included PEV charging equipment, both at public charging stations and owners' premises, metering and rate policies (including time-of-use rates), grid impact, and outreach and education concerning PEVs.

The PSC stated that, as an initial matter, it must determine whether to assert or disclaim jurisdiction over public PEV charging stations, their operators, and transactions between operators and the public. If charging station transactions are merely to provide a service, rather than the sale of electricity, station operators would not constitute electric corporations and the stations themselves would not constitute electric plants, effectively removing the transaction from the PSC's jurisdiction.

Comments filed by the July 8, 2013 deadline by various utilities—including Central Hudson Gas & Electric, Con Edison, Orange & Rockland Utilities, NYSEG, RG&E, and National Grid—all cautioned against PSC regulation of public charging stations. Other parties, including NYPA, NYSERDA, and New York City, also commented against PSC regulation, advocating a market approach where consumers "choose chargers based on price, speed, and service."

E. ***Case 13-F-0287 – In the Matter of AES Energy Storage, LLC - Petition for Declaratory Ruling***

On June 26, 2013, the AES Energy Storage, LLC submitted a petition for the PSC to issue a declaratory ruling that battery-based energy storage facilities are not subject to Article 10 of the PSL. AES develops, owns, and operates energy storage facilities in a number of markets, including an 8 MW facility in Johnson City, NY.

AES has proposed the installation of battery-based energy storage facilities at sites across Long Island and in the New York City area "to provide peak capacity, energy and ancillary services[.]" Those facilities would store electricity generated during off-peak periods in batteries and provide capacity, energy, or ancillary services to the electric grid when needed. AES's proposal involves multiple 50 MW units around Long Island and multiple 100 MW units around NYC.

AES argues in its petition that because its facilities do not actually produce or generate electric power or energy, or transform other forms of energy into electric energy, its siting of those facilities is not subject to Article 10. As of this writing the PSC had not ruled on AES's petition.

3. <u>New York State Energy & Research Development Authority ("NYSERDA")</u>

In a July 9, 2013, statement, the Cuomo administration announced that it would award $54 million for 79 large-scale solar energy projects across the state under the NY-Sun Initiative. NYSERDA administers several programs under the Initiative, including:

- The Competitive PV Program, which invites proposals for the installation of customer-sited photo-voltaic ("PV") projects greater than 50 kW in load zones A-J;
- The Solar PV Financial Incentives Program, which provides cash incentives, granted on a first-come first-served basis, for the installation of new solar electric or PV systems that are 7kW or less for residential and 50 kW or less for commercial sites;
- The PV Balance-of-System Cost Reduction program, which seeks proposals to identify and address balance –of-system issues that will result in cost savings associated with purchasing, installing, owning, and operating a PV system in New York;

- The Advance Clean Power Technologies program, which seeks proposals to develop and demonstrate innovative renewable and other advanced clean power technologies, develop and demonstrate technologies that improve performance; and
- The PV Balance-of-System Training and Education preprogram, which seeks proposals to support education and training on PV or solar electric systems.

The administration anticipates that its investment will allow new projects to add 64 megawatts to New York's solar capacity.