NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Department of Public Service
Case No. 99-F-1314

Application of Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need to Repower its East River Generating Station located in the Borough of Manhattan, New York City.

AND

Department of Environmental Conservation
Case No. 2-6206-00012/000021
SPDES No.: NY-0005126

In the Matter of Applications for: (1) a State Pollutant Discharge Elimination System (SPDES) permit pursuant to Environmental Conservation Law (ECL) Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 750 et seq., (2) a pre-construction Air State Facility permit pursuant to ECL Article 19, and 6 NYCRR Part 201 and Subpart 231-2, and (3) a Prevention of Significant Deterioration (PSD) permit pursuant to Title 40 of the US Code of Federal Regulations (40 CFR) 52.21 by Consolidated Edison Company of New York, Inc.

ISSUES RULING AND PROCEDURAL RULING

(Issued March 15, 2001)

WALTER T. MOYNIHAN and
RAFAEL A. EPSTEIN, Presiding Examiners, and
DANIEL P. O'CONNELL, Associate Examiner:

INTRODUCTION

Pursuant to Public Service Law (PSL) §165(2), the presiding examiner must issue an order identifying the issues to be addressed at the PSL Article X hearing. Similarly, 6 NYCRR 624.4(b)(5) directs the DEC associate examiner to rule on requests for full party status and amicus status, and to

determine which issues satisfy the requirements of adjudicable issues as set forth in §624.4(c). To satisfy these requirements, we issue the following ruling jointly, which identifies the issues that will the subject of the adjudicatory hearing scheduled to commence on April 16, 2001. This ruling provides a brief description of the captioned proposal, a summary of the proceedings related to the joint pre-hearing conference, as well as a discussion of the issues proposed for adjudication.

Project Description

In May 2000, the Consolidated Edison Company of New York, Inc. (the Applicant or Con Edison), applied for a Certificate of Environmental Compatibility and Public Need pursuant to Article X of the NYS Public Service Law (PSL) to construct and operate two General Electric dual fuel combustion turbine generators (CTGs) and two heat recovery steam generators (HRSGs) that would produce a nominal electric generation capacity of 360 megawatts (MW), and an estimated 3,000,000 pounds per hour of steam. The two proposed units will use non-interruptible natural gas, and in emergency situations, distillate oil. Water for steam production and other uses will be supplied by the NYC Department of Environmental Protection, Bureau of Water and Sewer Operations. The site of the proposed facility is the Applicant's East River Complex, which is located in Manhattan between East 13th and East 15th Streets from the FDR Drive to Avenue C.

At present, the East River Complex includes the following: There is the East River Generating Station, where the two proposed CTG /HRSG units would be located. There is the South Steam Station, which consists of a series of boilers that produce steam for the Applicant's steam distribution system. In addition, the Complex includes electric switchyards and a fuel oil storage facility.

Proceedings

As provided for in notices issued by the Secretary to the Siting Board, public statement sessions were held on August 22, 2000 at the Department of Public Service's Offices at One Penn Plaza in Manhattan, and on October 5, 2000 at Public School No. 34, 730 East 12th Street, Manhattan. These sessions provided members of the public with an opportunity to comment about the PSL Article X application filed by Con Edison. Pursuant to additional notices duly published by the Applicant, joint public statement sessions (PSL Article X) and legislative hearing sessions (6 NYCRR Parts 621 and 624) were held on January 24, 2001 at Public School No. 34. The January 24, 2001 public hearings were scheduled to fulfill the notice and public comment requirements outlined in 6 NYCRR Part 621 and 40 CFR Part 124 regarding the required environmental permit applications pending before the NYS Department of Environmental Conservation. A summary of the comments filed during the public statement sessions will be provided as an attachment to the recommended decision.

On February 20, 2001, a joint DEC issues conference and PSL Article X pre-hearing conference convened at 11:00 a.m. at the Department of Public Service's Offices, 8th Floor, One Penn Plaza (250 West 34th Street Between 7th and 8th Avenues), Manhattan. Since the parties to the related PSL Article X proceeding had been participating in settlement discussions during the preceding two weeks, the parties collectively moved to adjourn the joint pre-hearing conference from February 20, 2001 to February 23, 2001. The purpose of the adjournment was to complete the settlement discussions. The examiners granted the motion. Accordingly, the pre-hearing conference reconvened on February 23, 2001 at the Department of Public Service's Offices at One Penn Plaza.

When the joint conference reconvened on February 23, 2001, Associate Examiner O'Connell conducted a DEC issues conference to consider requests for full party status and amicus status, as well as proposed issues for adjudication with respect to the pending environmental permit applications, consistent with the requirements outlined in 6 NYCRR Parts 621 and 624.

Manhattan Community Board No. 3 and the East River Environmental Coalition (CB3/EREC), who are active parties to the proceeding concerning the requested certificate, timely filed a joint petition for full party status on February 9, 2001 pursuant to the requirements outlined in 6 NYCRR 624.5(b).[1] The DEC Office of Hearings and Mediation Services received no other petitions for full party status. The issues proposed by CB3/EREC are discussed below.

During the joint conference, CB3/EREC was represented by Susan Steinberg and Susan Stetzer, president and vice-president, respectively of EREC. Mathy Stanislaus, Charles Komanoff, Daniel Gutman, and Dr. Luz Claudio also appeared.

Petitions for amicus status were received from Honorable Carolyn B. Maloney, United States House of Representatives (14th District, NY); Honorable Nydia M. Velazquez, US House of Representatives (12th District, NY); Honorable Thomas Duane, New York State Senate (27th District); Honorable Roy M. Goodman, NYS Senate (26th District); and Honorable Steven Sanders, NYS Assembly (63rd District).

According to Representative Maloney's petition, the Applicant's proposal should be considered a major modification of an existing air emission source. Representative Maloney wants all the equipment at the East River Complex to be brought into compliance with current air emission requirements. Representative Maloney is also concerned about the cumulative impact that other proposed electric generating facilities would have on her constituents. Representative Maloney's petition states that Con Edison's East River, Waterside and 74th Street plants are located in her district, as well as the proposed Poletti, Ravenswood, and Astoria facilities in Queens. Finally, Representative Maloney argues that granting approval to the Applicant's proposal would be environmentally unjust.

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[1] With a cover letter dated February 2, 2001, CB3/EREC filed comments about the draft PSD determination. During the Issues conference, the prospective intervenor requested that its PSD comments be considered part of the petition for full party status.

Representative Velazquez is concerned about the public health of her constituents living in the vicinity of the East River Complex. If the Applicant's proposal is approved, Representative Velazquez wants all of the equipment at the East River Complex to comply with applicable state regulations concerning air emissions. Representative Velazquez argues that granting approval to the Applicant's proposal would be environmentally unjust.

Justin Handman represented Senator Goodman, and Burt Nusbacher represented Assemblyman Sanders at the joint conference on January 24, 2001. These members of the NYS Legislature want a complete and thorough environmental justice analysis of the proposal before any final decisions are made about whether to issue the requested environmental permits or the certificate.

The other participants in the DEC issues conference were the DEC Staff and the Applicant. The DEC Staff was represented by William G. Little, Esq. and Victor Gallo, Esq. Other DEC Staff members present included Rich Benas, the DEC project manager, and Leon Sedefain and Thomas Christoffell, from the DEC Division of Air Resources.

The Applicant was represented by J. Kevin Healy, Esq, and Philip Karmel, Esq., from the law firm of Robinson, Silverman, Pearce, Aronsohn and Berman, LLC, New York City, and Peter Garam, Esq. and Jeffery L. Riback, Esq.

After discussions related to the issues proposed in CB3/EREC's petition for full party status, the presiding examiners conducted a pre-hearing conference to determine adjudicable issues related to the pending certificate. During this portion of the joint conference, Kevin Lang, Esq., and Peter Seidman from the NYS Department of Public Service represented PSC Staff . Mr. Seidman is the DPS project manager. Anthony Grey, Ph.D., represented the Staff from NYS Department of Health.

The stenographic record of the joint conference was received on March 8, 2001, whereupon the record of the joint conference closed.

RULINGS ON PROPOSED ISSUES
FOR ADJUDICATION RELATED
TO THE ENVIRONMENTAL PERMITS

Standard for Determining Issues

For the environmental permits pending before the Department of Environmental Conservation, 6 NYCRR 624.4(c) outlines the standards for adjudicable issues. When, as here, the DEC Staff has determined that a proposal, as conditioned by the draft permits, will conform to all applicable statutory and regulatory requirements, the burden of persuasion is on the prospective party advancing the issue to show that the proposed issue is both substantive and significant.[2]

An issue is substantive if there is sufficient doubt about the Applicant's ability to meet the applicable statutory or regulatory criteria such that a reasonable person would inquire further. To determine whether an issue is substantive, the DEC associate examiner must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for full party status and amicus status, the record of the issues conference and any subsequent written arguments authorized by the DEC associate examiner.[3] To be substantive, the issue cannot be based merely on speculation but on facts that can be subjected to adjudication.[4] In addition, an issue can be demonstrated by

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[2] 6 NYCRR 624.4(c)(4).

[3] §624.4(c)(2). Also see, Matter of Superintendent of Fish Culture, Interim Decision, August 19, 1999, which was affirmed in the Decision and Judgment In the Matter of Upper Saranac Lake Association, Inc., et al. v. John P. Cahill, Commissioner, et al., (Supreme Court, Albany Co., Index No. 6027-99), March 24, 2000.

[4] Matter of Concerned Citizens Against Crossgates v. Flacke, 89 AD2d 759 (3rd Dep't., 1982), aff'd, 58 NY2d 919 (1983).

identifying a substantive defect or omission in the application materials.[5]

An issue is significant if the adjudicated outcome can result in permit denial, a major modification to the proposed project, or the imposition of significant conditions in addition to those proposed in the draft permit.[6]

DISCUSSION AND RULINGS ON PROPOSED ISSUES RELATED TO THE DEC ENVIRONMENTAL PERMITS

Draft State Pollutant Discharge Elimination System (SPDES) Permit

Consolidated Edison's East River Complex currently has a SPDES permit. With its PSL Article X application, the Applicant requested a modification of the Complex's exiting SPDES permit to accommodate the discharges associated with the proposed facility.[7] The DEC Staff reviewed the modification request, and developed draft SPDES conditions with the required fact sheet for public review and comment.

The major wastewater streams from the proposed project include reverse osmosis (RO) discharge, multimedia filter backwash, blowdown from the HRSGs, chemical feed/sampling water, and service water from operation and maintenance activities. Multimedia filters will be used to pretreat the municipal water supply by trapping suspended solids in the feed water to ensure that the RO membrane is not fouled. Filter backwash will consist of water used in the periodic cleaning of the multimedia filters in the demineralized water system. HRSG blowdown consists of water released from the HRSG to prevent the build-up of constiuents that would deposit on the boiler tube surfaces

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[5] Matter of Oneida County Energy Recovery Facility, Interim Decision, July 27, 1982; Matter of Halfmoon Water Improvement Area, Interim Decision, April 2, 1982; Matter of Broome County Department of Public Works, Commissioner's Decision, June 11, 1984.

[6] §624.4(c)(3).

[7] Application materials, Vol. I, §3.

and reduce the heat transfer. Service water consists of water used for various plant operation and maintenance activities.

Stormwater from the existing station is conveyed to the NYC Department of Environmental Protection (DEP) sewer system on East 14th Street and East 15th Street. The rainwater that falls on the fuel oil storage facility is conveyed via a trench drain system to an oil/water separator and subsequently discharged to the East River (SPDES Outfall #001E). The Complex has developed and implemented a Stormwater Pollution Prevention (SPP) Plan to reduce exposure of source materials to stormwater.

During the DEC issues conference, the Applicant and the DEC Staff confirmed there were no disputes over any substantial terms or conditions of the draft SPDES permit.[8] Neither CB3/EREC's joint petition for full party status nor the petitions for amicus status assert any issues related to the draft SPDES permit. Therefore, there are no substantive and significant issues for adjudication related to the terms of the draft SPDES permit.

Draft Air State Facility Permit

The federal Clean Air Act, ECL Article 19 (Air Pollution Control), and their respective implementing regulations identify criteria air pollutants, and regulate their emissions by establishing ambient air quality standards. In New York, the review of air emission sources, such as the Applicant's proposed electric generating facility, is divided into two permit programs: (1) the Prevention of Significant Deterioration (PSD),[9] and (2) new source review in non-attainment

[8] See, 6 NYCRR 624.4(c)(1)(i). February 23, 2001 (2/23/2001) Tr., pp 14-16.

[9] The PSD program is a pre-construction review of any new or modified air emissions source to ensure that air quality is not degraded beyond established increments. As noted above, the draft PSD permit proposed by DEC Staff was the subject of a public comment period and a legislative hearing. Pursuant to 40 CFR 124.71(c), it is not subject to an adjudicatory or evidentiary hearing.

areas.[10] The applicability of the two programs depends on whether the ambient concentrations of the criteria pollutants at a particular location are less than the ambient air quality standards.[11] It is possible, depending on the location of a proposed air emission source, to have some criteria pollutants that are in attainment (PSD), while others are not in attainment (new source review). Therefore, both review programs could apply to a particular emission source. Such is the case with the proposed facility, as discussed further below.

By letter dated February 2, 2001, the Applicant provided the DEC Staff with comments about the draft Air State Facility Permit and the draft PSD determination. At the issues conference, the DEC Staff and Con Edison confirmed that the Applicant's comments were not disputes over any substantial terms or conditions in the draft air permits. Con Edison and the DEC Staff anticipate that any concerns raised in the Applicant's comments can be resolved without an adjudicatory hearing. After further discussions with the Applicant, the DEC Staff expects to issue a revised draft air permits.[12]

In the joint petition for full party status, however, CB3/EREC proposes issues about the current air emissions from the East River Complex, and the anticipated air emissions from

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[10] The regulatory criteria for new or modified emission sources in non-attainment areas are outlined in 6 NYCRR Subpart 231-2 (Requirements for Emission Units Subject to the Regulation on or after November 15, 1992). For non-attainment review, 6 NYCRR Subpart 231-2 is part of a federally approved state permit program.

[11] Air quality standards must be health based [42 USC 7409(d)(1)]. The federal Clean Air Act authorizes the US Environmental Protection Agency (EPA) to identify criteria pollutants and to establish national ambient air quality standards [42 USC 7408 and 7409]. In addition, New York has adopted the national ambient air quality standards as state standards, and established ambient air quality standards for beryllium [6 NYCRR Subpart 257-9] and fluoride [6 NYCRR Subpart 257-8].

[12] 2/23/01 Tr., p. 15.

the proposed CTG/HRSG units. CB3/EREC argues that any permit issued by the DEC should require the Applicant to modify current operating practices at the Complex and implement additional pollution control equipment. Furthermore, CB3/EREC has proposed alternatives that would split the installation of the two proposed CTG/HRSG units between the East River Complex and another facility operated by Con Edison.

CB3/EREC's proposed issues are based on the assertion that the Applicant has not demonstrated compliance with 6 NYCRR 231-2.4(a)(2)(ii). As explained above, Subpart 231-2 applies to new air emission sources, or major modifications to existing sources, in non-attainment areas. With respect to the captioned matter, the relevant non-attainment contaminants are: particulates, carbon monoxide, and ozone. Though generally not emitted from emission sources, ozone is created through the interaction of oxides of nitrogen (NOx) and volatile organic compounds (VOCs) in the presence of sunlight and warm summertime temperatures. Consequently, the concentrations of ozone's precursors, (i.e., NOx and VOCs) are regulated. NYC is part of a severe ozone non-attainment area.

> Pursuant to §231-2.4(a)(2)(ii), applicants must: submit an analysis of alternative sites, sizes, production processes, and environmental control techniques which demonstrates that benefits of the proposed source project or proposed major facility significantly outweigh the environmental and social costs imposed as a result it its location, construction, or modification within New York State; ...

Based on this requirement, CB3/EREC proposes several issues for adjudication, which are organized in its joint petition for full party status into five topic areas: (1) Health,[13] (2) $PM_{2.5}$ Emissions and Concentrations,[14] (3)

[13] CB3/EREC's joint petition, Section A, pp. 7-12. Proposed issues A1, and A2.

[14] CB3/EREC's joint petition, Section B, pp. 12-18. Proposed issues B1, B2, and B3.

Alternative Sites and Sizes,[15] (4) Alternative Control Techniques,[16] and (5) Environmental Justice.[17]

1. $PM_{2.5}$

According to CB3/EREC, the Applicant has not provided any information about the potential adverse human health effects from exposure to fine particulate matter ($PM_{2.5}$). CB3/EREC offers the expert testimony of Dr. Luz Claudio, who has a doctorate degree in pathology from the Albert Einstein College of Medicine, and is currently a member of the faculty. Dr. Claudio would testify about how fine particulates may cause airway obstruction, impair clearance which may increase susceptibility to infection, cause cardiovascular perturbation, induce changes to the epithelial lining of the lungs, alter the immune system, and induce inflammatory responses that aggravate existing abnormal lung conditions.

In addition, CB3/EREC wants to show that the ambient concentration of $PM_{2.5}$[18] is greater than 15 $\mu g/m^3$, and that the results of the Applicant's modeling underestimate the amount of fine particulates the proposed facility would emit. To demonstrate these contentions, CB3/EREC offers a letter from Kathleen Callahan, Director of the Division of Environmental

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[15] CB3/EREC's joint petition, Section C, pp. 18-22.

[16] CB3/EREC's joint petition, Section D, pp. 22-25, Proposed issues D1 and D2.

[17] CB3/EREC's joint petition, Section E, pp. 25-28.

[18] For particles that are 2.5 microns (μm) or less ($PM_{2.5}$), EPA has promulgated a 24-hour standard of 65 μg per cubic meter ($\mu g/m^3$) and an annual average limit of 15 $\mu g/m^3$ [62 Fed. Reg. 38,652 (1997)]. In May 1999, the DC Circuit Court of Appeals invalidated the new $PM_{2.5}$ standard [American Trucking Associations, Inc. v. EPA, 175 F3d 1027 (DC Cir. 1999)]. On appeal, the US Supreme Court upheld the $PM_{2.5}$ standard [Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et al., ___US ___ (Index Nos. 99-1257 and 99-1426, February 27, 2001].

Planning and Protection at EPA Region 2,[19] which states that the background concentrations of $PM_{2.5}$ in Manhattan are "unusually high." In addition, CB3/EREC proffers Daniel Gutman, as an expert, who would testify that: (1) the Applicant's modeling underestimates the amount of fine particulates the proposed facility would emit, and (2) that the $PM_{2.5}$ emissions from the East River Complex would be at least 20% higher than the Applicant's estimates.

Based on the Commissioner's Interim Decision in the Matter of American Marine Rail, LLC (AMR), dated February 14, 2001,[20] the proposed issues asserted by CB3/EREC that relate to $PM_{2.5}$ are not substantive and significant issues for adjudication in this proceeding, with respect to the pending air permit applications. The pending application by AMR is for a permit, and other related approvals, to construct and operate a solid waste transfer station on a site near the East River in the Hunts Point section of the Bronx. AMR proposes to bring mixed municipal solid waste from sources throughout the city to its proposed facility via barge. The solid waste would be unloaded from the barges, brought into the facility, where it would be compacted and placed in containers. The containers would then be sealed and transferred to flatbed railcars. Trains would transport the contained solid waste via rail to out-of-state landfills.

Prospective intervenors in the AMR case proposed numerous issues. The principal ones were whether an environmental impact statement (EIS) was necessary to comply with the requirements prescribed by the State Environmental Quality Review Act (SEQRA),[21] and what its scope should be, if an EIS were required. With respect to the scope of the EIS, prospective intervenors asserted that AMR should be required to

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[19] CB3/EREC attached the April 20, 2000 letter to their joint petition.

[20] DEC Project No. 2-6007-00251/00001.

[21] Environmental Conservation Law Article 8; 6 NYCRR Part 617.

assess the potential adverse environmental impacts of the proposed transfer station's $PM_{2.5}$ emissions. The administrative law judge (ALJ) assigned to the case determined that an EIS is mandated and that the EIS should include a $PM_{2.5}$ assessment.[22] After reviewing appeals from the ALJ's rulings, however, the Commissioner determined that "federal and state court decisions concerning $PM_{2.5}$ do not compel imposing upon the applicant the requirement of performing a $PM_{2.5}$ environmental review for the project..."[23]

CB3/EREC argues that the facts related to the captioned matter are different from the AMR application. For example, the AMR application relates to mobile air emission sources, where Con Edison's proposal relates to a stationary air emission source. The Applicant and the DEC Staff, however, argue the contrary. According to these issues conference participants, the interim decision concerning AMR is the precedent that must be followed here. The DEC associate examiner agrees.

CB3/EREC also asserts that the facts related to the captioned matter are analogous to the facts in the Matter of the Applications of Consolidated Edison Co. of New York, Inc., 1983 WL 166627 (September 14, 1983), where Consolidated Edison requested authorization to convert the fuel used at three of its facilities from oil to coal. In the Consolidated Edison matter, the DEC Commissioner determined that the utility would have to install flue gas desulfurization equipment at two of the three facilities as part of the authorized fuel conversion. In the

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[22] ALJ Rulings on Issues and Party Status and Environmental Significance, Application by American Marine Rail, LLC (August 25, 2000), pp. 57-59.

[23] Matter of American Marine Rail, LLC (AMR), Commissioner's Interim Decision dated February 14, 2001, p. 8. The federal and state court decision relied upon by the Commissioner were American Trucking Association v. EPA, supra., and Spitzer v. Farrell, Index No. 400365-00, (Supreme Court, New York County, October 12, 2000).

AMR interim decision, however, the Commissioner determined that the Consolidated Edison matter is distinguishable.[24]

CB3/EREC contends further that the Commissioner's reference in the AMR interim decision to EPA Division Director Callahan's April 20, 2000 letter,[25] shows that the DEC will consider the potential health impacts of projects that could have significant $PM_{2.5}$ emissions. Contrary to CB3/EREC's contention, however, this quotation appears in the AMR interim decision to illustrate "[t]he absence of clarity from EPA on modeling and analyzing $PM_{2.5}$...," and "the uncertainty surrounding $PM_{2.5}$."[26]

There are no factual disputes about the potential adverse human health impacts associated with exposure to particulate matter, in general, and to $PM_{2.5}$, in particular. A review of the scientific information related to $PM_{2.5}$ is what prompted the EPA to promulgate a national ambient air quality standard for fine particulate matter. The growing body of scientific information about fine particulate matter and its effects on human health appear to be consistent, and demonstrate the need for a standard that is protective of public health with an adequate margin of safety.[27]

The purpose of the instant proceeding, however, is not to promulgate that standard, but to determine whether the proposal is consistent with established standards.[28] With respect to the air permit application pending before the DEC, there is an established emission standard for particulate matter

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[24] AMR, Interim Decision dated February 14, 2001, p. 12.

[25] AMR, Interim Decision, p.8.

[26] AMR, Interim Decision, pp. 9 and 10.

[27] See, 42 USC 7409(b)(1).

[28] See, Matter of Herbert/Triga Company, Commissioner's Interim Decision (1989).

up to 10 microns in diameter, which would include particulate matter 2.5 microns, or less, in diameter.[29]

The US Supreme Court's recent ruling[30] does not change the situation here. The ruling, in part, overturns the DC Circuit Court of Appeals determination that the $PM_{2.5}$ standard was arbitrary and capricious. With the legal status of the $PM_{2.5}$ standard resolved, the work of implementation, which had begun, can continue. After the required data is collected, the EPA will determine which areas of the country are in attainment for $PM_{2.5}$, and which areas are not. States, like New York, then will have an opportunity to develop implementation plans, or revise existing ones, to bring non-attainment areas into compliance with the ambient air quality standard. The EPA will then review the states' proposed implementation plans and decide whether the plans should be approved. If the EPA approves New York's plan, then the DEC will implement it. The implementation process can take a considerable amount of time.

2. Good Engineering Practice (GEP) and Air Modeling

A. GEP

The existing Generating Station at the East River Complex has four air emission stacks. Each is 367.5 feet in height.[31] At present, air emissions from the South Steam Station are vented through Stack 1, and emissions from Boilers 60 and 70 are vented through Stacks 3 and 4, respectively. The proposed facility does not include any modifications to the height of these stacks. If the proposed facility is approved, emissions

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[29] The presiding examiners take up the question of potential adverse health impacts from exposure to $PM_{2.5}$ below within the context of the pending PSL Article X certificate. The DEC associate examiner takes no position about that issue's determination.

[30] Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et al., supra.

[31] Application materials, Vol. 1, §6.2.3.3.

from the East River Complex would be vented as follows. Stacks 1 and 2 would be used to vent the air emissions from the two proposed CTG/HRSG units, which would be housed in the Generating Station. Air emissions from the South Steam Station would continue to be vented through Stack 1. Emissions from Boilers 60 and 70 would continue to use Stacks 3 and 4.[32]

In 1985, the EPA promulgated regulations concerning good engineering practices (GEP) to determine the appropriate height for emission stacks.[33] The purpose of the regulations is to prevent downwashing, which occurs when emissions are drawn down around the source before the dispersion of emissions can occur. The formula in the GEP regulations is used to calculate the optimum stack height by taking into account the dimensions of buildings within the region of influence, which contribute to the downwash effect.

The Applicant applied the GEP analysis to the four existing stacks to determine whether the dispersion of emissions from the stacks would be influenced by wind flow on the buildings. Based on those calculations, Stack 1 should be 489 feet, Stack 2 should be 526 feet, Stack 3 should be 593 feet and Stack 4 should be 593 feet.[34] As explained above, the Applicant does not propose to adjust the height of the existing stacks as part of its proposal. Consequently, the height of all four stacks would remain at 367.5 feet.

CB3/EREC argues that the Applicant has provided an inadequate justification for not increasing the height of the emission stacks so that they are consistent with GEP. According to CB3/EREC, interrogatory responses from Con Edison[35]

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[32] Application materials, Vol. III, Appendix L-C, *Air Dispersion Modeling Protocol*, Figure 2-3.

[33] See, DEC Air Guide 26 (Revised 12/9/96).

[34] Application materials, Vol. III, Appendix L-C, *Air Dispersion Modeling Protocol* §4.2.1.

[35] CB3/EREC's joint petition, pp. 16 and 17. EREC/CB3 Interrogatory No. 107.

inappropriately emphasize the potential visual impacts of taller stacks as part of the justification for not constructing GEP stacks for the proposed facility. CB3/EREC asserts there is precedent that favors mitigating potential health impacts over potential visual impacts.[36] In addition, CB3/EREC proffers the expert testimony of Mr. Gutman to show that higher emission stacks would be necessary for the proposed facility because nearby buildings contribute to "building-wake turbulence," which would inhibit dispersion of air emissions from the East River Complex. As a result, the actual concentrations of the expected emissions from Stack 3 and 4 (Boilers Nos. 60 and 70) would be higher than those predicted by the Applicant, according to Mr. Gutman.

The Applicant provides the following justification, as required by DEC Air Guide-26, for not constructing new stacks, or modifying the existing stacks, to comply with GEP. According to the Applicant, it would not be technically feasible to increase the height of Stacks 1 and 2 for the following reasons. First, the existing stacks would need to be dismantled. Then, the building and roof of the Generating Station would need to be reinforced to accommodate the added weight and height of the taller stacks. In addition, the Applicant maintains that increasing the height of Stacks 1 and 2 would result in an adverse visual impact on the NYC skyline because the existing stacks are all the same height.[37]

Since the proposed stack height would be less than the GEP calculated height, the Applicant's air dispersion modeling

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[36] CB3/EREC's joint petition, p. 17, which refers to Case 80010, Matter of Application by Inter-Power of New York, Inc. (Half Moon Cogeneration Project), NYS Board on Electric Generation and the Environment (1990).

[37] Application materials, Vol. 1, §6.2.3.3. Since Stacks 3 and 4 relate to emissions from Boilers 60 and 70, any proposed adjustment to their height is beyond the scope of this proceeding. Although proximate to each other, the proposed facility does not include modifications to Boilers 60 and 70.

includes a "cavity analysis" to determine the probability of building downwash. Consistent with the guidance outlined in DEC Air Guide-26, the results of the cavity analysis show that a downwash effect would not occur with the existing stacks at their current height.[38] CB3/EREC does not challenge these results.

Based on additional guidance from the DEC Staff, the Applicant also calculated the "maximum cavity height,"[39] which is the product of 1.5 and either the building height, or its width, whichever is less. Based on a maximum building height of 210.5 feet, the maximum cavity height is 316 feet.[40] Because the current height of the stacks (367.5 feet) is greater than 316 feet, there would be no cavity impacts. CB3/EREC does not challenge these calculations either.

As discussed further below, Stacks 3 and 4 are not part of the proposed facility, and are, therefore, not within the scope of this proceeding. Even if they were, based on the foregoing, the DEC associate examiner concludes that CB3/EREC has not raised a substantive issue concerning the Applicant's GEP analysis. CB3/EREC's objection to the Applicant's aesthetic justification for not increasing the height of the stacks is not sufficient to raise an adjudicable issue relative to the four stacks.[41] Indeed, the applicable DEC policy allows the GEP stack height to be minimized to reduce the impact on an area's aesthetics.[42] Moreover, the results of Applicant's air dispersion modeling, which includes a cavity analysis, and the

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[38] Application materials, Vol. III, Appendix L-C, *Air Dispersion Modeling Protocol* §4.3.2, Appendix E.1, SCREEN3.

[39] During the issues conference, the Applicant used the term, "cavity-effect height" (2/23/01 Tr., p. 71).

[40] Application materials, Vol. III, Appendix L-C, *Air Dispersion Modeling Protocol* §4.3.2.

[41] See, 6 NYCRR 621.7(d).

[42] DEC Air Guide 26 (Revised 12/9/96), §III(1)(b).

Applicant's calculations of the maximum cavity height, demonstrate there would be no cavity impacts.

B. Air Modeling and Building Turbulence

CB3/EREC challenges the results of the Applicant's air modeling analysis. At the issues conference, it asserts that the analysis did not consider the effects of building turbulence.[43] According to Mr. Gutman, building-wake turbulence would increase the emission concentrations from Stacks 1 and 2 on nearby residential buildings.[44]

DEC Staff and the Applicant contend, however, that the air modeling analysis did consider the potential effects of building turbulence. A review of the application materials shows that this contention is correct.[45]

By letter dated May 30, 2000, the DEC approved the Applicant's air modeling protocol. The approved protocol, which is consistent with DEC guidance,[46] requires the use of urban dispersion coefficients[47] and a consideration of elevated (or flagpole) receptors.[48] Therefore, CB3/EREC has not raised a substantive issue for adjudication.

C. Gradual Plume Rise Option

Con Edison's approved air modeling protocol includes the "gradual plume rise" option.[49] CB3/EREC contend that none of

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43 CB3/EREC's joint petition, pp. 14 and 18.

44 CB3/EREC's joint petition, p. 18.

45 Application materials, Vol. III, Appendix L, §L6.2.2.

46 DEC Air Guide 26, §III(1)(d), and Appendix B.

47 Application materials, Vol. III, Appendix L-C: *Air Dispersion Modeling Protocol*, §4.2.2.

48 Application materials, Vol. III, Appendix L-C: *Air Dispersion Modeling Protocol*, §4.2.4.

49 Application materials, Vol. III, Appendix L §L6.2.7; and Appendix L-C entitled, *Air Dispersion Modeling Protocol*, §4.5.4.

the Applicant's reported results reflect a consideration of this option.[50] At the issues conference, the Applicant confirmed CB3/EREC's contention, and said that modeling results with the gradual plume rise option were pending.[51] Based on prior administrative decisions, an issues conference participant can demonstrate an adjudicable issue by identifying a substantive defect or omission in the application materials.[52] This appears to be the case here.

Ordinarily, a ruling on proposed issues related to omissions in the application would be reserved when, as here, an applicant is attempting to rectify the omission. Then, after the parties have had an opportunity to review the forthcoming information, they can report whether their concerns have been adequately addressed, or re-assert the issue for my consideration. However, the evidentiary hearing and the dates for prefiling testimony are imminent.[53]

Accordingly, the following procedures will be used. The Applicant shall distribute the air modeling results related to the plume rise option to the parties as soon as the results become available. If the modeling results become available by March 20, 2001, the DEC Staff and other parties will have until April 4, 2001 to review the materials, and if necessary submit rebuttal testimony, which will be considered during the adjudicatory hearing.

If the results are not available by March 20, 2001, the DEC Staff and the prospective intervenors will have an

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50 PSD comment letter from CB3/EREC dated February 2, 2001 letter, pp. 14 and 15; 2/23/01 Tr., pp. 29-33.

51 2/23/01 Tr., pp. 69-70.

52 Matter of Oneida County Energy Recovery Facility, Interim Decision, July 27, 1982; Matter of Halfmoon Water Improvement Area, Interim Decision, April 2, 1982; Matter of Broome County Department of Public Works, Commissioner's Decision, June 11, 1984.

53 Case 99-F-1314, Ruling Establishing Procedural Schedule, December 12, 2000.

opportunity to review the data and submit comments about the pending results. Upon review of these comments, a determination will be made about whether a substantive and significant issue for adjudication exists.

3. Alternatives

CB3/EREC's petition includes a number of alternatives. The range of alternatives includes using alternative fuels at the East River Complex, reconfiguring the two proposed CTG/HRSG units by installing one at the East River Complex and the second at another steam generating facility operated by the Applicant, and alternative emission control technologies. Alternative fuels, and alternative configurations and locations are discussed below. Alternative emission control technologies will be discussed in the next section of this ruling.

A. Alternative Fuels

As part of settlement discussions, the Applicant proposes to limit the fuel oil used by Boilers Nos. 60 and 70 from April through October, and use natural gas as an alternative fuel during this period.[54] To limit particulate emissions from the East River Complex further, however, CB3/EREC also wants the Applicant to use natural gas during winter months for Boilers Nos. 60 and 70. CB3/EREC offers the expert testimony of Kaiser Aziz, a mechanical engineer. Mr. Aziz would testify that the Applicant can use natural gas for Boilers Nos. 60 and 70, year round, by constructing addition supply lines. Alternatively, Mr. Aziz would testify that using low sulfur fuel oil would also reduce particulate emissions from the East River Complex. According to Mr. Aziz, these mitigation alternatives are feasible and affordable.

Although raised in the context of settlement discussions, the air emissions from Boilers Nos. 60 and 70 are

[54] See, Applicant's cover letter dated January 19, 2001, Air Resources Topic Agreement, §I(C)(11), and the certificate condition proposed in §II(B).

not part of, and therefore not relevant to, the Applicant's pending air permit applications or the related PSL Article X certificate application. Consequently, the alternative fuels proposed by CB3/EREC for Boilers Nos. 60 and 70 are not substantive and significant issues for adjudication in this proceeding.

B. Alternative Configurations and Locations

The application materials identify and discuss alternative sites owned by the Applicant where the proposed electric and steam generating equipment could be installed. The Applicant, for various reasons, finds that these alternatives are not reasonable.[55] CB3/EREC contends, however, that the Applicant inappropriately emphasized visual and aesthetic criteria over potential adverse environmental and health impacts when Con Edison evaluated its alternatives. CB3/EREC has proposed two alternatives, which it claims would comply with the requirements outlined in §231-2.4(a)(2)(ii).

To support its claim, CB3/EREC proffers the expert testimony of Charles Komanoff, an economist. Mr. Komanoff would testify that the two units proposed for the East River Complex should be separated. CB3/EREC contends that one unit should be installed at the East River Complex and the other should be installed at another Con Edison facility, or site owned by the Applicant. Mr. Komanoff would also testify that the steam generating equipment at all of the Applicant's facilities should be upgraded including the existing equipment at the East River Complex. Additional testimony from Mr. Aziz would support Mr. Komanoff's testimony by describing how CB3/EREC's proposed alternatives should be designed so that they could be implemented.

To obtain a permit, an applicant must submit an analysis of alternatives which demonstrates that the benefits of a proposed major air emission source significantly outweigh the environmental and social costs that may associated with the

[55] Application materials, Volume I, §4.

proposed new source.[56] With respect to the alternative analysis required by §231-2.4(a)(2)(ii), CB3/EREC has proposed a substantive and significant issue for adjudication. The proposed issue is substantive because the offer of proof raises doubt about whether an adequate record concerning alternative sites currently exists to demonstrate that the benefits of the Applicant's proposed facility would significantly outweigh its environmental and social costs. There is sufficient doubt to inquire further. The issue is substantive because the requested air permit could be denied, if the analysis required by §231 2.4(a)(2)(ii) is either inadequate to make the requisite demonstration. In the alternative, the project could be substantially modified, if the adjudicated outcome of this issue shows that one of the proposed CTG/HRSG units should be installed at an alternative location.

During the issues conference, the alternative locations were identified: (1) the 74th Street Station, and (2) a parcel called Kips Bay near the Waterside Station.[57] The Applicant's attorney said that the combustion turbine generator (CTG) is massive and must be delivered as a single unit. These characteristics, the Applicant's counsel asserts further, would preclude the delivery of a CTG to the 74th Street Station. According to Mr. Komanoff, who is the proffered expert, the Applicant's claim that the CTG must be delivered as a single unit was disclosed for the first time at the issues conference. Mr. Komanoff said that he would be prepared to address concerns about the delivery of a CTG to the 74th Street Station in his testimony.[58] Factual questions about whether the CTG unit must be shipped as a single unit, and whether the CTG unit could be delivered to the 74th Street Station as a single unit are disputed issues of fact that can be resolved only through the adjudication of this issue.

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[56] 6 NYCRR 231-2.4(a)(2)(ii).

[57] 2/23/01 Tr., p. 125.

[58] 2/23/01 Tr., pp. 158, 168.

The Applicant also objects to a consideration of the Kips Bay site because that parcel is part of the First Avenue Properties. Although the sale of the First Avenue Properties has not been finalized, the Applicant said that a contract for their sale has been pending since November 2000. Accordingly, the Applicant argues that the Kips Bay site is not available.[59]

Mr. Komanoff described the location of the Kips Bay parcel in relation to the other First Avenue Properties, and the area of the Kips Bay site compared to the total acreage of the First Avenue Properties. Based on Mr. Komanoff's description, the Kips Bay site is not contiguous with the other First Avenue Properties, and is not a substantial portion of the total acreage.[60]

The Applicant's objection about the Kips Bay alternative is not persuasive. According to the application materials,[61] Con Edison would continue to operate the Waterside Station, if the proposed facility is not constructed at the East River Complex. This implies that the Waterside Station is essential to the current operation of the steam system, and would continue to be essential if the requested permits and/or certificate for the captioned proposal are denied, or if construction of an approved facility is otherwise delayed. Yet, before obtaining any one of the many necessary approvals for the East River proposal, the Applicant has proceeded at its own risk to negotiate the sale of the First Avenue Properties. Given these circumstances, the Applicant's claim that a consideration of the Kips Bay alternative in this proceeding could prompt a renegotiation of the sale of the First Avenue Properties, and thereby create a hardship is dubious. If such a hardship were to materialize, it would be self-created.

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[59] 2/23/01 Tr., p. 83.

[60] 2/23/01 Tr., pp. 159-162.

[61] Application materials, Vol. I, §4.2.4, *No-action Alternative*.

Nonetheless, if the Applicant chooses to pursue its objections about the Kips Bay site further, the Applicant may present information during the hearing about the status of the sale of the First Avenue Properties as part of the "social costs" element of the alternative analysis required by §231-2.4(a)(2)(ii). Pertinent information may include, but would not be limited to, the pending sales contract and additional information about the potential consequences of renegotiating the pending contract.

4. Alternative Control Techniques - LAER for NOx and Particulates

Oxides of nitrogen (NOx) are regulated as a criteria pollutant pursuant to the federal Clean Air Act. Since the ambient concentration of NOx in the NYC metropolitan area does not exceed the national ambient air quality standard, NOx is regulated as a PSD criteria pollutant. Emissions of PSD pollutants are controlled by the best available control technology.[62] NOx emissions, however, are precursors to ozone, and the NYC metropolitan area is designated a severe ozone non-attainment area.[63] Consequently, control technology that will result in the lowest achievable emission rate (LAER) must be used.[64] In addition, the Applicant is required to obtain emission offsets. After the DEC certifies the offsets, they are referred to as emission reduction credits (ERC).[65] According to

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[62] The best available control technology (BACT) is an emission limitation or equipment standard. The definition of this term is found at 6 NYCRR 200.1(j).

[63] See, DEC Air Guide 12.

[64] LAER is the lowest achievable emission rate. It is the most stringent emission limitation and must be implemented for criteria pollutants that are not in attainment. When required, LAER technology must be applied regardless of the cost. A definition of the term, lowest achievable emission rate (LAER), is provided at 6 NYCRR 200.1(ak).

[65] See, 6 NYCRR 231-2.1(b)(13) and (14) for definitions. Requirements for the certification, registration and use of

the DEC Staff, the Applicant has obtained the necessary ERCs for NOx , as well as the other required ERCs for the proposed facility.[66]

To determine the appropriate LAER technology for controlling NOx emissions, the Applicant consulted the EPA's RACT/BACT/LAER Clearinghouse.[67] There are "front-end" control technologies and "back-end" controls. The use of dry low-NOx combustors is an example of a front-end control. These combustors limit peak flame temperature and excess oxygen, and thereby reduce NOx formation by lowering the combustion temperature and limiting the amount of oxygen that could combine with either atmospheric nitrogen or nitrogen in the fuel. Selective catalytic reduction (SCR) is an example of a back-end control. Before they are vented, the air emissions are mixed with aqueous ammonia. In the presence of a catalyst, NOx emissions combine with the ammonia to form nitrogen gas (N_2) and water. The Applicant proposes to use both of these technologies to obtain the lowest achievable emission rate for NOx emissions at the proposed facility.[68]

CB3/EREC objects, however, to the Applicant's proposal to use SCR technology to control NOx emissions. According CB3/EREC, excess ammonia (referred to as "ammonia slip") from the SCR can combine with sulfuric and nitric acid aerosols and create ammonium salts, which are particulates. As an alternative to SCR, CB3/EREC proposes the use of SCONOx, and proffers the expert testimony of Elwood Halterman, a chemical

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emission offsets as emission reduction credits are outlined at §231-2.6.

66 2/23/01 Tr., pp. 50-51; For this proposal, ERCs are required for NOx, CO, and particulates, since these criteria pollutants are in non-attainment.

67 RACT is reasonably available control technology, which considers technological and economic feasibility [6 NYCRR 200.1(bp)]. Definitions of the terms "BACT" and "LAER" have been provided above.

68 Application materials, Vol. III, Appendix L, §L5.2.

engineer.[69] Mr. Halterman would testify about the advantages of SCONOx over SCR. According to Mr. Halterman, SCONOx does not use ammonia. Consequently, the ammonium salts that may develop with SCR would not be present if SCONOx is used at the proposed facility. Mr. Halterman said that using SCONOx to control NOx emissions would be consistent with the LAER requirement, with the added benefit of reducing particulate emissions. CB3/EREC maintains that reducing particulate emissions is essential from a public health perspective, particularly since ambient particulate concentrations in Manhattan currently exceed the national ambient air quality standard.[70]

According to Con Edison, the application of the various LAER technologies to the proposed facility will be unique for two reasons. The first reason is based on how the facility would be operated. The second relates to the interaction of the various air pollution control technologies.[71]

First, the proposed facility is neither completely a simple cycle nor a combined cycle plant, according to the Applicant. Like other combined cycle facilities, the proposed facility will generate steam, but in contrast to most combined cycle facilities, the steam will not be superheated and it will not be used to generate additional electricity. Rather, the steam from the proposed facility would be diverted to the Applicant's steam distribution system, and made available to its steam customers. Compared to typical cogeneration facilities, the amount of steam produced at the proposed facility would be larger and more variable. As a result, the maximum duct burner firing rate would be equivalent to about 50% of the CTG heat

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[69] CB3/EREC attached a draft copy of Mr. Halterman's direct testimony to their PSD comment letter dated February 2, 2001. CB3/EREC's letter is part of the joint petition for full party status.

[70] This determination is based on the national ambient air quality standard for PM_{10}, which by definition includes particulates 10 microns, or less, in diameter.

[71] Application materials, Vol. III, Appendix L, §L5.1.1.

input. These differences, the Applicant asserts, would require changes in the placement of control catalysts, and would result in variations in their operating temperature compared to more typical facilities. The Applicant concludes that catalyst performance could vary significantly based on the operating conditions described above.[72]

Second, the proposed facility needs to implement other LAER technologies to control other criteria pollutants, such as CO and particulates. Under these circumstances, the control technologies may compete. For example, reducing oxygen to minimize NOx formation can encourage CO to form. According to the application materials, the catalysts used to reduce NOx and CO emissions increase particulate emissions.[73]

The application materials and CB3/EREC's proposed issue highlights the interaction among the various proposed emission control technologies. CB3/EREC prefers the SCONOx technology over the proposed SCR technology not to control NOx emissions, but to reduce particulate emissions. However, the accepted LAER technology for controlling particulate emissions is to use a low ash fuel,[74] like natural gas. Moreover, the anticipated concentrations of particulate emission from the proposed facility are not expected to exceed emission standards, and by a wide margin.[75]

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[72] Ibid.

[73] Id.

[74] Application materials, Vol. III, Appendix L, §L5.5.2, and Appendix L-D, *Control Technology Evaluation Back-up Material: RACT/BACT/LAER Clearinghouse Information for NOx, CO and VOC Emission Control*. Despite the title of Appendix L-D, this appendix also provides a list of facilities and the technologies used for controlling particulates. For most, the applicable technology standard is BACT, rather than LAER.

[75] Application materials, Vol. III, Appendix L, §L6.3.3. See also, 2/23/01 Tr., pp. 43-44, 60.

Due to the atypical nature of the proposed facility as described in the application materials, and given that the proposed facility would be located in a non-attainment area for both ozone and particulates, CB3/EREC has raised a substantive and significant issue about the Applicant's proposal to use SCR as a LAER technology to control NOx, an ozone precursor, when its use may increase particulate emissions from the facility. Even though particulate emissions are expected to comply with current emission standards, the issue is substantive because the offer of proof raises doubt about whether the Applicant should use the SCR technology to control NOx emissions from the proposed facility because its use may exacerbate particulate emissions, the ambient concentration of which currently exceeds the national air quality standard. An evaluation of the Applicant's proposed LAER technology to control NOx and particulates is required pursuant to §231-2.4(a)(2)(ii). The issue is significant because the requested air permit could be denied, or the project could be substantially modified by requiring the Applicant to implement SCONOx as an alternative LAER technology.

The Applicant asserts a number of reasons why the SCONOx technology proposed by CB3/EREC should not be implemented at its proposed facility.[76] These assertions, however, raise a number of factual disputes that can be resolved only through the adjudication of this issue. First, for example, the Applicant asserts that the generation station is not large enough to accommodate the two proposed CTG/HRSG units with the SCONOx equipment, if required.[77] CB3/EREC, however, has already raised a substantive and significant issue about alternative configurations and locations that could split the location of the two proposed CTG/HRSG units between the East River Complex and another Con Edison facility, or site owned by the Applicant. At present, no factual record exists to answer the question of

[76] See generally, 2/23/01 Tr., pp. 66-69.

[77] 2/23/01 Tr., p. 66.

whether the SCONOx equipment would fit at the East River Complex if only one CTG/HRSG unit is installed there. Similarly, there is insufficient information to determine now whether a CTG/HRSG unit would fit at the alternative locations identified by the prospective intervenors with the SCONOx equipment.

Second, if the East River Generating Station were large enough, then the Applicant contends that the CTGs would not operate properly given the "back pressure" created by the SCONOx equipment.[78] In a conclusory manner, the application materials also report that the HRSG manufacturer does not recommend SCONOx for this project.[79] At hearing, the Applicant will have an opportunity to provide the underlying factual bases that support these contentions, subject to review by the other hearing participants.

Finally, the Applicant contends that the SCONOx technology is "not available."[80] The Applicant said that the SCONOx technology has never been installed on large turbines like those proposed here. The Applicant explained further that SCONOx technology was installed at a 5 MW facility in Massachusetts 21 months ago.[81] Since that time, the operator of the Massachusetts facility cannot get the SCONOx equipment to work properly, according to the Applicant.[82]

There appears to be no dispute that the use of SCONOx technology on the turbines proposed here has not been "achieved in practice." The regulatory definition of LAER, however, also requires the use of technology that "can reasonably be expected

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[78] 2/23/01 Tr., pp. 66-67.

[79] Application materials, Vol. I, §6.2.4.2.

[80] 2/23/01 Tr., pp. 68-69. For the same reason, the DEC Staff does not favor the use of SCONOx here (1/23/01 Tr., p. 48).

[81] In California, a 28 MW facility has been constructed with SCONOx technology (Application materials, Vol. I, §6.2.4.2).

[82] 2/2/301 Tr., pp. 67-68.

to occur in practice."[83] Although the experience at the Massachusetts facility seems to cast doubt on the reliability of the SCONOx technology, the factual record about whether SCONOx technology should be considered a technology that can reasonably be expected to occur in practice is presently insufficient. For example, a detailed technical explanation has not been offered for why the SCONOx technology at the Massachusetts facility has not operated properly. Furthermore, there is no factual information in this record about the California facility other than SCONOx technology has been, or will be, installed there. Consequently, the adjudication of this issue will provide the DEC Commissioner with the factual information needed to make an informed decision about the best way to control both NOx and particulate emissions from the proposed facility.[84]

5. Draft PSD Permit - Environmental Justice

On February 11, 1994, President Clinton issued Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.[85] The purpose of the Executive Order is to achieve environmental protection for all communities, particularly those with significant minority and low-income populations. The Order directed federal agencies to determine whether an agency's programs, policies, and activities disproportionately affect either the health or environment of minority and low-income populations. The Order further directed federal agencies to develop environmental justice strategies that avoid these disproportionate effects by promoting nondiscrimination, as well as by increasing public participation in matters related to human health and the environment.

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[83] 6 NYCRR 200.1(ak).

[84] In addition, this record will be available to the Siting Board when it makes the findings required by PSL §§168(2)(c)(i and iv).

[85] As of the date of this ruling, this Presidential Executive Order remains in effect.

By letter dated March 28, 2000, US EPA Region 2 Staff informed the DEC Staff that all future applications for PSD approvals must include an environmental justice analysis. With the application materials filed in May 2000, the Applicant included an environmental justice analysis,[86] which was based on EPA guidance.[87] At the August and October 2000 public statement hearings, many people were very critical of the Applicant's environmental justice analysis. Many objections focused on the selection of the reference community, which was the population of New York County.

Subsequently, the Applicant filed a supplemental environmental justice evaluation in December 2000[88] based on additional EPA guidance.[89] Members of the public were critical of the Applicant's supplemental environmental justice evaluation at the January 24, 2001 public statement hearing sessions.[90] Objects of criticism included: (1) making revisions without input from the local community, (2) redefining the community of concern to be the population within a one-mile radius of the East River Complex, where a significant portion of the area considered is the East River, and (3) redefining the reference community as the combined population of New York, Kings and Queens Counties.

CB3/EREC challenges the Applicant's environmental justice analyses and propose to adjudicate the issue. To support its position, CB3/EREC refers to Commissioner Cahill's October 1999 announcement that environmental justice

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86 Application materials, Vol. III, Appendix L, §L7.0, *Environmental Justice Evaluation*.

87 EPA-Region 2, *Draft Interim Policy on Identifying Environmental Justice Areas*, (Revised June 1999).

88 Application materials, Appendix L - Supplemental Information (December 12, 2000), S10.

89 US EPA Region 2, *Interim Environmental Justice Policy*, December 2000.

90 Transcript of the January 24, 2001 Public Statement Hearing.

considerations are necessary to prevent and reduce the disproportionately adverse environmental effects on low-income and minority communities.

CB3/EREC acknowledges that an environmental justice analysis is a required element of the PSD application. It argues, however, that environmental justice considerations are essentially codified in the requirements outlined in 6 NYCRR 231-2.4(a)(2)(ii). To support its position, CB3/EREC offers a memorandum dated December 1, 2000 from EPA's General Counsel.[91] Based on this memorandum, CB3/EREC contends that an environmental justice analysis, or an analysis substantially the same as the environmental justice analysis required by the federal executive order, is a required element of the new source review.

CB3/EREC has two principal concerns about the Applicant's environmental justice analyses.[92] First, CB3/EREC disputes the method used by the Applicant to identify the community of concern and the reference community. According to CB3/EREC's proffered expert, Mathy Stanislaus, the Applicant inappropriately relied on the interim draft guidance issued by the EPA Region 2 Office in June 1999 in developing the protocol for the environmental justice analyses. Rather, Mr. Stanislaus would testify that reliance should be placed on guidance dated April 1998 from EPA's central office,[93] as well as guidance provided by the Council on Environmental Quality.

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[91] Memorandum dated December 1, 2000 by Gary S. Guzy, EPA General Counsel, Washington, DC. The subject of the memorandum is, *EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting*. CB3/EREC specifically referred to Paragraph No. 1 on page 11 of the memorandum.

[92] EREC's and CB3's objections relate to the Applicant's original evaluation as well as to the supplemental evaluation.

[93] This guidance document is entitled, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, dated April 1998. The document has

In addition, CB3/EREC argues that the scope of the Applicant's environmental justice analyses should have included an analysis of the alternative proposals identified in the application materials. CB3/EREC contends that not only would the proposal transfer electric and steam generating capacity from the Waterside Station, but the expansion at the East River Complex would also reduce steam production and the associated air emissions at Con Edison's other steam generating facilities on the Upper East Side. Nevertheless, the community surrounding the East River Complex would experience an increase in air emissions after the steam generation system has been reconfigured, according to CB3/EREC. CB3/EREC explains that portions of the testimony offered by Dr. Claudio and Mr. Gutman would substantiate Mr. Stanislaus' proposed environmental justice analysis. CB3/EREC seeks to prove that the potential adverse environmental impacts of the proposal would disproportionately affect the minority and low-income residents living near the East River Complex compared to the residents who live in the vicinity of other Con Edison steam facilities.

Dr. Claudio would also testify about the allegedly sensitive subpopulations living in the vicinity of the East River Complex who may be adversely effected by its emissions. According to CB3/EREC's offer of proof, these groups include minority populations, in general, and African-Americans and Puerto Ricans, in particular, as well as low-income residents who live in the vicinity of the East River Complex, children, the elderly, and individuals with respiratory and cardiovascular disease. CB3/EREC asserts that Dr. Claudio's testimony would demonstrate that the social burden that could result from the Applicant's proposal would be disproportionately higher in the Lower East Side neighborhoods surrounding the East River Complex compared to other communities in New York City.

The Applicant and the DEC Staff object to the adjudication of this proposed issue. At the issues conference,

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been posted on the EPA website at www.es.epa.gov\oeca\ofa\ejepa.html.

the Applicant argues at length that an environmental justice analysis should not even be required. According to the Applicant, Title VI of the Civil Rights Act relates to the DEC's statewide administration of its air program, not to each and every individual facility and pending application for proposed facilities.[94] Although the Applicant does not agree with EPA's requirement to evaluate potential environmental justice issues, the Applicant has complied with these requirements to obtain the requested PSD permit for the proposed facility.

The DEC Staff argues first that the EPA's environmental justice guidelines relate only to the PSD program, where the DEC acts as EPA's agent, compared to other fully delegated permit programs such as the SPDES and new source review. Second, the DEC Staff contends that the DEC is in the process of developing environmental justice guidelines for the state permitting programs that it administers. Since final state guidelines are not yet in place, the DEC Staff contends that additional environmental justice analyses should not be undertaken now.[95] To support this contention, the DEC Staff refers to a letter dated August 28, 2000 from the DEC Commissioner to the EPA Region 2 Administrator. The Commissioner's August 28, 2000 letter expresses concern about implementing the EPA directive requiring environmental justice analyses as part of PSD applications, and requests further assistance and guidance from EPA to implement this requirement. To date, EPA has not responded.

The DEC Staff and Applicant assert that the analysis required by 6 NYCRR 231-2.4(a)(2)(ii) does not require an environmental justice analysis or contemplate an equivalent type of analysis. According to DEC Staff,[96] the Applicant has complied with this requirement by providing a net air quality

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[94] 2/23/01 Tr., pp. 107-109.

[95] 2/23/01 Tr., pp. 117-121.

[96] 2/23/01 Tr., p. 49.

benefit analysis.[97] The Applicant makes a similar assertion.[98] In addition, the DEC challenges CB3/EREC's assertion that the EPA General Counsel's December 1, 2000 memorandum applies to New York's program to permit new major air emission sources in non-attainment areas.[99]

The Applicant's contention that the EPA, and the DEC as the EPA's agent, does not have authority to require an environmental justice evaluation for individual permit applications is beyond the scope of this proceeding. Despite Con Edison's objection, the Applicant, in fact, has provided an environmental justice evaluation and a supplement to it. Therefore, for purposes of discussion, it will be assumed that a legal basis exists to require an environmental justice analysis for individual PSD applications. Based on this assumption, the environmental justice analysis is a requirement relevant only to the PSD application since the basis for the requirement is a federal executive order.

Because New York's implementation plan does not include an approved PSD permit program, the EPA has authorized the DEC to act as EPA's agent, and to implement the federal PSD regulations.[100] Administrative review procedures for PSD applications (and other federal permit programs) are outlined in 40 CFR Part 124. Pursuant to 40 CFR 124.71(c), a draft PSD permit is not subject to an adjudicatory or evidentiary hearing. Therefore, CB3/EREC's proposal to adjudicate the Applicant's environmental justice analysis is not a substantive and significant issue due to this federal prohibition. CB3/EREC should follow the applicable procedures outlined in 40 CFR

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97 The Applicant's analysis is located in the application materials, Vol. III, Appendix L-F, *Environmental and Social Benefits Analysis*.

98 2/23/01 Tr., pp. 110-111, 125-126.

99 2/23/01 Tr., pp. 138-139.

100 The applicable PSD regulations are found at 40 CFR 52.21, and 40 CFR Part 72.

Part 124 to pursue any additional concerns about the Applicant's environmental justice analyses or other aspects of the draft PSD permit.[101]

Based on the Commissioner's August 28, 2000 letter to the EPA Region 2 Administrator, the DEC associate examiner agrees with the DEC Staff that the analysis required by 6 NYCRR 231-2.4(a)(2)(ii) does not require an environmental justice analysis consistent with EPA guidelines, or contemplate an equivalent type of analysis. As discussed above, however, the prospective intervenor has raised substantive and significant issues about whether the Applicant's 6 NYCRR 231 2.4(a)(2)(ii) analysis is sufficient to make the requisite determination that the benefits of the proposed facility "significantly outweigh the environmental and social costs."

RULINGS ON REQUESTS FOR PARTY STATUS AND AMICUS STATUS

As provided by 6 NYCRR §624.5, the parties to any DEC adjudicatory hearing are the Applicant, the Department Staff and those who have been granted full party status. As explained above, Manhattan-Community Board No. 3 and the East River Environmental Coalition timely filed a joint petition for full party status.

The criteria for determining whether the DEC associate examiner should grant petitions for full party status are provided in §624.5(d)(1). Upon review of these criteria and the joint petition for full party status, CB3/EREC filed an acceptable petition as required by §§624.5(b)(1) and (2). As discussed above, CB3/EREC has raised substantive and significant issues for adjudication concerning alternative configurations, and alternative emission control technologies. In addition, CB3/EREC has shown an adequate environmental interest.

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[101] Some additional procedures were outlined in the DEC Notice of Determination to Issue Prevention of Significant Deterioration (PSD) Permit.

Therefore, CB3/EREC's joint request for full party status is granted.[102]

The criteria for determining whether the DEC associate examiner should grant petitions for amicus status are provided in §624.5(d)(2). Upon review of these criteria and the petitions for amicus status, Honorable Carolyn B. Maloney, Honorable Nydia M. Velazquez, Honorable Thomas Duane, Honorable Roy M. Goodman, and Honorable Steven Sanders filed acceptable petitions as required by §§624.5(b)(1) and (3). In addition, these petitioners have shown the requisite environmental interest. Therefore, the individual petitions for amicus status filed by Honorable Carolyn B. Maloney, Honorable Nydia M. Velazquez, Honorable Thomas Duane, Honorable Roy M. Goodman, and Honorable Steven Sanders are granted.[103]

APPEALS

A ruling of the DEC associate examiner to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the DEC Commissioner on an expedited basis,[104] and must be filed to the DEC Commissioner in writing within five days of the disputed ruling.[105]

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[102] Pursuant to PSL §166, CB3/EREC is already a party in the matter regarding the pending certificate before the Siting Board.

[103] Pursuant to PSL §166, the members of the US House of Representatives and the New York State Legislature are already parties in the matter regarding the pending certificate before the Siting Board.

[104] 6 NYCRR 624.8(d)(2).

[105] 6 NYCRR 624.6(e)(1).

Allowing extra time due to the length of these rulings, any appeals[106] must be in writing and received by the DEC Commissioner (Office of the Commissioner, NYS Department of Environmental Conservation, 50 Wolf Road, Albany, New York, 12233-1010) before 2 p.m. on March 28, 2001. Replies are authorized and must be received by the DEC Commissioner before 2 p.m. on April 4, 2001.

The rulings that may be appealed to the DEC commissioner pursuant to 6 NYCRR 624.8(d)(2) are the items addressed under the following headings: (1) Rulings on Proposed Issues for Adjudication related to the Environmental Permits, and (2) Rulings on Requests for Party Status and Amicus Status. Appeals filed pursuant to §624.8(d)(2) should address the DEC associate examiner's rulings directly, rather than merely restate a party's contentions. In a ruling dated December 21, 2000, the examiners established a hearing schedule. The appeals schedule outlined above does not modify the established hearing schedule.[107]

The remainder of this ruling addresses the proposed issues related to the requested certificate pending before the Siting Board. Accordingly, the presiding examiners rule as follows.

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[106] Send three copies of any appeal and reply to the DEC associate examiner. Parties who use word processing equipment to prepare the brief and reply must also submit a copy of their appeal and reply to the associate examiner in electronic form on a 3.5 computer disk (double density, not high density) formatted in either WordPerfect or ASCII. As an alternative to submitting a computer disk, parties may file an electronic copy via e-mail to: dpoconne@gw.dec.state.ny.us. The electronic copy sent via e-mail must be formatted in either WordPerfect or ASCII. The parties shall ensure that the transmittal of all papers is made to the DEC associate examiner and all other parties at the same time and in the same manner as transmittal is made to the DEC Commissioner. No submissions by telecopier will be allowed or accepted.

[107] See, 6 NYCRR 624.8(d)(7).

ISSUES RULING WITH RESPECT TO PSL ARTICLE X

With respect to Article X issues under PSL §168, CB3/EREC proposes issues concerning public health, noise, alternate sites, air quality, and environmental justice. CB3/EREC suggests that the adverse health effects of fine particulate matter ($PM_{2.5}$) dictate that it not be subsumed in the PM_{10} analysis, but rather independently investigated. According to CB3/EREC, research has shown that the two categories of inhalable particles differ in physical and chemical properties, origins, and health effects. CB3/EREC's proposal would focus on the present state of knowledge regarding the epidemiology of $PM_{2.5}$ at concentrations that are likely to occur in the area surrounding the East River Station and the presence of susceptible populations in the community surrounding the East River Station as compared to communities surrounding alternate sites.

Con Edison contends that the Siting Board need look no further than compliance with the PM_{10} standard. Con Edison maintains that CB3/EREC should be prevented from proceeding with its presentations because CB3/EREC does not intend to establish a control group in accordance with generally accepted rules governing the presentation of scientific evidence. A control group is needed, Con Edison asserts, to establish a cause and effect relationship between $PM_{2.5}$ and the health impacts raised by CB3/EREC. DPS Staff voices a similar concern by claiming that CB3/EREC has not proposed to demonstrate such causation.

Con Edison's and DPS Staff's criticisms should not preclude CB3/EREC from presenting its case on this issue, although they may have a bearing on the probative value of the presentation once it has been offered. First, PSL §168(2)(b) does not require the Siting Board to limit its examination of health effects to instances in which a clear cause and effect relationship is established. Instead, this section allows the Siting Board to determine "the probable environmental impacts, including an evaluation of the predictable . . . impact on the . . . public health . . ." (emphasis supplied). Also, in at least two places, PSL §167(1)(b) states that the rules of

evidence applicable to proceedings before a court shall not apply to our proceeding. Consequently, we will allow CB3/EREC to present its case concerning the health effects of $PM_{2.5}$.[108]

With respect to noise impacts, CB3/EREC claims that Con Edison's model is deficient and that the existing ambient noise level already exceeds New York City standards. CB3/EREC claims that Con Edison modeled the noise from the East River Station as emanating from a point rather than the surface of the building, thus understating the noise impacts at nearby locations. CB3/EREC also notes that, since the noise levels at nearby locations already exceed the New York City standards, Con Edison cannot reduce the proposed project's noise impact to an acceptable level.

Con Edison responds that it will accept as a condition to certification a requirement that it receive the necessary noise control permit from New York City. Thus, if sound attenuation measures beyond those set forth in its application are needed, it will undertake to implement them.

In view of Con Edison's commitment to accept as a condition of certification the obligation to obtain the necessary noise control permit from New York City, concerns about the modeling and accumulated impacts are not material because the development of this issue will not be of decisional consequence. CB3/EREC contends that the alleged faults in Con Edison's model will subvert the City's permitting process, which

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[108] Con Edison and DEC Staff claim that CB3/EREC's proposed presentation is improper as a matter of law, because the relevant inquiry concerns only PM_{10} and precludes a separate examination of $PM_{2.5}$ effects. However, the legal significance of a $PM_{2.5}$ analysis may evolve on the basis of other administrative and judicial decisions while this case is pending. Moreover, CB3/EREC claims that its proposed filing would not logically require rejection of a PM_{10} criterion. Therefore, while the respective applicability of $PM_{2.5}$ and PM_{10} criteria may depend on additional legal argument during this proceeding, the PM_{10} criterion should not preclude CB3/EREC from presenting its case insofar as PSL §168(2)(b) and (c)(ii) require consideration of impacts on public health.

is said to rely on the same model. However, we do not believe the Siting Board may dispute the scientific validity of a City permit. Consequently, we will not accept CB3/EREC's proposal on noise impacts as an issue to be adjudicated.

Regarding alternate sites, CB3/EREC proposes examining the Kips Bay site (one of four properties intended to be sold at the Waterside site), which was not evaluated in Con Edison's application. According to the company, because it has contracted to sell the Kips Bay property, that location should not be considered an available alternate site. We disagree with Con Edison; as long as the company retains title to the site, it remains available and therefore should be considered as a possible alternative. Thus, we will allow CB3/EREC to develop this issue on the record.

In addition, CB3/EREC proposes that the 74th Street Station be examined as a potential site. Con Edison would dismiss consideration of this site because, it maintains, the turbines are so large that they cannot be transported over the streets to the plant. While access to the 74th Street Station is an important factor to consider, it should not preclude examination of this site as an alternative, especially if a smaller generating unit is available for installation.

Next, CB3/EREC proposes to present evidence on the effects of burning more natural gas in steam boilers that already exist and thus are not part of the proposed new steam and electrical generating facilities at the East River site. CB3/EREC argues that it should be allowed to address this issue because Con Edison has offered to burn natural gas in the existing steam facilities to improve air quality at the site.

Con Edison reasons that only those facilities that constitute the East River Repowering Project, i.e., the additional new combustion turbine generators, the heat recovery steam generators and appurtenant facilities, should be examined.

We agree with Con Edison. Under PSL §168(2), the Siting Board may:

> grant or deny the application as filed or . . . certify the facility upon such terms,

> conditions, limitations or modifications of the construction or operation of the facility as the board may deem appropriate. (emphasis supplied)

Even though the existing boilers are proximate to the proposed facility, they are not part of the facility. Thus, issues with respect to their operation are beyond the scope of this proceeding. Those issues include not only the impacts of burning natural gas instead of oil, but also proposed modifications of Stacks No. 3 and No. 4 (which would not serve the new units) and gas main configurations to transport more gas to the existing boilers.

A somewhat different problem is presented by CB3/EREC's request for an opportunity to advocate larger duct burners than Con Edison has proposed for the new units. This likewise is an aspect of CB3/EREC's contention that the East River plant should make greater use of gas than assumed in the filing. In contrast to the choice of fuel for the existing units, which is not an aspect of the "facility" under review, the physical design of the new units is an issue CB3/EREC should be free to raise. We recognize that, to address the issues adequately, CB3/EREC or other opposing parties may find it necessary to introduce, as ancillary matters, facts concerning the existing units. For example, the feasibility of using more gas at the new units may depend on how the existing units are operated, or vice versa.[109]

Finally, CB3/EREC identified only air quality as the impact to be considered in an environmental justice review, but it seeks to submit evidence that it claims could support the selection of an alternate site or the "no build alternative," as

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[109] Con Edison and DPS Staff assert that CB3/EREC would have the burden of identifying gas supply sources adequate to support its proposal, while CB3/EREC argues that such information is uniquely within Con Edison's possession. These disagreements may call for an interpretation of the Commission's discovery rules and may affect the probative value of CB3/EREC's case concerning the design of the new units, but should not preclude CB3/EREC from raising the issue.

a matter of environmental justice. Given that CB3/EREC's proposed environmental justice issues relate only to air quality impacts, they may be pursued in the PSD process, and environmental and social costs may be examined pursuant to 6 NYCRR 231-2.4(a)(2)(ii), as explained above.

MOTION FOR ACTIVE PARTY STATUS

We will grant a motion by the Owners Committee on Electric Rates (OCER) to intervene as an active party.[110] The motion is opposed by East Midtown Coalition for Sensible Development (EMCSD)[111] and CB3/EREC.[112] Until now, OCER has been participating provisionally, subject to our disposition of the motion.[113]

Parties' Arguments

OCER describes itself as "an organization that [represents] the energy interests of large commercial real estate owners and managers," whose members assertedly account for over 25% of peak electric load within New York City and over 25% of Con Edison's in-City steam sales. The motion chronicles OCER's long-time participation in Public Service Commission (Commission) proceedings concerning such matters, and notes that

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110 Letter to Examiner Moynihan dated January 18, 2001.

111 Letter to Examiner Epstein dated January 25, 2001.

112 Letter to Examiners Moynihan, Epstein, and O'Connell dated January 31, 2001.

113 Another motion similar to OCER's remains pending, in which the General Contractors Association of New York, Inc. (GCA) seeks leave to intervene. (Two letters to Examiner O'Connell dated February 1, 2001.) GCA will be added to the active parties list provisionally, subject to objections. Arguments against GCA's intervention will be considered to the extent they are consistent with the conclusions in today's ruling. However, the time allowed under 16 NYCRR 3.6(d)(1) for responding to GCA's motion will not begin to run until GCA has served the motion on all parties, as directed by E-mail to GCA on February 14, 2001. If the motion is not served within five days after issuance of today's ruling, we shall deny it. In addition, an intervention motion from KeySpan Energy Delivery New York is pending, but the time for replies has not yet run.

no other party in this case represents the interests of large commercial utility customers exclusively. OCER proposes to pursue two interests as an intervenor. First, OCER says Con Edison's proposal is essential for maintaining adequate electric generating capacity and thereby maintaining adequate electric reliability and economic growth, in contrast to problems currently prevailing in California. OCER describes California's experience as a symptom of "the same 'not in my back yard' attitudes" that it imputes to the project's opponents in this case. Second, OCER argues that rejection of this project would undermine the economic assumptions on which the Commission based its recent Con Edison steam rate determinations,[114] and thus would impair the prospects of reliable steam service. OCER says this in turn would increase steam customers' incentive to convert to electricity, aggravating the existing burdens on the electric system. Finally, presumably in an allusion to the Commission's rules in 16 NYCRR 4.3(c)(2), OCER agrees to accept the record as developed to date.

We have summarized EMCSD's and CB3/EREC's interests previously.[115] In opposition to the motion, EMCSD objects to OCER's assertion that the opponents seek to exclude the project from their neighborhood, observing that the steam plant at issue already is sited there and is expected to remain so. As to steam service reliability, EMCSD denies that it is a legitimate issue in this case. In EMCSD's view, any steam reliability concerns should have been considered before the Commission invited Con Edison to pursue a plan based on a shift of steam production capacity from the Waterside plant to the East River plant. EMCSD says that if OCER is allowed to intervene for the purposes it has cited, then in fairness we also must allow intervention by Communities United for Responsible Energy (CURE), which EMCSD describes as "an umbrella group of civic and

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[114] Case 99-S-1621, Consolidated Edison Company of N.Y., Inc. - Steam Rates, Opinion No. 00-15 (issued December 1, 2000).

[115] Case 99-F-1314, Ruling Awarding Funds (issued September 1, 2000).

neighborhood organizations" that would present arguments contrary to OCER's.

CB3/EREC raises the same points as EMCSD's. It says CURE would seek to show "that the need for more power is exaggerated and the siting procedures faulty." Additionally, CB3/EREC notes that OCER has not explained its failure to seek active party status within 45 days of the application's June 1, 2000 filing date, as required by various subdivisions of PSL §166(1). CB3/EREC says it would suffer unfair prejudice should we open the proceeding to the issues OCER wants to present, because CB3/EREC already has allocated its limited time and funds to other, assertedly more salient issues that CB3/EREC deemed implicit in the project application as filed.[116]

Discussion and Conclusions

The threshold issue is the timing of OCER's motion. We have authorized active party status for many other persons that missed the 45-day deadline in PSL §166(1). Our rationale, which we previously had no occasion to state explicitly, was that we did not regard those late interventions as a threat to the fair and orderly conduct of the proceeding and we heard no argument to the contrary. This instance obviously is different, because the intervention is opposed and because the opponents assert that OCER's proposed issues should not become the focus of other parties' attention this late in the proceeding. The question then is whether late intervention is permissible under PSL §166 and the Commission's rules as incorporated by reference in the rules of the Siting Board.[117]

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[116] In response to a February 2, 2001 telephone inquiry from OCER counsel Scott Petersen, Esq., Examiner Epstein advised him that, in accordance with 16 NYCRR 3.6(d)(3), OCER could not reply to the EMCSD and CB3/EREC answers unless so directed by the Examiners. At the Issues conference, OCER expressed only its interest in pursuing electric and steam reliability issues, and an expectation that it would join in stipulations among Con Edison and the participating government agencies (2/23/01 Tr., pp. 264-65, 267-68).

[117] 16 NYCRR 1000.1.

PSL §166(4) allows waiver of the 45-day deadline for good cause, if the proposed intervenor fits within the categories listed in PSL §166(1). OCER appears to qualify under subdivision (j) of that subsection, as a non-profit entity formed to "promote consumer interests" or "represent commercial and industrial groups."[118] OCER's long record of competent participation in this type of proceeding, and its representation of customer classes not otherwise specifically represented among the current parties, provide the requisite "good cause" to support a waiver of PSL §166(1)(j) 45-day deadline pursuant to PSL §166(4).[119]

We thus reach the question whether OCER's intervention is precluded by other applicable regulations. The Commission's rules provide that intervention shall be allowed if it "is likely to contribute to the development of a complete record or is otherwise fair and in the public interest" (16 NYCRR 4.3(c)(1)),[120] but may be denied if it is sought "after a hearing

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[118] We therefore need not determine whether OCER could be allowed to participate as an exercise of the Siting Board's discretion under §166(1)(m), which states no deadline for intervention.

[119] We recognize that in a steam rate settlement proposal executed by OCER and other parties, whose terms the Commission adopted as its decision (Opinion No. 00-15, supra,) OCER agreed (in Paragraph 10) "to reasonably support [Con Edison's] efforts to gain expeditious and other regulatory approvals" for the East River Project. However, such agreement does not obligate us to waive otherwise applicable procedural deadlines.

[120] Similarly, under the DEC's rules, amicus status may be granted if the person "has identified a legal or policy issue [that] needs to be resolved" and "has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue" (6 NYCRR 624.5(d)(2)(ii) and (iii)).

has commenced" and we determine that it "would be unfairly prejudicial to other parties" (16 NYCRR 4.3(c)(2)).[121]

We consider the 16 NYCRR 4.3(c)(1) public interest standard to be satisfied in this instance if OCER's intervention would be consistent with a fair, orderly process that would generate a legally sufficient record basis for the Siting Board's decision. The next step therefore is to apply the criteria of fairness under §4.3(c)(1) or unfair prejudice under §4.3(c)(2). Although EMCSD and CB3/EREC argue that they will have had no time to prepare a case in opposition to OCER's arguments, and that other intervenors might have sought to participate had they anticipated OCER's intervention, in fact there never has been a valid expectation that all parties supporting the Applicant's proposal would file their direct cases early enough to be addressed responsively in the opponents' direct cases. Furthermore, OCER did not raise any issues at the Issues Conference.

The scope of the issues has been established in earlier sections of this ruling and we do not expect to add issues during the proceeding. Thus, there is no unfair prejudice in granting OCER party status and in compelling OCER to follow the same schedule as the other non-applicant parties, from this point forward in its quest to contribute to the record as contemplated in the portions of 16 NYCRR 4.3(c)(1) quoted

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[121] Under the DEC's rules, full party status may be granted on a showing that, inter alia, the person "has raised a substantive and significant issue" or "can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party," and has an "adequate environmental interest" (6 NYCRR 624.5(d)(1)(ii) and (iii)). At the Issues conference, we stated that the §624.5(d)(1) "substantive and significant" standard would be a criterion for determining the legitimacy of an issue under PSL §168 (2/23/01 Tr., p. 180). In retrospect, however, that premise appears to have been unnecessary for determining the scope of issues under §168 in this instance, and we therefore need not examine whether the §624.5(d)(1) standard is coextensive with all standards of admissibility that may be appropriate in an Article X proceeding.

above. For the reasons stated, the objections to OCER's intervention provide no sufficient reason to deny the motion.

(SIGNED) WALTER T. MOYNIHAN

(SIGNED) RAFAEL A. EPSTEIN

(SIGNED) DANIEL P. O'CONNELL