

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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Secretary

April 13, 2009

Via Email

Hon. Michelle L. Phillips
Three Empire State Plaza
Albany, New York 12223-1350

Hon. Jeffery E. Stockholm
Three Empire State Plaza
Albany, New York 12223-1350

2009 APR 14 AM 9:57

Re: Case 06-T-0650 Application of New York Regional Interconnect Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for a high voltage direct current electric transmission line approximately 190 miles in length running between a converter station with an AC interconnection to National Grid's Edic Substation in the Town of Marcy, and a converter station with an AC interconnection to Central Hudson Gas Electric's Rock Tavern substation located in the Town of New Windsor.

Dear Judges Phillips and Stockholm:

Pursuant to your direction at the hearing in the above-captioned proceeding on April 3, 2009, enclosed please find the response of the Staff of the Department of Public Service designated to represent the public interest in this proceeding to the letter submitted by New York Regional Interconnect, Inc. on April 6, 2009.

Very Truly Yours,

Steven Blow
Assistant Counsel

cc. Hon Jaclyn A Brillling, Secretary
Litigation Parties

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Case 06-T-0650 - Application of New York Regional Interconnect Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for a high voltage direct current electric transmission line approximately 190 miles in length running between a converter station with an AC interconnection to National Grid's Edic Substation in the Town of Marcy and a converter station with an AC interconnection to Central Hudson Gas & Electric's Rock Tavern Substation in the Town of New Windsor.

DPS STAFF RESPONSE TO NYRI'S APRIL 6, 2009 LETTER

INTRODUCTION

At the Evidentiary Hearing held in this proceeding on April 3, 2009, Leonard Singer, the attorney for New York Regional Interconnect, Inc. (NYRI), stated:

As I said off the record, we have discussed a couple of times in the last two days the [Federal Energy Regulatory Commission (FERC)] order that came out, I believe it was on March 31st, rejecting [NYRI]'s request for rehearing with respect to the [New York Independent System Operator (NYISO) Congestion Analysis and Resource Integration Study (CARIS)] process. Based on that order from the FERC, the investors have decided that the financial risks of cost recovery are too great at this point in time, and as a result they are withdrawing their Article VII application.¹

Administrative Law Judge (ALJ) Stockholm asked NYRI to "file a letter with the Secretary withdrawing the case".² The ALJ also stated: "[W]e will give the parties one week ... from Monday. If any of the parties believe for any reason that this case needs to remain open for any purpose, the parties should advise us."³ That afternoon, NYRI issued a press release.⁴

¹ Transcript (Tr.) 4239

² Tr. 4240

³ Tr. 4240-4241

⁴ The press release states:

[NYRI] today announced that, while it remains committed to transmission development in New York State, it is suspending its current participation in the New York Public Service Commission (PSC) Article VII process for its 1200MW HVDC project. The March 31st decision by the Federal Energy Regulatory Commission (FERC) denying NYRI's request to review the recently approved rules of the New York State Independent System Operator (NYISO) for transmission tariffs has created an unacceptable financial risk for NYRI's investors. Even if the NYRI project were to be

On April 6, 2009, NYRI provided written notification stating that it was "suspending its application filed under Article VII of the Public Service Law [(PSL)]". On April 8, 2009, NYRI sent a second letter to the ALJs, stating: "NYRI confirms that it has withdrawn its application for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the [PSL] in Case No. 06-T-0650".

The Staff of the Department of Public Service designated to represent the public interest in this proceeding (DPS Staff)⁵ hereby submits our response to NYRI's on-the-record and written statements. The ALJ's should certify the question of the appropriate response to NYRI's statements and actions directly to the PSC for its expeditious consideration.

BACKGROUND

Since 1970, the PSC has had jurisdiction to consider applications for Certificates of Environmental Compatibility and Public Need for major utility transmission facilities, including electric lines of a design capacity of 125kV or more that extend a distance of one mile or more.⁶ In 2005, the Federal Power Act (FPA) was amended to provide FERC backstop siting authority for the construction or modification of electric transmission facilities in any national interest electric transmission corridor (NIETC) (as designated by the Secretary of Energy) under certain conditions. One condition provides for FERC's jurisdiction where a State commission has withheld approval with respect to the siting of electric transmission facilities for more than one year after the filing of an application pursuant to applicable law or one year after the designation of the NIETC, whichever is later.⁷

On May 31, 2006, NYRI submitted to the PSC a document it considered to be an application pursuant to Article VII. On August 26, 2006, the Secretary of the PSC advised NYRI that a number of deficiencies were found in such document and that the deficiencies must be remedied before the document could be deemed to

sited by the PSC, NYRI would face the prospect of being unable to recover transmission costs from the ratepayers who would benefit from the project.

⁵ PSL §124(2)

⁶ Chapter 272 §2 of the Laws of 1970, enacting PSL Article VII

⁷ FPA §216(b)(1)(C)(i)

comply with PSL §122. On November 10, 2006, the PSC, inter alia, directed NYRI to file supplemental information.⁸

On December 14, 2006, the PSC, inter alia, adopted 16 NYCRR §85-2.9 to specify precisely what an application for an electric transmission line in a NIETC must contain to be considered filed within the meaning of FPA §216(b)(1)(C)(i).⁹ On October 5, 2007,¹⁰ the Secretary of Energy designated the Mid-Atlantic NIETC (including 47 counties in New York).¹¹

On February 21, June 5 and August 8, 2008, NYRI made supplemental submissions. On August 27, 2008, the Secretary advised NYRI that the Article VII application documents were filed pursuant to 16 NYCRR §85-2.9 and otherwise in compliance with PSL §122 as of August 8, 2008.

Following a pre-hearing conference held on September 8, 2008, the ALJs, inter alia, established a procedural schedule for this proceeding.¹² The first public hearing on NYRI's application was held on October 20, 2008; thereafter, several public hearings were held in October and November of 2008. Pursuant to the established schedule, several parties filed their direct cases on January 9, 2009. On January 26, 2009, the ALJs, inter alia, established a revised schedule for the remainder of the proceeding; they directed DPS Staff (in consultation with other parties) to propose a schedule for the appearance of witnesses who would be cross-examined at the Evidentiary Hearings.¹³

Pursuant to the revised schedule established by the ALJs, several parties filed rebuttal testimony on March 2, 2009. Evidentiary Hearings commenced on March 16, 2009 and witnesses appeared generally as set forth in the schedule proposed by DPS Staff and agreed to by the other parties and the ALJs. The

⁸ Case 06-T-0650, New York Regional Interconnect, Inc., Order on Waiver Motion and Directing the Filing of Supplemental Information (issued November 10, 2006).

⁹ Case 06-M-1019, Rules and Regulations, Memorandum and Resolution Adopting Amendments to 16 NYCRR Sub-part 85-2 and Parts 86 and 88 (issued December 14, 2006). The regulations became effective January 3, 2007.

¹⁰ The Secretary of Energy denied rehearing of this NEITC decision on March 6, 2008, effective March 11, 2008.

¹¹ NYRI's proposed project would be located wholly within this NIETC.

¹² Case 06-T-0650, Supra, Procedural Ruling (issued September 17, 2008)

¹³ Case 06-T-0650, Supra, Ruling on Scope, Hearing Procedures and Schedule (issued January 26, 2009).

witnesses who appeared testified on environmental matters, construction-related topics and various alternatives to NYRI's proposed project. Subsequently, some parties filed rebuttal testimony concerning the Thruway buried cable alternative project described by Communities Against Regional Interconnect in its direct case.¹⁴ This testimony was not entered into the evidentiary record; nor was the testimony of NYRI's witness panel C, nor the rebuttal testimony of its witness William H. Hieronymus (concerning the need for the proposed facility) because these witnesses were not subjected to cross-examination. Moreover, the testimony of some witnesses of other parties was not entered into the evidentiary record because these witnesses did not take the stand. When Mr. Singer made the announcement quoted above, a NYRI witness panel (consisting of Jonathan A. Lesser and J. Nicolás Puga) was being cross-examined concerning their testimony, which was filed to rebut the testimony of various witnesses on the subject of the need for NYRI's proposed facility.

CERTIFICATION BY THE ALJs OF THE QUESTION TO THE PSC

Certification of the question of the appropriate response directly to the PSC is proper because NYRI has committed an offense against the honor and dignity of the PSC by taking unilateral action to short-circuit this proceeding, particularly the evidentiary phase. Moreover, it is not clear that an ALJ may take final action concerning a request to withdraw. By contrast, an ALJ may, pursuant to 16 NYCRR §4.6, adjourn any hearing from time to time. In addition, certifying the question to the PSC will minimize the further expenditure of time and resources in this proceeding.

PSC ACTION NECESSARY ON WITHDRAWAL OF APPLICATION

Consistent with PSC practice, NYRI cannot effectuate withdrawal of its application merely by proffering a letter stating that it intends to withdraw its application or that it has done so. A withdrawal, even if couched in absolute terms,

¹⁴ Case 06-T-0650, Supra, Order Upon Interlocutory Review (issued March 10, 2009).

is properly treated as a request for permission to withdraw.¹⁵ Therefore, PSC action in response to NYRI's statements and actions is required.

PSC DETERMINATION

The PSC should determine that NYRI's statements and actions with respect to the withdrawal of its application in the middle of evidentiary hearings, which were proceeding pursuant to a schedule that NYRI did not object to, means that no filed application is before the PSC in this proceeding. To the extent a filed application is before the PSC, it should be denied because NYRI has short-circuited the process, and has impaired and abridged the numerous other parties' right of cross-examination guaranteed by §306(3) of the State Administrative Procedure Act.¹⁶

In light of the forgoing, there is no evidence in the record that would support the finding required by PSL §126(1)(a) that the transmission facility proposed by NYRI is needed. Moreover, given the fact that NYRI's interconnection request to the NYISO has been withdrawn,¹⁷ the PSC cannot make the finding required by PSL §126(1)(g) that the facility will serve the public interest, convenience and necessity. Nor does the record support the finding required by PSL §126(1)(f) that the location of the facility conforms to applicable State laws and regulations.¹⁸

¹⁵ See, e.g., Case 09-T-0003, Orange & Rockland Utilities Inc., Letter dated March 30, 2009 and the Secretary's response dated April 3, 2009 (copies attached). See, §3217 of the Civil Practice Law and Rules. See, also Folta v. Sobol, 210 A.D.2d 857 (3d Dept., 1994)

¹⁶ Exhibits received into evidence that were not subject to any party's cross-examination, and which therefore must be stricken, are Exhibits 6, 13, 23, 25, and 35. The rebuttal testimony of the NYRI witness panel of Lesser and Puga (to the extent not already stricken by the ALJs at Tr. 4246), as well as Exhibits 326 through 353 (which were sponsored by the panel or introduced during the partial cross-examination of the witnesses and received into evidence at the end of the April 3 hearing), must also be stricken.

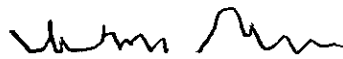
¹⁷ The NYISO has posted an updated interconnection queue (copy attached). Should NYRY wish to revive its project, it will have to file a new interconnection request with the NYISO and follow it's interconnection study process (described by NYISO witness Steven Corey at Tr. 3516).

¹⁸ The evidentiary record does not contain proof that the substantive requirements of 6 NYCRR Part 663, specifying that, in order to allow the crossing of a class one or two state-regulated wetland, a compelling or pressing need, respectively, must be shown. Nor does the record contain evidence that the Commission's electrostatic field requirements (established in Opinion 78-13 in Cases 26529 and 26559) can be met without the acquisition of a right-of-way wider than that proposed by NYRI.

CONCLUSION

The ALJs should certify directly to the PSC the question of the appropriate response to NYRI's statements and actions. The PSC should find that, as a matter of law, NYRI's application is no longer before it. Moreover, to the extent the application is before it, the PSC should deny the Certificate of Environmental Compatibility and Public Need sought therein.

Respectfully submitted,



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Assistant Counsel

Anthony Belsito
Assistant Counsel

Dated April 13, 2009
NYS Department of Public Service
Three Empire State Plaza
Albany, New York 12223

cc. Hon. Jaclyn A. Brillling, Secretary
Litigation Parties