

**New York State Department of Environmental Conservation**  
**Deputy Commissioner and General Counsel**  
**Office of General Counsel, 14<sup>th</sup> Floor**  
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Alexander B. Grannis  
Commissioner

April 13, 2009

The Hon. Jaclyn A. Briling  
Secretary  
New York State Public Service Commission  
Empire State Plaza, Agency Bldg 3  
Albany, NY 12223-1350

2009 APR 13 PM 2:01

**Re:** Case No.: 06-T-0650 - Application of New York Regional Interconnect Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for a High Voltage Direct Current Electric Transmission Line Running Between National Grid's Edic Substation in the Town of Marcy, and Central Hudson Gas & Electric's Rock Tavern Substation Located in the Town of New Windsor

Dear Secretary Briling:

Enclosed please find an original and two copies of DEC response to NYRI's withdrawal of application in the above captioned matter.

Sincerely,

David Sampson  
Associate Counsel

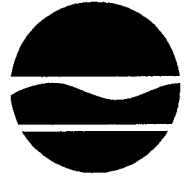
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## VIA HAND DELIVERY

Hon. Jeffrey Stockholm  
Hon. Michelle Phillips  
New York State Public Service Commission  
Empire State Plaza  
Agency Building Three – 18th Floor  
Albany, New York 12223-1350

**Re:** Case No.: 06-T-0650 - Application of New York Regional Interconnect Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for a High Voltage Direct Current Electric Transmission Line Running Between National Grid's Edic Substation in the Town of Marcy, and Central Hudson Gas & Electric's Rock Tavern Substation Located in the Town of New Windsor

Dear Judge Stockholm and Judge Phillips:

Pursuant to your direction to the parties at the hearing convened on April 3, 2009, please accept this letter as the New York State Department of Environmental Conservation's ("NYSDEC") response to New York Regional Interconnect, Inc.'s (NYRI) announcement on the April 3, 2009 record withdrawing its Article VII application. NYSDEC concurs with the response filed by the Staff of the Department of Public Service and the Certification of the Question to the Commission. To the extent that an application is currently pending before the Public Service Commission ("Commission"), the Certificate of Environmental Compatibility and Public Need sought therein should be denied as a matter of law and public policy.

### NYRI's Withdrawal of its Article VII Application.

At the April 3, 2009 hearing Leonard Singer, the attorney for New York Regional Interconnect, Inc. (NYRI), announced:

As I said off the record, we have discussed a couple of times in the last two days the [Federal Energy Regulatory Commission (FERC)] order that came out, I believe it was on March 31st, rejecting [NYRI]'s request for rehearing with respect to the [New York Independent System Operator (NYISO) Congestion Analysis and Resource Integration Study (CARIS)] process.

Based on that order from the FERC, the investors have decided that the financial risks of

cost recovery are too great at this point in time, and as a result they are withdrawing their Article VII application.

Following Mr. Singer's announcement, Administrative Law Judge (ALJ) Stockholm directed NYRI to "file a letter with the Secretary withdrawing the case" and also stated: "[w]e will give the parties one week ... from Monday. If any of the parties believe for any reason that this case needs to remain open for any purpose, the parties should advise us."

On April 6, 2009, NYRI provided written notification to ALJ Stockholm and ALJ Phillips stating that it was "suspending its application filed under Article VII of the Public Service Law [(PSL)]". NYRI also stated in a press release: "The March 31st decision by the Federal Energy Regulatory Commission (FERC) denying NYRI's request to review the recently approved rules of the New York State Independent System Operator (NYISO) for transmission tariffs has created an unacceptable financial risk for NYRI's investors. Even if the NYRI project were to be sited by the PSC, NYRI would face the prospect of being unable to recover transmission costs from the ratepayers who would benefit from the project."

On April 8, 2009, NYRI sent a second letter, stating: "NYRI confirms that it has withdrawn its application for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the [PSL] in Case No. 06-T-0650".

#### **The Effect of NYRI's Withdrawal.**

Commission action is required to remove any doubt in the record regarding the status of the NYRI Article VII application. NYSDEC concurs with the Staff of DPS that the Commission could determine that NYRI's withdrawal of its application in the middle of adjudicatory hearings effectively removes the application from the Commission's docket.

To the extent that NYRI's Article VII application may still be pending before the Commission, and in the interests of having a clear record of its final disposition, the Commission should recognize NYRI's withdrawal and deny the application as a matter of law and public policy. PSL §126.1(g) requires the Commission to determine that a proposed transmission facility will serve the public interest, convenience and necessity. NYRI's unambiguous and unequivocal statements that it is abandoning its Article VII application, and would not build the facility even if the PSC granted an Article VII Certificate, precludes the Commission from making finding that the project would serve the public interest.

#### **A Decision on the Merits.**

NYRI's action in this case foreclosed the development of a complete administrative record and abridged the parties' right of cross-examination guaranteed by §306(3) of the State Administrative Procedure Act. As a result, insufficient evidence exists to support the finding required by PSL §126.1(a) that the transmission facility proposed by NYRI is needed.

Absent the Commission's finding of public need, the record fails to establish that the NYRI project could comply with the substantive requirements of the Environmental Conservation Law ("ECL") and its implementing regulations at 6 NYCRR Part 663, specifying that, in order to allow the

crossing of a Class I or II State-regulated freshwater wetland, a compelling (Class I) or pressing (Class II) economic or social need that clearly and substantially outweighs the loss of or detriment to the wetland benefits must be shown. *See* 6 NYCRR §663.5(e)(2). Nor could the NYRI project meet ECL Article 15 standards for stream protection as elucidated in 6 NYCRR §608.8(a)-(c), which requires a demonstration that (1) the project is reasonable and necessary, (2) the project will not endanger the health and welfare of the people of New York, and (3) the project will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the state including soil, forests, water, fish, shellfish, crustaceans, and aquatic and land-related environment. Establishing public need is an essential component to demonstrating substantive compliance with the ECL and its regulations. Its absence on this evidentiary record automatically precludes a finding under PSL §126.1(f) that the location of the facility conforms to applicable State laws and regulations.

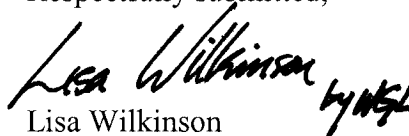
In addition to demonstrating public need, PSL §126 requires that the Commission make three important findings with respect to environmental compatibility. The Commission must find and determine (1) the nature of the probable environmental impact of the facility (PSL § 126.1(b)), (2) that the proposed facility represents the minimum environmental impact in light of the state of technology and nature and economics of various alternatives and other pertinent considerations, including but not limited to the effect on agricultural lands, wetlands, parklands and river corridors traveled (PSL § 126.1(c)), and (3) that the facility as proposed complies with state and local laws and regulations (PSL § 126.1(f)). The administrative record in Case 06-T-0650 contains insufficient information to support any of these required statutory findings.

The NYRI Article VII application raised significant concerns for adverse environmental impacts but failed to present a factual case sufficient to favourably resolve those impacts. NYSDEC Staff's testimony and the hearing record unequivocally demonstrate that the NYRI project, as proposed, would have an adverse impact on protected streams and regulated freshwater wetlands, create unacceptable risks of severe sedimentation and soil erosion in critical environmental areas, encroach upon lands held by NYSDEC on behalf of the People of New York State, and fail to meet the requirements of the State Pollutant Discharge Elimination System permit program for stormwater discharges (ECL Article 17). Throughout the Article VII application process, NYRI consistently deferred the assessment of environmental impacts and avoidance measures, the conduct of necessary field surveys, and the development of minimization and mitigation plans to the Environmental Management & Construction Plan, to be produced after Article VII Certificate issuance. NYRI's consistent and thorough deferrals effectively precluded a complete assessment of environmental impacts or any demonstration of whether its facility would avoid and minimize those impacts as required under the PSL and the ECL. The record to date is therefore insufficient to make findings pursuant to PSL §126.1.

Conclusion.

The matter of the appropriate response to NYRI's statements and actions to withdraw its Article VII application should be certified directly to the Commission. On behalf of NYSDEC, we respectfully submit that the Commission should find that, as a consequence of such statements and actions, NYRI's application is no longer pending before it as an Article VII proceeding. Moreover, to the extent the application has been before the Commission, the Certificate of Environmental Compatibility and Public Need sought therein should be denied.

Respectfully submitted,

Handwritten signature of Lisa Wilkinson in black ink, with the initials 'LW' written to the right of the signature.

Lisa Wilkinson  
Senior Attorney  
and

Handwritten signature of David Sampson in black ink, appearing as 'D.S.S.' with a horizontal line extending to the right.

David Sampson  
Associate Counsel  
Office of General Counsel  
New York State Department of  
Environmental Conservation

cc.: List Serve 08-T-0650