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October 31, 2016

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
3 Empire Plaza
Albany, New York 12223

Re: Greenidge Generation LLC, Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation
Cases 15-E-0516 and 15-G-0571

Dear Secretary Burgess:

Enclosed for filing with the Commission please find the Opposition of Greenidge Generation LLC, Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation (the "Certificate Holders") to the Petition for Rehearing filed in these proceedings by the Coalition to Protect the Finger Lakes and the Coalition to Protect New York.

Respectfully submitted,

/s/

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Verified Petition of Greenidge Generation LLC for an Expedited Order Granting An Original Certificate Of Public Convenience And Necessity and Lightened Regulation.	Case 15-E-0516
Petition of Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation for an Expedited Original Certificate of Public Convenience and Necessity and for Incidental or Lightened Regulation.	Case 15-G-0571

OPPOSITION TO PETITION FOR REHEARING

Pursuant to Rule 3.7(c) of the Commission's Rules, 16 N.Y.C.R.R. § 3.7(c) (2015), Greenidge Generation LLC ("Greenidge Generation"), Greenidge Pipeline LLC ("Greenidge Pipeline") and Greenidge Pipeline Properties Corporation ("Greenidge Pipeline Properties" and, collectively with Greenidge Generation and Greenidge Pipeline, the "Certificate Holders") respectfully submit this Opposition to the Petition for Rehearing filed in these proceedings by the Committee to Preserve the Finger Lakes ("CPFL") and the Coalition to Protect New York ("CPNY" and, collectively with CPFL, the "Petitioners") on October 17, 2016 (the "Rehearing Petition").

INTRODUCTION AND SUMMARY OF POSITION

On September 16, 2016, the Commission issued its *Order Granting Certificates of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation* in these proceedings (the "Order"). The Order granted Certificate Holders the certificates of public convenience and necessity ("CPCNs") under § 68 of the Public Service Law ("PSL") required for certain activities associated with the construction and operation of the Greenidge Generation facility (the "Plant") and for the operation of the pipeline servicing that facility (the "Pipeline"). In their Rehearing Petition, Petitioners request that the Commission: (1) rescind the CPCNs; and (2) order the Certificate Holders to immediately cease and desist from all further efforts to restart the Plant or to construct the Pipeline.

Certificate Holders respectfully submit: (1) that PSL § 130 deprives the Commission of jurisdiction to take any action in these proceedings that would interfere in any way with the approval for construction of the Pipeline granted by the Commission in its *Order Granting Certificate of Environmental Compatibility and Public Need* in Case 15-T-0586, also issued on September 16, 2016, (the "Article VII Order"); [1] and (2) that the Petitioners' claim that the Commission failed to comply with the requirements of the State Environmental Quality Review Act ("SEQRA") in issuing the CPCNs must be rejected on the grounds that Petitioners have failed to identify any errors of law or fact in the Order or that new circumstances warrant a change in the Order as required by Rule 3.7(b) of the Commission's Procedural Rules, 16 N.Y.C.R.R. § 3.7(b)(2015).

[1] Case 15-T-0586, *Application by Greenidge Pipeline LLC; Greenidge Pipeline Properties Corporation to construct a Fuel Gas Transmission Line, Containing Approximately 24,318 Feet of 8" Steel Pipeline, Located in the Towns of Milo and Torrey, Yates County*, Order Granting Certificate Of Environmental Compatibility And Public Need (Issued and Effective September 16, 2016).

ANALYSIS

I. PSL § 130 DEPRIVES THE COMMISSION OF JURISDICTION TO TAKE ANY ACTION IN THESE PROCEEDINGS THAT WOULD INTERFERE WITH THE CONSTRUCTION OF THE PIPELINE

As previously noted, Certificate Holders have applied for and received a certificate of environmental compatibility and public need for the construction of the Pipeline under PSL Article VII (the "Article VII Certificate") in the Article VII Order. Petitioners have not requested rehearing of the Article VII Order, and the period for seeking rehearing of that Order has expired.[2] Moreover, Petitioners' request for an order preventing Certificate Holders from proceeding with construction of the Pipeline is not based on any alleged infirmities in the Article VII Order or on any claim that Certificate Holders have failed to comply with the requirements of the Article VII Order or the Article VII Certificate.

Instead, Petitioners claim that Certificate Holders must also satisfy the separate requirements of PSL § 68 in order to construct the Pipeline. This claim is expressly preempted by PSL § 130, which flatly prohibits the Commission from using its authority under PSL § 68 to impose any "approval, consent, permit, certificate, or other condition" on the construction of any Article VII facility, including the Pipeline.[3] Accordingly, the Commission must reject Petitioners' request for an order in these proceedings that would interfere with Certificate Holders' construction of the Pipeline in accordance with the Article VII Certificate.

[2] *See* N.Y. Pub. Serv. L. § 128(1) (McKinney 2011) (requiring that petitions for rehearing of any Commission order issued under PSL Article VII be filed within 30 days of the issuance of the order in question).

[3] N.Y. Pub. Serv. L. § 130 (McKinney 2011).

II. PETITIONERS' CLAIM THAT THE ORDER FAILS TO COMPLY WITH THE REQUIREMENTS OF SEQRA IS WITHOUT MERIT

Petitioners' sole basis for seeking to overturn the Order is their claim that the Commission failed to comply with the requirements of SEQRA. As the SEQRA issues relating to the CPCN granted for the Pipeline differ substantially from the SEQRA issues relating to the CPCN issued for the Plant, Certificate Holders will address these issues separately.

A. The Commission Properly Determined That Issuance Of The CPCN For The Pipeline Was Not Subject To Review Under SEQRA

As the Commission noted on page 2 of the Order, the CPCN requested by Certificate Holders for the Pipeline is limited to approval of "the exercise of a road use agreement in connection with the operation of [the Pipeline] in the Towns of Milo and Torey, Yates County."[4] Importantly, Petitioners do not raise any objections in their Rehearing Request whatsoever to Certificate Holders' exercise of these municipal consents. For this reason alone, Petitioners' Rehearing Request fails to identify any error of law or fact as required by Rule 3.7(b) of the Commission's Procedural Rules with respect to the CPCN issued for the Pipeline.

The Commission's reasons for concluding that it could grant this limited relief without conducting a SEQRA review are presented on page 20 of the Order. Specifically, the Commission ruled that:

> A comprehensive environmental review of the gas transmission facility proposed by the Pipeline Companies in Case 15-T-0586 has been conducted pursuant to PSL Article VII. The granting of a PSL Article VII Certificate is specifically listed as a Type II action exempt from review under SEQRA. The record in the Article VII proceeding contains extensive information regarding the potential environmental impacts of the gas transmission facility and provides protective measures tailored to avoid, minimize, and mitigate the environmental impacts. The granting of a CPCN

[4] Order, slip op. at 2 (footnote omitted). Certificate Holders also requested and were granted lightened regulation for both the Pipeline and the Plant, which requests were granted in the Order. Petitioners do not challenge these actions.

> approving the Pipeline Companies' exercise of the consent to use municipal property in conjunction with the gas transmission facility is not, by itself, an action subject to the requirements of SEQRA.[5]

Petitioners have made no effort to identify any errors of law or fact in these Commission determinations.

Moreover, the Commission's conclusions in this passage are plainly correct as a matter of law. As the Commission noted in the Order, section 617.5(c)(35) of the regulations of the New York State Department of Environmental Conservation ("DEC") implementing SEQRA makes clear that "actions requiring a certificate of environmental compatibility and public need under article VII . . . of the Public Service Law and the consideration of, granting or denial of any such certificate" are exempt from SEQRA review.[6] The correctness of the Commission's determination is also confirmed by section 617.2(b)(1) of DEC's regulations implementing SEQRA, which defines the "actions" for which SEQRA review is required as "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure."[7] The actual physical construction of the Pipeline under the municipal roads in question is exempt from SEQRA review because it falls within the Article VII Certificate. In such circumstances, the Commission's issuance of a CPCN authorizing Certificate Holders to exercise its municipal consents under PSL § 68 does not involve any "action" subject to SEQRA review.

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[5] Order, slip op. at 20 (footnotes omitted). The Commission correctly also held that "[Greenidge] Generation's request for lightened regulation as an electric corporation and the Pipeline Companies' requests for lightened and incidental regulation as gas corporations are Type II actions, so no SEQRA review of those actions is required." *Id*.

[6] 6 N.Y.C.R.R. § 617.4(c)(35)(2015).

[7] 6 N.Y.C.R.R. § 617.2(b)(1)(2015).

B. The Commission Properly Determined That The DEC's Negative Declaration Concerning The Resumption Of Operations At The Plant Is Binding On It In These Proceedings

Petitioners assert that the Orders are affected by errors of law due to their reliance on the Negative Declarations issued by the DEC concerning the resumption of operations at the Plant. Petitioners' challenge is effectively that the DEC's review under SEQRA was both factually and legally in error and, consequently, that the Commission is required to conduct its own separate review of the resumption of operations at the Plant under SEQRA. Such a challenge, however, is not proper in this forum. Instead, DEC's determination of non-significance under SEQRA, as set forth in the Negative Declarations, is binding on the Commission in these proceedings.

Because multiple agencies were involved in the approval of resumption of operations at the Plant, a coordinated SEQRA review was undertaken for that project in accordance with section 617.6(b)(3) of DEC's regulations implementing SEQRA.[8] In its capacity as lead agency, DEC properly identified all involved agencies, including the Commission and, by letter dated June 16, 2015, requested that the Commission consent to DEC's assertion of lead agency status in a coordinated SEQRA review of this project. By letter dated June 25, 2015, the Commission consented to DEC's request. Thereafter, DEC made its determination of significance, concluding that resumption of operations by the Plant would not result in any significant adverse environmental impacts. DEC also provided the necessary written notice of its determination in accordance with Part 617 of its regulations.[9] The Commission acknowledged DEC's role as the SEQRA lead agency in the Certificate Order and confirmed that the Commission's

[8] 6 NYCRR § 617.6(b)(3).

[9] 6 NYCRR Part 617. DEC copied Mr. James Austin, Chief of the Commission's Office of Environmental Certification and Compliance. Copies of DEC's Negative Declaration and the Air Permits were also filed with the Commission on June 29, 2016, and September 8, 2016, in Cases 15-E-0516 and 15-G-0571, respectively.

responsibilities were limited to that of an involved agency as provided in DEC's regulations.[10] Specifically, section 617.6(b)(3)(iii) of DEC's regulations provides that:

> If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. ***The determination of significance issued by the lead agency following coordinated review is binding on all other involved agencie***s.[11]

New York courts have consistently held that once a lead agency issues its determination of significance, an involved agency is bound by that determination. *See Inc. Village Of Poquott v. Cahill*, 11 A.D.3d 536, 541 (2d Dep't 2004) (finding that once the lead agency issues its determination of significance, the review procedure comes to an end, and no involved agency may later require a second determination in connection with the action); *see also Matter of Gordon v. Rush,* 100 N.Y.2d 236, 244 (2003) (finding that as an involved agency, the Board was bound by the DEC's negative declaration, which properly identified the involved agencies through "due diligence" and apprised those involved agencies of its decision); *Matter of Turkewitz v. Planning Board of City of New Rochelle*, 24 A.D.3d 790 (2d Dep't 2005) (holding that the Planning Board properly relied on the SEQRA review of the lead agency.).[12]

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[10]*See* Order, slip op. at 19-20 ("As the Department of Environmental Conservation is the lead agency for purposes of SEQRA review, the Commission's SEQRA responsibilities are limited to the role of an involved agency. DEC as lead agency conducted a coordinated review, made the required determination of significance on behalf of all involved agencies, and issuing negative declarations regarding the action of resuming operation of Unit #4. Therefore, absent any change in circumstances or new information of significance, of which the Commission finds none in the record, the SEQRA review is complete.").

[11] 6 NYCRR § 617.6(b)(3)(iii) (emphasis supplied).

[12] The Commission has recognized this binding effect itself. *See, e.g.*, Case 05-E-1070, *Joint Petition of Flat Rock Windpower LLC and Flat Rock Windpower II LLC to Amend its Certificate of Public Convenience and Necessity*, Order Granting Amendment of Certificate of Public Convenience and Necessity (issued and effective October 31, 2005) (the lead agency's issuance of a negative declaration is binding upon the Commission as an involved agency); Case 03-E-1581, *Petition of Calpine Eastern Corporation for (1) a Certificate of Public Convenience and Necessity and (2) Approval of Financing for its Proposed 79.9 MW Combined Cycle Combustion Turbine Generating Unit in Bethpage, NY*, Order Granting A Certificate of Public Convenience and Necessity (issued and effective June 21, 2004).

Notably, Petitioners do not assert – and indeed cannot assert – either that DEC failed to exercise the requisite due diligence in identifying all other involved agencies or that DEC did not provide written notice of its determination of significance to the Commission. Rather, they seek to mount a collateral attack on DEC's environmental review under SEQRA in this forum. Because the Commission is bound by law to accept DEC's determination of significance, Petitioners' request for rehearing of the Order fails to demonstrate any error of law or fact in the Order and must therefore be dismissed.

Respectfully submitted,

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Dated: October 31, 2016