

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 14-E-0270 - Petition for Initiation of Proceeding to
Examine Proposal for Continued Operation of
R.E. Ginna Nuclear Power Plant.

ORDER DIRECTING NEGOTIATION OF A
RELIABILITY SUPPORT SERVICE AGREEMENT
AND MAKING RELATED FINDINGS

Issued and Effective: November 14, 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 November 13, 2014

COMMISSIONERS PRESENT:

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

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BY THE COMMISSION:

BACKGROUND

In a petition filed on July 11, 2014, R.E. Ginna Nuclear Power Plant, LLC (Ginna, the Petitioner) requests initiation of a proceeding to examine a proposal for continued operation of the R.E. Ginna Nuclear Power Plant (the Ginna Facility). Specifically, Ginna seeks: (1) a finding that continued operation of the Ginna Facility is necessary for electric service reliability; (2) a determination that its Petition satisfies the requirements for giving notice of a proposed retirement; and, (3) an Order directing Rochester Gas and Electric Corporation (RG&E) to promptly negotiate and file a Reliability Support Services Agreement (RSSA) for the continued operation of the Ginna Facility in support of electric system reliability on the bulk transmission system and in RG&E's service territory. The Petitioner describes the Ginna Facility

as a 581 MW single-unit pressurized water reactor located along the south shores of Lake Ontario, in Ontario, New York, approximately 20 miles northeast of Rochester, New York. In 2004, Ginna relates, the federal Nuclear Regulatory Commission extended the Facility's license to operate to September 2029.¹

Ginna, a subsidiary of Constellation Energy Nuclear Group, LLC (Constellation), sold a majority of the Facility's output to RG&E under a purchase power agreement (PPA) until that agreement expired on June 30, 2014. Since then, Ginna has operated as a merchant generator selling into the wholesale markets that the New York Independent System Operator, Inc. manages.

Ginna alleges that revenues the Facility has earned in recent years have been insufficient to cover the costs of its operation, and it forecasts that expected revenues will remain below the continuing costs of operation into the foreseeable future. As a result of these economic circumstances, Ginna reports, it met separately with individual Commissioners, Department of Public Service Staff (Staff), RG&E, and the NYISO to discuss its evaluation of the economic forces it perceives as driving its Facility into retirement. On February 21, 2014, Ginna, RG&E, and the NYISO entered into a reliability study agreement, and in conformance with that agreement, the NYISO produced the 2014 Reliability Study on May 12, 2014,² where it found that the retirement of Ginna would result in bulk transmission system and non-bulk local distribution system reliability violations in 2015 and 2018, the two years studied.

¹ Issuance of Renewed Facility Operating License No. DPR-18 for R.E. Ginna Nuclear Power Plant, Operating License, Nuclear Regulatory Commission, (issued May 19, 2004).

² New York Independent System Operator, Additional Reliability Study for Exelon Corporation - Final Report, (May 12, 2014) (Reliability Study).

When Ginna filed its Petition, RG&E simultaneously filed a letter confirming entry into the reliability study agreement for the purpose of determining what, if any, adverse reliability risks would exist if energy and capacity from the Ginna Facility were not available. RG&E also explains it joined in conducting the 2014 Reliability Study and supports the analysis demonstrating that the permanent retirement of the Ginna Facility would result in bulk system and local reliability needs in the NYISO control region for the greater Rochester area in 2015 and 2018.

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of the petition was published in the State Register on July 30, 2014.³ The SAPA §202(1)(a) period for submitting comments in response to that notice expired on September 15, 2014. Comments objecting to the relief requested were timely submitted by: Multiple Intervenors (MI), Alliance for A Green Economy (AAGE), the Entergy Entities,⁴ Indicated New York Transmission Owners (Indicated Owners),⁵ the NRG Companies,⁶ and New York City (NYC, the City) (together, the Opponents).

³ After the deadline expired, Citizens Environmental Coalition filed a comment on September 25, 2014; that comment will not be considered because it is untimely and does not advance the record in this proceeding.

⁴ The Entergy Entities are: Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.

⁵ The Indicated New York Transmission Owners are: Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, and Orange and Rockland Utilities, Inc.

⁶ The NRG Companies are: NRG Power Marketing, LLC, GenOn Energy Management, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, NRG Bowline LLC and Oswego Harbor Power LLC.

Over 220 timely public comments, including eight from public officials, were received in support of the petition.

POSITIONS OF THE PARTIES

The Petition

Ginna begins by emphasizing that, in the 2011, 2012 and 2013 calendar years preceding its petition, it incurred cumulative losses at the Ginna Facility amounting to more than \$100 million. Additionally, Ginna complains, its parent, Constellation, has not been compensated for any operational risk or earned any return on its investment over this period. These circumstances, Ginna explains, motivated its meetings with individual Commissioners, RG&E, Staff, and the NYISO to discuss its consideration of retirement.

Ginna requests that the Commission find the continued operation of the Ginna Facility is needed to preserve electric system reliability based upon the findings of the 2014 Reliability Study RG&E and NYISO conducted. Ginna notes that the need for the Facility will continue until RG&E's proposed Rochester Area Reliability Project (the RARP) enters service. The RARP consists of 1.9 miles of new 345 kV transmission line, 23.6 miles of new or rebuilt 115 kV transmission line, a new 345 kV/115 kV substation, and equipment upgrades at several existing substations, all in Monroe County, and equipment upgrades at two substations in Niagara County.⁷ The RARP is intended, in part, to serve the electricity needs of the Rochester area if a long-term outage were to occur at the Ginna Facility. Ginna asserts that no alternatives have been identified to replace the full

⁷ Case 11-T-0534, Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need for the Construction of the "Rochester Area Reliability Project, Application (filed Sept. 30, 2011).

electricity output of the Ginna facility until at least October 2018, when the RARP is scheduled for completion.

Lastly, Ginna notes that substantial adverse impacts on local electric reliability could be experienced, in addition to the impact on reliability of the bulk power transmission system, if the Facility were to close. Ginna also points to the economic and environmental benefits that the Facility brings to the State and local community. Quantifying the reductions in emissions that would otherwise be released from the alternative fossil fuel burning generator that would replace the Facility, Ginna states that continued operation would prevent the emission of 1,000 tons of nitrogen oxide and 1,040 tons of sulfur dioxide annually. The carbon emissions its operations would avoid, Ginna continues, assist New York State in satisfying its Regional Greenhouse Gas Initiative (RGGI) carbon-reduction goals.

Based upon the foregoing, Ginna requests that the Commission find a reliability need justifies continued operation of the Facility. In addition, Ginna asks that the petition itself be deemed satisfactory to meet the requirements for giving notice of generation unit retirements established in the Generation Retirement Order.⁸ Ginna argues that the petition notice, along with its communications with individual Commissioners, Staff, RG&E and NYISO, constitute the giving of notice sufficient to satisfy the policies behind the requirements established in the Generation Retirement Order.

According to Ginna, that notice requirement was adopted so that there would be sufficient time to investigate system reliability and community impacts before a generation

⁸ Case 05-E-0889, Generation Unit Retirements, Order Adopting Notice Requirements of Generation Unit Retirements (issued December 20, 2005).

facility actually left service. Since its petition and the 2014 Reliability Study afford the opportunity to examine those issues, Ginna maintains, no further notice is required.

Analysis of Comments

A. Multiple Intervenors

In a motion filed on July 29, 2014, and in separate comments filed on September 15, 2014, Multiple Intervenors (MI) argues that the Petition should be dismissed because it fails to meet the requirements for giving notice of a generation facility retirement. Those requirements, MI insists, compel owners of generating facilities to file a written notice, if a permanent shutdown is planned due to economic reasons,⁹ at least 180 days prior to the time retirement is effectuated.¹⁰ MI believes that it would set a poor precedent if Ginna's Petition were accepted as a notice of retirement.

MI contends that Ginna's actions are insufficient to serve as notice of retirement. MI dismisses the action Ginna took as substitutes for written notice. Meeting separately with individual Commissioners, Staff, RG&E and NYISO, MI maintains, is not compliance because other potentially interested parties were not informed of the meetings or the communications that took place there. Moreover, nowhere in Ginna's recounting of its communications, MI remarks, does Ginna promise to retire the Facility. The petition itself, MI protests, is also inadequate as notice because Ginna did not undertake there a binding commitment to retire the Facility, much less to retire it by a specific date. According to MI, Ginna's affirmation in its petition that its management will recommend to Constellation

⁹ Case 04-E-0030, Declaratory Ruling on Regulatory Regime, Order Providing for Lightened Regulation of Nuclear Generation Facility Owner (issued May 20, 2004), p.6.

¹⁰ Generation Retirement Order, pp. 14-15.

that the Facility should be retired falls far short of a commitment to actually retire.

MI also argues that the submission of the NYISO Reliability Study is not a substitute for giving notice. Preparation of the study, MI contends, has no bearing on satisfaction of the notice requirements.

The notice requirements, MI asserts, are more than a mere formality. Notice must be given in accordance with the Generation Retirement Order's requirements, MI maintains, so that those affected by the retirement are afforded time to devise measures for mitigating any adverse impacts that might attend a shutdown. Moreover, MI believes, absent receipt of the notice of retirement, the NYISO cannot notify market participants of the planned retirement. If the form of Ginna's notice were accepted, MI argues, the reasons for the public notice requirement would be frustrated -- that is, market participants would be denied with the opportunity to propose solutions to meet the reliability need. These policies, MI maintains, are at the heart of both the Generation Retirement Order and the separate notice requirements provided for in the Ginna Light Regulation Order.¹¹

MI believes that the notice is essential for another reason because it is the evidence that an RSSA is the only available solution to a reliability need. Absent strict adherence to the notice requirement, MI fears, the doors will open for any generator to seek an RSSA without showing that such an agreement, which MI believes should be a last resort employed

¹¹ Case 04-E-0030, R.E. Ginna Nuclear Power Plant LLC, Order Providing For Lightened Regulation of Nuclear Generation Facility Owner (issued May 20, 2004).

only when reliability cannot be otherwise preserved, is appropriate.¹²

In its comments, MI builds upon its arguments in its motion. MI would draw a distinction between planned and proposed retirements, arguing that a mere proposal to retire is insufficient to justify entry into a RSSA, which should be limited to instances where retirement is certain. That certainty can be established, MI maintains, only where an exact date on which retirement will occur has been firmly established.

An RSSA, MI emphasizes, is a last resort that should be deployed only when other alternatives to preserving reliability are not feasible. Directing entry into an RSSA, MI asserts, is not appropriate unless the generation facility will clearly be forced into retirement absent the RSSA, because without such a showing the RSSA may not be needed. Only that strong showing of need, MI declares, justifies an RSSA, when it is ratepayers that will be forced, through increases in the utility rates they pay, to fund the out-of-market costs incurred under the RSSA.

Criticizing the 2014 Reliability Study, MI complains that it is deficient as compared to other reliability studies relied upon when other RSSAs were granted. According to MI, the Study is not independent, because Ginna commissioned it and the data relied upon is flawed. In particular, MI asserts, only the years of 2015 and 2018 chosen by Ginna are analyzed in the 2014 Reliability Study, when other reliability studies analyze an entire consecutive period of years. The Study, MI adds, must also be updated with the most recent data from 2014, instead of the 2013 data on which it relies.

¹² AAGE voices states its support for MI's Motion to Dismiss and states that it joins in MI's reasoning.

B. The Entergy Entities

The Entergy Entities maintain that the Petition should be denied on procedural and substantive grounds. They state that the notice was improper, and without adequate notice, the record does not include sufficient information to identify the scope, extent or duration of a reliability need stemming from a Ginna retirement.

If the Commission accepts the Petition as constructive notice, the Entergy Entities believe that the Commission should ask the NYISO to post a retirement notice on its website and then request the NYISO and RG&E to conduct a thorough and comprehensive reliability study. The 2014 Reliability Study described in the Petition, Entergy contends, was not as comprehensive as the NYISO normally produces upon request following a retirement notice. In prior cases, Entergy maintains, the NYISO has performed studies over a consecutive five-year period; here the reliability study was limited to only two years -- 2015 and 2018. Additionally, Entergy believes the analysis of local reliability needs was inadequate.

Entergy also opposes the Petitioner's request that a completed and binding RSSA be entered into and then filed for the Commission's review. In the two cases previously where RSSAs were required, Entergy protests, term sheets were filed and time was allotted for public comment on them before an RSSA was executed.

Moreover, the Entergy Entities maintain that an RSSA should be a last resort to resolving a reliability issue. When prior RSSAs were proposed, they claim, the Commission properly sought alternatives to an RSSA more vigorously than it did here.

The Entergy Entities further argue that the Commission lacks the authority to compel RG&E and Ginna to enter into an RSSA because that action would be preempted by the exclusive

jurisdiction over wholesale sales of electricity and capacity granted to the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). If an RSSA is warranted, Entergy asserts, a petition requesting that relief should be submitted to FERC for its consideration because that relief falls within its exclusive purview.

C. The Indicated Owners

The Indicated Owners request that the Commission reject the Petition. They argue that a proper notice of retirement must be distributed to all New York wholesale market participants, so that they then have an opportunity to propose solutions. In particular, the Indicated Owners maintain that the mere suggestion of a potential retirement is inadequate either to justify an RSSA or to satisfy the requirements of the Ginna Light Regulation Order and the Generation Notice Order. As a result, the Indicated Owners support the arguments set forth in MI's Motion.

D. The NRG Companies

The NRG Companies also argue that the Petitioner's notice of retirement is inadequate. The NRG Companies join with the Entergy Entities and the Indicated Owners in claiming that the Generation Retirement Order procedures were intended to provide all parties with notice and information about potential retirements. One primary means of communicating that notice, the NRG Companies note, is through the NYISO website. But, the NRG Companies protest, the NYISO has not posted notice of Ginna's Petition.

The NRG Companies contend that the NYISO's evaluation of alternative solutions for identified reliability needs is obstructed where adequate notice is not given. NRG maintains that if the Petition is accepted, a reliability study should be

ordered that corrects the deficiencies in the 2014 Reliability Study already conducted.

E. NYC

NYC raises the broader concern of what it perceives as a growing reliance upon RSSAs. The City believes that when competition was introduced -- for the purpose of replacing utility owned generation plants at rate based costs with independently owned generation plants at market based prices -- the expectation was that older, less efficient generation plants would eventually retire and be replaced with more economically and environmentally beneficial plants. The City notes that, recently, the Commission confronted three circumstances where generation plants, including Ginna, posed electric system reliability problems if they were to retire, and that the first two instances resulted in ratepayer support for the generators through RSSAs.¹³ This trend, the City propounds, undermines the purposes of competitive wholesale generation markets.

Additionally, NYC supports MI's Motion to Dismiss. Ginna's request that its petition be accepted as notice of retirement, the City protests, should be denied because it undermines the purpose of the notice requirement, which is to avail to other market participants the opportunity to offer alternative solutions to a reliability issue resulting from the closure of a generator. Without a specific date for retirement, the City argues, any action on this petition would be based on mere speculation, enabling Ginna to obtain an RSSA without substantiating the basis for such extraordinary relief and

¹³ Case 12-E-0136, Dunkirk Power LLC, Order Deciding Reliability Issues and Addressing Cost Allocation Recovery (issued August 16, 2012); Case 12-E-0400, Cayuga Operating Company LLC, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (issued December 17, 2012) and Order Deciding Reliability Need Issues and Addressing Cost Allocation and Recovery (issued January 16, 2014).

without showing there are no alternatives superior to that relief.

Electric distribution utilities, the City insists, should be aware of and prepare for any reliability issue arising within their service territory. The City charges the Commission with using that information to create a proper platform for the success of competitive generation markets. NYC concludes that RSSAs are not a substitute for a functioning competitive markets that would support the goals anticipated upon utility deregulation and advance the goals stated in the Commission's Reforming the Energy Vision (REV) proceeding.¹⁴

F. Public Comments

About 220 timely public comments have been received.¹⁵ These comments included letters from the following government officials: U.S. Representatives Dan Maffei and Tom Reed, Senators George Maziarz and Patty Ritchie; Assemblymembers Robert Oaks and William Barclay; Chairman James Hoffman of the Wayne County Board of Supervisors; Monroe County Executive Maggie Brooks; Supervisor John Smith and Councilmember Michael Melino of the Ontario Town Board; and, the Town Board of Palmyra. The rest of the public comments were from individuals who filed letters in support of Ginna. Many came from employees at Ginna, who expressed pride in their work and in the professionalism of the facility's workforce.

The public comments generally approved of the operations of Ginna Facility in the Rochester region, and expressed concern if the facility were to close. One commentor

¹⁴ Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

¹⁵ Numerous untimely public comments, making the same points as the timely comments, were also received.

referred to a recent poll that showed a 97% acceptability rating for the Ginna plant in the region.¹⁶

Ginna, the public comments indicate, is an economic pillar within the local community, employing a workforce of 700 people that expands by an additional 800 - 1,000 contractual workers during refueling. The plant supports the property tax base in the local community and is the largest tax payer in Wayne County. The specialized workforce is well paid, and lends its own strong support to the tax base. In a rural community, this tax base funds quality educational and recreational opportunities for residents. In addition to the economic benefits, Ginna gives back to its home community; it is the largest contributor to the United Way in Wayne County, and supports other local charities. Lastly, Ginna enriches the community through the diversity of its employees.

Employees of Ginna stated that they take environmental stewardship very seriously, and that the facility is not only clean, but is also quiet. The employees emphasize safety is a paramount value at the facility, and many, as evidence of their trust in the safety of Ginna, announced that they live within a short distance of the Facility.

The Director of Disaster Preparedness for the Wayne County Emergency Management Office wrote expressing his support, and stating that his office has an excellent relationship with Ginna based on communicating with it on a regular basis. He calls Ginna a good neighbor that is vital to emergency management in terms of grid reliability and preparation for hazardous events.

Finally, many comments reported that benefits attach to the electricity supplied from the Facility, in that the electricity is produced from a reliable and stable resource with

¹⁶ Public Comment of Sue DeVito (September 8, 2014).

little or no price fluctuation due to short term fuel procurement challenges. The Facility, they add, lends fuel diversity to New York's energy portfolio, which reduces reliance upon any one resource, and thereby enhances reliability. Many of the comments also noted, that, as a nuclear facility, Ginna has a zero carbon footprint.

G. Ginna's Response

On August 6, 2014, Ginna filed a response to MI's Motion to Dismiss. Ginna states that it met all of the objectives of the Commission's retirement and other policies. It stressed that the already-completed 2014 Reliability Study confirms a need for continued operation at the Ginna Facility. Disputing MI's analysis of the retirement notice requirements, Ginna notes that those requirements are not set forth in a statute and instead were imposed in the Generation Retirement Order. Consequently, Ginna asserts, the Commission may depart from the requirements if it states valid reasons for doing so, in conformance with generally-accepted principles of New York administrative law.

According to Ginna, providing written notice of a definitive retirement date for the Ginna Facility would disrupt rather than advance the policies stated in the Generation Retirement Order. Selection of an exact date, Ginna claims, would only constrain evaluation of an RSSA agreement to an artificially-determined period for conducting the analysis. So long as it shows that retirement is the appropriate response to economic conditions, and otherwise meets the policies behind the notice requirements, Ginna maintains it need not select a specific date. Ginna believes it has satisfied those policies, through the 2014 Reliability Study showing its facility is needed and the reasons presented in its petition justifying entry into an RSSA.

DISCUSSION AND CONCLUSION

In order for Ginna to obtain an RSSA, it must first show that its Facility must remain in operation in order to preserve electric system reliability. Second, it must demonstrate that it has provided a notice of retirement that complies with the Generation Retirement Order policies,¹⁷ by affording sufficient time to address adverse impacts that might attend retirement and to investigate alternatives to continued operation for preserving reliability. Third, it must show that the RSSA is superior to alternatives as a means for preserving reliability.

Ginna has demonstrated that its facility is needed for system reliability purposes and that its notice should be deemed satisfactory because it serves the purposes of the generation retirement requirements and policies. Given the size, location, and importance of the Ginna Facility as a generation resource, Ginna has also justified directing RG&E to commence negotiations over for an RSSA, albeit further procedures are required to ensure that an RSSA is the best and most cost-effective alternative for maintaining reliability.

Reliability Need

A. The 2014 Reliability Study

The NYISO's 2014 Reliability Study demonstrates that there would be a negative impact on the reliability of the New York bulk electric transmission system and in the local Rochester electric distribution region during 2015 and 2018, respectively, if Ginna ceased operations before the RARP is scheduled to enter service. The system representation analysis

¹⁷ Because the Ginna Light Regulation Order provides for the same six-month notice period as the Generation Retirement Order, both Orders will be considered directed to the same purpose.

was developed based on the NYISO's 2013 FERC 715 filing,¹⁸ and the study was conducted in accordance with applicable North American Electric Reliability Corporation (NERC) Reliability Standards, Northeast Power Coordinating Council (NPCC), Design Criteria, New York State Reliability Council (NYSRC) Reliability Rules and Procedures, and NYISO planning and operation practices.¹⁹ Completed and issued on May 12, 2014, the study is timely, and the analyses of 2015 and 2018 are sufficient to show an immediate and continuing need for the Ginna Facility to preserve bulk transmission system and local distribution system reliability.

B. Objections to the 2014 Reliability Study

The objections to the 2014 Reliability Study that the Opponents present are not persuasive. Primarily, they complain that only two years, 2015 and 2018, were analyzed in the Study, when the analysis should have covered an entire period of consecutive years. There is, however, no such requirement. The two years selected properly bound the period during which the RARP transmission project now under development will not be available to support reliability if Ginna were absent. Moreover, that the plant is needed in 2015 and 2018 is sufficient to show that it should remain in operation for the entire period.

Even if it could be shown that the plant were not needed in 2016 and 2017 -- a showing that the Opponents have been unable to make -- reliability could only be preserved by running the plant in 2015, mothballing it for 2016 and 2017, and then returning it to operation in 2018. But, since Ginna is a nuclear facility, mothballing it over a two year period and then returning it to service poses risks that likely would far

¹⁸ 2014 Reliability Study at 5.

¹⁹ 2014 Reliability Study at 7.

outweigh any savings that could be derived from the mothballing. The costs of mothballing would be significant; the techniques and processes required would be complex; and, many skilled employees would have to be retained so that sufficient qualified personnel, not readily found in the short-term labor market, would be available to restart the Facility.

The Opponents also criticized the use of 2013 data. For a Study promulgated in May 2014, however, use of that data was clearly appropriate. The Opponents have not shown that updating the data would result in any material change to its outcome. Nor is the fact that Ginna contracted for the Study prove it is biased; the NYISO, as discussed above, responded to the inquiry regarding the effect of the closure of the Ginna Facility by conducting the 2014 Reliability Study in conformance with its usual methods. It produced a result that meets all applicable NERC, NPCC and NYSCC standards and is persuasive as well.

C. Conclusion

Therefore, the findings made in the 2014 Reliability Study are accepted. They establish the reliability need for continued operation of the Ginna Facility that is the essential prerequisite to negotiating an RSSA.

Adequacy of the Notice

According to the Opponents, Ginna must set a specific, binding date for the retirement of the Facility in order to comply with the Generation Retirement Order and to justify entry into an RSSA. Ginna has not identified such a specific date, notwithstanding the Generation Retirement Order requirement that notice be given 180 days before a facility may cease to operate.

A. The Notice Policies

In the Generation Retirement Order, however, the Commission explained that a 180-day period for giving notice of

retirement before it can be effectuated represents "the minimum period that NYISO indicates as adequate to identify and resolve reliability concerns."²⁰ Therefore, the purpose of the 180-day period is to determine whether any adverse impacts on reliability might arise upon the closure of a generation facility, and if so, to afford time to develop and implement alternatives.

The emphasis the Opponents would place upon the selection of a specific retirement date is misplaced. As Ginna points out, the Commission has the authority to modify the policies it establishes when doing so is reasonable and in the public interest. Instead of rigid adherence to a generalized 180-day specification that does not assist in the evaluation of these unusual circumstances, the issue here is effectuation of the policies established in the Generation Retirement Order. As discussed in that Order, the 180-day requirement is intended to assure sufficient time to determine if a retirement has an adverse impact on reliability, and to investigate alternatives for alleviating any such impacts.

B. Compliance With the Notice Policies

1. Effect of the 2014 Reliability Study

In most circumstances, a reliability study is not commenced until the notice is received. Here, however, the 2014 Reliability Study was filed at the same time as Ginna's petition. As a result, there was no need to request a study and allow for time to prepare and examine it after its receipt before determining that a need existed. That process alone can take months, and the availability of the 2014 Reliability Study that was provided when at the time the petition was filed therefore considerably foreshortens the need for a 180-day period.

²⁰ Id. at 15.

Moreover, as discussed above, the 2014 Reliability Study demonstrates the Ginna Facility is currently needed for reliability purposes. An RSSA, however, cannot be negotiated and filed prior to January 2015, and further procedures will be needed before it can be approved and take effect. If Ginna had filed a 180-day notice as of the July 11, 2014 date of its Petition, the notice period would have ended in January 2015, so the notice period has, in effect, been met. Finally, the Commission possesses the authority to waive the notice period for the purpose of either extending it or shortening it, and that authority extends to granting relief from the notice period here tailored to these unusual circumstances, which include impacts related to the size, location, specialized workforce, and nuclear fueling of the Ginna Facility.²¹

2. Examination of Alternatives

The other function of the 180-day notice period is to afford sufficient time to examine alternatives if a retirement poses adverse impacts to reliability or otherwise raises public interest considerations. The Opponents complain that Ginna has not afforded them sufficient time to propose alternatives to an RSSA because of its failure to select a retirement date. Any such alternative, however, could have been proposed in response to the petition within the comment period established for those responses, because the 2014 Reliability Study came with the Petition, and interested parties did not have to await its preparation, as normally would occur upon a 180-day retirement notice. No such alternative was presented.

²¹ See, e.g., Case 10-E-0553, Project Orange Associates LLC, Order Accepting Notice of Retirement and Making Other Findings (issued December 21, 2010); Case 08-E-0016, Onondaga Cogeneration, L.P., Order Excusing Late Filing (issued March 25, 2008); Case 14-E-0117, Danskammer Energy LLC, Order Approving Transfer and Making Other Findings (issued June 27, 2014).

Moreover, on October 6, 2014, RG&E issued a Request for Proposals (RFP), soliciting replacements for the capacity and electricity generated at the Ginna Plant. To the extent that Opponents complain that alternatives to an RSSA for Ginna were not sufficiently examined as contemplated in the Generation Retirement Order, the RFP corrects for that deficiency. As a result, the policies underpinning the Generation Retirement Order have been furthered. As discussed further below, however, RG&E must coordinate evaluation of the responses to the RFP with the negotiation of an RSSA for Ginna.

C. Other Factors Affecting Notice

Other factors also justify accepting Ginna's notice without selecting a specific retirement date at this time. The fact that Ginna is a nuclear facility creates a unique set of issues, both regulatory and practical. As a nuclear facility Ginna, must comply with the Nuclear Regulatory Commission's (NRC) rules, which require Ginna to submit to the NRC a written certification of a determination of retirement stating the date that power generation will permanently cease.²² This provision protects the public interest even without the selection of a specific retirement date under the Generation Retirement Order.

Once such a specific retirement date has been noticed, NRC would consider Ginna to be within five years of the projected end of operations, compelling submission of a preliminary decommissioning cost estimate,²³ which must include plans for accomplishing decommissioning.²⁴ Ginna would also be required to provide a Post Shutdown Decommissioning Activities Report (PSDAR),²⁵ which is relied upon to ensure there is

²² 10 C.F.R. §§50.82(a)(1)(i) and 50.4(b)(8).

²³ 10 C.F.R. §50.75(f)(3).

²⁴ 10 C.F.R. §50.75(f)(5).

²⁵ 10 C.F.R. §50.82(a)(4)(i).

adequate assurance of funding for decommissioning. These protections remain in place regardless of a retirement date selected under the Generation Retirement Order.

In addition, if Ginna, as a nuclear plant owner, were to specify a definitive retirement date, it risks losing the specialized talent of the personnel within its employ. Nuclear physicists, engineers, and other highly technical professionals are in demand, and may leave for other work if their job security appears at risk. Continuing operation of the Facility could become subject to unnecessary stresses if those employees are lost, notwithstanding reliability need or profitability.

Selecting a specific retirement date would also have an adverse impact on the local community. As the public comments establish, the Ginna facility and its employees are the linchpin of the economic health of the local Wayne County community, and its economic benefits are felt throughout the Rochester region. Identifying a date at which retirement would occur would require many municipalities and businesses that depend upon the economic activity the Ginna Facility generates, either directly or indirectly, to commence planning for substantial reductions in revenues. Steps might be taken that are unnecessary and counterproductive in order to prepare for a deadline that is artificially set at a 180-day period. This impact on the public interest is best avoided.

D. Conclusion

Therefore, Ginna has shown that it has provided proper notice of retirement, under the Generation Retirement Ginna Light Regulation Orders, as properly interpreted. Having commenced this proceeding and given notice of retirement through a petition without selecting a specific retirement date, however, Ginna is reminded that it cannot cease operations without the Commission's permission. Under most circumstances,

that permission is deemed granted if the 180-day period expires without Commission action, because, after giving the notice, nothing prevents retirement once the period has passed. Since there is no 180-day period here, however, Ginna may not cease operation without written permission. This requirement is sufficient to protect the public interest and is a satisfactory substitute for the selection of a 180-day retirement period at the time the petition was filed.²⁶

Entry into an RSSA

As discussed above, Ginna has justified entry into RSSA negotiations because retention of its Facility is necessary for the preservation electric system reliability. Moreover, by affidavit dated October 23, 2014, Ginna now certifies that the revenues it expects from the sale of capacity and energy into NYISO markets will not be sufficient to cover the costs of continued operation, which includes new capital investments that must be made. Absent an RSSA, the Facility would be retired as soon as would be practicable. This affirmation buttresses the conclusion that the commencement of negotiations over an RSSA for the Ginna Facility is warranted.

With the essential reliability need predicate to obtaining an RSSA satisfied, it may be noted that an RSSA is otherwise in the public interest, in that loss of the Ginna Facility would adversely affect the local economy, and the adverse impact would ripple out into the surrounding region as well. Moreover, the absence the Facility's nuclear generation would inevitably lead to an increase in fossil fuel use; renewables and energy efficiency cannot replace all of its generation if it were lost. As a result, Ginna's retirement

²⁶ Ginna may apply for the requisite permission during the course of this proceeding, or it may be selected subject to Commission approval by specifying a date in the RSSA.

would adversely affect air quality in New York and make compliance with RGGI more difficult.

A. RSSA Costs

The Opponents, however, raise important issues concerning the cost of the RSSA, which on one hand is recovered from ratepayers but on other hand is necessarily tied to the profitability of the Ginna Facility. The Opponents maintain that Ginna has failed to adequately demonstrate that forecasted revenues will be insufficient to meet ongoing costs, especially since Ginna did not select a retirement date by which it must cease operations in order to avoid incurring additional losses.

Moreover, of critical importance in negotiating an RSSA is the price that will be paid for the reliability attributes purchased. In connection with that analysis, RG&E is expected to investigate thoroughly the economic circumstances Ginna confronts so that the value of those reliability attributes is not overstated. The review of the economic circumstances that will be conducted in arriving at an RSSA price for the reliability attributes will necessarily answer questions on economic viability that the Opponents have posed. As a result, RG&E and Ginna are expected to support their positions on an RSSA with the economic analysis that will enable the Commission to determine the extent to which RSSA pricing is required. Additionally, it is expected that any RSSA resulting from these negotiations should address impacts of changes in economic circumstances and concomitant market electric prices on Ginna over time.

B. The Effect of the RFP

As discussed above, RG&E must also coordinate its RFP process with the negotiation of the RSSA. Initial responses to the RFP are due on November 21, 2014 and RG&E expects to short list the qualified bidders by December 19, 2014. RG&E shall

share the initial responses with Staff by November 25, 2014 and shall report its analysis of the short list to Staff by December 23, 2014. The sharing and reporting will indicate if there are proposals that could preserve reliability on a cost-effective basis without Ginna during the period that would be covered under the RSSA.

To the extent that alternatives proposed through the RFP might affect entry into an RSSA, or the period for which the RSSA remains in effect, RG&E, in consultation with Staff, would evaluate if viable, cost effective substitutes for the Facility, including generation, transmission, and other resources, would be available and could commence operations in a timely fashion. If it is determined that alternatives could affect negotiation of the RSSA, RG&E should redirect the RSSA negotiations to accommodate the alternatives. For example, an alternative might reduce the time period for which the Ginna Facility is needed, resulting in a shorter term for the RSSA.²⁷

C. Conclusion

Since Ginna has shown there is a reliability need for its Facility; that it has given proper notice of the potential retirement of the Facility; and, that its economic circumstances warrant commencement of negotiations over an RSSA, RG&E is directed to participate in those negotiations with Ginna. The negotiations shall conclude with the filing of an RSSA by January 15, 2015.²⁸ If the parties cannot agree on the terms,

²⁷ Given the size, location and reliability of the Ginna Facility, and that it is currently needed, it is unlikely that any alternative proposed could eliminate entirely reliance upon an RSSA here, at least during the earlier portion of the RSSA term.

²⁸ The Entergy Entities' claim that an RSSA term sheet must be prepared and evaluated before an RSSA contract can be entered into has no basis in law or fact and is rejected.

they shall file so much of the RSSA upon which they do agree, while proposing alternatives to provisions in dispute.

Federal Preemption

The Entergy Entities assert that RSSA agreements fall squarely within the area over which FERC has exclusive jurisdiction, and could pose an obstacle to FERC's implementation of the FPA, and so the Commission is preempted from requiring RG&E to enter into an RSSA with Ginna. As is well established, however, the Commission is responsible for ensuring "safe and adequate service" by "electric corporations," including independent generation owners.²⁹ In order to fulfill its responsibility, the Commission takes an active role in reviewing whether a proposed retirement of an independently owned generation facility may adversely impact reliability.

Moreover, to the extent that FERC has addressed this issue in New York, it has recognized the Commission's role in protecting the public interest where a generation facility retirement calls electric system reliability into question. The NYISO tariff states that, when a threat to electric reliability arises, "[t]he appropriate governmental agency(ies) and/or authority(ies) with jurisdiction over the implementation or siting of Gap Solutions will determine whether the Gap Solution or an alternative Gap Solution will be implemented to address the identified Reliability Need."³⁰

Once a Gap Solution is selected, which can include forestalling a generation unit retirement through an RSSA, the NYISO tariff provides further that the "[c]osts related to regulated non-transmission reliability projects will be recovered by Responsible Transmission Owners, Transmission

²⁹ PSL §§2(13), 65(1), 66(1), (2), (3) & (5).

³⁰ NYISO Open Access Transmission Tariff (OATT), Attachment Y, §31.2.10.4.

Owners and Other Developers in accordance with provisions of the New York Public Service Law, New York Public Authorities Law, or other applicable state law.”³¹ Therefore, the tariff recognizes the Commission’s authority to address a reliability need through directing the recovery of costs incurred in implementing a Gap Solution, such as the costs of retaining in service through an RSSA a generation facility that would otherwise be retired.

The FPA itself also preserves the Commission’s authority over generation and reliability. Indeed, the FPA explicitly provides that States retain jurisdiction over “facilities used for the generation of electric energy” and the ability “to take action to ensure the safety, adequacy, and reliability of electric service within that State.”³²

While it is true FERC has exclusive jurisdiction over rates for the wholesale transactions of energy,³³ an RSSA does not attempt to set wholesale rates. Instead, an RSSA is tied exclusively to the adequacy of reliability specifically reserved in the FPA to the States, in that payments are made in return for the obligation to remain in operation. As such, RSSA payments made for the purchase of such reliability attributes are no different than tax credits, grants, emissions reductions credits, renewable energy credits, or other methods of compensating generators for the attributes they provide that are outside the scope of FERC’s wholesale markets, whether the costs are recovered through state-regulated distribution utility rates or other state-approved mechanisms.

Since the Commission, in carrying out its duty to address reliability issue under New York’s Public Service Law is ensuring, through an RSSA, that electric service is safe and

³¹ NYISO OATT, Attachment Y, §31.5.1.6.

³² 16 U.S.C. §§824, 824d, 824e, 824o.

³³ 16 U.S.C. §824.

adequate, it is acting within the sphere accorded to it under the FPA. The federal preemption argument is therefore rejected.

The Commission orders:

1. Rochester Gas and Electric Corporation and R.E. Ginna Nuclear Power Plant LLC shall negotiate a Reliability Support Services Agreement in conformance with the discussion in the body of this Order, and make the filings regarding the Reliability Support Services Agreement described in the body of this Order by January 15, 2015.

2. Rochester Gas and Electric Corporation shall share the initial responses to its October 6, 2014 Request for Proposals with the Department of Public Service Staff (Staff) by November 25, 2014 and shall report its analysis of the short list of qualified bidders to Staff by December 23, 2014.

3. The Secretary in her sole discretion may extend the deadlines set forth in the Order, provided the request for an extension is in writing, includes a justification for the extension and is filed on at least one day's notice prior to the affected deadline.

4. This proceeding is continued.

By the Commission,

KATHLEEN H. BURGESS
Secretary