

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
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October 11, 2007

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

Re: Case 01-F-1276 - Application Filed by TransGas Energy Systems, LLC For a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100 Megawatt Generating Facility in the Borough of Brooklyn, New York City.

Dear Secretary Brillling:

The Staff of the Department of Public Service ("Staff") submits this letter in response to the "Motion for Procedural Order Concerning Further Deliberations" ("Motion") filed by TransGas Energy Systems, LLC ("TransGas" or "Applicant") on October 3, 2007. Simply stated, the TransGas motion employs overblown histrionics in a diversionary effort to gain support for the Applicant's request that the Siting Board hold "further proceedings in abeyance until the Siting Board's authority over use of city streets is resolved with finality, and, for prompt action on its petition for rehearing" filed July 25, 2007.¹ Moreover, TransGas' allegations do not provide any foundation to support the requested relief. As stated in our September 26, 2007 letter in lieu of brief, Staff believes the Siting Board can make a final decision on the Applicant's proposed aboveground facility; the Siting Board does not need to further bifurcate this proceeding by ruling only on the property rights and New York City ("City") permitting issues.

The TransGas claim that Staff is attempting to "whipsaw" the Applicant with objections based on land use and visual impacts, and a diminution of the Board's authority in order to deprive the Applicant of the ability to address the land use and visual impact concerns

¹ The motion challenges the determinations in the Siting Board's June 25, 2007 Order, that the Board has no authority under Public Service Law ("PSL") Article X to grant TransGas the right to use inalienable New York City ("City") property.

(Motion, p. 2), is ridiculous. Staff's role in this and all Article X cases has been to present and evaluate potential issues material and relevant to the Siting Board's requisite determinations under PSL §168.² All project configurations have potential environmental impact issues; some may be positive, others negative.

Staff appreciates TransGas' clarifying that despite resurrecting its aboveground facility proposal, as modified to eliminate the steam plant and off-site water plant, it is not withdrawing its underground facility proposal. Staff was confused by the statements the Applicant made in its July 6, 2007 letter that "TransGas is substantially reverting back to its original proposal," and, in its Reply Brief on Exceptions ("RBOE"), filed September 21, 2007, that "[t]here is no need to speculate about TransGas Energy's Proposed Plant Configuration"... "TransGas is eliminating the steam production from its proposal and will build the originally proposed plant with air-cooled condensers" (RBOE, p. 2, citing July 6, 2007 letter, p. 2). The impact of the Applicant's latest statement, however, is that the Active Parties are left without a description of "the proposed facility" (PSL §164(1)(a)). Instead, they are left to speculate on a number of project alternatives that TransGas has proposed.

The Applicant erroneously claims that Staff sought to stop the project via indefinite delay by having the Siting Board – "contrary to precedent" – require TransGas to apply to the Army Corps of Engineers ("ACOE") for a permit to conduct work in the East River.³ Staff's position was explained in its April 30, 2004 Brief Opposing Exceptions (pp. 19-22) to the Hearing Examiners' April 1, 2004 Recommended Decision.⁴ In essence, Staff felt that administrative efficiency would be best served if the Siting Board required TransGas to apply for the ACOE permit and obtain a decision on the permit before proceeding further in this case, since the State's Coastal Zone Management ("CZM") policies emanate from the Federal CZM policies, and the Federal CZM determination for the ACOE permit would involve areas covered by the State CZM review (reasonable alternatives analysis, impact on Local Waterfront Revitalization Programs ("LWRP"),⁵ etc.). The New York State Department of State ("DOS") would be responsible for addressing consistency with the State's CZM policies in conducting the federal permit review. That consistency determination would be necessary regardless of a Siting Board certification of the facility, and a finding of inconsistency by the DOS may preclude issuance of federal permits, thus potentially presenting a conflict with the Siting Board's CZM determination.

² As TransGas points out in its Motion (p. 2), the Siting Board has not yet determined the aboveground facility as unable to satisfy the requirements of PSL §168; the recommendation to deny a Certificate for the aboveground facility was made by the Hearing Examiners.

³ Delays have occurred for various reasons, including but not limited to, actions that have been taken by the Applicant.

⁴ Additional discussion of the NWRP and the State's Coastal Zone Management determination can be found in Staff's December 22, 2003 Initial Brief, pp. 27-38.

⁵ The relationship of the LWRP and the ACOE permit was discussed in Staff's May 12, 2006 letter submitted in response to the April 12, 2006 Notice Soliciting Comments.

According to TransGas, Staff exhibited hostility to the Applicant's proposed project because, on the issue of revocable consents, Staff failed to advise the Siting Board that in other contemporaneous proceedings, permits to use city streets were made subject to Siting Board or Public Service Commission ("Commission") authority. TransGas asserts that Staff has put "result-driven advocacy over its responsibilities to all citizens of the State."⁶ Aside from the fact that administrative decisions do not constitute binding precedent, the cases TransGas cited do not support their position that the Siting Board has the power to grant the Applicant the right to construct an approximately 6.4 mile water line in the City's streets and 1.25 mile steam line in the East River.⁷ TransGas further implies that the Siting Board's or Commission's adoption of the terms of Joint Proposals in other cases operates as a collateral estoppel on the issue of City property rights and permit issuance in the instant case. Clearly, they do not.

TransGas claims that Staff lost sight of certain key facts (Motion, p. 6). Notwithstanding that Staff obviously did not foresee, in its September 26, 2007 letter, what the Department of Environmental Conservation Commissioner would say at the IPPNY conference held two days later, most of the Applicant's claims regarding other potential generating projects, capacity levels and whether displacement would occur, etc., were raised and considered as part of the litigated case record which was completed with the briefs filed April 30, 2004.

TransGas requests that the Siting Board ensure that Staff's representation is "balanced" and presents a "state-wide perspective" to the proceeding. TransGas also suggests that DPS has taken positions on "purely local issues" while ignoring broader interests of the State. To the contrary, DPS is the only party to the proceeding to significantly represent State interest in matters such as the New York State Coastal Zone Management Program and the New York State Open Space Plan. Despite TransGas' characterization, these are not purely local issues.

The remaining portions of the motion continues TransGas' attack on Staff, arguing that Staff's failure to challenge the Hearing Examiners' "alarming dismissal of the Applicants computer simulated forecasts" and other economic and environmental benefits alleged by TransGas, resulted in the Applicant's asserted economic and environmental benefits being discounted entirely. As stated, Staff's role in Article X proceedings is to ensure that the

⁶ It is apparent that TransGas seeks to pressure Staff into ignoring potential issues that are problematic to the Applicant's project proposals. Ignoring such issues would, in fact, "put result-driven advocacy over its responsibilities to all citizens of the State."

⁷ In support of its position the Applicant cited to Case 00-F-1522, Astoria Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 25, 2003) and Case 01-T-1474 (Joint Proposal, dated February 11, 2003, Appendix A, pp. 2-3). The City permits for Astoria were for work almost exclusively within the property of the station. All piping and interconnection work was to be on-site. The only permit for street work involved removal of street grates at the driveway edge for modification and repaving of the entrance driveway and sidewalk at the street line, and, a permit for temporary use of a City fire hydrant for construction water. This is shown in the Application Table 4.7-1.

Siting Board has a complete record on those issues relevant and material to the Siting Board's decision under PSL §168.⁸ Doing so, however, does not mean that every issue raised, and benefit claimed, be discussed in Staff's pleadings.

Therefore, Staff recommends that the Siting Board determine TransGas' motion to be unfounded and dismiss it in its entirety.

Sincerely yours,



DAVID R. VAN ORT
Assistant Counsel

cc: Active Parties via e-mail

⁸ Staff believes that some of the issues that TransGas has complained of throughout this case might have been resolved if the Applicant had initiated and participated in negotiations pursuant to 16 NYCRR §3.9.