

152 FERC ¶ 61,027  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

R.E. Ginna Nuclear Power Plant, LLC	Docket Nos.	ER15-1047-001
		ER15-1047-002
		ER15-1719-000

ORDER ON REHEARING, COMPLIANCE FILING, AND PROPOSED  
AGREEMENT

(Issued July 13, 2015)

1. On February 13, 2015, R.E. Ginna Nuclear Power Plant, LLC (Ginna) filed, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> an executed Reliability Support Services Agreement (RSSA or Agreement)<sup>2</sup> between Ginna and Rochester Gas and Electric Corporation (RG&E) to help ensure reliability in the Rochester, New York region (Original Filing).<sup>3</sup> On April 14, 2015, the Commission issued an order on the RSSA in the Original Filing, rejecting it in part, accepting it in part, suspending it for a nominal period, to be effective on April 1, 2015, as requested, subject to a compliance filing and refund, and establishing hearing and settlement judge procedures.<sup>4</sup> On

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<sup>1</sup>16 U.S.C. § 824d (2012).

<sup>2</sup> “Reliability Support Service,” also referred to here as “must run” service, or “reliability must run” (RMR) service, provides for the continued operation of and compensation to generation units wishing to deactivate, often because they have become uneconomic, but which are needed for transmission system reliability.

<sup>3</sup> R.E. Ginna Nuclear Power Plant, LLC, [RSSA, FERC Rate Schedule No. 1, 0.0.0.](#)

<sup>4</sup> *R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶ 61,023 (2015) (April 14 Order). By order issued May 28, 2015, Chief Administrative Law Judge Curtis L. Wagner, Jr. ordered the continuation of the settlement judge procedures as the parties are engaged in settlement discussions concerning the RSSA in the Original Filing.

May 14, 2015, various parties, including Ginna, filed requests for rehearing or clarification of the April 14 Order. On the same date, Ginna submitted in Docket No. ER15-1047-002 its compliance filing to the April 14 Order, which contained a revised RSSA (Compliance Filing),<sup>5</sup> and it submitted the identical filing in Docket No. ER15-1719-000, as a new filing pursuant to FPA section 205 (New RSSA).<sup>6</sup> For the reasons discussed below, we grant in part and deny in part requests for rehearing of the April 14 Order. We also accept the revised RSSA in the Compliance Filing, effective April 1, 2015, subject to the outcome of the ongoing hearing and settlement judge procedures established by the April 14 Order, and we dismiss as moot the New RSSA.

## **I. Background**

### **A. Original Filing**

2. In the Original Filing, Ginna stated that it approached RG&E, the New York Independent System Operator, Inc. (NYISO) and the New York Public Service Commission (New York Commission) in early 2014 to inform them that the R.E. Ginna Nuclear Power Plant (Ginna Plant) was not earning enough money in the NYISO markets to justify continued operation, incurring avoidable operating losses in 2014 of \$35 million, and that it was projected to continue losing money in the future.<sup>7</sup> Ginna, RG&E and NYISO entered into a Reliability Study Agreement to study the Ginna Plant's potential retirement. NYISO studied the Ginna Plant's potential retirement and issued a report (Ginna Reliability Study), finding that its retirement would result in bulk and non-bulk reliability criteria violations in years 2015 and 2018.<sup>8</sup> The Ginna Reliability Study found that a mitigation solution equivalent to the impact of the full output of the Ginna Plant would be necessary to maintain reliability in the Rochester area.<sup>9</sup> In late 2014, citing an immediate reliability need, the New York Commission directed RG&E and Ginna to negotiate a Reliability Support Services Agreement, finding that no

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<sup>5</sup> R.E. Ginna Nuclear Power Plant, LLC, [RSSA, FERC Rate Schedule No. 1, 1.0.0.](#)

<sup>6</sup> R.E. Ginna Nuclear Power Plant, LLC, [RSSA, FERC Rate Schedule No. 1, 2.0.0.](#)

<sup>7</sup> Ginna stated that it accumulated losses in excess of \$150 million between 2011 and 2013. Absent an RSSA, Ginna stated that the “estimated costs for keeping the Ginna Facility online and operating from 2015-2018 will substantially exceed estimated market revenues ... consistent with the historical performance of the unit[.]” *See* Ginna Original Filing, Attachment C, Jeanne M. Jones Test. at 15, 17.

<sup>8</sup> *See* Original Filing, Attachment G, Ginna Reliability Study at 5-6.

<sup>9</sup> *Id.* at Attachment G, Ginna Reliability Study § 4.

potential alternative would completely obviate the need for the Ginna Plant until 2018, and it also ruled that the Ginna Plant could not retire without its permission.<sup>10</sup>

3. The RSSA between Ginna and RG&E extends from the requested effective date of April 1, 2015, through September 30, 2018. The RSSA allows RG&E to terminate the contract early, upon 12 months' notice to Ginna, if more cost-effective solutions to the identified reliability need became available earlier than anticipated. In such circumstances, RG&E must pay Ginna a termination fee (Settlement Payment), described as an amortized payment to recover amounts already expended by Ginna on capital investments, outage costs, and fuel payments at the time of the termination.<sup>11</sup> Ginna proposed that the RSSA could be extended by 18 months to March 31, 2020, if RG&E exercised a unilateral option to extend.

4. As proposed in the RSSA in the Original Filing, Ginna would receive a monthly fixed charge of \$17,504,118.25. In addition, Ginna was obligated to sell all of its energy, capacity and ancillary services into the NYISO market. Ginna proposed to retain 15 percent of the Ginna Plant's energy and capacity market revenues (15 Percent Mechanism). Because Ginna would receive all such revenues through the NYISO settlement process, RG&E's 85 percent share of capacity and energy revenues, and 100 percent of any ancillary service revenues, would be credited against the monthly fixed charge for the applicable delivery month.<sup>12</sup> The RSSA provided that RG&E's share of market revenues that are in excess of the monthly fixed charge would be paid to RG&E.<sup>13</sup>

5. The RSSA also included a provision that required Ginna to repay any capital investment costs it recovered from RG&E under the RSSA (Capital Recovery Balance), in the event the Ginna Plant returned to the market after the RSSA's expiration or termination.<sup>14</sup> Ginna stated that the Capital Recovery Balance represented the accrual of

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<sup>10</sup> Original Filing, Transmittal Letter at 3 (citing *Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E.Ginna Nuclear Power Plant, LLC*, Order Directing Negotiation of a Reliability Support Service Agreement and Making Related Findings at 22, Case 14-E-0270, New York Public Service Commission (Nov. 14, 2014)).

<sup>11</sup> RSSA § 2.2(c); Original Filing, Transmittal Letter at 20 n.118.

<sup>12</sup> Original Filing, Transmittal Letter at 11-12; RSSA § 4.1.

<sup>13</sup> RSSA § 3.2(f).

<sup>14</sup> RSSA §§ 1.1(g), 4.3.

capital investments made in the Ginna Plant at certain periods throughout the life of the RSSA.<sup>15</sup> Exhibit 5 to the RSSA prescribed various dollar amounts for the Capital Recovery Balance based upon the expiration or termination date of the RSSA.<sup>16</sup>

**B. April 14 Order**

6. In the April 14 Order, the Commission found, as an initial matter, that the RSSA constituted an agreement for RMR service, and, therefore, that the Commission had the authority under the FPA to evaluate the justness and reasonableness of the rates, terms and conditions of the RSSA.<sup>17</sup> The Commission also held that it would not revisit the reliability determination underlying the agreement, which supported the initial term of the RSSA.<sup>18</sup> However, because Ginna did not submit evidence demonstrating a reliability need beyond the initial term of the RSSA, the Commission held that Ginna had not shown the extension provision to be just and reasonable. The Commission, therefore, directed Ginna to remove all provisions in the RSSA related to extension of the RSSA beyond its initial term, and to do so in a compliance filing due within thirty (30) days of the date of the April 14 Order.<sup>19</sup>

7. In addition, the Commission expressed concerns regarding the rates, terms and conditions reflected in the RSSA. The Commission stated that its preliminary analysis indicated that the proposed RSSA had not been shown to be just and reasonable and may

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<sup>15</sup> Original Filing, Transmittal Letter at 20.

<sup>16</sup> In Exhibit 5 to the RSSA, the Capital Recovery Balance fluctuates from a low of \$20,140,090.97 should the RSSA be terminated in March 2017, to a high of \$65,266,227.71 if the RSSA is terminated in May 2017.

<sup>17</sup> April 14 Order, 151 FERC ¶ 61,023 at P 40 (citing *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 3 & n.8, and P 9 & n.19 (2015) (*NYISO RMR Order*) (stating that RMR service helps to ensure the continued reliable and efficient operation of the grid, and of NYISO's markets, and, as such, is subject to the Commission's FPA jurisdiction)). In the *NYISO RMR Order*, the Commission instituted a proceeding, under section 206 of the FPA, directing NYISO to establish provisions in its tariff governing the retention of and compensation to generating units required for reliability, including procedures for designating such resources, the rates, terms and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* RMR service agreement.

<sup>18</sup> *Id.* P 40.

<sup>19</sup> *Id.*

be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.<sup>20</sup> Accordingly, the Commission rejected in part and accepted in part the proposed RSSA for filing, suspended it for a nominal period, to become effective April 1, 2015, as requested, subject to a compliance filing and refund, and established hearing and settlement judge procedures.<sup>21</sup> Although the Commission set the RSSA for hearing and settlement judge procedures, the Commission also provided guidance on certain aspects of the RSSA.

8. The Commission found that Ginna's proposed 15 Percent Mechanism in the Original Filing does not comport with the general principle that rates under an RMR agreement must be cost-based and, therefore, Ginna had not shown the proposal to be just and reasonable.<sup>22</sup> The Commission explained that a compensation structure that provides for both a cost-based monthly fixed rate (whether going-forward costs at the low end, or a full cost of service at the upper end) and a share of market revenues does not meet that principle, as the revenue sharing provision is not cost-based and may allow for Ginna to earn more than its full cost of service.<sup>23</sup> Accordingly, the Commission rejected the proposed 15 Percent Mechanism, clarified that that issue should not be addressed at hearing, and directed Ginna to submit a compliance filing removing from the RSSA the 15 Percent Mechanism.<sup>24</sup>

9. With respect to the Capital Recovery Balance in the Original Filing, the Commission found that it provides a sufficient disincentive for Ginna to toggle between compensation under the RSSA and the NYISO markets.<sup>25</sup> Accordingly, the Commission stated that the hearing should not address the issue of toggling between compensation under the RSSA and NYISO's market, but may address whether the amounts in the Capital Recovery Balance are just and reasonable.<sup>26</sup>

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<sup>20</sup> *Id.* P 42.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* P 44.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* P 45.

<sup>26</sup> *Id.*

10. Finally, the Commission found that an intervenor's argument that the RSSA, and all other similar reliability agreements, should not be allowed to suppress prices to be beyond the scope of the proceeding. The Commission noted, however, that Ginna would be subject to and obligated to comply with any bidding or mitigation requirements that apply to NYISO's energy and capacity markets.<sup>27</sup>

**C. Ginna's Compliance Filing and New RSSA, Notices of the Filings, and Responsive Pleadings**

11. As noted above, on May 14, 2015, Ginna submitted the revised RSSA in the Compliance Filing, pursuant to the April 14 Order. On the same date, Ginna submitted the New RSSA, which is identical to the revised RSSA in the Compliance Filing. Also on May 14, 2015, Ginna, Entergy Nuclear Power Marketing, LLC (Entergy Nuclear), Multiple Intervenors,<sup>28</sup> Alliance for a Green Economy (AGREE),<sup>29</sup> TC Ravenswood, LLC (TC Ravenswood), and the New York Commission submitted requests for rehearing of the April 14 Order.

12. Notice of Ginna's Compliance filing was published in the *Federal Register*, 80 Fed. Reg. 29,696 (2015), with interventions and protests due on or before June 4, 2015.

13. Notice of Ginna's New RSSA was published in the *Federal Register*, 80 Fed. Reg. 29,319 (2015), with interventions and protests due on or before June 4, 2015.

14. Regarding the Compliance Filing and New RSSA, a timely intervention and protest was filed by TC Ravenswood.<sup>30</sup> Regarding the New RSSA, timely interventions

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<sup>27</sup> *Id.* P 46 (citing *NYISO RMR Order*, 150 FERC ¶ 61,116 at P 3).

<sup>28</sup> Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout the State of New York, including the RG&E service territory.

<sup>29</sup> AGREE represents member organizations, including Citizens' Environmental Coalition, and Nuclear Information & Resource Service.

<sup>30</sup> TC Ravenswood notes that it is a party with respect to the Original Filing in Docket No. ER15-1047-000.

raising no substantive issues were filed by PSEG Companies,<sup>31</sup> NRG Companies,<sup>32</sup> FirstEnergy Solutions Corp., RG&E, Entergy Nuclear, and Multiple Intervenors.

## **II. Overview of Rulings in this Order**

15. As discussed below, we grant in part and deny in part the requests for rehearing and clarification of the April 14 Order. Specifically, we deny rehearing regarding: (1) the Commission's jurisdiction over the RSSA; (2) NYISO's reliability determination for the RSSA and whether to examine alternatives to the RSSA; (3) the length of the term of the RSSA; and (4) whether the RSSA will cause price suppression in the NYISO markets. We grant clarification regarding Ginna's ability to retain 15 percent of its revenues from the NYISO markets, subject to a cost-based cap, and we grant rehearing on the issue of whether the RSSA provides a sufficient disincentive for Ginna to toggle between the RSSA and the NYISO markets. After addressing the requests for rehearing and clarification, we accept Ginna's Compliance Filing, effective April 1, 2015, which is the effective date granted by the April 14 Order, and subject to the outcome of the ongoing hearing and settlement judge procedures established by the April 14 Order. Finally, because Ginna's New RSSA is identical to the revised RSSA in the Compliance Filing that we here accept, we dismiss the New RSSA as moot. Similar to the April 14 Order, we note that nothing in this order should be read to prejudice any proposal that NYISO may file in the *NYISO RMR Order* proceeding.<sup>33</sup>

## **III. Requests for Rehearing and Clarification**

### **A. Jurisdiction Over the RSSA**

#### **1. Request for Rehearing**

16. The New York Commission requests rehearing of the Commission's determination that it has jurisdiction over the RSSA.<sup>34</sup> The New York Commission

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<sup>31</sup> The PSEG Companies are each wholly owned, direct and indirect subsidiaries of Public Service Enterprise Group Incorporated, and they include PSEG Power LLC, PSEG Energy Resources & Trade LLC and PSEG Power NY LLC.

<sup>32</sup> NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC, which control the output of affiliated generation assets in NYISO.

<sup>33</sup> See April 14 Order, 151 FERC ¶ 61,023 at P 45 n.95.

<sup>34</sup> The New York Commission has raised this jurisdictional argument in its rehearing requests in multiple pending proceedings, including the *NYISO RMR Order* proceeding (Docket No. EL15-37-001), the proceeding concerning NYISO's market rule (continued...)

asserts that the Commission erred by “interfering with the New York Commission’s on-going exercise of its authority to make resource adequacy determinations and approve RSSAs with generating facilities needed for reliability.”<sup>35</sup> The New York Commission argues that, in drafting the FPA, Congress “constrain[ed] the Commission’s jurisdiction to facilities used for interstate transmission of electricity and wholesale power rates, while at the same time preserving state jurisdiction over generation and local distribution.”<sup>36</sup> The New York Commission argues that the Commission cannot regulate an area traditionally occupied by the States unless Congress clearly specified its intent to supersede the States’ historic police powers.<sup>37</sup> The New York Commission argues that the Commission has “unlawfully claimed jurisdiction over the rates to be charged to retail customers for the retention of a generation facility,” and has provided no legal basis for doing so.<sup>38</sup> The New York Commission contends that the Commission’s assertion of jurisdiction was based only on the Commission’s own statement, in the *NYISO RMR Order*, that RMR service is subject to the Commission’s jurisdiction.<sup>39</sup> The New York Commission contends that the Commission has attempted to expand its jurisdiction beyond the limits of the FPA and, in doing so, has interfered with the New York Commission’s authority to determine the generation resource mix needed to ensure adequate service in New York.<sup>40</sup>

17. The New York Commission further argues that the Commission has acknowledged the New York Commission’s authority to address reliability matters and to approve RSSAs, because Attachment Y of the NYISO Open Access Transmission Tariff (Tariff) allows for “Gap Solutions” to address reliability needs and provides that the costs associated with non-transmission reliability projects will be recovered in accordance with New York law.<sup>41</sup>

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revisions for generator outage states (Docket No. ER14-2518-004), and the Dunkirk RSSA proceeding (Docket No. ER14-543-002).

<sup>35</sup> New York Commission Request for Rehearing at 6.

<sup>36</sup> *Id.* at 3 (citing 16 U.S.C. § 824(b)(1)) (internal citation omitted).

<sup>37</sup> *Id.* (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

<sup>38</sup> *Id.* at 6-7.

<sup>39</sup> *Id.* at 7 (citing *NYISO RMR Order*, 150 FERC ¶ 61,116 at PP 3, 9).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 5-6 (citing NYISO OATT, Att. Y, § 31.5.1.6).

## 2. Commission Determination

18. We deny the New York Commission's request for rehearing. The New York Commission argues that the Commission does not have jurisdiction over the RSSA and has erred by interfering with the New York Commission's jurisdiction. We disagree. As explained below, the rates, terms and conditions of the RSSA fall squarely within the Commission's jurisdiction under the FPA.

19. The FPA grants the Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale.<sup>42</sup> FPA section 201(b)(1) limits the Commission's jurisdiction by stating that the Commission "shall not have jurisdiction, *except as specifically provided* in [Subchapters II and III of the FPA], over facilities used for the generation of electric energy."<sup>43</sup> However, the Commission's authority over interstate transmission and wholesale rates are examples of jurisdiction specifically provided in Subchapters II and III of the FPA.<sup>44</sup>

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<sup>42</sup> 16 U.S.C. §§ 824(a), 824(b) (2012).

<sup>43</sup> *Id.* § 824(b)(1) (emphasis added). We note that the language in FPA section 201(a) concerning matters regulated by the States does not alter our analysis of this issue. While FPA section 201(a) provides that the Commission's authority extends "only to those matters which are not subject to regulation by the States[.]" *Id.* § 824(a), the Supreme Court has explained that this language is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction," and "[b]ecause the FPA contains such a clear and specific grant of jurisdiction to FERC over interstate transmissions . . . the [language in FPA section 201(a)] does not undermine FERC's jurisdiction." *New York v. FERC*, 535 U.S. 1, 22 (2002).

<sup>44</sup> *See id.* §§ 824(a), 824(b)(1), 824d(a), 824e(a), 824o(b); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (holding that the Commission has exclusive jurisdiction over wholesale rates) (*Nantahala*); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (explaining that section 201(b) does not limit the Commission's plenary jurisdiction over wholesale rates); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 383 (1988) (Scalia, J., concurring) ("it is reasonable to regard FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided.'"); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 (D.C. Cir. 2000) (explaining that the Commission's jurisdiction over interstate transmission is jurisdiction "specifically provided"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (2014) (holding that the Commission's transmission planning mandate did not intrude on States' authority because it was directed at ensuring the proper functioning of the interconnected

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As a result, the courts have long held that the Commission “clearly has exclusive jurisdiction over [wholesale rates]”<sup>45</sup> and that the Commission “may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate commerce.”<sup>46</sup>

20. The Ginna RSSA sets forth the rates, terms and conditions of providing a service to maintain the reliability and efficient operation of the interstate transmission system<sup>47</sup> and NYISO’s wholesale markets.<sup>48</sup> In order to provide this service to the interstate

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grid and, therefore, fits within the Commission’s jurisdiction over the transmission of electric energy in interstate commerce.).

<sup>45</sup> *Nantahala*, 476 U.S. 953, 966.

<sup>46</sup> *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718; *see also Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 482, 485 (2009) (holding that the Federal Energy Regulatory Commission’s determination of the rate necessary to procure sufficient resources to meet the Federal Energy Regulatory Commission’s estimate of demand does not constitute regulation of generation facilities in violation of FPA section 201).

<sup>47</sup> Similar to our jurisdiction over the rates, terms and conditions of the Ginna Plant’s provision of RMR service to support the reliability and efficient operation of the interstate transmission system, the Commission regulates, under the Commission’s open access transmission policies, various ancillary services, which include the provision of capacity and energy from generating facilities, to support the reliability and efficient operation of the interstate transmission system. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>48</sup> *See, e.g.*, Ginna, Transmittal Letter, Docket No. ER15-1047-000, at 2 (Feb. 13, 2015) (“The [NYISO Reliability Study], attached hereto as Attachment G, confirmed that operation of the Ginna Facility was needed through at least September 30, 2018 to avoid any adverse impacts on electric system reliability.”); *id.* at 11 (“The Agreement provides for a monthly fixed charge and a sharing of market revenues from Ginna’s sales into NYISO markets.”); *see also* R.E. Ginna Nuclear Power Plant, LLC, R.E. Ginna Nuclear Power Plant, LLC, RSSA, FERC Rate Schedule No. 1 (0.0.0) (“Pursuant to the rates, terms and conditions of this [RSSA], . . . [Ginna] shall provide reliability support services

(continued...)

transmission system and NYISO's wholesale markets, the RSSA obligates Ginna to provide RMR services to RG&E, it obligates Ginna to engage in wholesale sales of capacity, energy and ancillary services in the NYISO's markets,<sup>49</sup> and it provides the manner in which Ginna and RG&E will be compensated for these wholesale sales.<sup>50</sup>

21. Furthermore, out-of-market compensation is of particular concern in the context of RMR agreements like the Ginna RSSA because of the locational market power issues inherent in RMR contracts.<sup>51</sup> Preventing the exercise of market power through RMR agreements is important to ensure that wholesale rates are just and reasonable. Therefore, finding that the Commission does not have authority to regulate such agreements — which keep RMR resources online, provide them out-of-market compensation, and remedy a potential opportunity to exercise market power — would be inconsistent with

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to [RG&E] from the R.E. Ginna Nuclear Power Plant which is interconnected with [RG&E's] transmission system.”).

<sup>49</sup> Ginna's market-based rate tariff was accepted by the Commission on March 24, 2004. *See R.E. Ginna Nuclear Power Plant, LLC*, Docket No. ER04-485-000 (Mar. 24, 2004) (unpublished letter order). Ginna filed an Application for Determination of Exempt Wholesale Generator Status on May 26, 2004. *See R.E. Ginna Nuclear Power Plant, LLC*, Docket No. EG04-73-000, Application for Determination of Exempt Wholesale Generator Status (May 26, 2004) (“Ginna EWG Application”). Because the Commission did not act on the Ginna EWG Application, the Application was approved by operation of law. *See* 18 C.F.R. § 366.7(a) (2014).

<sup>50</sup> Contrary to the New York Commission's assertion (New York Commission Rehearing Request at 6-7), the RSSA does not involve a retail rate. Although the RSSA may impact retail rates because RG&E will pass the costs of the RSSA through to its retail customers, the same is true of all wholesale rates. It is well settled that the Commission's exercise of authority to set wholesale rates does not infringe upon a state's retail jurisdiction. *See Nantahala*, 476 U.S. 953; *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354.

<sup>51</sup> *See, e.g., Pub. Utils. Comm'n of State of Cal. v. FERC*, 254 F.3d 250, 257 (D.C. Cir. 2001) (the “Commission has long been aware of the locational market power issues inherent in the ISO's efforts to contract for RMR service.”); *Cities of Anaheim, et al. v. California Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,070, at P 26 n.6 (2004) (“RMR unit owners at those times have location-specific market power and could potentially charge a high price in the absence of an RMR agreement. The RMR agreements prevent RMR unit owners from taking advantage of location-specific market power.”), *reh'g denied*, 110 FERC ¶ 61,387, *reh'g denied*, 111 FERC ¶ 61,218 (2005).

the Congressional intent behind the FPA.<sup>52</sup> Accordingly, we find that the Commission correctly asserted jurisdiction over the RSSA.

22. The New York Commission argues that the Commission has acknowledged the New York Commission's authority to address reliability matters and to approve RSSAs, because Attachment Y of the NYISO Tariff allows for "Gap Solutions" to address reliability needs and provides that the costs associated with non-transmission reliability projects will be recovered in accordance with New York law.<sup>53</sup> We disagree. Attachment Y of the NYISO Tariff sets forth the procedures for NYISO's Comprehensive System Planning Process.<sup>54</sup> While NYISO's Tariff does allow for Gap Solutions to address reliability needs, that fact is irrelevant to this proceeding. Gap Solutions must be developed according to the substantive and procedural requirements set forth in Attachment Y of the Tariff.<sup>55</sup> The RSSA was not developed according to those Tariff requirements and it is, therefore, not a Gap Solution. Furthermore, the fact that the Commission allowed for a State role in the cost recovery of regulated non-transmission reliability projects developed pursuant to Attachment Y does not affect the Commission's jurisdiction over RMR agreements, which are not developed pursuant to Attachment Y. As stated in section 31.5.1.6 of Attachment Y, which contains the cost recovery language to which the New York Commission cites, "[n]othing in this section shall affect the [Federal Energy Regulatory Commission's] jurisdiction over the sale and transmission of electric energy subject to the jurisdiction of the Commission."<sup>56</sup>

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<sup>52</sup> See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) ("As FERC's authority generally rests on the public interest in constraining exercises of market power, see *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1003 (D.C. Cir. 1987), whether in the utility's rates or other terms of service, and as a common test for the lawfulness of rates is their connection to the reasonably-incurred costs of providing the regulated service, *National Fuel Gas Supply Corp. v. FERC*, 900 F.2d 340 (D.C. Cir. 1990), it is hard to see how the statute could leave FERC weaponless against conduct that might encourage or cloak the running up of unreasonable costs."), *cert. denied*, 552 U.S. 1230 (2008).

<sup>53</sup> New York Commission Rehearing Request at 5-6 (citing NYISO OATT, Att. Y, § 31.5.1.6).

<sup>54</sup> NYISO, NYISO Tariffs, OATT, § 31 OATT Attachment Y (0.0.0) ("Comprehensive System Planning Process"), *et seq.*

<sup>55</sup> NYISO, NYISO Tariffs, OATT, § 31.2 OATT Attachment Y (13.0.0), at § 31.2.11.

<sup>56</sup> *Id.* § 31.5 OATT Attachment Y (6.0.0), at § 31.5.1.6.

**B. 15 Percent Mechanism****1. Request for Rehearing or Clarification**

23. Ginna requests clarification that the April 14 Order's elimination of the 15 Percent Mechanism did not require Ginna to accept total revenues below those that it negotiated under the RSSA in the Original Filing, or prevent replacement of the 15 Percent Mechanism with a revenue mechanism that ensures the RSSA does not exceed its full cost of service, which will be established in hearing and settlement judge procedures. Absent clarification, Ginna requests rehearing of the Commission's elimination of the 15 Percent Mechanism, arguing that a rate may have market- and cost-based elements and be just and reasonable if there is a cost cap.<sup>57</sup>

24. Ginna asserts that simply removing the 15 Percent Mechanism without a replacement would deprive Ginna of roughly \$100 million over the course of the RSSA, and that such a result would be confiscatory. Ginna alleges that its total proposed compensation amounted to \$835 million – including the revenues from the 15 Percent Mechanism – which is approximately two-thirds of its proposed \$1.27 billion full cost of service.

25. Ginna notes that the April 14 Order found that an RSSA with a fixed monthly fee plus a 15 percent share of NYISO market revenues “does not comport with the general principle that rates under an RMR Agreement must be cost-based” because “[a] compensation structure that provides for both a cost-based monthly fixed rate (whether going-forward costs at the low end, or a full cost of service at the upper end) and a share of market revenues does not meet this principle, as the revenue sharing provision is not cost-based and may allow for Ginna to earn more than its full cost of service.”<sup>58</sup>

26. Ginna requests that the Commission clarify that a 15 Percent Mechanism subject to a cost-based cap may be introduced at hearing – or, as Ginna did here, through either a compliance filing or a new FPA section 205 filing. According to Ginna, such a cap would ensure that Ginna would not earn more than its full cost of service. Ginna also requests clarification that the April 14 Order did not require Ginna to accept less total revenues than the estimated \$835 million that it negotiated with RG&E under the RSSA in the Original Filing.

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<sup>57</sup> Ginna May 14, 2015 Rehearing Request at 4 (citing *Enron Power Marketing, Inc.*, 66 FERC ¶ 61,244, at 61,599 (1994)).

<sup>58</sup> *Id.* at 10 (citing April 14 Order, 151 FERC ¶ 61,023 at P 44).

27. Ginna states that if the Commission does not grant clarification, then rehearing is required to restore the negotiated RSSA rate because elimination of the 15 Percent Mechanism would result in Ginna accepting total revenues below which it negotiated with RG&E. Ginna states that the New York Commission prohibited it from retiring and that therefore the RSSA in the Original Filing is involuntary and Ginna is entitled to its full cost of service. Ginna argues that striking the 15 Percent Mechanism but setting the remainder of the RSSA for hearing and settlement judge procedures deprives Ginna of its negotiated rate of \$835 million. Ginna argues that, without a replacement of the uncapped 15 Percent Mechanism, it is left with a rate that is neither its negotiated rate, nor its full cost of service. Ginna argues that such a rate would be confiscatory, because, while Ginna may waive its right to full cost of service by agreeing to a negotiated rate, the Commission cannot unilaterally waive that right and impose a rate that is neither negotiated, nor a utility's full cost of service.

28. Ginna states that if clarification or rehearing is granted, then the only remaining purpose of the hearing or settlement is to determine the amount of the cap, as opposed to whether a cap is necessary. Ginna argues that it does not matter whether rates are cost-based or market-based, only that they are just and reasonable.<sup>59</sup> Ginna maintains that market elements may exist in a cost-based rate, and that such elements do not render the overall rate market-based.<sup>60</sup> Finally, Ginna argues that eliminating a material revenue mechanism without adopting a just and reasonable alternative was contrary to the limitations imposed on the Commission under FPA section 205.<sup>61</sup>

## 2. Commission Determination

29. We grant clarification of the April 14 Order regarding the 15 Percent Mechanism. The Commission stated in the April 14 Order that “[c]ompensation to an RMR generator must at a minimum allow for the recovery of the generator’s going-forward costs, with parties having the flexibility to negotiate a cost-based rate up to the generator’s full cost of service.”<sup>62</sup> Thus, while Ginna should not be compensated at a level that is higher than

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<sup>59</sup> *Id.* at 20 (citing *New York Indep. Sys. Operator, Inc.*, 105 FERC ¶ 61,108, at P 21 (2003), *petition for review denied*, *Elec. Consumers Resource Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005)).

<sup>60</sup> *Id.* at 23 (citing *Ill. Power Co.*, 57 FERC ¶ 61,213, at 61,700 (1991) (stating “[w]e find nothing unreasonable in Illinois Power’s decision to offer market-driven discounts from a cost-based cap” (internal citations omitted))).

<sup>61</sup> *Id.* at 24-27.

<sup>62</sup> April 14 Order, 151 FERC ¶ 61,023 at P 43 (citing *NYISO RMR Order*, 150 FERC ¶ 61,116 at P 17).

the level required to recover its full cost of service, a 15 Percent Mechanism that ensures that total compensation under the RSSA is capped at Ginna's full cost of service is consistent with the April 14 Order. Accordingly, as further discussed below, we will allow Ginna to submit through its Compliance Filing a 15 Percent Mechanism that ensures that total compensation under the RSSA is capped at the Ginna Plant's full cost of service. The merits of that filing are addressed below.

30. Given our grant of Ginna's requested clarification of the April 14 Order, we need not address Ginna's alternative request for rehearing.

31. We note that Ginna also requests that the Commission clarify that the April 14 Order did not require Ginna to accept less total revenues than the estimated \$835 million that it negotiated with RG&E under the RSSA in the Original Filing. We deny the request because it potentially prejudices the issue as to what the just and reasonable full cost service revenue requirement is, which we set for hearing in the April 14 Order.

**C. Reliability Determination, Alternative Solutions, and Length of the RSSA Term**

**1. Requests for Rehearing and Clarification**

32. AGREE requests that the Commission revisit NYISO's determination that Ginna is needed for reliability, order NYISO to conduct a new reliability study, and clarify that the hearing in this proceeding will examine the nature of the reliability issues that form the basis of Ginna's filing of the RSSA. AGREE asserts that information filed in the ongoing New York Commission proceeding concerning the RSSA has revealed that the reliability need caused by Ginna's retirement is largely confined to several hours in the summer when load in the area exceeds 1430 MW,<sup>63</sup> which, according to AGREE, only occurred in 18 hours during the summer of 2014, 67 hours during the summer of 2013, and 73 hours during the summer of 2012.<sup>64</sup> AGREE therefore contends that RG&E's customers are being asked to subsidize the operation of an extraordinarily expensive baseload generator in order to fill a peak load role.<sup>65</sup> AGREE estimates that if the proposed RSSA had been in effect during the years 2012 through 2014, customers would have paid the equivalent of between \$8,290 and \$70,224 per MWh for the hours that exceeded 1430 MW of load, which is well in excess of peak electricity prices during

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<sup>63</sup> AGREE Rehearing Request at 4.

<sup>64</sup> *Id.* at 4, Appendix.

<sup>65</sup> *Id.* at 4.

those years.<sup>66</sup> AGREE argues that this new information about the reliability need and the cost of meeting that need through the Ginna RSSA warrants a close examination of the reliability study underlying the RSSA.

33. AGREE urges the Commission to order the NYISO to perform a new reliability study, using the most up-to-date load forecasts, and to examine alternatives, a step that, AGREE asserts, was missing from the NYISO's Ginna Reliability Study.<sup>67</sup> AGREE argues that the new NYISO study should look at the entire year, not just summer, to determine when the reliability needs exist.<sup>68</sup> AGREE also argues that the new study should be inclusive of project parameters and detailed project schedules, conducted using the base case from the most recent NYISO planning study and evaluate the full range of alternatives, including transmission upgrades, demand-side resources, generator alternatives, and alternative operating procedures (e.g., re-dispatch, temporary rating increases, special protection systems).<sup>69</sup> AGREE asserts that an examination of the alternatives would be consistent with the Commission's policy, articulated in the *NYISO RMR Order* proceeding, that "[t]he evaluation of alternatives to an RMR designation is an important step that deserves the full consideration of NYISO and its stakeholders to ensure that RMR agreements are used only as a limited, last-resort measure."<sup>70</sup>

34. Entergy Nuclear, Multiple Intervenors and AGREE request that the Commission clarify that the length of the RSSA term is an issue within the scope of the hearing and settlement procedures. On this point, Entergy Nuclear notes that the Commission characterized the RSSA in the Original Filing as providing for Ginna to continue reliability support services only "until such time that certain transmission upgrades are completed or other reliability remedies are identified and implemented."<sup>71</sup> Entergy Nuclear argues that clarification is warranted to the extent that any party interprets the Commission's decision not to revisit the reliability determination underlying the RSSA as a ruling on the appropriate length or termination date of the RSSA.<sup>72</sup> Entergy Nuclear

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<sup>66</sup> *Id.* at 4, Appendix.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *NYISO RMR Order*, 150 FERC ¶ 61,116 at P 16).

<sup>71</sup> Entergy Nuclear Rehearing Request at 4 (citing April 14 Order, 151 FERC ¶ 61,023 at P 46).

<sup>72</sup> *Id.* (citing April 14 Order, 151 FERC ¶ 61,023 at P 40).

asserts that such an interpretation would be inconsistent with: (1) the Commission's characterization of the RSSA as a vehicle to be used until alternatives can address the identified reliability need; and (2) the Commission's general RMR policy of, according to Entergy Nuclear, disfavoring terms that exceed the scope of the identified reliability need because RMRs must be "limited, last-resort" measures.<sup>73</sup>

35. Entergy Nuclear, Multiple Intervenors and AGREE argue that if the Commission does not grant the requested clarification because the Commission found that the length of the RSSA term is not an issue set for hearing and settlement procedures, then rehearing is required. To that end, Entergy Nuclear asserts that the Commission did not address Entergy Nuclear's evidence and arguments demonstrating that: (1) the RSSA was executed without adequate consideration of the alternatives;<sup>74</sup> (2) the RSSA should terminate upon the implementation of alternatives that address the need for Ginna's continued operation; and (3) an RSSA term that lasts even after the reliability need has been established is contrary to the Commission's precedent that reliability services agreements must be limited, last resort measures.<sup>75</sup>

36. Entergy Nuclear also asserts that the Commission failed to address its arguments explaining why the existing early termination provisions of the RSSA, which provide RG&E with a unilateral right to terminate, do not adequately ensure that the RSSA will terminate when an alternative transmission solution is in place because RG&E may weigh termination against a number of competing benefits, including short-term price suppressive effects in wholesale markets, the local economy and community, jobs, or other factors.<sup>76</sup>

37. Entergy Nuclear, Multiple Intervenors and AGREE argue that the term of the RSSA (through September 30, 2018) is unnecessarily long, because, according to these parties, information produced in the New York Commission's proceeding indicates that the Ginna transmission solution is scheduled to be in-service sometime between

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<sup>73</sup> *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237, at P 36 (2012)). *See also* Multiple Intervenors Rehearing Request at 4; AGREE Rehearing Request at 5-6.

<sup>74</sup> Entergy Nuclear observes that, in three other regional transmission organizations, the Commission has approved tariffs providing for the consideration of alternatives to directly impact the length and/or qualification for RMR-type agreements. Entergy Nuclear Rehearing Request at 8.

<sup>75</sup> Entergy Nuclear Rehearing Request at 5-9.

<sup>76</sup> *Id.* at 9.

December 2016 and June 2017.<sup>77</sup> Therefore, even if the April 14 Order intended to approve the length of the RSSA term, Multiple Intervenors assert that this new information raises serious concerns regarding the term of the RSSA.<sup>78</sup> AGREE further argues that, while RG&E has the ability to terminate the RSSA early, it may only do so if it gives 12-months' notice and remits an early-termination Settlement Payment that ranges from \$3.8 million to \$55.2 million, depending on the termination date.<sup>79</sup>

## 2. Commission Determination

38. We deny the requests to revisit NYISO's reliability determination underlying the RSSA and examine alternatives to the RSSA, along with the requests to set the length of the RSSA term for hearing or reduce the RSSA term.

39. In the April 14 Order, the Commission held that it would not revisit the NYISO's reliability determination underlying the RSSA in the Original Filing.<sup>80</sup> Ginna submitted the NYISO's Ginna Reliability Study, which analyzed the Ginna Plant's potential retirement. The Ginna Reliability Study found that the Ginna Plant's retirement would result in bulk and non-bulk reliability criteria violations in years 2015 and 2018.<sup>81</sup>

40. NYISO stated that its Ginna Reliability Study was conducted consistent with national, regional, state and NYISO-specific standards, procedures and practices,<sup>82</sup> and it

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<sup>77</sup> *Id.* at 5; Multiple Intervenors Rehearing Request at 3; AGREE Rehearing Request at 5. AGREE also asserts that during construction of the Ginna transmission solution, there is a possibility that RG&E could rely on operating procedures to comply with reliability requirements.

<sup>78</sup> Multiple Intervenors Rehearing Request at 6.

<sup>79</sup> AGREE Rehearing Request at 5.

<sup>80</sup> April 14 Order, 151 FERC ¶ 61,023 at P 40.

<sup>81</sup> *Id.* P 3.

<sup>82</sup> In particular, NYISO stated that its assessment of the Ginna Plant's potential retirement was "performed 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." Original Filing, Attachment G, Ginna Reliability Study at 7.

used the information available at the time of the study.<sup>83</sup> We decline the requests to revisit the NYISO's determination of a reliability need for the RSSA and to require examination of the alternatives to the RSSA.

41. In the April 14 Order, the Commission found that because Ginna did not submit evidence demonstrating a reliability need beyond the initial term of the RSSA, it had not shown the extension provision to be just and reasonable, and it ordered Ginna to remove all provisions in the RSSA related to extension of the RSSA.<sup>84</sup> The April 14 Order accepted the term of the RSSA in the Original Filing from April 1, 2015 through September 30, 2018.

42. We deny the requests to set the term of the RSSA for hearing. The April 14 Order noted that RG&E has the right to terminate the RSSA, upon 12 months' notice, so that the term of the RSSA will match the duration of RG&E's reliability need.<sup>85</sup> RG&E's early termination rights ensure that RG&E can replace the RSSA with the Ginna transmission solution or any other reliability solution that may be developed to replace the RSSA. Therefore, the term of the RSSA, in combination with RG&E's early termination rights, is fully consistent with our policy that RMR agreements must be limited, last-resort measures to address the identified reliability need.<sup>86</sup> In light of RG&E's early termination rights, Entergy Nuclear's allegations that RG&E will be influenced by other factors and will not act to terminate the RSSA when there is no longer a reliability need for the RSSA are not persuasive. We find Entergy Nuclear's concerns regarding RG&E's potential termination decision to be speculative and unsupported by the record.

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<sup>83</sup> We note that NYISO's compliance filing to the *NYISO RMR Order*, which has not yet been filed for consideration by the Commission, will propose an RMR process, including a description of the process for conducting the reliability analyses necessary to determine whether there is a reliability need for the generating unit. *NYISO RMR Order*, 150 FERC ¶ 61,116 at P 13.

<sup>84</sup> April 14 Order, 151 FERC ¶ 61,023 at P 40.

<sup>85</sup> *Id.* P 6.

<sup>86</sup> *See, e.g., NYISO RMR Order*, 150 FERC ¶ 61,116 at P 16.

## **D. Suppression of Market Prices**

### **1. Request for Rehearing**

43. TC Ravenswood seeks rehearing of the Commission's determination that Indicated Suppliers'<sup>87</sup> argument that the RSSA in the Original Filing should not be allowed to suppress market prices is beyond the scope of this proceeding.<sup>88</sup> It argues that the Commission's lack of scrutiny of the price suppressive effects that the RSSA may have on capacity market prices that will be paid to suppliers other than Ginna is in error. It asserts that the error is highlighted by the significant scrutiny that the Commission has ordered for the RSSA rates in contrast to the absence of its scrutiny of the rate impacts on competitive suppliers, which rely on market prices reflecting the timely exit of excess capacity that is not needed for resource adequacy. By failing to scrutinize the impacts on market prices, TC Ravenswood asserts that the Commission is not fulfilling its statutory obligation, under section 205 of the FPA, because the RSSA is inextricably linked to the price formation and rates in NYISO's competitive capacity market.<sup>89</sup>

44. TC Ravenswood recognizes that the April 14 Order noted that Ginna will be subject to and obligated to comply with any bidding or mitigation requirements that apply to NYISO's energy and capacity markets, including any bidding or mitigation requirements that NYISO may develop in response to the *NYISO RMR Order*.<sup>90</sup> TC Ravenswood also recognizes that the Commission directed NYISO to establish a stakeholder process to consider whether mitigation measures are needed for the NYISO capacity market to address concerns regarding potential price suppression impacts of repowering agreements.<sup>91</sup> TC Ravenswood argues, however, that neither of those

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<sup>87</sup> Indicated Suppliers is made up of Empire Generating Co, LLC and the Dynegey Companies.

<sup>88</sup> April 14 Order, 151 FERC ¶ 61,023 at P 46.

<sup>89</sup> TC Ravenswood Rehearing Request at 7-11 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 (2008); *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 27 (2008); *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at P 73 (2012); *ISO New England Inc.* 135 FERC ¶ 61,029, at PP 13 and 170 (2011); and *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143 (2011)).

<sup>90</sup> *Id.* at 7 (citing April 14 Order, 151 FERC ¶ 61,023 at P 46 & n.96).

<sup>91</sup> *Id.* (citing *Indep. Power Producers of New York, Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, at P 71 (2015)).

measures serves as a valid basis for declining to examine in this proceeding whether any element of the RSSA could cause artificial price suppression in NYISO's competitive markets. TC Ravenswood asserts that this examination is consistent with FPA section 205(a), which states that, not only must rates be just and reasonable, but "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable," as well.<sup>92</sup>

## **2. Commission Determination**

45. We deny TC Ravenswood's rehearing request. In the April 14 Order, the Commission held that Indicated Suppliers' argument that the RSSA should not be allowed to suppress market prices is beyond the scope of the proceeding,<sup>93</sup> which is limited to consideration of whether the rates, terms and conditions of the RSSA itself are just and reasonable. This proceeding does not involve changes to the NYISO market rules nor does it encompass the consideration of how RMR agreements, such as the RSSA, affect the NYISO market rules.<sup>94</sup> If TC Ravenswood believes that the NYISO market rules need to be revised to account for the effects of RMR agreements, it should pursue this concern through NYISO's stakeholder process regarding the *NYISO RMR Order*.<sup>95</sup>

### **E. Toggling**

#### **1. Request for Rehearing**

46. AGREE argues that the Capital Recovery Balance is not a sufficient disincentive for Ginna to toggle between the RSSA and the NYISO market, should market conditions improve. AGREE states that the Capital Recovery Balance will be paid back over two or more years and may be mitigated by a Settlement Payment that RG&E would owe Ginna in the event RG&E terminates the agreement early. For example, if RG&E terminates

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<sup>92</sup> *Id.* at 11 (citing 16 U.S.C. § 824d(a) (2012)).

<sup>93</sup> April 14 Order, 151 FERC ¶ 61,023 at P 46.

<sup>94</sup> We note that the cases that TC Ravenswood cites in support of its position that the Commission should take action in this proceeding are inapposite because those cases concerned either changes in market rules or a complaint concerning the implementation of market rules. *Supra* n. 89.

<sup>95</sup> *Supra* n. 17.

the RSSA in July 2017,<sup>96</sup> it would owe Ginna a Settlement Payment of about \$49 million. If Ginna decides to continue operating the reactor at that point, the Capital Recovery Balance would be about \$61 million, which Ginna would pay to RG&E in installments over 28 months. AGREE argues that Ginna could use the Settlement Payment to offset the capital recovery balance, leaving just \$12 million owed to RG&E – about \$430,000 per month over those 28 months. AGREE contends that this may still be a disincentive to continued operation, but it is not as significant a disincentive as originally portrayed in the April 14 Order.

## 2. Commission Determination

47. We grant rehearing on the issue of the RSSA's toggling disincentive. AGREE argues that the toggling disincentive is insufficient because Ginna will pay the Capital Recovery Balance over a period of 24 or 28 months and because, if RG&E terminates the agreement early, RG&E's Settlement Payment to Ginna will offset the Capital Recovery Balance payments. As a result, AGREE states that the toggling disincentive in the RSSA, as filed, ranges from approximately \$3.5 million to \$31 million.<sup>97</sup> We agree that, while these amounts may provide some disincentive for Ginna to toggle, it is not possible at this point to conclude that the RSSA provides an adequate toggling disincentive. Further, because the Commission in the April 14 Order found that the RSSA in the Original Filing has not been shown to be just and reasonable, and therefore set the RSSA for hearing, it is possible that the terms of the RSSA—including the dollar amounts of the Capital Recovery Balance, Settlement Payment, and Ginna's overall RSSA revenues—will change, thereby affecting the level of the toggling disincentive that the RSSA provides.<sup>98</sup>

48. For the above reasons, we find that the pleadings raise disputed issues of material fact concerning Ginna's incentive to toggle between RSSA compensation and the NYISO markets. Accordingly, we grant rehearing on this issue and direct the parties to address it

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<sup>96</sup> July 2017 is one month after the latest date by which RG&E's transmission solution is estimated to be in place.

<sup>97</sup> See AGREE Rehearing Request at 8-9 (comparing the dollar amounts of the Capital Recovery Balance to those of the Settlement Payment). We note that AGREE's comparison is based on data available from the Original Filing. See RSSA Exhibit 1 - Settlement Payment, and Exhibit 5 - Capital Recovery Balance.

<sup>98</sup> In fact, if the revenues that Ginna could earn in the NYISO markets in the 24 or 28 months after the RSSA terminates are higher than the net \$3.5 million to \$31 million that Ginna would owe RG&E for returning to the markets, then the RSSA would essentially have provided no toggling disincentive.

in the ongoing hearing and settlement judge procedures that the Commission established in the April 14 Order. Specifically, we expect the parties to address, at a minimum, not only the appropriate dollar amounts for the Capital Recovery Balance, but also the Settlement Payment, Ginna's overall revenues under the RSSA and projected market revenues that Ginna could earn from sales in the NYISO market. Based on this information, the Commission will determine whether or not the RSSA provides a sufficient disincentive for Ginna to toggle between the RSSA and the NYISO markets.

49. We further note that the cost of service reflected in the RSSA in Ginna's Original Filing, which is the subject of the ongoing hearing and settlement judge procedures, reflects an accelerated depreciation of the plant over the 3.5 year term of the RSSA. Under this scenario, Ginna's costs for providing capacity and energy to the NYISO markets after the RSSA terminates would be significantly lower than they would have been without the accelerated depreciation. While we do not prejudge here the issue of whether it is appropriate for Ginna to recover accelerated depreciation in its cost of service, in the context of determining whether the RSSA provides an adequate disincentive to toggle, we question whether a generator may face an adequate disincentive to toggle back to the market if it is allowed to recover revenues based on a cost of service using an accelerated depreciation rate rather than under its book depreciation rate while operating under an RSSA.

#### **IV. Compliance Filing and New RSSA**

50. In its Compliance Filing, Ginna states that it has removed the extension-related provisions from the RSSA,<sup>99</sup> as directed in the April 14 Order.<sup>100</sup> However, consistent with its rehearing request, Ginna proposes to keep the 15 percent share of NYISO market revenues, subject to a cap that "limits Ginna's total RSSA revenues ... to no more than its full cost of service."<sup>101</sup>

51. Ginna asserts that the Commission stressed the importance of permitting the RSSA rates to continue as negotiated rates when the Commission quoted language from the *NYISO RMR Order* stating that "[c]ompensation to an RMR generator must at a minimum allow for the recovery of the generator's going-forward costs, *with parties having the flexibility to negotiate a cost-based rate up to the generator's full cost of*

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<sup>99</sup> Ginna Compliance Filing Transmittal Letter at 2-4.

<sup>100</sup> April 14 Order, 151 FERC ¶ 61,023 at P 40.

<sup>101</sup> Ginna Compliance Filing Transmittal Letter at 5.

*service.*”<sup>102</sup> Based on the italicized passage, Ginna states that it “interprets the [April 14] Order to direct Ginna to revise the RSSA in a manner that modifies the RSSA to remove the existing un-capped 15 Percent Mechanism and replace it with a mechanism that addresses the [April 14] Order’s directives to ensure that compensation below full cost of service is negotiated, while also ensuring that the compensation cannot exceed full cost of service.”<sup>103</sup> Therefore, Ginna proposes to retain the 15 Percent Mechanism, but cap the total RSSA revenues Ginna receives at the lower of its full cost of service as proposed in its Original Filing, or the full cost of service determined as a result of a hearing or settlement in this docket.<sup>104</sup> This cost-based rate cap is defined in the Compliance Filing as the Ginna Annual Revenue Cap.<sup>105</sup> Ginna argues that the Commission has long held that cost-capped rates are cost-based rates, even if the actual amount paid contains elements that are market-driven. Ginna asserts that a cost-based cap on its total revenues, including the 15 Percent Mechanism, addresses the Commission’s concern in the April 14 Order that the 15 Percent Mechanism could result in revenues above Ginna’s full cost of service, and therefore its proposal should be accepted.

52. As part of its changes to implement the Ginna Annual Revenue Cap in the Compliance Filing, Ginna also proposes to add the following language at the end of RSSA § 2.1(b): “Notwithstanding the foregoing provisions of this Section 2.1(b), RGE shall be entitled to challenge, in its sole and absolute discretion, including in any regulatory proceedings before [the Commission] and/or the [New York Commission] (whether in the context of settlement discussions or otherwise), Ginna’s proposed annual cost of service related to the operation and maintenance of the Facility, including pursuing a reduction in the Ginna Annual Revenue Cap derived from Ginna’s annual cost of service[.]”

53. In addition, Ginna proposes to add the following language in the Compliance Filing at the end of RSSA § 2.1(C): “Notwithstanding the foregoing provisions of this Section 2.1(c), the Parties expressly acknowledge and agree that any modification by [the

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<sup>102</sup> *Id.* at 5 (quoting April 14 Order, 151 FERC ¶ 61,023 at P 43 (internal quotations omitted) (emphasis added by Ginna)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; RSSA §§ 1.1(y) and 3.2(k), and Exhibit 7.

<sup>105</sup> In RSSA §§ 1.1(y), the “‘Ginna Annual Revenue Cap’ shall mean, for any calendar year during the Term, the lesser of (i) the amount set forth in Exhibit 7 (attached hereto) applicable to such calendar year and (ii) the amount determined by FERC (either through settlement proceedings or final adjudication) to be Ginna’s annual cost of service related to the operation and maintenance of the Facility;”.

Commission] of the Ginna Annual Revenue Cap in a manner that is reasonably likely to preclude Ginna from recovering the amount of Energy Revenues and Capacity Revenues contemplated by the Parties in the version of the Agreement originally executed by the Parties shall be considered an imposition of a term or condition in a manner that is adverse in a material respect to Ginna[.]”

54. Ginna requests that the Compliance Filing be made effective on April 1, 2015, which is the effective date established by the April 14 Order. To the extent necessary, Ginna requests that the Commission consolidate its Compliance Filing with the underlying proceeding in Docket No. ER15-1047-000, because both of these proceedings concern the same issue – Ginna’s cost of service and the justness and reasonableness of the RSSA.

55. Ginna states that its New RSSA in Docket No. ER15-1719-000 contains an RSSA that is identical to the revised RSSA included in its Compliance Filing. Ginna states that it filed the New RSSA “out of an abundance of caution, in the event that the Commission rejects the submission of the replacement compensation mechanism submitted in [the Compliance Filing].”<sup>106</sup>

56. Ginna also requests that its New RSSA be made effective on April 1, 2015, which is the effective date established by the April 14 Order. In addition, Ginna requests that the Commission consolidate its New RSSA with the underlying proceeding in Docket No. ER15-1047-000.

**A. Protest**

57. TC Ravenswood’s protest, which asserts that the revised RSSA submitted in the Compliance Filing and New RSSA should not be allowed to suppress NYISO capacity and energy market prices, contains similar arguments to its request for rehearing on this issue. In addition, TC Ravenswood asserts that if Ginna’s approximately 580 MW resource is artificially retained in the NYISO’s capacity market, it would result in an approximately \$1.108/kW-month price suppression that would not otherwise occur, and would result in over \$2 billion in artificial price suppression during the four-year term of the RSSA.<sup>107</sup> TC Ravenswood further asserts that based on a sloped demand curve, all other things being equal, capacity market prices would increase for remaining competitive suppliers if Ginna exited the market. TC Ravenswood posits that the societal impact of these artificially suppressed capacity market prices is that there are inaccurate price signals, the market cannot function properly, and economic capacity investments

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<sup>106</sup> Ginna Compliance Filing Transmittal Letter at 7 n.20.

<sup>107</sup> TC Ravenswood Protest at 13-14.

will not be made. TC Ravenswood requests that the Commission act now to prohibit Ginna from participating in the NYISO capacity market, and to delete section 3.2(c), which requires Ginna to offer its capacity into the NYISO capacity market, from both the revised RSSA in the Compliance Filing and the New RSSA.<sup>108</sup>

58. TC Ravenswood also argues that, as a continuously operating nuclear facility, Ginna will displace hundreds of millions of MWHs in the NYISO energy market during the term of the RSSA through 2018.<sup>109</sup> TC Ravenswood asserts that Ginna's energy will: (1) eliminate opportunities for other resources that rely on the energy market to earn just and reasonable rates; (2) result in insufficient investment returns that will delay potentially needed investment; and (3) possibly lead to a continuing chain of requests to retire and the filing of reliability agreements at the Commission for approval.<sup>110</sup> TC Ravenswood requests that the Commission act now to require modification of Section 3.2(b), which requires Ginna to offer its energy into the NYISO energy market, in both the revised RSSA in the Compliance Filing and the New RSSA, and to develop a mechanism to minimize the energy price suppressive impact of these agreements in the NYISO energy markets.<sup>111</sup>

## **B. Commission Determination**

### **1. Procedural Matters**

59. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.<sup>112</sup>

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<sup>108</sup> *Id.* at 14. TC Ravenswood states that if deleting RSSA Section 3.2(c) would result in Ginna under-collecting its full cost of service revenue requirement relative to its expectations under the black box settlement agreement it negotiated with RG&E, the Commission should further condition acceptance of the RSSA on RG&E paying Ginna additional fixed revenues in order to make Ginna revenue-neutral relative to the capacity revenues it anticipated under the original RSSA. *Id.*

<sup>109</sup> *Id.* at 15.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> We note that TC Ravenswood filed an intervention, and we granted it party status, in the Original Filing in Docket No. ER15-1047-000, and that intervention serves to make it a party to the Compliance Filing in this docket.

## 2. Substantive Matters

60. We accept Ginna's Compliance Filing, subject to the outcome of the hearing and settlement judge procedures directed in the April 14 Order. As stated in the April 14 Order, Ginna's total compensation should not be higher than the level required to recover its full cost of service. As discussed above with regard to Ginna's request for clarification, a 15 Percent Mechanism that ensures that total compensation under the RSSA is capped at Ginna's full cost of service is consistent with that holding because Ginna would not earn revenues in excess of its cost of service.<sup>113</sup> In the Compliance Filing, Ginna has inserted language that caps Ginna's total RSSA revenues, including revenues from the 15 Percent Mechanism, at its full cost of service. Therefore, consistent with the April 14 Order, as clarified, we accept Ginna's Compliance Filing, effective April 1, 2015, which is the effective date granted by the April 14 Order, and subject to the outcome of the ongoing hearing and settlement judge procedures established by the April 14 Order.

61. In the April 14 Order, the Commission also directed Ginna to remove the extension provisions from the RSSA. In its Compliance Filing, Ginna has removed the relevant provisions from the RSSA, and we find the deletions to be in accordance with the April 14 Order.

62. Because Ginna's New RSSA is identical to Ginna's revised RSSA in the Compliance Filing that we are accepting here, we dismiss as moot Ginna's New RSSA.

63. We deny TC Ravenswood's protest of the revised RSSA in the Compliance Filing and the New RSSA on the same grounds that we denied TC Ravenswood's rehearing request. TC Ravenswood's argument that the RSSA should not be allowed to suppress NYISO capacity and energy market prices is beyond the scope of the proceeding. As we previously stated, if TC Ravenswood believes that the NYISO market rules need to be revised to account for the effects of RMR agreements, like the RSSA, on the NYISO markets, it should pursue this concern through NYISO's stakeholder process regarding the *NYISO RMR Order*.<sup>114</sup>

### The Commission orders:

(A) The requests for rehearing and clarification of the April 14 Order are hereby granted in part, and denied in part, as discussed in the body of this order.

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<sup>113</sup> *Supra* P 29.

<sup>114</sup> *Supra* n. 17.

(B) Ginna's revised RSSA in the Compliance Filing is hereby accepted, effective April 1, 2015, subject to the outcome of the hearing and settlement judge procedures established by the April 14 Order, as discussed in the body of this order.

(C) Ginna's New RSSA is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.