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

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of Albany on August 8, 2000

BOARD MEMBERS PRESENT:

Maureen O. Helmer, Chairman
New York State Department of Public Service

James H. Ferreira, Alternate for
John P. Cahill, Commissioner
New York State Department of Environmental Conservation

Roger McDonough, Alternate for
Charles A. Gargano, Commissioner
Empire State Development

Thomas A. DiCerbo, Alternate for
Antonia C. Novello, M.D., M.P.H., Commissioner
New York State Department of Health

Robert K. Irwin, Sr., Ad Hoc Member

Bernardina C. Torrey, Ad Hoc Member

CASE 97-F-1563 - Application by Athens Generating Company, L.P. for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,080 Megawatt Natural Gas-fired Combined Cycle Combustion Turbine Generating Facility, in the Town of Athens, Greene County.

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective August 10, 2000)

BY THE BOARD:

INTRODUCTION

On June 15, 2000, the Board on Electric Generation Siting and the Environment (the Board) granted a certificate of environmental compatibility and public need to Athens Generating Company, L.P. (AGC) authorizing, subject to the conditions set forth in the certificate, the construction and operation of a 1,080 megawatt generating facility in the Town of Athens, Greene

County.[1] Intervenors Citizens for the Hudson Valley (CHV), Janessa Nisely (Nisely), and Jay Carlisle (Carlisle) have filed a joint petition, dated July 14, 2000, seeking rehearing of the resolution of four issues addressed in our decision and in the Recommended Decision of Examiners Harrison and O'Connell issued on September 3, 1999. AGC and the staff of the New York State Department of Environmental Conservation (DEC) have filed replies in opposition to the petition. The petition is dismissed and denied, as stated herein.

APPLICABLE STANDARDS FOR PETITIONS FOR REHEARING

The Board's rules of procedure provide as follows:

> Unless a provision of PSL Article X, Section 306 of the State Administrative Procedure Act, or this Part conflicts therewith, the Rules of Procedure of the Public Service Commission (contained in Subchapter A of Chapter I of this Title) that are in force on the effective date of this Part shall apply in connection with each certification proceeding under PSL Article X. When such regulations indicate that the Commission is the decision maker, such reference shall be deemed to apply to the Board.[2]

The Public Service Commission's rules of procedure regarding petitions for rehearing provide, in pertinent part, that:

> 1. "Rehearing may be sought only on the grounds that the commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and

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[1] Case 97-F-1563, Application by Athens Generating Company, L.P. for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,080 Megawatt Natural Gas-fired Combined Cycle Combustion Turbine Generating Facility, in the Town of Athens, Greene County, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000) (Opinion and Order). A summary of the procedural history of this case is set forth at pp. 1-5 of the Opinion and Order.

[2] 16 NYCRR §1000.1.

specifically explain and support each alleged error or new circumstance said to warrant rehearing."[1]

2. "A party's failure to except with respect to any issue shall constitute a waiver of any objection to the recommended decision's resolution of that issue. If the Commission adopts the recommended resolution, a party that has not excepted may not seek a different resolution of that issue on rehearing."[2]

ISSUES RAISED

Local Zoning Ordinance

Pursuant to PSL §168(2)(d), the Board found certain provisions of the zoning ordinance of the Town of Athens to be unduly restrictive and granted waivers from them for the following purposes:

1. To permit the water intake pumphouse to be constructed in a rural residential zoning district. (The pumphouse, though designed to resemble a conforming residential structure, would be a nonconforming use.)

2. To permit the pumphouse to be located inside the 50-foot setback area along the river shore, in order to minimize excavation requirements, allow easy access to the site by vehicles used for construction and maintenance, and preserve existing vegetation screening.

3. To permit the installation of electric and gas interconnections and water supply lines in zoning districts where such facilities would be nonconforming uses.

4. To permit the installation of structures taller than 35 feet.[3]

The Town of Athens is not opposed to the foregoing waivers.

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[1] 16 NYCRR §3.7(b).

[2] 16 NYCRR §4.10(d)(2).

[3] Opinion and Order, pp. 81-86.

In their petition, CHV, Nisely, and Carlisle acknowledge that PSL Article X "in its overall general application would appear to fit within the construct of State usurpation [sic] of local authority that is not violative [of] the home rule protections of . . . Article IX of the State Constitution."[1] The petitioners contend, however, that "Article X as applied in this case is unconstitutional," because, they claim, "the record is entirely devoid of any information which establishes that the proposed facility satisfies any substantial New York Statewide [sic] concern."[2]

Petitioners Nisely and Carlisle did not file briefs on exceptions in this proceeding, and petitioner CHV did not address this issue in the brief it filed. Therefore, they are barred, by 16 NYCRR §4.10(d)(2), from raising this issue in a petition for rehearing.

In any event, the petitioners' core contention, that the constitutionality of an override of local laws by a state law of general applicability is determined on a case-by-case basis, is incorrect. The courts have held that enactment of a state law of general applicability results in an override of local laws and home rule.[3] Public Service Law Article X allows the Board to override local ordinances that are unduly restrictive regardless of how the Board decides individual requests for waivers of those ordinances.[4]

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[1] Petition, p. 18.

[2] Ibid., pp. 18, 19.

[3] See Opinion and Order, pp. 30-31, and the cases cited therein.

[4] The petitioners also overlook the fact that PSL Article X requires the Board to find that a proposed facility is designed to operate in compliance with applicable municipal laws unless we find that compliance would be "unreasonably restrictive in view of the existing technology" (PSL §168(2)(d)). Waivers of the Town's zoning ordinance have been granted in this proceeding to accommodate existing power generation technology.

Alternate Sites

The Board adopted the Examiners' conclusion that none of a variety of alternate sites proposed by CHV for AGC's project had been shown to be suitable for that purpose. We found that "[t]here has been no showing that there is an available, preferable site that should be developed instead of the site proposed by AGC, such as a showing that development of the alternate site would resolve a significant problem with the proposed site."[1] Because we determined that (i) "with mitigation, adverse environmental impacts at the proposed Athens site are not significant and have been minimized," and (ii) AGC, a non-utility applicant, does not have alternate sites available for its proposed plant, we concluded that "in these circumstances . . . we would require evidence that some greatly superior site is available that should (and may) be used instead for such a generating plant, before we would consider 'alternative sites' to be a material issue."[2]

CHV, Nisely, and Carlisle contend that the Examiners and the Board were "wrong in concluding that the burden should be upon the intervenors to show clear superiority" of alternate sites. Instead, they argue, should an intervenor identify alternative sites that were "apparently usable, based upon a short-form environmental assessment," an applicant "must be required to do at least some serious environmental analysis of each one of those identified sites prior to the Board's finding that the original site is clearly superior."[3]

AGC argues in response that evidence of "some greatly superior site" should be submitted by the proponent of that site. AGC points out that there is no legal support for the shift in the burden of proof for which the petitioners argue.

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[1] Opinion and Order, p. 97.

[2] Ibid., pp. 96-97.

[3] Petition, p. 26.

Petitioners Nisely and Carlisle did not file briefs on exceptions in this proceeding. Therefore, they are barred, by 16 NYCRR §4.10(d)(2), from raising this issue in a petition for rehearing.

CHV's contention lacks merit. Public Service Law §164(1)(b) requires "[a] description and evaluation of reasonable alternative locations to the proposed facility, if any . . . provided that the information required pursuant to this paragraph shall be no more extensive than required under article eight of the environmental conservation law." In adopting regulations to implement this provision, the Board defined a "private applicant" as "an applicant that does not have the power of eminent domain."[1] Consistent with the proviso in PSL §164(1)(b), the Board decided that private applicants need not present, and the Board need not consider, alternate sites unless applicants own or have options on such sites.[2]

In exercising our discretion to allow parties to present alternate sites, we reaffirm our conclusion that an intervenor advocating an alternative to the site proposed by a private applicant must submit evidence that the alternative is superior to that proposed by the applicant. Accordingly, there is no merit to petitioners' suggestion that an intervenor in an Article X proceeding may shift the burden of proof on alternate sites to a private applicant merely by submitting assessments of alternate sites that are not owned by or under option to the applicant.

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[1] 16 NYCRR §1000.2(o).

[2] Case 97-F-0809, In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, contained in 16 NYCRR -- Addition of a new Chapter X, Subchapter A, to implement Article X of the Public Service Law, Memorandum and Resolution Adopting Article X Regulations (issued December 16, 1997), p. 8, citing Horn v. IBM, 110 A.D.2d 87 (2d Dep't 1985).

Dry Cooling

As discussed in the Board's decision,[1] the visual impacts resulting from installation of different water cooling systems were evaluated during the hearings in this proceeding. Consideration was given to a system relying on evaporation ("wet"), a system employing both evaporation and cooling fans ("hybrid"), and a system relying entirely on fans ("dry"). In a decision dated June 2, 2000, the DEC Commissioner decided that the State Pollutant Discharge Elimination System (SPDES) permit for AGC's project should include an intake limitation of 180,000 gallons per day. That condition effectively required AGC to install a dry cooling system. A certificate of environmental compatibility and public need was issued by the Board to AGC subject to the applicant's compliance with all SPDES permit conditions.

In their joint petition, CHV, Nisely, and Carlisle assert that "[i]n the present matter, the ruling of the DEC Commissioner requiring dry cooling systems at this facility results in and amounts to, without question, a fundamental change in the application before the Board."[2] According to the petitioners, "[t]here is simply no reasonable basis upon which the revision from hybrid to dry cooling with its attendant facility dimensional changes can be determined to not require

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[1] Opinion and Order, pp. 31-36, 54-57.

[2] Petition, p. 23. The petitioners contend, in an argument that is not (apparently) addressed to the Board, that the DEC Commissioner's determination "was invalid because DEC failed to conduct a State Environmental Quality Review Act ("SEQRA") review, which is integral to DEC's issuance of SPDES permits as satisfying federal water pollution control requirements" (Petition, pp. 22-23, footnote omitted). The propriety of DEC's procedures in granting a SPDES permit is not the subject of this proceeding. In any event, as DEC points out in its response to the petitioners, "the environmental review under Article X is broad and as comprehensive as a SEQRA review and, as such, [DEC] is directed under PSL §172 to follow Article X procedures for environmental review" (DEC's Response, pp. 5-6).

additional consideration by the Board . . . ."[1] In the petitioners' view, "Article X contemplated the possibility of material changes and a consequent enlargement of the hearing process and directed the Board to promulgate regulations for such an eventuality, which the Board did."[2]

DEC opposes the petition, pointing out that "the essential features of dry cooling including the dimensions and size of the dry cooling towers, the overall size of the proposed facility with the dry cooling towers, the height of the stacks, the lack of a visible plume from the dry cooling towers, the impacts to aquatic organisms and water quality resulting from the dry cooling towers, the costs of the dry cooling towers, and the location, design, and capacity of the intake structures were considered at length and addressed in detail on the record."[3]

The petitioners' contentions notwithstanding, PSL §165(4) authorizes, but does not require, the Board to extend its 12-month deadline for decision (by six months) in the event of a "material and substantial amendment" to an application. But that is beside the point, for no such amendment was proposed by AGC in this case. Throughout the course of the proceeding, the issue of what type of cooling system would be the most protective of the environment was actively contested. The relative visual impacts of hybrid and dry cooling system structures were addressed extensively in the hearings held prior to the issuance

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[1] Id. The petitioners refer to, among other things, "the overall combined volume of the proposed cooling structures under dry cooling" and the "overall increased power plant mass" (Petition, p. 21). While various witnesses discussed the external dimensions of different cooling system structures, those dimensions do not provide measures of "volume" and "mass," at least as those terms are conventionally defined.

[2] Ibid., p. 21, citing PSL §165 and 16 NYCRR §1000.12.

[3] DEC's Response, pp. 3-4.

of the Examiners' Recommended Decision.[1] On the basis of that record, the Examiners made findings about the comparative visual impacts of hybrid and dry cooling system structures.[2] When additional hearings were ordered after exceptions were filed and after the Board viewed the project site and surrounding areas, the parties were directed to augment the record with, among other things, "a drawing and schematic diagram of the plant layout with a dry cooling tower designed to the lowest reasonably achievable profile."[3] At the ensuing prehearing conference, AGC described the materials it proposed to submit to meet that directive; no party objected to AGC's proposal.[4] At the hearing held on January 26, 2000, the materials prepared by AGC were submitted into evidence without objection.[5]

In short, by the time the DEC Commissioner's SPDES determination was issued (on June 2, 2000), the options before the Commissioner were fully explored, and information about the visual impacts associated with each option had already been included in the evidentiary record in this proceeding for over five months. Accordingly, the Commissioner's determination on the SPDES permit did not introduce a substantial modification to

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[1] See, e.g., Tr. 4,696, 4,708-4,713, and 4,934-4,936 (AGC witnesses Ward and Crandall); Tr. 5,190-5,192 (DEC witness Turner); Tr. 5,330-5,331 (Department of Public Service [DPS] witness Davis); Tr. 5,455 (Scenic Hudson & Friends of Olana [SH&FO] witness Smardon). Additional hearings, which were not attended by the petitioners, involved consideration of, among other things, simulations of the visual impact of the proposed facility following implementation of a variety of mitigation measures proposed by DPS (see, e.g., Tr. 5,802-5,807, 5,894-5,896, and 5,911-5,916).

[2] Recommended Decision, pp. 63-69 and 193-194.

[3] Letter from Chairman Helmer to the Active Parties, November 30, 1999.

[4] Tr. 5959-5960. Petitioners did not attend the prehearing conference (Tr. 6014-6015).

[5] Exh. 354; Tr. 6,055-6,058; see also Exh. 359. Petitioners did not appear at the remand hearings (Tr. 6,019-6,020, 6,268).

AGC's proposal, and there was no need for additional hearings once the Commissioner acted.[1]

Public Interest and Policy Considerations

Public Service Law §164(1)(e) requires that an Article X application filed "subsequent to the adoption of a state energy plan [SEP] pursuant to article six of the energy law" shall include a showing that "the construction of the [proposed] facility is reasonably consistent with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan." In the alternative, the application must include a statement that the proposed facility "was selected pursuant to an approved procurement process." Public Service Law §168(a) requires the Board to make corresponding findings and determinations.

In Case 98-E-0096, the Public Service Commission issued a declaratory ruling, in response to a petition by AGC, stating that "competition in the electricity supply market is an approved procurement process because it is an electricity capacity procurement process approved as reasonably consistent with the 1994 SEP."[2] Subsequently, the New York State Energy Planning Board, noting the Commission's ruling, concluded as follows:

> To the extent that new generation facilities, even those not selected pursuant to an approved procurement process, will promote or contribute to competition in

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[1] The petitioners also argue that because the SPDES permit allows a far smaller volume of water intake than proposed by AGC, there is now a "presumptive availability of [alternate] sites without massive cooling water sources" (Petition, p. 25). As discussed earlier, however, AGC is a private applicant that is not required to propose sites it neither owns nor has under option as alternates to its proposed project site. In any event, the permitted water intake (180,000 gallons per day) is still a considerable volume, and we will not presume its availability at another site.

[2] Case 98-E-0096, Petition of Athens Generating Company, L.P., Declaratory Ruling Concerning Approved Procurement Process (issued April 16, 1998), p. 8.

> electric markets, including the reduction of market power conditions, they will be consistent with the long-range plan for expansion of the electric power system in New York State envisioned by this SEP, and the public interest will likely be served so long as environmental impacts are also found to be within acceptable ranges or can be mitigated.[1]

In our June 15, 2000 decision, the Board determined that the proposed project would satisfy PSL §168(2)(a) if it was either consistent with the SEP or if it was selected pursuant to a generation procurement process that had been approved by the Public Service Commission.[2] Given that the Commission previously determined that competition among electric generation providers is an approved procurement process, the Board determined that it is clear that AGC's proposed project was selected pursuant to an approved procurement process.[3] It is also consistent with 1998 SEP.

In their petition for rehearing, CHV, Nisely, and Carlisle contend that "there is no basis in this record" to support a finding that the proposed project is selected pursuant to an approved procurement policy, or to support a conclusion that certification of the project will be in the public interest. According to the petitioners, "the reason that the propositions cannot be demonstrated is that applicant refuses to commit to serving New York State, despite repeated opportunities to do so."[4]

Petitioners Nisely and Carlisle did not file briefs on exceptions in this proceeding. Therefore, they are barred, by

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[1] New York State Energy Plan and Final Environmental Impact Statement (November 1998), p. 2-52.

[2] Opinion and Order, p. 22.

[3] Opinion and Order, p. 25. A discussion of competitive developments in electricity markets is set forth at pp. 26-28 of the Opinion and Order.

[4] Petition, p. 1.

16 NYCRR §4.10(d)(2), from raising this issue in a petition for rehearing.

CHV's argument is incorrect for at least four reasons:

1. Misstatement of the 1998 SEP's policy. The 1998 SEP provides that "[t]o the extent that new generation facilities, even those not selected pursuant to an approved procurement process, will promote or contribute to competition in electric markets, including the reduction of market power conditions, they will be consistent with the long-range plan" (emphasis supplied). CHV argues that this passage from the SEP is "[o]f particular import" to its petition, but it has excised the underlined passages.[1]

DPS witness Harvey testified that "the desired public policy goal . . . is to have a market emerge in which there are many market suppliers."[2] Mr. Harvey noted that AGC's parent, USGen, currently holds only 214 MW of capacity in the state, which is 0.6% of the statewide total. With the construction of the proposed facility, that market share would increase to 3.5%.[3] Were the relevant market considered to be the energy market in Eastern New York, Mr. Harvey continued, construction of the proposed facility would boost USGen's market share from 0.4% to 9.7%.[4] Mr. Harvey testified that "construction of a 1080 MW generating station at Athens by USGen will establish USGen as a significant participant" in the New York market for electric generation," and he concluded that the Board "should consider the effect on competition by this facility to be a positive consideration or factor."[5]

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[1] Petition, pp. 5-6.

[2] Tr. 1,622.

[3] Tr. 1,624.

[4] Tr. 1,625.

[5] Tr. 1,625-1,626.

This testimony, which is uncontroverted,[1] shows that AGC, as a new entrant, will contribute to building a competitive market consistent with both the SEP and the Public Service Commission's approval of competition as an approved procurement process. CHV's categorical denial that the proposed facility would enhance competition in New York's electric markets is, therefore, incorrect.

2. Concern about "commitment" to the New York market. CHV argues that "there is no directive by the Board, through a Certificate condition or otherwise, that the facility's energy be required to be offered at all times to the ISO for dispatch to serve the State of New York, and be sent out of New York only when the [New York Independent System Operator (ISO)] determines that that is in the best interests of New York." The policy of the Public Service Commission is that competition is the desirable procurement process for new power plants; but in CHV's view, the only competitive entry that would comply with the Commission's policy would be entry under terms that resemble the service obligations of vertically-integrated utilities under cost-of-service regulation.[2] However, as just discussed, the supply side of a competitive electricity market should consist of many sellers, including new entrants, who are free to maximize their sales volumes (to a variety of buyers, including end-users, marketers, and utilities) in order to maximize the returns on their generation plant investments.

CHV further contends that:

> The fact that the Athens facility's energy will NOT be dispatched upon directive of the ISO for the benefit of

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[1] CHV did not cross-examine DPS witness Harvey.

[2] CHV's vision of "competition" apparently would also include some sort of wholesale-level fuel cost adjustment, given its concerns that "there is no necessary correlation between production cost savings and charges to customers," and that "[m]ore than likely, the entirety of the savings will be taken by the applicant as profit" (Petition, p. 13).

> the State of New York produces the inexorable conclusions that this facility will not be consistent with the Energy Plan and that it was not selected pursuant to any approved procurement process as defined by the Commission. As demonstrated supra, there is nothing in the Energy Plan that can reasonably be read as endorsing the construction in New York of a facility to serve out-of-state load or even approving such construction as consistent with the Energy Plan or providing any foundation for ascribing to such a facility the status of being selected pursuant to an approved procurement process. And yet, the Board has speculated that competition will be created and has expanded the geographic ambit of the New York State Energy Plan to one that encompasses numerous states and regions.[1]

CHV apparently assumes that (i) buyers in other, nearby regional markets--CHV frequently mentions "New England" as one such market--will offer better prices to AGC for its electricity production than it could receive in New York; and (ii) AGC will be assured of earning greater profits by committing all electricity production from its proposed facility, under long-term contracts, to buyers in those markets.[2] CHV's assumptions are unsupported and incorrect.

First, CHV sets forth no information showing that buyers in the New England market would offer better prices to AGC circumstances than would buyers in the New York. Second, CHV ignores the testimony of AGC's witnesses who stated that "Athens Generating will submit to the security dispatch and commitment procedures of the NY ISO and is forecast to operate only when it will be economic on a statewide basis."[3] Third, CHV also

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[1] Petition, p. 11.

[2] Elsewhere in the Petition, CHV alleges, without accompanying citations to the evidentiary record, that "the reading of the record most favorable to applicant is that a substantial--perhaps overwhelming--portion of the power could well be destined for New England" (Petition, p. 8). A similar assertion, also unaccompanied by citations to the evidentiary record, appeared in CHV's brief on exceptions (at p. 8).

[3] Tr. 1,252.

disregards the uncontroverted testimony of DPS witness Paynter, who explained why, under the ISO tariff, AGC will generally be better off selling its production through the ISO in a manner that maximizes its profits on its sales. Because transmission capacity to New England is limited, the applicant can sell in New England during periods of transmission congestion only if it incurs congestion costs that reflect the highest price of generation located there. As a merchant plant, AGC will have an incentive to operate in a manner that minimizes its congestion costs, including making sales in New York.[1]

3. Misunderstanding of ISO operations. CHV argues that "[t]here is absolutely no basis in the record" for the Board's conclusion that "AGC's electricity production will physically remain in New York, requiring the NYISO to ramp down

[1] Tr. 1,586-1,599. CHV did not cross-examine Staff witness Paynter. In its petition, CHV nevertheless cites Dr. Paynter's response to a question from the bench (Tr. 1,691) and asserts that the response shows that "the entire foundation for the Board's conclusions regarding transmission surcharges [sic] as incentives for the facility's production to be dispatched through the ISO is a false premis" (Petition, p. 9). CHV appears to misunderstand Dr. Paynter's response--which explained that "the production of all of the generators together leads to the dispatches and prices set by the ISO and the congestion is a fallout of that dispatch" (Tr. 1,619)--by arguing that "[t]he upshot of that is that applicant would not bear the cost alone of its prospering at the expense of New York consumers" (Petition, p. 9). In fact, as Dr. Paynter testified, the transmission usage charges (which are not "surcharges") AGC would pay, were it to eschew ISO dispatch, would include congestion charges equal to marginal congestion costs (reflecting the highest-priced generation in the relevant area), with the result that the reduction in AGC's profits on contract sales would likely exceed the actual congestion costs imposed on the New York system (Tr. 1,595, 1,598).

less efficient generators."[1] CHV is incorrect, because the record reflects an understanding that ISO operations rely on competitive market forces to induce rational economic behavior by market participants, and that such operations result in the dispatch of the most efficient units (i.e., those with lowest overall cost), which is the same as ramping down or not dispatching less efficient generators.[2] In any event, as we stated in the Opinion and Order, to the extent that AGC is able to sell its output in New England, "[r]egionalization of the power market benefits all states by increasing the extent to which they can draw on other states' resources to maintain reliability and by enhancing competition."[3]

CHV nevertheless raises the question as to whether AGC might act irrationally by, for example, choosing to sell to New England even if it were to lose money. This question was addressed in Dr. Paynter's testimony, where he explained that AGC could "choose to operate at maximum capacity, regardless of . . . transmission congestion" but that it could "suffer operating

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[1] Petition, p. 9. The Board's statement is part of a discussion of the displacement effect the proposed facility would have in New York operating under ISO control. The full discussion is as follows:

> The Examiners correctly concluded that when transmission is constrained AGC's production would displace the production of other less efficient plants in New York regardless of whether AGC has contracts to sell in New England or elsewhere. Commercial transactions do not govern the flow of electricity. AGC's electricity production will physically remain in New York, requiring the NYISO to ramp down less efficient generators. Thus, even if there were a constraint-caused price differential prompting AGC to enter into out-of-state transactions, the net result for New York from operating the proposed facility would be similar to the outcome when AGC sells its output through the NYISO.

Opinion and Order, p. 91.

[2] See, e.g., Tr. 1,293-1,295.

[3] Opinion and Order, p. 91.

losses" as a result of having to pay full congestion charges.[1] It is not reasonable to conclude that the applicant will act in a manner diametrically opposed to its financial interests, as CHV assumes.

4. Misunderstanding of contribution to reliability. In our decision, we pointed out that there were several "noncontroversial attributes of [AGC's] proposed facility," including "increased transmission system reliability, resulting from increased flexibility during emergencies, a reduction in the system's calculated loss-of-load probability, and a reduction in the risk of voltage collapse in eastern New York."[2] CHV asserts, in its petition, that "with respect to improvement of generation reliability in New York through increasing capacity, the proposed facility provides none because of the refusal to commit all energy to the ISO for dispatch, and the capacity cannot be counted as being available in New York."[3]

CHV contends that Tr. 1,177, part of its cross-examination of DPS witness Schrom, supports its assertion. CHV is incorrect. At Tr. 1,177, there appears the following exchange:

> Q. So, if at the extreme case that the entirety of the capacity of [the proposed facility] were to be sold to the New England market, then your [testimony] about increasing the reliability of the system really would not be applicable. Is that a fair statement?
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> A. No, because all capacity that gets sold out of state is always recallable by the pools.

In fact, construction of the proposed facility at the Athens site would enhance the reliability of the statewide electric power system, even if the facility's output were frequently sold to

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[1] Tr. 1,595.

[2] Opinion and Order, p. 9 n. 2.

[3] Petition, p. 12.

buyers in New England, because it could be used by the ISO to maintain service reliability within this state. As AGC points out in its response, it is must comply with the ISO's security commitment and dispatch requirements.[1]

In addition to raising the foregoing arguments, CHV contends further that certification of the proposed facility would not be in the public interest because estimates of the dollar value of the statewide electricity production cost savings and the environmental benefits resulting from displacement of production from older generation facilities are small when compared with total existing costs and adverse environmental impacts. According to CHV, such savings and benefits are insufficient to outweigh what it alleges would be "the compromise of a unique and internationally renowned viewshed."[2]

To address the latter assertion first: visual impact issues are addressed, at considerable length, in the evidentiary record, the Recommended Decision, and the Board's decision,[3] and we have concluded as follows:

> [T]he proposed facility, with modifications accepted by AGC and with the elimination of cooling tower plumes would not cause a significant adverse visual impact at any site where visual resources require protection, as identified in PSL §168(2). We conclude, moreover, that the visual impact of the facility would be minimized to the extent practicable, were dry cooling technology installed, given the revised estimate for the height of dry cooling towers (90 ft. instead of 100 ft., as estimated earlier in the proceedings), the painting of the facility in non-contrasting colors, the complete elimination of steam plumes, and the verification on remand that the height of the exhaust stacks would be the same with dry cooling as with hybrid cooling.[4]

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[1] AGC's Reply, p. 3; Tr. 1,252.

[2] Petition, p. 16.

[3] See Opinion and Order, pp. 41-72, and the sources cited therein.

[4] Opinion and Order, p. 72.

CHV has not alleged that the foregoing conclusion rests on an error of law or fact, as required by 16 NYCRR §3.7(b); instead, its petition simply brushes aside the extensive record on visual impact with the bald allegation that the Board has compromised the Hudson River viewshed. In fact, the Board has ensured that the visual impacts of the proposed facility have been mitigated to the extent practicable, that the remaining impact is not significant, and that the facility, considering its contribution to electric competition and system reliability, is in the public interest.

CHV argues that construction and operation of the proposed facility might result in only very minor statewide production cost savings (expressed as a percentage of total estimated production costs). Were we to accept CHV's premise that a single applicant's entry, by itself, must have a large effect on overall statewide production costs in order to be in the public interest, no applicant who planned to build a single generation plant could be certificated. Needless to say, PSL Article X contains no provision establishing such a threshold for new entry.[1] The Board, instead, properly determined that construction and operation of the proposed facility would be in the public interest by adding to electric competition, enhancing the reliability of the New York electric system, and potentially

[1] Similarly, there is no provision in PSL Article X requiring some minimum level of displacement of production from existing, less-environmentally-benign generation plants as a condition for certification of a new entrant. Displacement can be estimated from computer simulations of generation station dispatch, but such simulations are prepared with the understanding that the "inputs" (independent variables) are themselves projections of expected market conditions (see Tr. 1,548-1,549; see also Tr. 1,295). An unexpected increase in demand could result in the new plant's operating alongside the existing plants, with no displacement occurring. On the other hand, an unexpected increase in fuel prices with no increase in demand could result in greater displacement of production from single-cycle baseload plants by a new combined-cycle plant.

displacing production from older, dirtier power plants, thus creating a net environmental benefit.

CONCLUSION

On the basis of the foregoing, the petition of CHV, Nisely, and Carlisle for rehearing is dismissed and denies as follows:

The New York State Board on Electric Generation Siting and the Environment for Case 97-F-1563 orders:

1. The joint petition filed by Citizens for the Hudson Valley, Janessa Nisely, and Jay Carlisle (dated July 14, 2000) seeking rehearing of the Board's Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000) is, for the reasons stated in this order, dismissed to the extent that petitioners Janessa Nisely and Jay Carlisle seek rehearing of issues decided in the Examiners' Recommended Decision without having excepted to the Recommended Decision, and to the extent that petitioner Citizens for the Hudson Valley seeks rehearing of the Board's approval of waivers of certain Town of Athens zoning ordinance requirements without having excepted to the Examiners' recommendation that such waivers be approved. In all other respects, the joint petition is denied.

2. This proceeding is continued.

By the New York State Board on
Electric Generation Siting and the
Environment for Case 97-F-1563

(SIGNED) JANET HAND DEIXLER
Secretary to the Board