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June 1, 2006

By Mail

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

Re: Case 01-F-1276 - TransGas Energy Systems, LLC

Dear Secretary Brilling:

I have enclosed an original and five copies of the City of New York's reply to the comments of TransGas Energy Systems, LLC pertaining to the Hearing Examiners' April 12, 2006 recommendation.

Thank you for your consideration.

Respectfully submitted,

William S. Plache
Assistant Corporation Counsel
Environmental Law Division

c. Hon. Judith Lee
Hon. Kevin Casutto
Sam Laniado, Esq.
Thomas P. Puccio, Esq.
Service List

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

IN THE MATTER

- of the -

Application filed by TransGas Energy Systems LLC For a Certificate of Environmental Compatibility and Public Need to Construct and Operate a Nominal 1,100 megawatt generating facility in the Borough of Brooklyn, New York City

Case 01-F-1276

THE CITY OF NEW YORK'S RESPONSE TO COMMENTS ON THE HEARING EXAMINERS' RECOMMENDATION

INTRODUCTION

The City of New York ("City") submits this response to the comments of TransGas Energy Systems, LLC ("TGE") on the Hearing Examiners recommendation, issued April 12, 2006, that TGE's application, as amended, be dismissed. The City responds in detail to TGE Comments I and IV. With respect to TGE's other comments, the City relies on the analysis contained in the recommendation itself.

TGE Comment I – The Hearing Examiners' conclusion that the Board lacks authority to issue revocable consents should be rejected

NYC Response -- The Examiners correctly recognized that the Board cannot authorize construction of water and steam pipes over the city's objection

The Examiners were correct in concluding that the Siting Board does not have authority to grant City property or the use of City property to third parties, such as TGE, over the objection of the City. TGE disagrees, and although TGE does not contest that the land into which the water and steam pipes are to be placed is the inalienable property of the City, it argues

that the Board may authorize the use of the City's property, and, in essence, issue revocable consents to place those pipes within the City's inalienable property pursuant PSL § 172(1). TGE's argument is flawed.

TGE, the City and the Examiners are in agreement that a revocable consent is not an interest in property, but rather a license to use the property of the City. The Examiners noted that a revocable consent is defined as "a grant by the city of a right, revocable at will (1) to any person to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over inalienable property." NYC Charter § 362(d). As defined in NY Jur. 2d, a license "is a privilege or permission *given by the owner of land* authorizing another to enter and use or occupy the land or a part of it for a special purpose." 24 NY Jur., Licenses in Real Property § 214 (italics added). Moreover, a license "is *revocable by the licensor.*" Id. (italics added). TGE itself notes that a license is "a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest in the land." TGE brief at 9, quoting 24 NY Jur., Easements and Licenses in Real Property § 214.

Thus, a license, and in particular, a revocable consent, as defined in the City Charter and New York Jurisprudence, has two necessary characteristics: (1) it may be granted only by the property owner (in this case, the entity that holds the property in trust), and (2) it is revocable by the licensor. The notion that another entity can override the City's authority to issue revocable consents is illogical. If the City were to grant to TGE the authority to lay pipes in the City's inalienable property, which it will not, it would have granted a revocable consent. However, it would impossible, by definition, for another party, including the Board, to issue a revocable consent or a license on the City's behalf. Such an instrument, if issued by the Board, would be neither issued by the property owner nor would it be revocable by the City. Rather,

any attempt by the Board to issue a revocable consent on behalf of TGE would necessarily be a *de facto* alienation of property.

TGE's attempt to cloud the distinction between the types of local regulatory approvals, permits and consents that, pursuant to PSL § 172(1), may not be required by any municipality absent Siting Board approval, and the City's rights with respect to inalienable property, is decidedly unconvincing. See, e.g., Matter of Athens Generating Co., Case 97-F-1563, cited by TGE at 17 (Siting Board can override local zoning); Consolidated Edison Company of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99 (1983) (town law prohibiting a prospective applicant from beginning a site study prior to obtaining a license, which could be denied at discretion of the town, was invalid in light of Article X). Neither case, which affirms the undisputed fact that Article X overrides municipal enforcement of local laws and zoning, is relevant to TGE's claim that the Board can authorize TGE's construction of facilities to permanently occupy the inalienable property of the City.

TGE also relies on the City's memorandum of law from an Article 78 proceeding brought by TGE, to argue that the City somehow admits that the Board can issue revocable consents for the construction of pipes. A copy of the City's memorandum of law from the Article 78 proceeding ("City Article 78 memo") is attached to TGE's brief. The City's Article 78 memo makes no such implication. At issue in that case, which is currently pending in the Supreme Court, New York County, is the set of City Council resolutions that implement the Greenpoint-Williamsburg rezoning and mapping of the 28-acre waterfront park, which includes the Bayside site. TGE seeks to overturn the rezoning and park mapping, by arguing, among other things, that the amendment to the City Map to designate the Bayside site as a public park is preempted by Article X.

In its memo, the City, referring to PSL §§ 168, and 172(1), explained that it is the Siting Board's discretion whether to consider the compatibility of the proposed power plant with local laws, or to override local zoning. Id. at 29. After noting that Justice Gerges, Supreme Court, Kings County, had enjoined the City's attempt to acquire the Bayside site through condemnation until the Siting Board ruled on the TGE application, the City stated, "only if the Siting Board denies TGE's Article X application, and the City thereafter takes possession of the property ... would there be a restriction on the ability of TransGas to construct its proposed power plant. City Council Resolution 964 [mapping the property as a public park] has no such result." NYC Brief at 32. The statement is merely a recognition that local laws and regulations, i.e. zoning and park mapping, do not have a preclusive effect on the Article X applicant, as the Siting Board can override the applicability of those local laws and regulations. This is contrasted with the City's attempt to acquire the property, which, if successful, would have prevented TGE from going forward.

Accordingly, the Article 78 proceeding only addresses the rezoning and park mapping, and the City's statements demonstrate that the rezoning and park mapping should not be invalidated by the presiding court. The rights pertaining to the inalienable property through which TGE proposes to construct water and steam pipes are not at issue in that case. The City's statements pertaining to the override of local laws and regulations, including zoning, under PSL § 172(1) in its memo must be taken in the context of the issues in that proceeding, are irrelevant to the inalienable property at issue here.

Accordingly, the Examiners correctly recognized that the Legislature did not empower the Siting Board with the authority to grant City property or authorize the permanent occupation of City property over the City's objection.

TGE Comment IV – There would be no prejudice to any party if hearings are held.

NYC Response – The pending application has resulted in numerous delays that have prejudiced the City of New York and the community.

The Hearing Examiners recognized that that further delay in denying TGE's pending application would prejudice the parties and the public. Significantly, the City and the community have already been prejudiced by the outstanding Article X application, which has prevented the City from moving forward with the acquisition of the Bayside site, and is being used as a basis to attack the validity of the entire Greenpoint Williamsburg rezoning. In light of the numerous impediments that have resulted from the pending application, TGE's arguments to the contrary are nonsensical.

As the City has discussed throughout this proceeding, the Greenpoint Williamsburg Land Use and Waterfront Plan ("LUAWP") is one of the most comprehensive and well-planned land use initiatives since the adoption of the City's Zoning Resolution. The City does not repeat the details and benefits of the LUAWP here, as they were recited in detail in the City's hearing testimony and post hearing briefs. As discussed in those briefs, the 28-acre waterfront park, which includes the 8-acre Bayside site, is the one of the most important, if not the most important aspect of the LUAWP. The park addresses the long-recognized need to create public waterfront access and provide additional open space in the community, which has been underserved by parks for years.

As the Examiners noted, the LUAWP has since been adopted, with certain modifications to increase the amount of affordable housing, by action of the City Council on May 11, 2005. Since that time, TGE has used its pending application to derail the City's attempts to move forward with the park acquisition and overall rezoning, at the expense of not only the community, but all City residents, who will benefit from the effects of the rezoning and

waterfront access. TGE claims that hearings are necessary to determine whether the pending application has, in fact, disrupted the rezoning and park mapping. TGE brief at 33. This argument is ludicrous, as the public record, which includes several court proceedings, demonstrates with indisputable clarity that TGE's application has been a serious impediment to the City's ability to proceed in accordance with the May 11, 2005 City Council resolutions.

As discussed in the Examiners' recommendation, on July 20, 2005, the City initiated a proceeding to acquire, through eminent domain, the Bayside site, for use as a public waterfront park. TGE intervened in that proceeding and opposed the City's condemnation of the property, arguing, among other things, that TGE's pending Article X application preempted the City's ability to condemn the site. On December 14, 2005, the Court issued an order and decision staying the City's condemnation until such time as the Siting Board rules on TGE's application. The time has come, once and for all, to deny the application so the City can proceed with implementation of the City Council resolutions adopting the LUAWP.

In addition to the proceedings surrounding the City's attempt to acquire the Bayside site, TGE has also attempted to condemn the Bayside property, through the incorporation of an affiliate, TransGas Energy Services Corporation ("TESC"), under the Transportation Corporations Law, and initiating a proceeding in Kings County Supreme Court to condemn the site. The City filed a challenge TESC's determination and findings under section 207 of the Eminent Domain Procedure Law in the Appellate Division, Second Department. The parties agreed to stay TESC's Supreme Court proceeding to condemn the site, pending determination of the City's § 207 challenge in the Appellate Division. However, TESC's proceeding to condemn remains pending, and if the Appellate Division rules in favor of TESC on the City's 207 challenge, the stay would be lifted, and TESC could restart its condemnation

proceeding in Supreme Court. The City, however, cannot return to Supreme Court on its proceeding to condemn the site until the Siting Board issues a decision, and the prejudice to the City, if TESC acquires the site through condemnation, would be monumental.

As noted above, TGE is also using its pending application to argue that the entire Greenpoint Williamsburg rezoning should be overturned. Not only does TGE argue, as discussed above, that the rezoning is preempted by Article X, and is therefore invalid, TGE also argues that the Final Environmental Impact Statement ("FEIS") is deficient because it did not study the alleged positive impacts that would result from the power plant. See Points II B and C of the City's Article 78 memo, which respond to TGE's arguments. Specifically, TGE has argued that the FEIS is invalid because it does not import and accept TGE's MAPS analysis allegedly showing net positive air quality impacts from its plant, and further because the FEIS does not discuss TGE's claims that it will allegedly remediate the Bayside site more effectively than the City.

Although neither allegation has any legal of factual merit, the City has wasted extensive resources defending against these claims in that proceeding, which is still pending before the Court. The fact that the Article X application remains pending has allowed TGE to proceed in Supreme Court with its characterizations of speculative environmental benefits of its project (benefits that have already been rejected by the Examiners in the April 1, 2004 Recommended Decision), and alleged inadequacies of the City's FEIS. The outcome of these claims is unknown, and TGE's proceeding has put a cloud of uncertainty to the fate of the entire rezoning. TGE has used its outstanding Article X application as a sword to attack the rezoning and park development at every turn. The City will continue to be prejudiced until the application is dismissed, at which time TGE will no longer be able to claim that the Siting Board considers

the alleged environmental benefits of the proposed plant to be credible, and further claim the rezoning is therefore invalid.

In addition to these concrete examples of TGE's pending application inhibiting the LUAWP are the intangible costs that cannot be quantified. It is impossible to know exactly how much development or investment has been deterred by the pending uncertainty regarding the future of the Bayside site itself or the entire rezoning. What is certain is that a hearing is not necessary to establish what is glaringly obvious – that the pending application has prejudiced the rezoning and park acquisition.

With respect to the LUAWP itself, TGE, in a last ditch effort to save its application, attempts to convince the Siting Board that the City does not truly intend to create the 28-acre waterfront park that includes the Bayside site. TGE claims that "[r]ecent documents show that the City may not even pursue the use considered by the Examiners in preparing the RD and Recommendation. Site sampling work plans for the Bayside site state the City will be constructing town homes on the site." TGE brief at 34. The City has already explained, in its Opposition to TGE's Motion to Consider New Information in Hearings, dated May 12, 2006 ("City's Opposition"), that the reference to town homes, in an early draft of the site investigation work plan, was a *typographical* error. As discussed in the City's Opposition, that error was corrected in a subsequent version of the work plan.

In addition to the site work plan for the Bayside site, the City's consultants have also prepared two other work plans for the properties to the south. Together, these three work plans comprise the entire 28-acre waterfront park. There is absolutely no uncertainty surrounding the City's intention to create a 28-acre waterfront park, which is an essential element of the LUAWP. TGE's attempt to capitalize on a mere typographical error, especially in

light of the explanation provided in the sworn affidavit attached to the City's Opposition, is another desperate attempt by TGE to jeopardize the broadly supported project for its own selfish purposes.

Moreover, the statements in TGE's brief regarding the waterfront park show that TGE still has a fundamental misunderstanding the underlying purpose of the park. Notwithstanding the numerous submissions by the City explaining that the park is an essential component of the LUAWP itself, TGE claims, "In the City's FEIS for the Greenpoint/Williamsburg rezoning, it stated that the park was only necessary to accommodate the increase in population expected with any residential build-out contemplated in the rezoning. In other words, the park is not necessary until the residential build-out has occurred and the buildings are ready for occupancy." TGE brief at 34. This statement is untrue. The FEIS makes no such statement, and the park is an independent project element that is necessary above and apart from the rezoning.

TGE's confusion stems from the misunderstanding that the park is only necessary as open space mitigation, to provide public access for the increased population that will result from the rezoning. The City has been clear throughout this proceeding, and it is further clear from the FEIS, that the 28-acre waterfront park is not proposed as mitigation, but is, rather, a fundamental, long-awaited action on its own, which could serve as the centerpiece of the LUAWP. The park capitalizes on opportunities for public access to the East River waterfront with its spectacular views of Manhattan, which has been made possible by the decline of industry over the past half century.

As the City has explained in prior correspondence to the active parties, because of the possibility that TGE could be authorized to construct a power plant on the Bayside site, it

chose to analyze, in the FEIS, whether the loss of open space that would result from a power plant on the Bayside site would create adverse environmental impacts in terms of the ratio of open space to population. See, e.g., NYC Letter to the Honorable Jaclyn Brilling, dated June 29, 2005. The FEIS concluded that the loss of the Bayside site as open space, in terms of that proportion of open space to population, could be mitigated by creating open space in other locations in the community. See Id. However, the creation of the public waterfront park is a significant project element, if not the centerpiece of the entire LUAWP, and the loss of the opportunity to develop the park would be tragic. TransGas is simply confused when it claims that the waterfront park is only proposed as mitigation to increase open space, and has no further utility.

Furthermore, TGE claims that it can provide a public park on top of its proposed underground plant. The City has addressed TGE's claims that the park and its plant can coexist in numerous submissions to date. The necessary construction of large access structures throughout the site, the looming stack, the truck traffic, and potentially limited public access due to security concerns all demonstrate that the plant and park cannot coexist. Moreover, the uncertainty surrounding TGE's ability to ever construct or operate a plant in reality, which cannot operate without steam export, could prevent TGE from constructing the park for years, if at all.[1]

[1] The City notes the incongruity of TGE's actions throughout this proceeding, as evidenced in its brief. TGE claims to be an applicant in the competitive market, but when unable to demonstrate a viable use for its steam, requests the assistance of the Public Service Commission to essentially force a purchaser for its product. As TGE's electric production is necessarily linked to steam output, both financially and from and engineering standpoint, the examiners correctly relied on TGE's lack of a credible use for its steam in their recommendation. The City further notes that the Examiners were correct that the incorporation of TESC, with the power of eminent domain, is inconsistent with TGE's purported status as a private applicant.

The City, the community and all those involved in the development of the Greenpoint and Williamsburg communities need to move forward with the actions authorized by the May 11, 2005 City Council resolutions, including development of the waterfront park, and cannot do so while TGE's application remains pending. Accordingly, the City supports the Examiners' recommendation that TGE's Article X application, as amended, be denied.

CONCLUSION

For the foregoing reasons, the City of New York respectfully requests that the Siting Board adopt the recommendation of the Hearing Examiners, and deny TGE's application for a certificate to operate and construct a power plant at the Bayside site.

Dated: New York, New York
June 1, 2006

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