

APPENDIX A

TOWN OF HENRIETTA LOCAL LAW ASSESSMENT

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION
CASE 11-T-0534
ROCHESTER AREA RELIABILITY PROJECT**

**APPLICABILITY OF TOWN OF HENRIETTA ORDINANCES TO THE
CONSTRUCTION AND OPERATION OF STATION 255
AT SITE 20 IN HENRIETTA, NEW YORK**

September 25, 2015

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I. INTRODUCTION

A. Background and Purpose of Local Law Assessment

On April 23, 2013 the New York State Public Service Commission (“Commission”) granted Rochester Gas and Electric Corporation (“RG&E”) a Certificate of Environmental Compatibility and Public Need (“Certificate”) under Article VII of the Public Service Law for the Rochester Area Reliability Project (“RARP”). On November 15, 2013 the Commission reopened the record in the RARP proceeding to allow re-examination and additional fact finding on siting Station 255 and the adjacent sections of Circuits 40, 940 and 941.

On April 24, 2015, Administrative Law Judges Elizabeth Liebschutz and Michelle Phillips directed Rochester Gas and Electric Corporation (“RG&E”) to submit by September 25, 2015 studies on the possibility of locating Station 255 of the RARP and its adjacent transmission lines at a location in the Town of Henrietta designated as Site 20. Among the studies required was a study of “the applicability of Town of Henrietta ordinances to the construction and operation of a substation, with attendant transmission lines, located on Site 20.” This report is the required study.

Exhibit 7 of RG&E’s initial Article VII application for the RARP, as it concerned the ordinances of the Town of Henrietta, focused on the ordinances that would apply to development of a portion of Circuit 40 and to proposed improvements at existing Substation 80 to accommodate Circuit 40, but not as those ordinances would apply to the development of a new substation, since RG&E’s application did not propose to locate a new substation in Henrietta. The present local law assessment provides a review of the ordinances of the Town of Henrietta that may be applicable to the construction, operation and maintenance of Station 255 and its associated transmission lines if the Commission determines that Station 255 should be located in the Town of Henrietta. The assessment also discusses which of those local legal provisions the Commission should refuse to apply if it selects Site 20, because, as applied to

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the RARP, such local legal provisions would be unreasonably restrictive in view of the existing technology, factors of cost or economics, or the needs of consumers.

B. Methodology

The report is based on a review of the Town of Henrietta ordinances as listed on “eCode 360” (www.generalcode.com/codification/ecode/library), an electronic library of municipal codes¹ If RG&E believes an otherwise applicable ordinance would be unduly restrictive, an explanation of why the Commission should refuse to apply the ordinance follows immediately after the description of the ordinance.

With the exception of ordinances on compliance with the New York State Uniform Fire Prevention and Building Code², ordinances that would require permits for construction of the RARP facilities are not included in this study, since Public Service Law §130 provides that no municipality or any agency thereof may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to which an application for an Article VII certificate has been issued, other than those provided by otherwise applicable state law for the protection of employees engaged in the construction and operation of such facility, provided that the municipality has received notice of the filing of the application for a certificate. RG&E served a copy of its initial Article VII application for the RARP on the Town of Henrietta and is serving on the town a copy

¹ The Town of Henrietta’s website provides a link to” eCode 360” for a copy of the town’s code.

² Certificate Condition Certification 6(d)) requires certification, by a public entity recognized by the Department of State as having the requisite training or qualifications, that the construction plans for project buildings are in compliance with the New York State Uniform Fire Prevention and Building Code and that those buildings have been constructed in compliance with that Code. This certification would likely be requested from the Town of Henrietta.

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of this study and RG&E's other studies on the possible use of Site 20 for Station 255 and its associated transmission lines.

II. TOWN OF HENRIETTA ORDINANCES

Chapter 48 - Building and Development

§48-1 establishes the New York State Uniform Fire Prevention and Building Code as the Town regulations governing building construction.

§48-11 provides that a building permit is valid for eighteen months, but the Town Board may grant an extension where the extension would not conflict with the best interests of the town.

§48-14 allows the Fire Marshall/ Building Inspector to issue a stop work order if reasonable grounds exist to believe that work on any building or structure is being performed in violation of the provisions of the applicable building laws, ordinances, or regulations, or if the work is being performed in an unsafe and dangerous manner.

§48-16 requires that a certificate of occupancy be obtained before a building can be used.

§48-18 requires that a certificate of occupancy be issued by the Fire Marshall/Building Inspector after a final inspection finds that the work has been completed in accordance with the applicable building laws, ordinances and regulations and also in accordance with the application plans and specifications.

§48-9 and §48-16 are applicable to buildings such as control houses in a substation.

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Chapter 119 - Fire Prevention

§119-7 requires persons owning or occupying property to comply with the New York State Uniform Fire Prevention and Building Code and all orders, notices, rules, regulations and determinations issued in connection with the Uniform Code.

§119-12A requires the provision of fire lanes when premises are not accessible from public roads.

§119-12(B)(4)(b) requires that where construction is undertaken and public mains do not exist, water mains and hydrants shall be installed prior to any aboveground construction.

§119-12 (E),(F), and (G)(2) provide for the establishment of various standards and prohibitions regarding the storage and handling of hazardous liquids, the transportation of hazardous chemicals, and motor vehicle routes for vehicles transporting explosives and blasting agents, respectively.

§119-12(G)(1) prohibits the storage of explosives and blasting agents.

Chapter 125 – Flood Damage Prevention

This chapter implements the National Flood Insurance Program. None of the locations for Station 255 included in RG&E's study of Site 20 are in a floodplain. The floodplains associated with the Genesee River that are crossed by Project transmission lines comprise special flood hazard areas as identified and defined on the flood insurance rate map for Monroe County prepared by the Federal Emergency Management Agency. §125-4(B) defines "Structure" as a "[w]alled or roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home," so provisions of Chapter 125 concerning "structures" do not appear to apply to transmission towers, but provisions dealing simply with "development" in a flood plain may apply to transmission towers.

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§125-13A(2) requires that public utilities and facilities such as electrical systems be located and constructed so as to minimize flood damage.

§125-13(B)(2)(a) provides that on streams with a regulatory floodway, no construction shall be permitted unless a technical evaluation by a professional engineer shows that such encroachment shall not result in an increase in flood levels during any occurrence of the base flood.

§125-18 allows the Zoning Board of Appeals to grant variances from the requirements of Chapter 125.

Chapter 168 - Noise

§168-2(A) prohibits unreasonably loud disturbances or unnecessary noise, defined as any excessive or unusually loud sound or any sound which crosses at least one real property line and which, in the opinion of persons or agents charged with the responsibility of enforcing this chapter, either annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of a person or neighborhood.

§168-2(B)(3) requires the use of mufflers on vehicle engines.

§168-2(B)(4) prohibits between 9:00 PM and 7:00 AM construction activities that disturb the peace and quiet of a person or neighborhood by reason of the use of power equipment, hammering, sawing or other activity which produces severe and continuous noise.

§168-6 provides exemptions for “permitted construction activities” and “federal and state regulations that preempt town authority.”

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Chapter 205 - Property Maintenance

§205-5 requires (a) the provision of adequate site drainage to prevent the development of stagnant ponds; (b) maintenance of fences and other minor construction in safe and substantial condition; (c) maintenance of steps, walks, driveways, and similar paved areas so as to afford safe passage under

normal use and weather conditions; (d) premises be kept clear of physical hazards, rodent harborage, and infestation; and, (e) elimination of heavy undergrowth and accumulation of noxious plant growth. Ground cover shall not exceed six inches in height.

§205-7 requires treatment of exterior structure surfaces to protect deterioration and weathering and maintenance of buildings and structures such that they do not become a hazard.

§205-8 requires premises to be maintained free of insect, vermin and rodent harborage and infestation, and adequate measures to prevent infestation.

§205-(9)(A) requires property be maintained free of litter and establishes standards for collection, storage and handling of refuse. §205-(9)(B) requires that adequate sanitary facilities and methods be used for the collection, storage, handling and disposal of garbage and refuse. §205(9)(D) requires that dumpsters be shielded from public view.

§205-13 establishes that property owners have the ultimate responsibility for compliance with the provisions of Chapter 205, Property Maintenance.

Chapter 234 - Solid Waste

§234-4 requires provision of adequate refuse receptacles on premises and establishes standards for placement for collection.

§234-5 prohibits accumulation of garbage, refuse, yard trimmings or brush on properties.

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§234-6 prohibits the depositing of any garbage, refuse, yard trimmings or brush in or upon any portion of public highway and streets or on the property of others.

§234-13 through §234-22 establish the Town's recycling program and requires the separation of recyclables from other solid wastes.

Chapter 236 - Stormwater Management

§236-8 prohibits discharging any materials into the municipal storm drain system or waters of the United States.

§236-10 requires that any person subject to an industrial or construction activity SPDES stormwater discharge permit comply with all the provisions of such permit.

§236-12 requires that best management practices adopted by the town shall be included as part of a stormwater pollution prevention permit.

§236-14 requires that as soon as any person responsible for a facility has information on a known or suspected release of materials which may result in a discharge of pollutants into stormwater, a public or private storm drain system or the waters of the United States, such person shall take all steps necessary to insure the discovery, containment and cleanup of such release.

§§236-15 through 236-24 establish the Town's program for regulation of stormwater management, including erosion and sediment control for land disturbance and construction activities. They apply to all activities that will disturb one or more acres of land unless specifically exempted. RARP construction activities do not fall under the exemptions, which are provided in §236-19B.

§§236-25 through 236-35 set forth the requirements for the design and management of post-construction stormwater pollution prevention measures. Chapter 236 treats buildings and structures

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similarly. Construction activities on one acre or more require a New York State Pollutant Discharge Elimination System (SPDES) permit. Coverage by a General Permit for Construction Activities is available to developers to regulate disturbances of one or more acres of land.

§236(18)(A) requires the use of the technical standards for erosion and control contained in the New York State Department of Environmental Conservation (“NYSDEC”) “Standards and Specifications for Erosion and Sediment Control.” NYSDEC’s “New York State Stormwater Management Design Manual” is referred to for post-construction stormwater runoff control practices.

RG&E sought coverage under the SPDES General Permit for Stormwater Discharges from Construction Activities (GP-0-15-002) for its originally proposed project, and obtained a Water Quality Certificate under the Federal Clean Water Act as part of the PSL Article VII certification process. Coverage under the SPDES General Permit GP-0-15-002 would have to be sought for the construction of Station 255 at Site 20.

Chapter A300 – Design Standards for Stormwater Management

Chapter A300 is an appendix on design standards for stormwater management systems to protect against flooding, provide clean channels for runoff, prevent encroachments on drainage channels, and equitably apportion the cost of improvements to protect scenic areas.

Chapter 295 - Zoning

§295-(2)(B) defines a “building” as: “Any structure having a roof supported by columns or by walls and intended for the shelter, housing or enclosure of persons, animals or chattels,” and a “structure” as “Any man-made facility, including buildings, towers and other edifices.” Substation facilities may have both structures and buildings. Chapter 295 would apply to the transmission lines and substations.

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§295-3 establishes the zoning districts in the Town of Henrietta. §295-4 incorporates into the ordinance the map entitled "Official Zoning Map of the Town of Henrietta," which provides boundaries for each zoning district within the Town. Site 20 is situated on a parcel that spans two existing zoning districts: the Industrial District and the Residential R-2-15 District, but the land studied for the possible location of Station 255 on Site 20 appears to be completely within the Industrial District.

§295-7 establishes permitted uses within Residential R-1 and R-2 zoning districts. Public utility uses are not listed as permitted uses, and §295-7 provides that any use not specified as a permitted use is prohibited in the R residential districts.

§295-8 provides that "[N]o structure in a residential district shall exceed two stories of any kind above the basement." It limits the height of most residential buildings from the floor of the first story to the ceiling of the second story to 21 feet, and provides a maximum height of 35 feet for certain other types of buildings allowed within residential zoning districts. Exceptions may be allowed by the Town Board by special permit granted after a public hearing.

§295-9 provides that the ground area of the principal and accessory buildings in an R District shall not exceed 25% of the area of the lot.

§§295-10 provides the following lot and yard requirements for the R-2-15 District:

- minimum lot area: 12,000 square feet (single-family units)
- minimum lot area: 15,000 square feet (two-family units)
- minimum lot width: 75 feet (single-family units)
- minimum lot width: 100 feet (two-family units)
- minimum front yard setback: 40 feet (Town or private road)

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60 feet (County or State road)

- minimum side yard setback: 10% lot width (or minimum of 8 feet)
- Minimum rear yard setback: 10 feet

§295-25(A) establishes permitted uses within Industrial Districts. Public utility facilities are not listed as permitted uses in Industrial Districts.

§295-26 establishes prohibited uses in Industrial District.

§295-25(A)(35) provides, “Any other industrial uses not prohibited by §295-26 may be permitted upon the granting of a special permit therefor by the Town Board after a public hearing on notice....” (Because public utility facilities could be permitted in an Industrial District by special permit, and Public Service Law §130 prohibits a municipality from requiring a permit for an Article VII facility, it could reasonably be argued that the Public Service Commission can approve the location of such facilities in an Industrial District in Henrietta without the need to refuse to apply the local law.)

§295-27 imposes a maximum building or structure height of 40 feet within the Industrial District. This height requirement can be exceeded by special permit granted by the Town Board after hearing.

§295-28(A), (B) and (C) provide minimum yard requirements in the Industrial districts:

- minimum front yard setback: 125 feet (or average of adjacent buildings - minimum of 80 feet)
- minimum side yard setback: 5 feet
- minimum side yard (corner lot): 50 feet to the side line of the lot abutting the side street
- Minimum rear yard setback: 60 feet

§295-28(D) requires for development in the Industrial districts abutting residentially zoned property at least a fifty-foot buffer zone on the applicant's property abutting any property zoned residential and Planning Board approval.

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§295-28(E) requires, for new buildings or structures in any industrial district, Planning Board review and approval of plans to insure that shrubbery and landscaping, construction materials and lighting and architectural designs and parking facilities are in harmony with the character of the neighborhood, and parking.

To the extent Chapter 295 would prohibit utility uses or structures in an I District or in an R-1-15 District, if the Commission selects Site 20 as the location of Station 255 RG&E would request that the Commission refuse to apply such prohibition because it is unduly restrictive in view of the needs of consumers inside or outside Henrietta. The Commission has determined that the RARP is needed, and if the Commission determines that Site 20 is the best location for Station 255 and the associated transmission lines, an ordinance that would bar construction at that location is unduly restrictive. In addition, to the extent that they are applicable to the proposed Project, RG&E also would request that the PSC refuse to apply the height, yard, buffer zone, and setback requirements for the R-1-15 District and the Industrial District prescribed in Chapter 295.

For Circuits 40, 940 and 941 (and for the two New York Power Authority 345 kV circuits that would have to be partially relocated to enter and exit Station 255), the individual structure locations will be a function of the optimal span lengths regardless of setback requirements, and the size and configuration of any necessary easements would be based on required clearance and reliability criteria. Based on NESC criteria and prudent engineering considerations, the optimal height for the Circuit 40 structures generally is 80 to 100 feet and the optimal height for Circuit 940 and Circuit 941 structures generally is 60 to 85 feet. It is not technologically feasible to comply at reasonable cost with the Town's height restrictions in the R-1-15 and Industrial Districts. In addition, RG&E would request that the PSC refuse to apply the buffer zone requirement for the Industrial District as this requirement may apply to the transmission facilities associated with Station 255; compliance with these requirements would unreasonably increase

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the land requirements for the transmission line right-of-way and increase the cost of the project without any corresponding benefit to area residents and ratepayers.

IV. Previous Waivers of Henrietta Ordinances

In a December 16, 2011 supplement to its Article VII Application for the RARP, RG&E asked that the Commission refuse to apply the following Henrietta ordinance:

§295-6 (now renumbered as §295-7) which establishes permitted uses within Residential R-1 zoning districts, does not reference public utility uses as permitted uses, and provides that any use not specified as a permitted use is prohibited in the R residential districts.

§295-7 (now §295-8), which limits the height of structures in residential zoning districts to 35 feet;

§295-9 (now §295-10), which establishes maximum lot sizes, dimensions and setbacks;

§295-24 and 25 (now §295- 25 and 26), which establish permitted and prohibited uses in industrial zoning districts and do not list public utility uses as permitted uses (although §295-24 (now §295- 25) could be interpreted as allowing public utility uses by special permit);

§295-26 (now §295-27) which establishes a maximum height limitation of 40 feet in industrial zoning districts, which limitation can be exceeded by special permit.

These requests were supported in the parties' Joint Proposal, which the Commission adopted in ordering clause 1 of its April 23, 2013 Order granting a certificate for the RARP. The basis for the requests was existing technology and factors of cost and economics, because for Circuit 40, which would run through Henrietta from the Genesee River to Station 80, individual structure locations would be a function of optimal span length regardless of setback requirements, and the size and configuration of any necessary easements would be based on required clearance and reliability criteria. In addition, RG&E had determined, based on NESC criterial and prudent engineering considerations, that for the structures of Circuit 40 the optimal height was 80 to 100 feet, and it was not technologically feasible to comply with the Town's height restrictions.

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In its May 7, 2014 petition for an amendment of the RARP certificate, RG&E requested that the Commission refuse to apply §295-7, which establishes permitted uses in an R-1 zoning district and does not reference public utility uses, and §295-8, which provides that no structure in a residential district shall exceed two stories in height above the basement, and establishes a maximum height limitation of 35 feet within residential zoning districts. The Commission refused to apply these local laws “in view of existing technological limitations and the needs of consumers.” *Order Granting Amendments to Article VII Certificate and Approving Environmental Management and Construction Plan for Segment II*, issued July 21, 2015, p. 15.