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October 11, 2007

Via Federal Express

Hon. Jaclyn A. Brilling, Secretary
State of New York Board on Electric Generation
Siting and the Environment
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 01-F-1276- Application of TransGas Energy Systems, LLC for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100-Megawatt Natural Gas-Fired, Cogeneration Plant in the Borough of Brooklyn, New York City

Dear Secretary Brilling:

Enclosed please find an original and 25 copies of the *Memorandum on Behalf of Brooklyn Parties Opposing the Motion for Procedural Order Concerning Further Deliberations* for filing in the above captioned proceeding.

Respectfully submitted,

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cc. Honorable Judith A. Lee (Via e-mail and regular mail)
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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Case 01-F-1276 -	Application of TransGas Energy Systems LLC for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100 Megawatt Combined Cycle Cogeneration Facility in the Borough of Brooklyn, New York.

MEMORANDUM ON BEHALF OF BROOKLYN PARTIES OPPOSING THE MOTION FOR PROCEDURAL ORDER CONCERNING FURTHER DELIBERATIONS

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Dated: October 11, 2007

TABLE OF CONTENTS

The Brooklyn Borough President, Brooklyn Community Board No. 1, and the Greenpoint/Williamsburg Waterfront Taskforce (collectively, "Brooklyn Parties") hereby submit this memorandum opposing the October 3, 2007 motion of TransGas Energy Systems, LLC ("TGE"), requesting that the New York State Board on Electric Generation Siting and the Environment ("Board") hold in abeyance further proceedings on the "electric only" cogeneration plant ("TGE's Motion"). The Brooklyn Parties oppose the request to hold proceedings in abeyance, but they do not oppose TGE's request included in its motion for prompt action by the Board on the rehearing petition.

INTRODUCTION

TGE's motion should be denied on equitable estoppel grounds and due to the substantial prejudice it causes the Brooklyn Parties. In addition, it should be noted that TGE's motion also serves as an improper surreply to claims made by the New York State Department of Public Service ("DPS") and the City of New York ("City") in their September 2007 filings, and continues to argue the merits of its application outside the submittals authorized by the Board.

DISCUSSION

I. TGE SHOULD BE EQUITABLY ESTOPPED FROM BRINGING THIS PROCEDURAL MOTION BECAUSE IT IS DIRECTLY INCONSISTENT WITH TGE'S JULY 6, 2007 REQUEST AND SUBSEQUENT FILINGS IN SUPPORT THEREOF.

The Board should deny TGE's motion to hold in abeyance consideration of TGE's proposal for an above-ground, electric-only power plant at the Bayside site on grounds of equitable estoppel. TGE's motion directly contradicts the position it took in its July 6, 2007 request for consideration of an above-ground, electric-only facility and its subsequent filings in support thereof.

"Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or in a prior proceeding." *Clifton Country Road Associates v. Vinciguerra*, 252 A.D.2d 792, at 793 (N.Y.A.D., 1998) (internal quotations omitted). "Once clearly asserted by the party against whom the doctrine is invoked, the party is bound by such prior stance." *Id.* Accordingly, a party is precluded from taking a position in court that directly contradicts a position previously held in an administrative proceeding. *Id.* Since a position in an administrative proceeding may have preclusive effect on the position a party may take in court, the same position must, *a fortiori*, have preclusive effect in future administrative proceedings. If parties were at liberty to hold inconsistent positions in administrative proceedings, it would erode the value of estoppel in judicial proceedings. A party should not be permitted to take inconsistent positions during an administrative proceeding and be rewarded by then choosing to take the most advantageous position in a later judicial proceeding, while denying opposing parties the ability to rely upon any position taken in the administrative proceeding. Therefore, the Board must not permit TGE, by entertaining TGE's procedural motion, to adopt a contradictory position in this proceeding.

Requesting a hold on consideration of the above-ground, electric-only facility directly contradicts TGE's previous representations to the Board. Indeed, TGE asked the Board in its July 6, 2007 request to make a final decision regarding the viability of an above-ground, electric-only power plant, and sought in its August 24, 2007 reply both "expeditious" (p. 18) review by the Board and that further "barriers to certification . . .

should be identified now" before it must file additional information involving "substantial expenditure of time and funds." (p. 4) Also in its August 24, 2007 submission, TGE stated that "all the information necessary for the Board to make the Article X findings is in the evidentiary record or in pleadings filed with the Board," and that it was not "seeking any delays in the consideration of the Electric-Only Facility" in order "to avoid unreasonable prejudice" on itself. (p. 18) Having indicated clearly to both the Board and the interested parties its desire for a swift and final decision on the viability of an above-ground facility, a point that TGE stressed in part to justify its sudden departure from the previous trajectory of the proceedings and its failure to seek consents from the City for its underground proposal, TGE's present motion to hold in abeyance consideration of its above-ground proposal is directly at odds with its prior position. Therefore, TGE should be estopped from bringing the procedural motion, as it may not present an inequitably inconsistent position to the Board. TGE may not "have its cake" by the Board's consideration of an above-ground, electric-only facility that diverges significantly from TGE's prior proposal, and "eat it too" by having the Board wait to decide the issue in accordance with TGE's preference.

TGE could readily have asked for this relief from the Board in July 2007 while it pursued its challenge to the Board's determination regarding the "consents" issue and obviated any need for the parties to file additional exceptions to the 2004 RD. It chose not to do so then and should be estopped from reversing course now after the parties have expended significant time and effort in direct response to TGE's request. Having failed to pursue this course of action, and having burdened the interested parties with a request that moved these proceedings to revisit the 2004 RD, TGE may not now seek to delay the

final resolution on the viability of an above-ground, electric-only facility. The fact that TGE was not pleased with how DPS responded to its latest course of action is not a legitimate basis for taking a new inconsistent position and for putting off a decision that can be made on the complete record now before the board on the above-ground proposal.

TGE should be estopped from taking an inconsistent position asking the Board to hold in abeyance consideration of TGE's own request until the Board has reached a decision, and the courts have reviewed TGE's subsequently filed motion for rehearing. Accordingly, the Board should deny TGE's motion.

II. THE RELIEF TGE SEEKS WOULD SUBSTANTIALLY PREJUDICE THE BROOKLYN PARTIES AND THEREFORE SHOULD NOT BE GRANTED.

The relief TGE seeks in its October 3, 2007 motion would, if granted, significantly prejudice the Brooklyn parties. Holding consideration of one of TGE's proposals in abeyance while consideration of another (of its many) proposals moves forward would unnecessarily delay the Board's final decision on TGE's application for an Article X certificate, which is already several years overdue, and would impede progress on the park planned for the site. Because of this prejudice and the Board's interpretation of the *Cortlandt* decision discussed below, the Board should deny TGE's motion.

In the June 25, 2007 Order, the Board determined that, "[i]ndeed, our reading of the *Cortlandt Nursing Home*[1] case suggests that in order for dismissal to be warranted based on prejudice, there must be substantial delay by an applicant that interferes with the

[1] *Cortland Nursing Home v. Axelrod*, 66 N.Y. 2d 169 (1985).

ability of others to be afforded a hearing within a reasonable time."[2] (p. 63) At that time, the Board found that TransGas had not attempted to delay this proceeding (p. 63) This is no longer the case. TGE's motion would prevent a decision on the above-ground proposal from occurring within a reasonable time. In addition, by requesting that the Board review an above-ground proposal, only to request that those proceedings be held in abeyance three months later, TGE has already substantially prejudiced the Brooklyn Parties.[3] In the instant motion, TGE claims that the DPS's strategy is "to whipsaw the Applicant between two opposing posts." (p. 2.) However in reality, it is TGE's conflicting requests and proposals that are "whipsawing" the interested parties and the Board.

In making its July 6, 2007 request, TGE ignored the Board's decision to hold the case in abeyance and led the interested parties down a burdensome and unexpected path. Now, upon receiving strong opposition to the above-ground proposal, TGE has asked the Board to hold in abeyance consideration of the proceedings that TGE itself initiated. If TGE's October 3 motion is granted, and the current proceedings are put in abeyance until the judicial review of the Board's "authority over the use of City streets" is completed, it could be years before the Board returns to consideration of the above-ground proposal. The delay will be significant as the parties are not simply litigating the "use of City streets," but whether TGE can blast through City property in order to create a steam

[2] Although there has been a hearing on TGE's proposal, in 2004, the parties have waited more than five years for a decision on the proposal that was the subject of that hearing and for an end to the process as contemplated by Article X. Moreover, the changes contemplated by TGE's various proposals, or the changes that have occurred while TGE was changing its proposals, might require additional hearings; but TGE's request would substantially delay such hearings.

[3] The Brooklyn Parties are not conceding that they did not suffer prejudice prior to the June 25th order, only that both TGE's July request to reconsider the 2004 proposal and its October motion to now hold it in abeyance have created additional prejudice.

tunnel "running under the East River, and landing near and running to an interconnection point in the vicinity of First Avenue or Con Edison's East River."[4]

Furthermore, holding in abeyance consideration of the above-ground, electric-only plant could render meaningless the significant time and resources spent by interested parties in responding to TGE's proposal. The Board, the Brooklyn Parties, the City of New York, and the Department of Public Service have now spent more than three months expending time and resources, and submitting detailed filings on TGE's request that the Board reconsider the 2004 proposal to build an above-ground plant. If TGE's motion is granted, some years from now, when the "consents" issue is ultimately concluded, the parties will be forced to supplement their exceptions to the 2004 RD yet again. This amounts to additional prejudice to those parties. As TGE stated, the Board has a full record before it upon which it can render a final decision. Nothing significant in the factual record has changed since TGE made its July 25, 2007 request for a rehearing on the issue of "consents." The Board's review of the current proposal is not dependent upon the Board's consideration of TGE's petition for rehearing. There is no reason to render all of the interested parties' efforts to revisit the 2004 RD moot and hold the proceedings related to the electric-only cogeneration configuration in abeyance.

As this Siting Board recognized more than three years ago, "[t]he City and the Greenpoint and Williamsburg communities have a legitimate interest in having this proceeding brought to a reasonably prompt conclusion."[5] Moreover, given that Article X expired nearly five years ago (and was intended by the Legislature to be a law of only ten

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[4] 2004 RD at p. 82.

[5] Case 01-F-1276: TransGas Energy Systems LLC, *Order Concerning Submission of Amendment to Application* (issued Sept. 15, 2004) at 10, citing *Suffolk County v. Gioia*, 96 AD.2d 220 (2nd Dept. 1983).

year's duration), and given all the delays already occasioned in this proceeding, the further delay TGE seeks is simply untenable and contrary to acceptable procedure. In order to avoid creating additional prejudice, and in the interest of judicial economy, the Board should come to a final decision on both the above- and below-ground proposals and allow the entire proceeding to reach judicial review simultaneously. As long as these proceedings remain unresolved the city cannot move forward on its plans to develop the Bayside site into a city park. The Board has all the information it needs in order to come to a final decision. It should deny the Certificate for the above-ground proposal on the grounds laid out in the 2004 RD. The Board should dismiss the below-ground proposal that was before the Board in the June 2007 order on the basis set forth in the April 2006 RD and the fact that TransGas elected not to attempt to obtain the required consents from the City. Finally, the Board should also act on and deny TGE's request for a rehearing on the consents.

III. MUCH OF TGE'S SUBMISSION IS IRRELEVANT TO ITS REQUEST TO HOLD REVIEW OF THE 2004 RD IN FURTHER ABEYANCE AND INSTEAD TGE IMPROPERLY USES THE EXCUSE OF THIS "PROCEDURAL MOTION" TO CREATE ANOTHER OPPORTUNITY TO ARGUE THE MERITS OF PROPOSALS THAT HAVE BEEN REJECTED BY THE HEARING EXAMINERS AND THE INTERESTED PARTIES

Rather than providing specific reasons for why the Board should hold in abeyance consideration of the above-ground proposal, TGE spends much of its October 3, 2007 "procedural motion" presenting to the Board a laundry list of reasons why it believes that its proposed facility deserves certification, and why it feels the other parties' objections to its application are unconvincing. Although these inappropriate arguments of TGE's are

irrelevant to the motion in question, because TGE has included them, the Brooklyn Parties briefly rebut a few of TGE's unsupported contentions:

First, DPS, as well as the Brooklyn Parties, are free to oppose *both* TGE's above- and below-ground proposals. TGE's charge that DPS seeks to "whipsaw" it "between two opposing posts,"[6] is based on nothing more than the fact that DPS found fault with both of TGE's proposals. In fact, DPS and the Brooklyn Parties have legitimate reasons for opposing both of TGE's proposals, as should be clear from the record of these protracted proceedings. TGE's proposed power plant, in all of its iterations, is plainly an unsuitable land use for the Bayside site—a site that the City has zoned for parkland as part of its local waterfront development plan. TGE implies that DPS is playing fast and loose with its application, when, in fact, DPS, and the Brooklyn Parties, have consistently opposed its application on land-use grounds from the very beginning of these proceedings. TGE can provide no support for its absurd suggestion that the parties to this proceeding can only object to one of its two (current) proposals.

Next, TGE's attempts to rely upon the City's Final Environmental Impact Statement ("FEIS") for the Greenpoint-Williamsburg rezoning have evolved over time, but are no more persuasive than when first asserted.[7] The City made clear long ago that the "the FEIS did *not* examine the impacts of the proposed power plant" and that "the power plant is *incompatible* with the rezoning and park mapping."[8]

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[6] TGE's October 3, 2007 Motion for Procedural Order Concerning Further Deliberations, pg. 2.

[7] TGE had earlier argued that the FEIS concluded that its facility "does not constitute an adverse impact," but TGE was soundly rebuffed by the City. *See* City's June 29, 2005 Letter to Secretary Brilling (citing TGE's June 17, 2005 Submission of Additional Information). *See also* City's September 21, 2007 Brief Opposing Supplemental Exceptions at 6.

[8] *Id.*

TGE also cites Siting Board Case 00-F-1522 to argue that "DPS was most decidedly of the view that Siting Board and PSC authority extend to the use of City streets."[9] The cited *Opinion and Order*, however, does not support TGE's claim. Indeed, it says nothing at all about what position DPS took on this, or any, issue. Thus, TGE is wrong to assert that DPS has taken inconsistent positions and abdicated "its responsibilities to all citizens of the State" in support of the City.[10] If any party is behaving myopically in these proceedings, it is TGE, which remains blindly determined to build a power plant on the Bayside site, and *only* that site, despite the fact that TGE's proposed facility is a completely incompatible land use for the Greenpoint-Williamsburg waterfront.

In addition, contrary to TGE's claim at paragraph 20(a) of its submission, the City has demonstrated that TGE's proposed facility *is not needed* to provide local electrical generation, and thus TGE's arguments that its proposal is needed to meet "capacity needs" are unpersuasive. The City pointed out in its September 21, 2006 Brief Opposing Supplemental Exceptions, that two new projects were completed in 2006, another plant has just recently been certified, and "[o]ther projects remain in the NYISO queue."[11]

CONCLUSION

For the reasons stated above, the Brooklyn Parties respectfully request that the Board deny TGE's motion to hold the above-ground proceedings in abeyance, and further

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[9] TGE's October 3, 2007 Motion for Procedural Order Concerning Further Deliberations, pg. 5 (citing *Opinion and Order Granting Certificate of Environmental Compatibility and Public Need,* June 25, 2003, at 9).

[10] *Id.*, pg. 5.

[11] At 10.

request that TGE's certificate to operate and construct a plant at the Bayside site be denied.

Respectfully Submitted,

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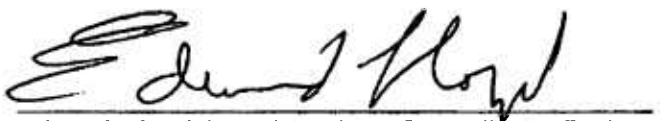

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