NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of Albany on June 21, 2001

BOARD MEMBERS PRESENT:

Maureen O. Helmer, Chairman
New York State Public Service Commission

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

Roger McDonough, Alternate for
Charles A. Gargano, Commissioner
Empire State Development

Erin M. Crotty, Commissioner
New York State Department of Environmental Conservation

Peter R. Smith, Alternate for
Timothy S. Carey, Acting Chairman
New York State Energy Research Development Authority

Andrew Reicher, Ad Hoc Member, dissenting in part

James White, Ad Hoc Member

Case 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.

ORDER CONCERNING INTERLOCUTORY APPEALS

(Issued and Effective June 22, 2001)

BY THE BOARD:

I. BACKGROUND AND INTRODUCTION

A. The Application

On June 1, 2000, Consolidated Edison Company of New York, Inc. (Con Edison, Applicant) filed an application for a Certificate of Environmental Compatibility and Public Need pursuant to Article X of the Public Service Law (PSL). Con Edison seeks to construct and operate two General Electric dual fuel combustion turbine generators (CTGs) and two heat recovery steam generators (HRSGs) with a nominal electric generating capacity of 360 megawatts (MW), and an estimated three million pounds per hour of steam for Con Edison's steam system. The site of the proposed facility is the Applicant's East River Complex,[1] which is located in Manhattan between East 13th and East 15th Streets from FDR Drive to Avenue C.

On July 31, 2000, Maureen O. Helmer, Chairman of the New York State Board on Electric Generation Siting and the Environment (Siting Board, Board), informed Con Edison under PSL §165(1) that the application generally complied with the requirements of PSL §164(1). Chairman Helmer directed the Applicant to submit additional information, however, relating to four specific topics, and fixed August 22, 2000 as the date for the commencement of public hearings.

On August 22, 2000 and October 5, 2000, public statement hearings were held before Presiding Examiners Walter T. Moynihan and Rafael Epstein (of the Department of Public

[1] At present, the East River Complex consists of electric switchyards, a fuel oil storage system, the East River Generating Station (where the two proposed combustion turbine/steam generator units would be located) and the South Steam Station, (which consists of a series of boilers that produce steam for Con Edison's steam distribution system).

Service (DPS)) and Associate Examiner Daniel P. O'Connell (of the Department of Environmental Conservation(DEC)).

On December 15, 2000, DEC solicited public comments on a draft water discharge permit for Applicant's proposed facility under the State Pollutant Discharge Elimination System (SPDES) program. On December 21, 2000, DEC sought public comment on draft air emission permits[2] addressing the proposed emissions of criteria air pollutants, including nitrogen oxides, carbon monoxide, and particulate matter of 10 microns or less in diameter (PM10).[3] On the same day, the Examiners established a joint procedural schedule, setting April 16, 2001 as the date for evidentiary hearings to begin and June 1, 2001 as the date for the completion of briefing.[4]

On January 24, 2001, the DPS and DEC Examiners jointly held a legislative hearing on the permits and a public statement hearing on the Article X application. On February 23, 2001, the

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[2] 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), which prevents backsliding in areas that comply with air quality standards in the Clean Air Act, and (2) New Source Review (NSR) in non-attainment areas, which ensures that new sources of pollution do not impede New York's program to bring areas that have not achieved air quality standards into attainment.

[3] A micron, or micrometer, is a unit of measurement equal to one millionth of a meter and is abbreviated by the letter μ.

[4] Ruling Establishing Procedural Schedule (December 21, 2000).

Examiners convened a joint pre-hearing and issues conference.[5] Associate Examiner O'Connell heard the parties' requests for full party status on the permits as well as proposed issues for adjudication with regards to the pending permit applications, as required by 6 NYCRR Parts 621 and 624. Presiding Examiners Moynihan and Epstein heard the parties' proposed issues for decision by the Siting Board, covering the full range of potential environmental impacts, including air emissions, noise, alternative sites and plant technology.

B. The Issues Ruling

On March 15, 2001, the DEC and DPS Examiners made a joint Issues Ruling and Procedural Ruling.[6] With respect to air emissions, Associate Examiner O'Connell ruled that environmental justice issues pertaining to air emissions were not issues for adjudication on the PSD permit, although they could be raised to the EPA on an appeal from that permit and social and economic cost issues would be adjudicated on the NSR permit.[7] The Associate Examiner ruled that airborne particulate matter less than 2.5 microns in diameter (PM2.5) was not a substantive and significant issue requiring an adjudicatory hearing on the draft air emissions permit.[8] In the same order, the DPS Examiners ruled that, for purposes of the Article X certificate, Manhattan Community Board 3 and the East River Environmental Coalition

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[5] Pursuant to PSL §165(2), the Presiding Examiner must issue an order identifying the issues to be addressed at the PSL Article X hearing. Similarly, DEC regulations require the DEC Associate Examiner to rule on requests for party status and amicus status, and to determine what issues, if any, should be adjudicated on the air emission permit application. 6 NYCRR §§624.4(b)(5), (c).

[6] Issues Ruling and Procedural Ruling (March 15, 2001)(Ruling).

[7] Ruling, at 36-37.

[8] Ruling, at 11-15.

(CB3/EREC) should be allowed to present evidence on the human health impacts of PM2.5.[9]

The Examiners ruled jointly on the parties' requests to submit evidence on other issues. They ruled that evidence on the noise impacts of the East River facility should not be heard in light of Con Edison's commitment to obtain a New York City noise control permit.[10] Regarding alternative sites, the DPS Examiners ruled that CB3/EREC should be allowed to submit testimony on two properties owned by Con Edison, the Kips Bay site (one of four properties Con Edison intends to sells at the Waterside site), and the 74th Street Station (which Con Edison had argued could not be reached over the public streets due to the size of the turbines).[11]

The Examiners also determined that CB3/EREC should not be able to submit evidence on the effects of burning more natural gas in steam boilers that are not part of the proposed East River Repowering Project. They determined that the existing boilers, although proximate to the proposed facility, are not part of the facility, and therefore, issues with respect to their operation are beyond the scope of the Article X application.[12] Regarding the new generating units that are part of the facility, the Examiners ruled that CB3/EREC should be allowed to present alternative technologies, such as larger duct burners for making greater use of natural gas than assumed in the application.[13] Finally, with respect to the proposal to conduct further environmental justice review, the Examiners

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[9] Ruling, at 11-15 and 40-41.

[10] Ruling, at 41-42.

[11] Ruling, at 42.

[12] Ruling, at 42-43.

[13] Ruling, at 43.

noted that, as CB3/EREC identified only air quality as the impact to be considered, CB3/EREC may pursue environmental justice issues before the EPA on the PSD permit, and could present evidence on environmental and social costs at the hearing on the NSR permit.[14]

Subsequently, four interlocutory appeals were timely filed. In three of the appeals, DEC Staff, DPS Staff and Con Edison ask the Board to reverse the decision of the DPS Examiners that intervenors may offer evidence on PM2.5, relative to the Article X certificate when it is not an issue for hearing on the DEC air emission permit. Con Edison also appeals from the Examiners' decision to allow intervenors to submit evidence on alternative sites. In the fourth appeal, CB3/EREC asks the Board to reverse the decision of the Examiners to exclude evidence on: (1) noise impacts of the proposed facility, (2) modification to emission stacks and boilers owned by Con Edison that are not part of the facility, and (3) environmental justice issues that are related to air emission impacts.

C. The Issues Reconsideration Ruling

SEF Industries, Inc. (SEF), in its Motion to Intervene dated June 14, 2000, identified several issues it sought to raise in the proceeding relating to the use of natural gas to fuel the proposed facility, including the circumstances and conditions under which natural gas would be provided, the effects on the Applicant's natural gas and steam customers, and the air emission impacts of using oil as an alternative fuel. SEF did not attend the February 23, 2001 issues conference, and, accordingly, none of these issues were included in the Examiners' March 15, 2001 Issues Ruling and Procedural Ruling. On March 20, 2001, SEF filed a pleading seeking reconsideration

[14] Ruling, at 43.

of the Issues Ruling insofar as it did not specify that certain fuel supply issues would be adjudicable.

In their March 26, 2001, Ruling on Schedule, Party Status, and Procedures, the Examiners noted that the motion did not directly call into question the Issues Ruling's identification of air permit issues, a matter which could be reviewed only in an appeal to the DEC Commissioner. Accordingly, they determined that they would consider the motion, on behalf of the Siting Board only, following replies and, potentially, the filing of testimony by SEF.

Letters concerning this motion were filed by Con Edison in opposition (March 26, 2001) and, in response to Con Edison, by SEF (March 27, 2001). SEF prefiled direct testimony on March 27, 2001. Subsequently, the Examiners ruled on SEF's March 20, 2001 motion in their Ruling on Party Status, Issues Reconsideration, and Discovery, dated April 6, 2001.

The Examiners ruled, first, that SEF's failure to appear at the prehearing conference did not preclude them from considering SEF's motion. The Examiners then found that SEF had raised issues that could be considered relevant and material (PSL §167(1)(a)), but nonetheless declined to permit litigation of the issues in this proceeding as they involved decisions regarding matters over which primary jurisdiction rests with other agencies. The Examiners found no need to consider whether: (1) natural gas would be available to Con Edison on a non-interruptible basis, for that is an issue for the State Energy Planning Board; and (2) if Con Edison were unable to comply with air emission permits because it could not operate the facility with natural gas as the exclusive fuel, its remedy would be to petition DEC for a modification of the permits. Similarly, the Examiners determined that they are entitled to rely on findings by the Public Service Commission (PSC) as to the scope and costs of gas distribution facilities to be

constructed for the project, and as to the competitive impact on Con Edison's and other producers' activities in the energy market.[15]

SEF asks the Board to reverse the April 6, 2001 Ruling and direct that the following issues are adjudicable: (1) whether the applicant's proposal to exclusively fuel the operation of the project with natural gas is practical, feasible, and advisable; (2) whether the applicant has accurately identified the environmental impacts likely to result from the project; and (3) whether alternative fuel supply arrangements should be evaluated by the Siting Board. In response, Con Edison argues that the Examiners' ruling excluding SEF's issues should be upheld and that, in any event, SEF should be held to have waived its right to have its issues considered when it did not attend the issues conference to present them in accordance with established procedures.

II. THE APPEALS

The appeals are considered in turn. For the reasons stated below, the ruling of the DPS Examiners that intervenors may offer evidence on PM2.5 is reversed. The joint ruling of the Examiners that intervenors may offer evidence on certain alternate sites owned by Con Edison is affirmed. The ruling of the Examiners that intervenors may not litigate alleged noise impacts of the proposed generating facility is affirmed. The ruling of the Examiners to exclude evidence on modification to emission stacks and boilers that are not part of the proposed generating plant and on environmental justice issues is affirmed. The ruling of the Examiners that failure to appear at an issues conference does not absolutely bar a party from having its issues considered is affirmed. The rulings of the Examiners that the scope of this proceeding does not include: (a) the

[15] Issues Ruling, pp. 6-7.

impacts of alternative fuels on air quality, and (b) the use of natural gas to fire the proposed East River facility are affirmed.

Following the filing of these appeals, hearings were held beginning April 18, 2001. Initial briefs have been submitted by the parties, dated May 25, 2001, and reply briefs have been submitted, dated June 4, 2001.

A. The DPS/DEC/Con Edison Appeal on PM2.5

At the joint DPS/DEC issues conference, CB3/EREC argued that the impacts of airborne particulate matter required adjudication in the DEC proceedings on the air emission permits and in the Siting Board hearings on the Article X certificate. The draft PSD permit issued by DEC addressed airborne particulate matter less than 10 microns in diameter (PM10), for which the DEC had implemented air quality standards promulgated by the federal EPA.[16] CB3/EREC argued that the smaller fraction of PM10, namely, particulate matter of 2.5 microns in diameter or less, has distinct and severe adverse health impacts, and proposed the impacts of the plant's emissions of PM2.5 on air quality as an issue for adjudication.[17]

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[16] At certain ambient air concentrations, PM10 has been shown to cause adverse human health effects, including respiratory distress and cardiological problems, resulting in increased mortality. The EPA's current National Ambient Air Quality Standard (NAAQS) for PM10 is 150 μg per cubic meter and the annual average limit is 50 μg per cubic meter. 40 C.F.R. §50.6.

[17] CB3/EREC's position was supported by Hon. Margarita López, Member of the Council of the City of New York, Hon. Carolyn B. Maloney, Member of the United States House of Representatives, Hon. Steven Sanders, Member of the New York State Assembly, Hon. Deborah Glick, Member of the New York State Assembly, and Hon. Rosaura Mendez, Democratic District Leader of the 63rd Assembly District, Part B.

The DEC ALJ determined that there is no dispute that there are potential adverse human health impacts associated with exposure to particulate matter, in general, and to PM2.5 in particular. Nevertheless, the DEC ALJ ruled that no standard for ambient air concentrations of PM2.5 had been implemented by EPA and DEC, and stated that "[t]he purpose of the instant proceeding . . . is not to promulgate that standard, but to determine whether the proposal is consistent with established standards."[18]

The DEC ALJ also noted that several steps had to be taken before a PM2.5 standard could be implemented: (1) three years of monitoring data must be collected, of which only two years had been obtained; (2) the EPA must designate attainment and non-attainment areas for PM2.5 across the country based on the monitoring data; and (3) thereafter, the DEC would promulgate and obtain EPA approval of a state implementation plan (SIP) for PM2.5 for New York State.[19]

Regarding the Article X hearings, the DPS ALJs ruled that the potential for PM2.5 impacts was an issue on which CB3/EREC should be allowed to present testimony relative to whether the Siting Board should grant a certificate. The DPS ALJs rejected Con Edison's and Staff's criticisms of CB3/EREC's study methodology, holding that PSL §168(2)(b) authorized the Board to determine the probable environmental and health impacts of a power plant proposal. They also rejected arguments that as there is no PM2.5 standard nor any implementation of that standard, PM10 is the applicable standard for evaluating the

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[18] Ruling, at 14.

[19] Ruling, at 15. In an Interim Decision (June 1, 2001) in Case No. 2-6206-00012/000021 and SPDES No. NY 0005126, Matter of Consolidated Edison Company of New York, Inc., DEC Commissioner Erin Crotty resolved appeals from the DEC ALJ's rulings.

health impacts of airborne particulates, including PM2.5. The DPS ALJs stated that

> the legal significance of a PM2.5 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 PM10 criterion. Therefore, while the respective applicability of PM2.5 and PM10 criteria may depend on additional legal argument during this proceeding, the PM10 criterion should not preclude CB3/EREC from presenting its case insofar as PSL §168(2)(b) and (c)(ii)require consideration of impacts on pubic health.[20]

Con Edison, DPS Staff and DEC Staff appeal, arguing that the DPS ALJs erred in designating PM2.5 as an issue for adjudication by the Siting Board. They argue that because an ambient air quality standard for PM2.5 has not been promulgated, and because implementation of such a standard by EPA and DEC will take years, there is no foundation for the Board to determine the health impacts of PM2.5 emissions. Con Edison also argues that because DEC, the expert environmental agency that has been granted permitting authority by the federal Environmental Protection Agency, has decided that PM2.5 is not a substantive and significant issue for hearing on the air emission permit, the Siting Board should defer to the DEC's decision. DEC Staff further argues that air quality and public health would be protected in any event because PM10 is a surrogate standard for particulate matter that includes the smaller fraction of PM2.5 particulates, and DEC had already determined that the proposed facility would meet the PM10 standard. In response, CB3/EREC argues that it has already put testimony into the record on estimated PM2.5 emissions from the

[20] Ruling, at 41 n. 108.

facility and that the Board must make an independent determination whether a power plant will adversely affect public health.

Discussion

In deciding what evidence should be taken on issues before the Siting Board,[21] it is helpful first to review the framework of Article X and the relationship between the Siting Board and the DEC. Article X of the Public Service Law provides for a comprehensive review of issues pertaining to the siting of major electric generating facilities,[22] and vests the Board on Electric Generation Siting and the Environment (the Board) with authority to grant or deny applications for certificates of environmental compatibility and public need for such facilities.[23] Following a required public involvement process and a formal pre-application environmental study and stipulation process, a developer files an application for a certificate with the Siting Board.[24] Under PSL §165(1), the Chairman then determines whether the application contains all of the information called for in PSL §164(1). If so, the Chairman sets a date for the commencement of public hearings.

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[21] CB3/EREC's claim that its prefiled testimony on PM2.5 is already part of the record in this case is incorrect. Testimony on issues contested in this interlocutory appeal was received by the Examiners as a matter of administrative convenience pending the outcome of the interlocutory appeals. See Case 99-F-1314, Ruling on Schedule, Party Status and Procedures (March 26,2001). The proffered testimony is not part of the record until it is accepted by the Examiners at the evidentiary hearing. 16 NYCRR §4.5(b)(2).

[22] A major electric generating facility is defined as a facility having a generating capacity of 80,000 kW (80 MW) or more. PSL §160(2).

[23] PSL §162.

[24] PSL §163; 16 NYCRR §§1000.3, 1000.4.

Simultaneously, the applicant must seek required air emission and water discharge permits from the DEC. Pursuant to a 1999 amendment to Article X and the Environmental Conservation Law (ECL), and pursuant to authority granted by the federal Environmental Protection Agency (EPA) under the federal Clean Water Act and Clean Air Act, the DEC determines whether air emission and water discharge permits should be issued to power plant developers subject to PSL Article X.[25] The Board cannot issue a certificate unless it first finds that the proposed facility will not violate applicable Department of Environmental Conservation regulations and water and air quality standards.[26] The DEC permits, therefore, are a prerequisite to certification.

The Siting Board must also find, as a prerequisite to issuing a certificate, that the proposed facility will minimize adverse environmental impacts (PSL §168(2)(c)(i)) and will be compatible with public health and safety (PSL §168(2)(c)(ii)). The DEC permits ensure that impacts to air and water quality are minimized and are compatible with public health and safety, including imposition of appropriate control technologies and permit conditions. Consequently, the Board must accept the specific findings and conclusions of the DEC Commissioner relating to the air emission and water discharge permits issued pursuant to federal delegation. In considering environmental issues that are subsumed by DEC's air and water permits, the Board must incorporate the DEC's resolution of these questions. After adding reasonable mitigation measures relating to other (non-DEC) matters and assuring that overall environmental impacts have been minimized, the Board then balances a proposed project's benefits against adverse environmental impacts, and

[25] 1999 N.Y. Laws c. 636, §§ 6-15; PSL §172(1); ECL §§ 17-0701(8),17-0823, 19-0305(2)(j).

[26] PSL §168(2)(c)(iii)-(iv).

determines whether construction and operation would be in the public interest.[27]

The DEC is the expert agency with the responsibility to issue permits relating to air emissions. Inasmuch as the DEC has determined that PM2.5 is not a substantive and significant issue for purposes of deciding whether to grant air emission permits, the Board is not in the position to sit in review of DEC's decision. Our responsibilities do not include consideration of issues addressed in the DEC permitting process. We may consider the issuance of permits by DEC as a basis for making the findings we are required to make under PSL §168.[28]

Were it otherwise, we still would have no basis for considering PM2.5 in this proceeding. Preliminary monitoring data on PM2.5 emissions continues to be collected by DEC, after which the EPA will designate areas of the country that are in attainment and non-attainment for PM2.5. Only then will the DEC promulgate and submit for EPA approval a state implementation plan to bring any areas of New York that are in non-attainment

[27] See PSL §168(e); Case 97-F-1563, Application by Athens Generating Company, L.P. for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,080 Megawatt Natural Gas-fired Combined Cycle Combustion Turbine Generating Facility, in the Town of Athens, Greene County, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (June 15, 2000), at 12, confirmed by Matter of Citizens for the Hudson Valley v. New York State Bd. on Electric Generation Siting and the Environment, Appellate Division, Third Department Index No. 87928, slip. op. (April 12, 2001).

[28] Likewise, if DEC were to conclude in the future that the air emission permitting process included the PM2.5 question, the Board could not reverse DEC's position.

into attainment for PM2.5.[29] Hence, the Commissioner of the Department of Environmental Conservation has ruled that PM2.5 should not be considered in evaluating environmental impacts until the EPA promulgates and implements a public health and welfare standard for PM2.5 emissions.[30] Finally, the courts have held that it is premature to isolate PM2.5 emissions in evaluating projects' potential environmental impacts under SEQRA.[31] In short, there is no basis for the Siting Board to second guess the DEC's determination that it is premature to judge the potential public health effects of PM2.5 separately from PM10.[32]

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[29] Because a standard for PM2.5 will not be implemented in New York State for at least several years, the DPS Examiners were not correct that the legal significance of a PM2.5 analysis may evolve on the basis of other administrative and judicial decisions while this case is pending. Ruling, at 41 n. 108.

[30] DEC Project No. 2-6007-00251/0001, Matter of American Marine Rail, LLC, Interim Decision (February 14, 2001) (Potential PM2.5 emissions of solid waste transfer station not an issue for adjudication due to lack of federal standard and federal and state implementation).

[31] Matter of Uprose v. New York Power Authority, slip op., Index No. 4704-01 (Supreme Court, Kings County, April 6, 2001) (confirming determination of New York Power Authority that PM2.5 need not be considered); Matter of Spitzer v. Farrell, slip op., Index No. 400365/00 (Supreme Court, New York County, October 12, 2000)(confirming determination of New York City Department of Sanitation that PM2.5 emissions need not be considered); Golden v. New York City Department of Sanitation, slip op., Index No. 42723/98 (Kings County June 25, 1999), at 23 (PM2.5 need not be analyzed separately because SEQRA hard look requirement for municipal solid waste project satisfied by analysis of PM10).

[32] CB3/EREC's claim that the Siting Board is disregarding the public health effects of airborne particulate matter is also incorrect; DEC evaluated the public health and environmental impacts of emissions of PM10 from the proposed plant, which includes PM2.5.

B. The Con Edison Appeal on Alternative Sites

At the issues conference, CB3/EREC proposed to present evidence on two alternative sites that were not considered in Con Edison's application. The intervenor sought to show that one of the generating sets should be located either at the Kips Bay site or at the 74th Street site, both of which are owned by Con Edison. Con Edison opposed consideration of either site. It argued that the Kips Bay site was one of four properties that Con Edison intends to sell as part of its transfer of the Waterside site for redevelopment. Con Edison also asserted that the generation turbines are so large that they could not be transported over the streets to the 74th Street site. The Examiners determined that as long as the company retains title to the Kips Bay site, it remains available and therefore CB3/EREC should be allowed to develop it as a possible alternative site on the record.[33] The Examiners also ruled that while access to the site is an important factor to be considered, it should not preclude examination of the site as an alternative.[34]

On appeal, Con Edison argues that the Examiners erred in allowing CB3/EREC to present evidence on alternative sites that were not in the application. Con Edison asserts that the Kips Bay site should not be considered by the Siting Board as a reasonable or available alternative site for the proposed facility because it has entered into a contract for the sale of the parcel. Con Edison also argues that consideration of the Kips Bay site would interfere with its plans to sell the land as part of a proposed redevelopment of the Waterside power plant, and would conflict with PSC orders that approved Con Edison's

[33] Ruling, at 42.

[34] Ruling, at 42.

plan to sell the Kips Bay parcel for redevelopment. In reply, CB3/EREC asserts that, so long as Con Edison retains title, the Kips Bay Site is available to the Company, that the use of the Kips Bay Site for one of the generator sets would not undermine Con Edison's redevelopment plans, and that any economic effects of the use of the Kips Bay Site is an issue for hearing.

Discussion

Public Service Law §168(2)(c) requires the Siting Board to find that a proposed major electric generating facility minimizes adverse environmental impacts "considering the nature and economics of such reasonable alternatives as are required to be examined pursuant to [Section 164(b)]". In turn, Section 164(b) requires the applicant to present "[a] description and evaluation of reasonable alternative locations to the proposed facility" and the Presiding Examiner "shall allow testimony to be received on reasonable and available alternate locations . . . ." PSL §167(4). Unlike a private developer that does not own or control alternate parcels,[35] Con Edison owns real estate in the City of New York that could potentially be suitable for the placement of the facility. At the hearings, the parties were permitted, pending resolution of these appeals, to introduce evidence on alternate locations owned or controlled by Con Edison that the Applicant did not present in the application. This evidence should be admitted into the record.

In essence, Con Edison argues that the Board should be barred from consideration of the Kips Bay site because the

[35] Compare 16 NYCRR § 1001.2(d)(2)(site alternatives may be limited to parcels owned by or under option to, such applicant). In Case 97-F-1563, Order Concerning Interlocutory Appeals (January 28, 1999), at 13-14, the Siting Board held that although private developers are not required to present evidence on alternative sites they do not own or control, the Presiding Examiner could allow intervenors to present alternative sites as a matter of discretion.

company has other plans for redeveloping it and has entered into a contract to do so with PSC approval. Nevertheless, the Waterside redevelopment project, which would include the Kips Bay parcel, is itself the subject of an environmental impact analysis under the State Environmental Quality Review Act (Env. Conserv. Law Art. 8) as a precursor to PSC approval of the transfer of the site under Section 70 of the Public Service Law and rezoning of the parcel by the City of New York.[36] That analysis will include its own consideration of alternative site development plans and locations.[37]

In the meantime, Con Edison continues to hold title to the site, which once housed a steam power plant (retired in 1978). The fact that the site is available for redevelopment shows that it may properly be considered a reasonable and available site in this proceeding. Given that the PSC's decision regarding the transfer of the Kips Bay parcel under Section 70 of the Public Service Law remains pending, receiving testimony on the suitability of that site for a power facility does not conflict with prior PSC's orders authorizing Con Edison to enter into contracts to sell the land for redevelopment.[38] It may be, as Con Edison states, that the Kips Bay parcel is unsuitable for the siting of a power facility as compared to siting the facility at the current East River power plant, and

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[36] See Agreement Between Consolidated Edison Company of New York, Inc. and FSM East River Associates, LLC (November 15, 2000), filed in PSC Case No. 01-E-0377 (March 21, 2001), Article 6, Rezoning and PSC Processes; Related Matters.

[37] Env. Conserv. L. § 8-0109(2)(d); 6 NYCRR § 617.9(b)(5)(v).

[38] See Case 96-S-1065, et al., Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Steam Service, Order (issued September 28, 1998); id., Order Concerning Phase II Steam Plan Report (issued December 2, 1999).

that the land would be better included, for environmental and economic reasons, as part of the multi-use redevelopment project contemplated by the Waterside project. The presence of this testimony in the record does not prejudice Con Edison. Con Edison is free to argue in brief what conclusions should be drawn from such testimony.

The bulk of Con Edison's appeal focuses on the Kips Bay site. Con Edison argues, however, that consideration of the steam facility at either the Kips Bay or 74th Street sites could endanger the time frame for the Waterside redevelopment project. Again, it is for Con Edison's briefs to address why the Kips Bay and 74th Street sites are, in its view, unsuitable alternatives to its proposed East River site. Finally, Con Edison further argues that evidence submitted by the intervenors should not be allowed into evidence as to the suitability of placing part of the facility at the 74th Street site to mitigate potential PM2.5 impacts. We agree. Given our determination that PM2.5 is not an issue for adjudication by the Board, the testimony on alternative sites should be admitted to the extent that it addresses potential adverse environmental impacts that are within the Board's purview.[39]

C. The CB3/EREC Appeal

1. Noise

At the issues conference, CB3/EREC argued that they should be permitted to present evidence to the Siting Board on noise impacts of Con Edison's reconstructed East River facility. CB3/EREC claimed that Con Edison failed to properly model noise impacts and, because noise levels near the site already exceed

[39] While this appeal has been pending, hearings were held in this proceeding, and issues regarding alternative sites were adjudicated. Assuming that no evidence that should have been allowed was withheld, pending appeal, the Examiners are free to proceed on the basis of the record as developed.

New York City standards, Con Edison cannot reduce the proposed project's noise impact to an acceptable level. Con Edison responded that it will accept as a condition on its certificate a requirement that it receive a necessary noise control permit from New York City and undertake any needed sound attenuation measures.

The Examiners rejected CB3/EREC's arguments, ruling that noise modeling and impact data will not be of decisional consequence in view of Con Edison's commitment to obtain a noise control permit from New York City and because "they do not believe that the Siting Board may dispute the scientific validity of a City permit."[40]

On appeal, CB3/EREC argues that the Examiners erred in ruling that evidence on the potential noise impacts of the East River facility should not be received. The intervenor asserts that the Board must make its own affirmative finding that the East River facility will comply with the noise levels prescribed by the New York City ordinance. To that end, CB3/EREC seeks to introduce evidence on transformer noise from the plant, and on noise projection from the south wall of the power plant building, as well as to cross examine Con Edison's witness. Con Edison responds that evidence on noise impacts is not decisional because it provided an adequate noise assessment in its application, has committed to meeting the New York City noise standards, and will demonstrate its compliance by making a post-certification compliance filing or by undertaking additional measures required by the Siting Board. DPS Staff replies that noise is not an issue because the application explains that the project will be constructed and operated in accordance with the most stringent noise guidelines, and that CB3/EREC is incorrect

[40] Ruling, at 41.

on transformer noise impacts and noise emanating from the south wall of the building.

Discussion

The Examiners are incorrect that Con Edison will obtain a noise control permit from the City of New York because the City does not issue noise control permits.[41] Con Edison's commitment to obtain such a permit, therefore, does not resolve the potential noise impacts of the proposed East River facility. The City of New York has, however, promulgated local noise control standards in its regulations.[42] Con Edison argues that it will abide by a certificate condition requiring it to meet these standards, making litigation on noise impacts unnecessary.

We agree. In order to obtain a certificate, Con Edison must maintain facility noise levels within New York City standards, which CB3/EREC agreed are the appropriate standards to avoid adverse noise emanations from the plant (Transcript of Issues Conference, at 249). Should a certificate be granted, Con Edison will, in its compliance filing, have to demonstrate that it will maintain its operations at all times within the New York City standards. Were Con Edison to exceed those standards, it would be in violation of its certificate, subjecting Con Edison to its revocation and penalties.

2. Modifications to Non-Facility Generators

At the conference, CB3/EREC also sought to offer evidence on existing Con Edison boilers and emission stacks that are not part of the new steam and electric generating facilities at the East River Site. Specifically, the intervenor sought to present evidence on how air emissions would be reduced if more natural gas and less oil were burned in Boilers 60 and 70 or if

[41] See N.Y.C. Admin. Code, Title 24, c. 2 Noise Control.

[42] Id.

the associated Stacks 3 and 4 were rebuilt. The Applicant responded 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 related facilities should be examined. The Examiners ruled that the existing Con Edison boilers and stacks are not part of the proposed facility and, therefore, "issues with respect to their operation are beyond the scope of this proceeding."[43]

On appeal, CB3/EREC argues that, because PSL §168(2)(b) requires the Siting Board to examine the cumulative effect of air emissions from existing and new facilities, the Examiners should consider modifications to existing generators that are not part of the proposed project. The intervenor argues that the Siting Board should not limit the definition of "facility" to the new generators Con Edison is proposing but should regard the entire East River plant to be the facility. CB3/EREC states that the Board could condition the certificate on modifications to existing facilities to mitigate cumulative particulate emissions that would be produced by the old and new facilities jointly.[44]

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[43] Ruling, at 43.

[44] In a footnote, CB3/EREC also states [i]n this connection is noteworthy that in settlement discussions regarding this permit, the Department of Public Service proposed that to satisfy the public interest the Applicant be required to widen a public esplanade that passes its unloading dock on the East River (Appeal, at 6 n. 2). Public Service Commission Rule 3.9(d), adopted by the Siting Board as one of its rules of practice, 16 NYCRR § 1000.1, forbids the disclosure of settlement negotiations among parties to Board proceedings and makes them inadmissible. Counsel for CB3/EREC shall refrain from any disclosure of the content of confidential settlement negotiations in the future. The content of the quoted footnote was in no way relied upon by the Board for decisional purposes on these appeals.

DPS Staff replies that although Article X applies to Con Edison's proposal to build 360 megawatts of new generating capacity at the East River Steam Station, it does not apply to the generators in the existing power plant that are not part of the proposed facility. Con Edison responds that, under basic rules of statutory construction and considering the legislative history of Article X, the Siting Board may determine the cumulative air emission impacts of the new and existing facilities in deciding whether to issue a certificate to the proposed facility, but cannot issue certificate conditions that would require Con Edison to modify other generators that are not part of the facility. DEC Staff responds that the combustion of alternative fuels in existing Boilers 60 and 70 was analyzed by Con Edison as part of its application to the DEC for an air emission permit, and that the air quality impacts of the new generators to be vented through stacks 1 and 2 were fully addressed in accord with DEC and EPA requirements, and that the project will not cause air quality violations due to the insignificant levels of emissions from the new generators. Finally, DEC Staff states that the cumulative air emission impacts were analyzed by Con Edison for the New York City Department of Environmental Protection.

Discussion

Section 168(2) states that "[t]he board shall render a decision upon the record either to grant or deny the application as filed or to certify the facility upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the board may deem appropriate." CB3/EREC's proposed modifications to fuel use in Con Edison boilers and on changes to emission stacks that are not part of the proposed facility, therefore, are not of decisional consequence. As amended in 1999, Section 168(2)(b) requires the Board to determine "the cumulative effects of air emissions from existing

facilities and the potential for significant deterioration in local air quality, with particular attention to facilities located in areas designated as severe nonattainment." The fact that the Siting Board could determine that the benefits of a proposed facility are outweighed by adverse impacts and, therefore, deny a certificate, does not change the definition of "facility" or empower the Board to require changes at non-facility generators as a certificate condition.

In any event, as described above in the discussion on intervenor's request to introduce evidence on PM2.5, the DEC has been authorized by the EPA to issue permits for new sources of air emissions in non-attainment areas and to prevent deterioration of local air quality. 6 NYCRR §200.10. Air emission permit applicants must model the potential adverse air quality impacts of new emission sources, including the cumulative impacts of new and existing sources. CB3/EREC has raised alternative technologies and fuel use as a way of reducing cumulative air impacts as a substantive and significant issue for adjudication in its appeal to the DEC Commissioner from the DEC Examiner's issues ruling.[45] Should the DEC deny air emission permits based upon adverse cumulative impacts of a new source on air quality, the Siting Board may deny a certificate based upon the absence of a permit as well as the adverse cumulative impacts determined by DEC. Concomitantly, should the DEC determine that the facility will not have adverse cumulative air impacts, the Board has no basis for second-guessing the DEC. Accordingly, we affirm the Examiners' decision to exclude evidence on modifications to fuel use in Boilers 60 and 70 and on reconfiguration of stacks 3 and 4.

CB3/EREC may present evidence on alternative plant technologies and configurations at the proposed facility to

[45] Ruling, at 21-31.

minimize its overall potential adverse environmental impacts. Nevertheless, given the DEC's primacy on air quality issues, the Examiners should not accept evidence on alternative plant technologies, such as larger duct burners, to minimize potential adverse impacts to air quality, beyond those already required by DEC.[46] CB3/EREC should direct evidence and arguments on such alternative technologies to DEC, the permitting agency, or to the EPA in the process provided for appeals from state PSD permit decisions.

3. Environmental Justice Issues Relating to Air Emissions

In proceedings on the DEC air permit and the certificate, CB3/EREC argued that the environmental justice impact of air emissions from the proposed generating facility is an issue for evidentiary hearings on which both the DEC and the Board should accept evidence. The intervenor argued that by shifting steam production from Con Edison's existing Waterside station and other steam generating facilities on the Upper East Side to the East River power plant, the proposal would shift air emissions from the neighborhoods surrounding the existing steam plants to the neighborhoods surrounding the East River plant. Moreover, CB3/EREC proposed to introduce evidence that the neighborhoods around the East River plants are populated by sensitive subpopulations who may be adversely affected by the emissions, including minority populations in general, and African-Americans and Puerto Ricans in particular, as well as low income residents, children, the elderly, and individuals with respiratory and cardiovascular disease. The Applicant argued that there was no basis for requiring it to conduct an environmental justice analysis, although it had done so.

The DEC Examiner determined that Con Edison's argument that the EPA and DEC do not have the authority to require an

[46] Ruling, at 43.

environmental justice evaluation for individual permit applications was beyond the scope of the proceeding on the air permit.[47] Because Con Edison had already conducted an environmental justice evaluation and a supplement to it, the DEC Examiner assumed that a legal basis existed for requiring it. Nevertheless, the DEC Examiner determined that because New York functions as EPA's agent for purposes of administering the PSD permit program, and no hearing is required on the PSD permit, the administrative review process before EPA was the proper place for CB3/EREC to direct its concerns on the Applicant's environmental justice analysis. Furthermore, the DEC Examiner ruled that, while DEC regulations did not require an environmental justice analysis, the intervenor had raised for hearing on the New Source Review permit the issue of whether the Applicant's analysis was sufficient to make a determination that the benefits of the proposed facility "significantly outweigh the environmental and social costs." 6 NYCRR §231-2.4(a)(2)(ii).[48]

Based on the DEC Examiner's ruling, the DPS Examiners concluded "[g]iven 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)."[49] CB3/EREC appealed to the Siting Board, arguing that environmental justice issues should be adjudicated before the Siting Board. CB3/EREC argues that the environmental justice impacts of the proposed facility's air emissions is an issue for the Siting Board because it must determine the probable

[47] Ruling, at 36.

[48] Ruling, at 37.

[49] Ruling, at 43.

environmental impacts of the plant, including impacts on public health and safety and air and water quality, and must also conclude that environmental impacts have been minimized and that the power plant is in the public interest as compared to alternative locations.

The Applicant, DEC Staff and DPS Staff all oppose CB3/EREC's request to introduce evidence on whether air emissions would have environmental justice impacts. DEC Staff and the Applicant argue that the proper forum for CB3/EREC's issue is the environmental justice complaint procedure before EPA on the PSD permit. DEC Staff also asserts that environmental and social cost issues surrounding air emissions can be raised before DEC at the evidentiary hearing on the new source review permit. Along with DPS Staff, the Applicant also argues that there is no basis for consideration of environmental justice allegations in Public Service Law Article X. Con Edison submits that while environmental and public health issues are germane to the Article X certificate, the intervenor should not be allowed to air its view that adverse public health effects would fall disproportionately on minority and disadvantaged populations. Con Edison also attacks CB3/EREC's proposed study methodology.

Discussion

Article X does not envision the Board examining environmental justice questions per se. It does, however, require the Board to minimize the adverse environmental impacts of a proposed facility (considering the state of available technology as well as "other pertinent considerations"). PSL §168(2)(c)(i). Further, Article X conditions the issuance of certificates on the Board finding that a proposed plant's operation will be compatible with the public health and safety and, considering its environmental impacts, advance "the public interest." PSL §168(2)(e). As a general matter, therefore, the

Board, in areas not subject to DEC permitting, has taken evidence on matters such as: (a) whether a proposed project is compatible with public health and safety; and (b) will result in unwarranted impacts. PSL §168(2)(b), (c).

The Examiners are correct that environmental justice issues relating to the PSD permit should be raised before the EPA under its environmental justice complaint review process in 40 CFR Part 124.

D. The SEF Appeal on Fuel-Related Issues

Little argument is presented on whether SEF should be barred from presenting its issues because it did not attend the issues conference. The Examiners ruled that relevant and material issues raised by SEF could be litigated "if it is demonstrated that . . . the delay does not substantially prejudice other parties" (Issues Reconsideration Ruling, p. 6). In this instance, SEF had explained its issues from the beginning, and had timely filed testimony. This ruling was within the Examiners' discretion, and we see no reason to disturb it. If circumstances require, parties may raise issues subsequent to the issues conference and before the commencement of public hearings so long as there is no prejudice to other parties or to the development of the record before the Examiners. Parties are strongly cautioned, however, to raise their proposed issues as early in the proceeding as possible.

On the merits, SEF argues that natural gas supplies will be inadequate for Con Edison to rely on natural gas as an exclusive fuel, and that the Siting Board must evaluate the environmental impacts of using distillate oil for reasonably estimated periods of time in order to determine the nature of potential environmental impacts and that Con Edison's proposed facility minimizes those impacts (PSL §168(c)(2)). Moreover, SEF asserts, Article X requires a review of reasonable energy supply source alternatives (PSL §§164(1)(b), 168(1),

168(2)(c)(i)) to determine whether the proposal to use natural gas exclusively is preferable and in the public interest. This review, SEF continues, may not properly be delegated by the Board to other agencies. Moreover, SEF argues, nothing in the Energy Law gives the State Energy Planning Board jurisdiction over issues relating to a proposed power plant, or jurisdiction to prohibit Con Edison's proposed non-interruptible use of natural gas. In any event, SEF asserts, the Siting Board has authority in conditioning a certificate to take actions concerning many matters (such as traffic control) where primary responsibility lies with another agency.

In response, Con Edison argues that it would not be sensible from an environmental perspective to review fuel alternatives that involve greater emissions than natural gas, and that, in any event, emissions issues are within the DEC's jurisdiction. Con Edison argues that SEF's true interest, which is assertedly to prevent an unfair competitive disadvantage as a potential competitive wholesale generator, is not adequately addressed in its prefiled testimony. In another Article X proceeding, Con Edison continues, the Presiding Examiner found SEF's motion papers inadequate to demonstrate that its participation "would contribute to the development of a complete record or would otherwise be fair or in the public interest" (Case 99-F-1625, Application of KeySpan Energy, Ruling on Party Status (issued December 12, 2000), p. 2). Finally, Con Edison argues, the Examiners correctly ruled that broad policy questions concerning reliance on gas are within the purview of the State Energy Board, and that the Siting Board must defer to its determinations.

We affirm the Examiners' determination that the scope of this proceeding should not include alternative fuel use at the proposed East River facility. The draft PSD air emission permit is predicated upon natural gas being the primary fuel for

the facility, with distillate oil being used only during testing and on an emergency basis. Draft PSC Permit, Permit No. 2-6206-00012/00012 (submitted June 6, 2001, Condition No. 115, Item 115.1 (authorizing use of natural gas with low sulfur distillate oil during an emergency and up to 16 hours per year)). SEF essentially seeks to relitigate the air emission impacts of the proposed facility. Again, the DEC reviews the subject air emissions in its permitting process, and our Article X findings appropriately rely on the DEC Commissioner's permitting decision.

SEF also argues that the use of natural gas at the facility is not practical, feasible or advisable. To the extent that SEF is concerned that Con Edison will not be able to have gas delivered to its facility, Con Edison has already committed to reinforcing its gas distribution system. Topic Agreement, Gas Supply and Transmission (May 14, 2001) at I (C)(1). Insofar as SEF argues that the gas transmission system is inadequate, SEF should raise such claims to the PSC or the Federal Energy Regulatory Commission (FERC), as appropriate. What SEF actually appears to be arguing is that it will suffer competitive injury in accessing supplies of natural gas as a commodity. Natural gas is sold in an interstate competitive marketplace that is administered by FERC. Moreover, an individual competitor's alleged economic injury is not an issue that falls within the purview of the Siting Board. Again, SEF may raise such claims to the FERC or the PSC, as appropriate.

CONCLUSION

For the reasons stated above, the interlocutory appeals of DPS Staff, DEC Staff and Con Edison are granted to the extent that intervenors will not be allowed to introduce evidence on PM2.5 emissions from the proposed facility in the record before the Siting Board. The interlocutory appeal of

CB3/EREC seeking to adduce evidence on the potential noise impacts of the proposed facility is denied. The interlocutory appeal of CB3/EREC is also denied to the extent that evidence may not be adduced on the use of alternative fuels or stack configurations for generators that are not part of the proposed facility, and that evidence may not be proffered on the alleged environmental justice impacts of air emissions from the proposed facility. Con Edison's appeal from the Examiners' ruling that evidence should be received on the 74th Street and Kips Bay parcels as alternative sites for the proposed facility is denied. The interlocutory appeal of SEF is denied.[50]

The Board on Electric Generation Siting and the Environment for Case 99-F-1314 orders:

1. The interlocutory appeals described in the foregoing order are decided as discussed above.

2. The parties are not authorized to submit evidence on particulate matter of 2.5 microns or smaller in aerodynamic diameter, modifications to non-facility generators and emission stacks, modification to the proposed facility beyond those required by the DEC to address air emissions, alleged environmental justice impacts of air emissions from the proposed facility, alleged noise impacts of the proposed facility, or on whether natural gas should be the primary fuel for the facility.

3. The alternative sites for the proposed facility that are owned or controlled by the Applicant are admissible into the record.

[50] Ad Hoc Member Reicher dissents in part, insofar as he would allow evidence on PM2.5 emissions, fuel use of non-facility generators, and environmental justice.

4. This proceeding is continued.

By the New York State Board on
Electric Generation Siting and
the Environment - Case 99-F-1314

(SIGNED) JANET HAND DEIXLER
Secretary to the Board