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May 22, 2001

Honorable Janet Hand Deixler
Secretary
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

RE: Case 99-F-1164 – In the Matter of Southern Energy Bowline, L.L.C., for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a Nominal 750 Megawatt Combined Cycle Combustion Turbine Electric Generating Plant in Haverstraw, Rockland County, New York.

Dear Secretary Deixler:

Enclosed please an original and 25 copies of the Response of the Staff of the Department of Public Service designated to participate in this proceeding to interlocutory appeals from the Examiners' May 9, 2001 ruling regarding additional issues.

Very truly yours,

Steven Blow

Steven Blow
Assistant Counsel

cc: Hon. Gerald L. Lynch, Presiding Examiner
Hon. Kevin J. Casutto, Associate Examiner
All Parties

enc.

STATE OF NEW YORK
BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

CASE 99-F-1964 – In the Matter of Southern Energy Bowline, L.L.C., for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a Nominal 750 Megawatt Combined Cycle Combustion Turbine Electric Generating Plant in Haverstraw, Rockland County, New York.

STAFF'S RESPONSE TO INTERLOCUTORY APPEALS OF EXAMINERS' RULING OF MAY 9, 2001

PRELIMINARY STATEMENT

In a Ruling issued March 30, 2001, the Examiners identified ten relevant and material matters as issues to be addressed by the parties at the evidentiary hearing and required the applicant to provide additional information on three matters. After the provision of such information, the Examiners (in a Ruling issued May 9, 2001):

> (1) declined to identify alternative sites as an issue warranting adjudication under Article X of the Public Service Law (PSL);
>
> (2) invited the applicant to augment its decommissioning plan, while declining to identify any decommissioning issues for adjudication under Article X at this time; and
>
> (3) declined to identify any impacts of Bowline Unit 3 on out-of-state transmission systems or on a 1,000 MW wheeling contract as a PSL Article X issue.

The County of Rockland (County) filed a timely interlocutory appeal of the Examiners' Ruling regarding alternative sites. Public Service Electric and Gas Company (PSE&G) and PJM Interconnection, LLC (PJM) jointly filed a timely interlocutory appeal of the Examiners' Ruling concerning the proposed facility's impacts on their transmission systems and on the wheeling contract with Consolidated Edison Company of New York, Inc. (Con Edison).

I. Alternative Sites

In the March 30, 2001 Ruling, the Examiners described the County's proposed issue as whether the applicant failed to consider adequately alternative sites for its proposed generating facility and noted that the County had sought a prompt determination, pursuant to PSL §167(5), that the applicant's consideration of alternative sites was inadequate. The Examiners also stated that the applicant and Staff took the position that, as a private applicant that neither owns nor has an option on alternative sites, Mirant Bowline, LLC need not present such evidence. The Examiners, however, required the applicant to supplement its application by describing alternative sites owned by, our under option to, its affiliates and discussing the suitability for each for the proposed generating facility.

Despite disagreeing with the Examiners' conclusion that a private applicant is required to present evidence concerning alternative sites owned by, or under option to, its affiliates, the applicant and Staff did not file interlocutory appeals to the March 30, 2001 Ruling. Instead, the applicant provided information on alternative sites in New York owned by, or under option to, its affiliates. In response, the County focussed on the applicant's consideration of alternative sites and argued that such sites should not be limited to those located in New York. In the May 9, 2001 Ruling, the Examiners decided the applicant's consideration of alternative sites could be limited to those located in New York. Thereupon, the County filed an interlocutory appeal, again focussing on the applicant's consideration of alternative sites and arguing that such consideration must includes sites in PJM's control area and in other states bordering New York.

From the foregoing discussion, it is clear that no party to this proceeding has indicated an intent to proffer testimony on an alternative site for the applicant's proposed generating facility. The only potentially relevant and material matter that might be identified as an issue to be addressed by the parties in the evidentiary hearing is whether the applicant failed to consider adequately alternative sites to its proposed generating facility. As noted above, Staff did not appeal the requirement in the Examiners' March 30, 2001 Ruling that the applicant present information on sites owned or under option to its affiliates; however, now that the issue of the adequacy of the applicant's consideration of alternative sites is before the Board, we consider it proper to state our position in full.

PSL §164(1)(b) provides that an application must contain:

> A description and evaluation of reasonable alternative locations for the proposed facility, if any ...; a description of the comparative advantages and disadvantages of each such location ...; a statement of the reasons why the primary proposed location ... is best suited among the alternatives considered to promote public health and welfare, including the recreational and other concurrent uses which the site may serve; provided that the information required pursuant to this paragraph shall be no more extensive than required under article eight of the environmental conservation law ...

PSL §168(2)(c)(i) and (e) explicitly refer to alternatives required to be considered pursuant to PSL §164(1)(b). When the Board adopted 16 NYCRR §§1000.2(o) and 1001.2(d)(2) to implement these PSL provisions, it cited a case that had defined the obligations of private project sponsors under Article 8 of the Environmental Conservation Law, Matter of Horn v. IBM, 110 A.D.2d 87 (2 Dept., 1985).[1]

[1] Case 97-F-0809 – In the Matter of the Rules and Regulations of the Board, Memorandum and Resolution Adopting Article X Regulations (issued December 16, 1997), p.8.

Replacing the terms used in 16 NYCRR §1001.2(d)(2) with the definitions of such terms contained in PSL §160(3) and 16 NYCRR §1000.2(a) and (o), the regulation would read:

> For an applicant that does not have the power of eminent domain, site alternatives may be limited to parcels owned by, or under option to, such individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate that proposed to submit, or in fact submits an application for a certificate to the board.

Southern Energy Bowline, LLC (now Mirant Bowline, LLC) is the applicant and does not have the power of eminent domain. Therefore, it need not present evidence concerning alternative sites not owned by or under option to it and the Board need not consider any further information on alternative sites. Because alternative sites owned by, or under option to, the applicant's affiliates need not be considered at all, the County's position that such alternative sites located outside New York must be considered must be rejected.

Assuming, arguendo, that the applicant was legally required to describe and evaluate reasonable alternative locations for its proposed facility that are owned by, or under option to, its affiliates, such description and evaluation need not include locations outside New York. The Legislature made this clear by limiting those who are required to be served with a copy of an application or notice thereof to New York State officials, agencies and municipalities.[2] In PSL §164(2)(b)(iii), the Legislature required that notice of the filing of an application be given to certain persons who state that they wish to receive such notices. While some out-of-state residents may benefit from this requirement, the Legislature did not specify

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[2] See PSL §§160(1) and 164(2).

that persons residing outside New York must be notified of applications that describe and evaluate alternative sites located in the municipalities where they reside.

Even assuming, arguendo, that an applicant may be required to describe and evaluate alternative sites outside the State that are owned by, or under option to, its affiliates, it need not do so if such sites are not reasonable alternative locations for its proposed facility. Here, the applicant proposed to construct and operate a generating facility in order to participate in the competitive wholesale electricity supply market in New York. No alternative location outside the State would allow the applicant to compete in the wholesale electricity supply market in New York. Even if the applicant's objective were only to supply a certain quantity of generating capacity and electric energy to the New York State transmission system, no out-of-state alternative site owned by, or under option to, the applicant's affiliates would permit any electric generating capacity to be made available in New York; moreover, given our understanding of neighboring states' transmission systems, we do not believe that the same amount of electric energy as that produced by the proposed facility at the Bowline Point site could be made available in New York from any such out-of-state alternative site.

As for the cases cited by the County, Matter of Tyminski v. Public Service Commission, 38 N.Y.2d 156 (1975) stands for the proposition that an applicant for a certificate to construct and operate major utility transmission facilities must present information on reasonable alternative locations for such facilities. Neither that case nor the others cited by the County give any support to the contention that out-of-state alternative sites in general or the nine sites mentioned by the County in particular are reasonable alternative locations for the applicant's proposed facility.

II. Transmission Issues

Staff does not consider it necessary to address this matter in great detail, since PSE&G, PJM and applicant and Staff have already submitted several pleadings on this topic. We support the Examiners' conclusion that, while the Board has jurisdiction to examine transmission system impacts caused by proposed generating facilities, it should not exercise such jurisdiction in this proceeding. The Article X proceedings in which Boards have exercised such jurisdiction have involved impacts to the intrastate transmission system. A State agency is not in the best position to resolve "seams" issues between electricity control areas. The difference between out-of-state environmental impacts and interstate transmission impacts is that in the former case there is no interstate agency with authority to minimize such impacts, whereas in the latter case such agency does exist. Similarly, issues regarding the wheeling contract between PSE&G and Con Edison and any adverse effect of the proposed facility on PSE&G's ability to fulfill such contract are issues best resolved by the Federal Energy Regulatory Commission.

Finally, Staff takes issue with the assertion of PSE&G and PJM that the Board in this proceeding should evaluate the cumulative impacts on the out-of-state transmission system that would be caused if three proposed generating facilities were constructed and operated in Rockland County. PSE&G and PJM should not have raised that issue in their interlocutory appeal of the Examiners' May 9, 2001 Ruling, since it was the subject of their interlocutory appeal of the Examiners' March 30, 2001 Ruling. Having responded to the earlier interlocutory appeal, Staff will not respond further now.

CONCLUSION

For the reasons stated herein, Staff's position as to the adequacy of the applicant's consideration of alternative sites should be adopted and the Examiners' decision that no

adjudicable issues regarding this topic exist should be affirmed on that basis. The Examiners' decision that no transmission issues are to be addressed in the upcoming evidentiary hearing should also be affirmed.

Respectfully submitted

Steven Blow
Assistant Counsel

Dated: May 22, 2001
Albany, New York