NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of Albany on January 30, 2002

BOARD MEMBERS PRESENT:

Leonard A. Weiss, Alternate for
Maureen O. Helmer, Chairman
New York State Public Service Commission

David L. Smith, Alternate for
Antonia C. Novello, M.D., M.P.H., Commissioner
New York State Department of Health

Michael Santarcangelo, Alternate for
Charles A. Gargano, Commissioner
Empire State Development

Jo Anne W. Di Stefano, Alternate for
Erin M. Crotty, Commissioner
New York State Department of Environmental Conservation

Jacquelyn L. Jerry, Alternate for
Vincent A. DeIorio, Chairman
New York State Energy Research and Development Authority

William Koh, Ad Hoc Member

CASE 99-F-1625 - Application by KeySpan Energy for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 250 Megawatt, Cogeneration, Combustion Turbine Electric Generating Facility to be Developed at the Existing Ravenswood Generating Station in Long Island City, Borough of Queens.

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective January 30, 2002)

BY THE BOARD:

INTRODUCTION

On September 7, 2001, the Board on Electric Generation Siting and the Environment (the Board) granted a Certificate of Environmental Compatibility and Public Need (Certificate) to

KeySpan-Ravenswood, Inc. (KeySpan or the applicant) authorizing, subject to the conditions set forth in the Certificate, the construction and operation of the Ravenswood Cogeneration Facility, a 250 megawatt (MW) electric generating facility on 2.5 acres at the existing Ravenswood generating station located on a 27.6-acre site along the East River in Long Island City, Queens, New York. Intervenor City of New York (the City) has filed a petition, dated November 8, 2001, seeking rehearing of the resolution of one issue addressed in the Board's opinion and in the Recommended Decision of Examiners Robert R. Garlin and Helene G. Goldberger issued on August 7, 2001.[1] KeySpan and the Staffs of the Department of Environmental Conservation (DEC Staff) and the Department of Public Service (DPS Staff) have filed replies in opposition to the petition. For the reasons set forth in this order, the City's petition is denied.

APPLICABLE STANDARD FOR PETITION FOR REHEARING

The Board's rules of procedure provide as follows:

> Unless a provision of PSL Article X, Section 306 of the State Administrative Procedure Act, or this Part conflicts therewith, the Rules of Procedure of the Public Service Commission (contained in Subchapter A of Chapter I of this Title) that are in force on the effective date of this Part shall apply in connection with each certification proceeding under PSL Article X. When such regulations indicate that the Commission is the decision maker, such reference shall be deemed to apply to the Board.[2]

The Public Service Commission's rules of procedure regarding petitions for rehearing provide, in pertinent part, that "[r]ehearing may be sought only on the grounds that the

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[1] Under Public Service Law §170(1), the City's petition would have been due on October 9, 2001. The Secretary granted the City's unopposed request for a one-month extension of the due date.

[2] 16 NYCRR §1000.1.

commission committed an error of law or fact or that new circumstances warrant a different determination." The rules go on to require that "[a] petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing."[3]

The City's petition does not allege that new circumstances warrant reconsideration of the Board's decision to grant a Certificate to KeySpan. The petition, instead, centers around its continuing contention that KeySpan should be required by the Board, pursuant to PSL §172(1), to obtain an air permit from the City's Department of Environmental Protection (DEP). According to the City, the Board's decision not to require KeySpan to obtain a DEP air permit[4] exempted the applicant, improperly, from "comply[ing] with the City's local air pollution control requirements."[5]

APPLICABLE STATUTORY LAW

PSL Article X and relevant sections of the Environmental Conservation Law (ECL) recognize that DEC has been delegated the authority to issue, among other permits, the requisite air quality permit. Pursuant to PSL §172(1), the DEC Commissioner provided an Air Title V Facility permit to the Board prior to our determination to issue a Certificate.

PSL §168(2)(d) provides the Board with the authority to decide whether to apply any local ordinance, regulation, standard, or requirement that would otherwise be applicable, depending upon whether the local law, as applied to a proposed facility, would be unreasonably restrictive. PSL §172(1)

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[3] 16 NYCRR §3.7(b).

[4] Our decision declining to adopt the City's position is explained at length in the September 7, 2001 opinion and order (pp. 9-20).

[5] The City's Petition, p. 1.

provides the Board with the authority to decide whether necessary state permits or approvals, other than DEC permits and approvals under federally-delegated or approved environmental permitting authority, and all local permits or approvals, should (essentially) be granted by the Board as part of a Certificate; or whether, instead, they should be granted by the state or local agencies who would grant those permits or approvals for non-Article X projects. In general, compliance by the sponsor of an Article X project with the substantive provisions of a local law is expected, but the municipality may not require an Article X project sponsor to obtain a permit or other approval under that local law without our authorization.

DISCUSSION

The City's central substantive contention in its petition for rehearing is as follows:

> DEC issues its air permit strictly based on compliance with the requisite [federal] Clean Air Act criteria. DEC does not specifically consider the cumulative local impacts on health and welfare of individuals in the immediate vicinity of the source in its air permit proceeding. Compliance with the regulatory requirements of the Clean Air Act . . . does not certify compliance with the requirement that health and environmental impacts be addressed under Article X. . . . [B]ecause the City possesses the unique expertise to enforce that requirement, the Board should authorize the City to require a local air permit under PSL §172(1)."[6]

This contention simply repeats arguments raised by the City in its earlier briefs to the examiners and to the Board, and they have been fully addressed. Accordingly, the City has provided no basis for rehearing. In any event, the City's position is unfounded. Condition 102 in the Air Title V Facility permit issued to KeySpan's facility, which was also included in DEC's draft air permit, provides as follows:

[6] The City's Petition, pp. 7, 8-9.

> No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emissions limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.[7]

This condition is effective for the entire length of DEC's Air Title V Facility permit.

DEC's draft air permit for the proposed facility was examined at two issues conferences convened pursuant to 6 NYCRR Part 624. The City was represented by counsel at the first issues conference,[8] but raised no issues about any aspect of the draft air permit. No representative of the City attended the second issues conference. Therefore, the City failed to demonstrate, in the proper forum (DEC), that cumulative local impacts on the health and welfare of individuals in the immediate vicinity of the proposed facility had not been given proper consideration in the formulation of DEC's draft air permit for the proposed facility.[9]

The City had a second opportunity to raise its proposal that KeySpan should be required by the Board to submit to a DEP air permit proceeding. The City was represented by counsel at the Article X prehearing conference, but did not propose, either then or in a written statement required to be filed by March 19,

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[7] This condition is required by 6 NYCRR §211.2. See also 6 NYCRR §257-1.4(b).

[8] Transcript (Tr.) at 8.

[9] The City provides no basis for its claim that "the DEC would not have entertained the City's arguments" (The City's Petition, pp. 13-14).

2001, to litigate any Article X issues about air quality, compliance with local laws, or delegation of permitting authority.[10] The examiners subsequently issued an order that granted DPS Staff's proposal to allow compliance with local laws and authorization of local permitting authority as issues that could be litigated,[11] but the City submitted no testimony or exhibits on the May 1, 2001 due date established by the examiners.[12]

The City concedes that it "did not file the proffered testimony of [its witness] prior to the close of the hearings," but goes on to assert that "[t]he Board should not go out of its way to find an excuse to exclude the City's legitimate concerns from the Article X process."[13] The Board has done nothing of the sort. As discussed in our opinion (at pp. 18-19),

> [t]he "proffer" by the City after post-hearing briefs had been filed was untimely, and the examiners properly declined to consider it or reopen the hearings to do so. The PSL directs the presiding examiner . . . "to expedite the orderly conduct and disposition of the hearing," and it imposes on the parties the concomitant obligation to "be prepared to proceed in an expeditious manner at the hearing so that it may proceed regularly until completion." This is not to say that an issue may never be taken up outside an established schedule, but the reasons for doing so should be compelling.

The City has provided no such compelling reason. As discussed in our opinion, the City has failed to demonstrate that the cumulative impact analysis it would have the applicant perform, over and above the analyses that were conducted in the course of the DEC air permitting process, is a requirement set forth in a

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[10] Tr. 76-77, 82-83, and 90-96.

[11] Case 99-F-1625, Order Specifying Article X Issues (issued March 26, 2001), p. 2.

[12] Case 99-F-1625, Procedural Ruling (issued March 12, 2001), p. 3.

[13] The City's Petition, pp. 12, 13.

substantive provision of local law. To the contrary, "[t]he City's laws and regulations set no emission limits, nor do they contain any standard or requirement for the type of cumulative air quality impact analysis the City would have KeySpan perform" (opinion, p. 15). Moreover, "the City has not developed an inventory of major air emission sources in the area" of the proposed facility; there is "a lack of predefined standards of attainment"; and "there exists the possibility that [a] requirement of compliance with a currently undefined local air permit condition would result in a facility design that differs from the one that had been reviewed by DEC" (opinion, p. 19).

For the reasons set forth above and in our September 7, 2001 opinion, we conclude that no legitimate concerns raised with respect to KeySpan's proposed facility have gone unaddressed in this proceeding.

CONCLUSION

On the basis of the foregoing, the petition of the City of New York for rehearing is denied.

The New York State Board on Electric Generation Siting and the Environment for Case 99-F-1625 orders:

1. The petition for rehearing filed by the City of New York is denied.

2. This proceeding is continued.

By the New York State Board on Electric Generation Siting and the Environment for Case 99-F-1625

(SIGNED) JANET HAND DEIXLER
Secretary to the Board