

**In the Matter of Astoria Gas Turbine
Power, LLC’s Application for a
Title V Air Permit Modification**

**REQUEST FOR
ADJUDICATORY HEARING
ON NOTICE OF DENIAL**

INTRODUCTION

Pursuant to Section 621.10(a)(2) of Title 6 of the New York Code of Rules and Regulations, Astoria Gas Turbine Power, LLC (“AGTP”) respectfully requests a hearing on the New York State Department of Environmental Conservation (“NYSDEC”) Staff’s October 27, 2021 Notice of Denial of Title V Air Permit associated with AGTP’s proposal to modify the Astoria Replacement Project, which NYSDEC previously approved in 2010 and fully permitted (the “Project”).¹

An adjudicatory hearing will establish that NYSDEC Staff’s denial of the Title V application for the Project is both legally and factually flawed. Not only does the Notice of Denial exceed NYSDEC’s jurisdiction under the Climate Leadership and Community Protection Act (“CLCPA”)² and employ an improper and incomplete analysis that is inconsistent with the statutory language, its conclusions are based on improper characterizations of the Project, exaggerated statements of the Project’s greenhouse gas (“GHG”) emissions and unrealistic predictions of Zone J’s capacity needs in the short and long term and how these needs will be addressed by yet-to-be-constructed renewable energy projects. It also ignores the significant benefits that the Project would provide to neighboring residents, ratepayers and the State as a whole.

A proper and thorough evaluation of the Project and review of the Application and supporting materials confirm that the Project is consistent with the limits, targets, and goals of the CLCPA and will play a meaningful role in New York meeting the GHG reduction standards established by the CLCPA, ECL Article 75 and Part 496. This is because the Project:

- Would be the most efficient backup/standby resource in New York City and operate only when sufficient renewable energy sources are not available:
- Replaces twenty four 50-year-old operating Pratt & Whitney (“P&W”) combustion turbine generators (“CTGs”) with a new, more efficient, state-of-the-art simple cycle dual-fuel CTG, resulting in annual reductions in

¹ AGTP reserves its right, either in conjunction with this hearing request or independently, to bring an Article 78 proceeding in New York State Supreme Court challenging NYSDEC’s decision.

² Ch. 106, Laws of 2019.

direct and upstream GHG emissions from displacement of other less efficient electrical generating units.

- Facilitates further indirect GHG emission reductions as it provides economic quick start and fast ramping capability, which allows additional renewable generation to be reliably interconnected to the New York bulk power system since it can generate needed electricity when intermittent resources are unavailable and/or when battery storage resources are insufficient.
- Minimizes the cost of reducing GHG emissions in New York City by supplying high value capacity in Zone J at less than 20 percent of the cost of battery storage systems alone, particularly during the 2030-2040 time period when the electrical system is rapidly transitioning to meet CLCPA targets.
- Incorporates energy storage technology at the site, with the attendant reduction in GHGs, through the proposed use of an approximately 24 MWe battery energy storage system (“BESS”) for black start capability, which is ultimately proposed to replace two P&W combustion turbines currently using natural gas and fuel oil.
- Preserves the site and its valuable electrical interconnections in Zone J for additional stand-alone energy storage applications in the future.

The legal and factual issues proposed for adjudication include, but are not limited to:³

1. Did NYSDEC Staff exceed its jurisdiction under Section 7(2) of the CLCPA by denying the Project.
2. Did NYSDEC Staff err in determining that the Project constitutes a “new” source of GHG emissions.
3. Did NYSDEC act in error of law and in contrast to the plain language of the CLCPA by limiting its Section 7(2) consistency analysis to an individual facility rather than take into account the Project’s impact on Statewide GHG emissions which by definition include displacement of GHG emissions at other less efficient New York generating facilities.
4. Did NYSDEC Staff err in interpreting the CLCPA to require a project to emit zero GHG emissions even if it results in a net reduction in Statewide GHG emissions, in order to be

³ AGTP reserves the right to modify or supplement these legal and factual issues prior to or at the issues conference or in any written submission authorized by the assigned Administrative Law Judge following the issues conference.

consistent with the CLCPA and not interfere with attainment of Article 75's Statewide GHG emissions limits.

5. Did NYSDEC err in requiring a Project to demonstrate compliance with the CLCPA's 2040 targets and goals and how can an agreement to cease operations by 2040 not meet this target.

6. Did NYSDEC Staff apply an improper analysis and ignore relevant factors in evaluating whether the Project satisfied the CLCPA's mandate that it provide a "detailed statement of justification as to why such limits/criteria may not be met."

7. What is the nature and extent of mitigation required by the CLCPA, specifically including, but not limited to, whether the requisite mitigation under Section 7(2) must take into account a project's net impact on Statewide greenhouse gas emissions or must reduce a project's GHG emissions to zero, even before 2040.

8. Did NYSDEC Staff err and ignore key evidence in the record when it determined that the Project is inconsistent with the CLCPA or would interfere with the attainment of the Statewide GHG emissions limits, particularly given NYSDEC Staff's complete disregard for the Project's significant net reduction in Statewide GHG emissions as well as its quick start and fast ramping capability that will facilitate additional renewable generation.

9. Did NYSDEC err in finding AGTP's plans for compliance with the CLCPA in 2040 insufficient.

10. Assuming arguendo that the Project is inconsistent with the CLCPA, did NYSDEC Staff err and ignore key evidence in the record when it determined that the Project is not needed or justified where (a) the Project provides, among other things, critical black start capability, significant reductions in Statewide GHG emissions and other hazardous air pollutants, and numerous economic benefits for New York and is also capable of future zero carbon operations; and (b) other pending projects, including the recently announced Tier 4 projects, do not alleviate the need for the Project.

11. Assuming arguendo that the Project is inconsistent with the CLCPA, did AGTP's proffer sufficient GHG mitigation.

THE ASTORIA REPLACEMENT PROJECT

AGTP has proposed to modify the Project, which was previously approved in 2010 and fully permitted. As modified, the Project will replace AGTP's existing natural gas and liquid fuel fired simple cycle combustion turbines with a new state-of-the-art simple cycle dual fuel peaking CTG.

The Project would be located at the existing Astoria Gas Turbine Generating Facility ("Facility") which has a combined nameplate rating of 646 electrical megawatts ("MWe") (502 MWe not including the retired Westinghouse turbines). The Facility is located on a 15-acre site at 31-01 20th Avenue, Astoria, Queens County, New York ("Site") and is situated within a large, approximately 300-acre complex (referred to as the "Astoria ConEd Complex" or "Complex").

The Astoria ConEd Complex is home to several power generating facilities, as well as barge delivery facilities, a liquefied natural gas plant, a decommissioned wastewater treatment plant, and other miscellaneous energy and utility scale operations. Public access is restricted into the Complex, as well as at the Facility gate. This area has been host to energy and electricity generating, transmission, distribution and associated activities since the 1890s and remains exclusively a major electric generating and utility operations complex.

The Facility currently provides three major functions:

1. dual fuel generation in times of high electric demand;
2. contingency support in case of unexpected transmission and generation outages, or during extreme weather events; and,
3. system restoration capability in response to a total system outage (*i.e.*, blackout).

The Project, as modified, will replace the 50-year-old P&W turbines at the Facility. The Project will include a new CTG which will be a highly efficient, quick start, fast-ramping, General Electric (“GE”) H-Class 7HA.03 unit that has a nominal generator output of approximately 437 MWe and is expected to be capable of transitioning to using 100% hydrogen fuel by 2040. The new CTG will fire natural gas as the primary fuel with limited ultra-low sulfur distillate (“ULSD”) liquid fuel for backup. The new CTG will be serviced by a single 250-foot exhaust stack. The Project will also include a ULSD-fired emergency generator to shut the unit down safely in the event of an electric power outage and two ULSD-fired emergency fire system pumps. In addition, the Project will re-utilize the Facility’s two existing ultra-low sulfur kerosene (“ULSK”) tanks to store ULSD as backup fuel for the new CTG. Each of these existing tanks has a nominal capacity of 2,000,000 gallons for a total of 4,000,000 gallons of ULSD.

Other ancillary project features that will be reused for the Project include the existing administration building and warehouse, parking, gated entrance, and existing underground fuel oil, natural gas and water pipes. A new 20,000 gallon tank will be installed for storage of aqueous ammonia that will be used to provide additional control of nitrogen oxides (“NOx”) emissions before exhausting through the new CTG stack. New storage tanks also include a service and fire water tank (raw water) and a demineralized water tank with nominal capacities of 300,000 gallons and 1,000,000 gallons, respectively.

All of the existing units, with the exception of one P&W Twin Pac (consisting of two combustion turbines and a single generator), will be permanently shut down once the Project has completed its shakedown period. The two remaining P&W turbines will remain operational to make the Facility black start⁴ capable but are proposed to be replaced by an approximately 24 MWe BESS subject to future approvals.⁵ The P&W Twin Pac uses natural gas as its primary fuel

⁴ Black start capability is the ability to restore power to the electric grid following a complete system power outage.

⁵ Conversion to the black start battery energy storage system may require prior approval from Con Edison, NYISO and the Federal Energy Regulatory Commission (“FERC”).

with ULSK as backup. A new 7,500-gallon ULSK tank will be used to store the backup fuel for the P&W Twin Pac.

The Project's purpose is to modernize the Facility with state-of-the-art technology to alleviate identified reliability shortfalls in New York City; increase generation efficiency; reduce GHG and air emissions; facilitate the reliable interconnection of additional renewable resources; help New York State and New York City achieve their climate change limits, targets and goals, including reducing Statewide GHG emissions; contribute to energy storage goals; continue to provide system restoration capability; and provide significant savings to electricity customers in New York City.

PROJECT HISTORY

Previous versions of the Project underwent extensive environmental review pursuant to Article 8 of the New York State Environmental Conservation Law, the State Environmental Quality Review Act ("SEQRA"), with NYSDEC serving as Lead Agency. Beginning in 2008, the environmental review and permitting process commenced for a 1,040 MWe combined cycle project, which was a modification of a never completed project in 2001 to install a new 79.9 MW CTG at the Facility. Following numerous public outreach activities and scoping, a Draft Environmental Impact Statement ("DEIS") for the combined cycle project was prepared. On April 16, 2010, NYSDEC accepted the DEIS and related Title V air and State Pollution Discharge Elimination System ("SPDES") applications for the Project and made the DEIS and draft permits available for public review and comment.

Following public comment on the DEIS and draft permits, which included two public hearings, NYSDEC accepted the Final Environmental Impact Statement ("2010 FEIS") on September 22, 2010 and issued its Findings Statement on October 4, 2010, concluding that the Project was designed, and where necessary revised, to avoid, minimize and mitigate adverse environmental impacts. All NYSDEC permits, including a Title V air permit, were subsequently issued. However, the Project was not constructed at that time, and the 24 existing P&W turbines continue to operate in accordance with their original permits.

In July 2017, in response to changes in market conditions, AGTP sought to move forward with the Project and filed a petition with the New York State Board on Electric Generation Siting and the Environment (the "Siting Board") seeking a declaratory ruling that the Project, with certain modifications, is exempt from review under Article 10 of the Public Service Law ("PSL") and instead should continue to be subject to SEQRA ("Petition"). On June 12, 2019, the Siting Board concluded that the Project was an "extension, amendment or continuation of the originally proposed project" and therefore ruled the Project "*...is exempt from review under Article 10 of the Public Service Law and should instead continue to be subject to the State Environmental Quality Review Act (SEQRA)...*" and "need not be treated as an altogether new project" ("Declaratory Ruling").

In accordance with the Siting Board's Declaratory Ruling, Part 1 of the Full Environmental Assessment Form ("EAF") was prepared and submitted to NYSDEC on April 27, 2020 to supplement the prior SEQRA review of the Project. Contemporaneously, AGTP submitted a Title V application to modify the Facility's existing Title V air permit along with other permitting

documents including a Supplemental Enhanced Public Participation Plan in accordance with Commissioner Policy 29 *Environmental Justice and Permitting* (the “Application”). Following scoping, a Draft Supplemental Environmental Impact Statement (“Draft SEIS”) was then prepared in accordance with SEQRA. AGTP’s Title V application as well as the Draft SEIS provided a detailed assessment of the Project’s consistency with the CLCPA.

Following various revisions and supplemental submissions, on June 30, 2021, the NYSDEC issued and published in the Environmental Notice Bulletin (“ENB”) a Combined Notice of Complete Application, Availability of Draft Permits, Announcement of Public Comment Period, Acceptance of Supplemental Draft Environmental Impact Statement, and Intent to Hold a Public Hearing (the “Notice”). In the Notice, NYSDEC indicated that “[b]ased on the information currently available, it appears that the proposed Replacement Project would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limits established in the [CLCPA]” and further that it was not currently able to satisfy the requirements of the CLCPA to either (1) provide a detailed statement of justification of the project; and (2) identify alternatives or GHG mitigation measures to be required.

A total of four (4) virtual public hearings were held, with two each on August 24, 2021 and August 26, 2021. The extended comment period then concluded on September 13, 2021. Public comments were received by the NYSDEC both for and against the Project.

NYSDEC STAFF’S NOTICE OF DENIAL

On October 27, 2021, NYSDEC Staff issued its Notice of Denial of the Application. In the Notice of Denial, NYSDEC Staff determined that the Project does not demonstrate compliance with the requirements of the CLCPA because it (1) would be inconsistent with or would interfere with the Statewide GHG emissions limits established in the CLCPA; and (2) AGTP failed to demonstrate a need or justification for the Project notwithstanding this inconsistency.

NYSDEC Staff’s finding of inconsistency was based on the following determinations:

1. The Project would be a “new” source of substantial direct and indirect GHG emissions and would also cause a substantial increase in upstream GHG emissions. *See* Notice of Denial, Section III(A)-(C).
2. The Project would constitute a new and long term utilization of fossil fuel, thus perpetuating reliance on fossil fuels in contradiction to the CLCPA’s climate change and clean energy policies to transition away from fossil fuels. *See* Notice of Denial, Section III(D).
3. AGTP failed to propose a specific plan to be emissions-free by 2040 because it did not demonstrate that renewable natural gas and hydrogen are feasible from both a supply and GHG emission perspective. *See* Notice of Denial, Section III(E).
4. Displacement of other less efficient electric generation within the State is uncertain and irrelevant. *See* Notice of Denial, Section III(F).

Based on its determination of inconsistency, NYSDEC Staff then evaluated the need for the Project by considering various New York Independent Systems Operator (“NYISO”) studies and analysis.⁶ Relying on Consolidated Edison’s Transmission Reliability and Clean Energy (“TRACE”) projects and the recently announced Tier 4 projects, NYSDEC Staff found that “there is no demonstrated reliability need or justification for the Project.” Notice of Denial, p. 15.

Because of the finding that there was no need or justification for the Project, NYSDEC Staff purported to not address whether sufficient mitigation had been proposed. *See* Notice of Denial, Section IV(B). Notwithstanding, NYSDEC Staff found that one of AGTP’s mitigation options (upgrades to the starting system for the two P&W combustion turbines to be retained for blackstart) was insufficient. Notice of Denial, p. 17. NYSDEC Staff did not consider the full suite of mitigation proposed by AGTP, including a declining carbon emissions cap, which would entail a condition in the Facility’s air permit that would limit the amount of carbon emissions that could be emitted by the Facility, with the limit declining to zero in 2040.

Finally, without addressing the Project’s compliance, the Notice of Denial noted that the Project would need to satisfy Section 7(3) of the CLCPA before the Application could be granted and a modified Title V air permit issued. *See* Notice of Denial, p. 17.

COMMUNITY LEADERSHIP AND COMMUNITY PROTECTION ACT REQUIREMENTS

The CLCPA and Environmental Conservation Law (“ECL”) Article 75 require NYSDEC to promulgate regulations to establish a Statewide GHG emissions limit for 2030 that is sixty percent of 1990 GHG emissions, and for 2050 that is fifteen percent of 1990 GHG emissions. By 2024, NYSDEC also must promulgate regulations that ensure compliance with the Statewide GHG emissions limits and include “legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources[.]” ECL § 75-0109(2).

The CLCPA also requires the Public Service Commission (“PSC”) to establish a program to meet a target of seventy percent of statewide electrical generation from renewable sources by 2030, and a target of zero GHG emissions for statewide electrical demand by 2040. In establishing such program, the PSC “shall consider and where applicable formulate the program to address impacts of the program on safe and adequate electric service in the state under reasonably foreseeable conditions.” PSL, § 66-P(2).

Section 7(2) of the CLCPA requires all state agencies to consider whether the decision to issue permit(s) is inconsistent with or will interfere with the attainment of the Statewide GHG emissions limits. If there is an inconsistency, the state agency must provide “a detailed statement

⁶ The Notice of Denial fails to recognize AGTP’s detailed analysis of the TRACE project (Draft SEIS, Appendix M) which demonstrated why a diversified portfolio approach, which includes both the TRACE Project and the Project, is necessary to fully address the identified reliability issues in New York City, maximize the reduction of both direct and indirect GHG emissions at minimal cost helping New York and New York City achieve their climate limits, targets and goals, facilitate a stable and orderly restoration of system power in the event of a partial or complete disruption of service and provide significant cost savings to electricity customers in New York City.

of justification as to why such limits/criteria may not be met and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.”

The CLCPA also created a 22-member Climate Action Council, tasked with preparation of a scoping plan to recommend ways for “attaining the statewide greenhouse gas emission limits ... and for the reduction of emissions beyond eighty-five percent, net zero emissions in all sectors of the economy.” ECL § 75-0103(11). In developing the scoping plan, the Climate Action Council shall, among other things, “evaluate, using the best available economic models, emission estimation techniques and other scientific methods, the total potential costs and potential economic and non-economic benefits of the plan for reducing greenhouse gases[.]” ECL § 75-0103(14).

NYSDEC adopted 6 NYCRR Part 496 on December 30, 2020, which established the Statewide GHG emissions limits for 2030 and 2050 consistent with ECL Article 75 and the CLCPA. On October 15, 2020, the PSC issued an Order expanding the Clean Energy Standard to increase renewable energy in the state to 70% by 2030.

IDENTIFICATION OF ISSUES FOR ADJUDICATION

A. Threshold Legal Issues⁷

The Notice of Denial rests on the NYSDEC’s purported authority and jurisdiction under the CLCPA as it relates to project specific permitting, including the proper framework for applying Section 7(2) of the CLCPA. The Notice of Denial, therefore, raises numerous threshold legal issues, which include, but are not limited to, the following:

1. *The Scope of NYSDEC’s Authority to Deny the Application under Section 7(2) of the CLCPA*

The sole basis for NYSDEC’s Staff’s Notice of Denial is Section 7(2) of the CLCPA. The CLCPA, however, does not vest NYSDEC with jurisdiction to deny a project specific permit. As such, NYSDEC exceeded its authority under the CLCPA by denying the Application. Importantly, implementation of the CLCPA is ongoing. The Climate Action Council has not yet finalized its recommendations as to how the State will achieve the CLCPA’s Statewide GHG emission reductions. NYSDEC also has not yet promulgated any regulations targeted at GHG emission sources. Such regulations, which will reflect the Climate Action Council’s recommendations, are not expected until January 1, 2024. *See* ECL § 75-0109; Notice of Denial, p. 6.

The proposed issues for resolution as a matter of law is whether Section 7(2) of the CLCPA vests NYSDEC with the authority to deny a project specific permit.

⁷ Part 624.4 requires early resolution of threshold legal issues. *See* 6 NYCRR § 624.4(2)(iv) (noting that the purpose of the issues conference is to, among other things, “determine whether legal issues exist whose resolution is not dependent in facts that are in substantial dispute and, if so, to hear argument on the merits of those issues.”); 6 NYCRR § 624.4(b)(5)(iii) (requires a ruling on the merits of legal issues that do not involve disputed issues of fact within 30 days after the issues conference or full briefing on the issues).

2. *The Required Consistency Analysis under Section 7(2) of the CLCPA*

NYSDEC Staff found the Project to be inconsistent with or would interfere with the attainment of the Statewide greenhouse gas emissions limits because the Project would be a “new” source of substantial direct and indirect substantial GHG emissions and would also cause a substantial increase in upstream GHG emissions. In doing so, NYSDEC Staff ignored the Project’s displacement of GHG emissions from other less efficient facilities as both uncertain and irrelevant.

First, NYSDEC Staff improperly characterized the Project as a “new” source of GHG emissions. The Project is proposed to be located on AGTP’s existing site in the Astoria ConEd Complex. This Site is currently occupied by a fully operational facility that includes power generation equipment and ancillary buildings, parking and circulation, storage tanks and other structures. The Facility’s existing generating equipment will be replaced by the Project’s new state-of-the-art simple cycle combustion turbine. As such, the Project is a replacement, not a new source.

NYSDEC Staff also improperly excluded consideration of the Project’s displacement of other generating facilities as part of its consistency analysis. The Notice of Denial ignores the Project’s displacement of other less efficient generating units and the correlating reduction of substantial GHG emissions based on NYSDEC Staff’s determination that the CLCPA requires that the NYSDEC evaluate consistency only “for an individual facility.” Notice of Denial, p. 14. The plain language of the CLCPA directly contravenes this interpretation.

There is no such requirement, and indeed, the CLCPA’s statutory language is contrary to NYSDEC’s determination that it must evaluate only the individual facility. Section 7(2) of the CLCPA requires NYSDEC to determine if its permitting decisions “are inconsistent with or will interfere with the attainment of the *statewide* greenhouse gas emissions limits established in [ECL Article 75]” (emphasis added). Statewide GHG emissions, in turn, are defined as “the total annual emissions of greenhouse gases produced within the state from anthropogenic sources and greenhouse gases produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state.” See CLCPA, § 7(2); ECL § 75-0101(13). To this point, even the Notice of Denial recognizes that the key consideration is “Statewide” GHG emissions. See Notice of Denial, p. 6 (citing ECL § 75-0109) (regulations for GHG emission sources are to “ensure compliance with the Statewide GHG emission limits”).

The proposed issues for resolution as a matter of law are (1) whether the Project constitutes a “new” source of GHG emissions; and (2) whether Section 7(2)’s consistency analysis is limited to an individual facility or must take into account a project’s impact on statewide GHG emissions which by definition include displacement of GHG emissions at other less efficient New York generating facilities.

3. *Allowable GHG Emissions Under the CLCPA Pre-2040*

The Notice of Denial assumes that any increase in GHG emissions is inconsistent or would interfere with the State’s attainment of the Statewide GHG emissions limits. This is not the

appropriate analysis under Section 7(2), particularly before 2040 when the CLCPA targets a zero-carbon electric grid, nor could it be. Such a standard of no GHG emissions from any new project (let alone a replacement project) is untenable and would set a far reaching precedent unintended by the CLCPA and adverse to not only New York State's current energy needs but also its businesses and economy.

The proposed issue for resolution as a matter of law is whether the CLCPA currently requires a project to emit zero GHG emissions, even if it results in a net reduction in Statewide GHG emissions, in order to be consistent with the CLCPA and not interfere with attainment of Article 75's Statewide GHG emissions limits.⁸

4. *The Need to Demonstrate Compliance with 2040*

The Application is clear as to AGTP's plans for 2040 – the Project will either transition to a zero carbon fuel, or stop operating by 2040, subject to the CLCPA provisions regarding safe and adequate electric service. Despite this, the Notice of Denial finds that AGTP failed to propose a specific plan to meet the CLCPA's zero carbon emissions by 2040 requirement because AGTP has not established that renewable natural gas or hydrogen are feasible from either a supply or GHG emission perspective. *See* Notice of Denial, p. 12. The CLCPA, however, does not require such a demonstration particularly where there are no project specific regulations, none are projected until 2024 and the Climate Action Council's recommendations are also still outstanding. Furthermore, any such analysis of zero-carbon operations approximately two decades from now would be wholly speculative and laden with conjecture. This, however does not mean that compliance with the CLCPA in 2040 is ignored. Instead, AGTP agreed to cease operating the Project in 2040 if zero-carbon fuels do not become feasible. Moreover, the Application is only for a permit with a 5 year term. Ample time exists to fully evaluate operations in 2040 and beyond during permit renewals. And, during this time, the feasibility of renewable natural gas and hydrogen will likely progress and other emission-free options may emerge.

The proposed issue for resolution as a matter of law is when must a current project demonstrate compliance with the CLCPA's 2040 targets and goals and how can an agreement to cease operations by 2040 not meet this target.

5. *Detailed Statement of Justification*

For projects found to be inconsistent with or would interfere with the attainment of the statewide GHG emissions limits, NYSDEC must provide "a detailed statement of justification as to why such limits/criteria may not be met." CLCPA, Section 7(2). The Notice of Denial addresses this requirement by evaluating the need for the Project solely from a reliability perspective and ultimately concluding that there is no need for the Project. *See* Notice of Denial, Section IV(A). Such an analysis, which as described below is factually incorrect and will be addressed during the adjudicatory hearing, is not supported by either the plain language of the CLCPA or the legislative

⁸ Part and parcel to this issue is the proper analysis of a project's GHG emissions and whether the analysis should focus on a project's expected emissions or its potential to emit, particularly where, as here, the Project will operate only when not enough renewable resources are available to meet demand.

history as it is too narrow in scope and ignores the many other important relevant factors that would justify a specific project.

The proposed issue for resolution as a matter of law is the appropriate analysis and relevant factors to be considered by NYSDEC in order to satisfy the CLCPA's mandate that it provide a "detailed statement of justification as to why such limits/criteria may not be met" for a project-specific permitting decision. Included in this issue is whether costs and benefits to ratepayers can be considered, particularly given that the CLCPA includes the consideration of costs in several places. *See, e.g.*, ECL § 75-0109 ("the Department shall design and implement all regulations in a manner that seeks to be equitable, to minimize costs and to maximize the total benefits to New York").

6. *Mitigation*

Although the decision purports to not address the adequacy of AGTP's proffered mitigation for the Project's GHG emissions, the Notice of Denial does find that one of the myriad of mitigation options proposed by AGTP is insufficient. *See* Notice of Denial, Section IV(B).

The proposed issue for resolution as a matter of law is the nature and extent of mitigation required by the CLCPA, specifically including, but not limited to, whether the requisite mitigation under Section 7(2) should take into account a project's net impact on Statewide greenhouse gas emissions or must reduce a project's GHG emissions to zero, even before 2040.

B. Factual Issues

The following represent contested or disputed issues of fact relating to matters cited in the Notice of Denial as a basis to deny AGTP's Application. In accordance with 6 NYCRR § 624.4(c)(1)(ii), these issues should be advanced for resolution in an adjudicatory hearing.

1. *Project Consistency with the CLCPA*

NYSDEC Staff's denial of the Application on the grounds that the Project is inconsistent with the CLCPA ignores overwhelming evidence in the record establishing the Project's consistency with the CLCPA. As evidenced by the Application and supporting materials, and as will be more fully developed at the adjudicatory hearing, the Project is consistent with the CLCPA and will not interfere with CLCPA targets, goals and emissions limits but will rather further the State's efforts in meeting the CLCPA's emissions limits, targets and goals. In particular, because the Project will displace higher emitting electric generating sources it will (i) result in a reduction in Statewide GHG emissions and (ii) provide economic capacity and flexible operating capabilities to the electric system allowing for reduced costs to ratepayers and acceleration of the procurement of downstate renewable energy projects, all consistent with the CLCPA.

The Project is part of a cost-effective path for New York to meet the CLCPA and Part 496 GHG emission reduction requirements and the CLCPA's targets to increase renewable generation and achieve a zero GHG emission New York electrical system, while maintaining reliability. In the near-term, the Project will add an efficient, low-emitting resource to the New York electrical system, resulting in a reduction of direct GHG emissions and a reduction in upstream GHG emissions. In the mid to longer term (2030-2040), as other renewable resources are added to the

system, maintaining efficient low capacity factor dual fuel generation in New York City is important to minimize system cost as technology develops to reach the ultimate CLCPA targets and to allow for renewables to be added to the system in a cost effective manner. The Project is best suited to fill this role and is forecasted to cause substantial direct, upstream and indirect reductions in GHG emissions through 2039.

The Project's GHG emissions are consistent with, and will not interfere with the attainment of, the CLCPA, ECL Article 75 and 6 NYCRR Part 496 GHG reduction requirements. By focusing on the Project's theoretical potential to emit, NYSDEC Staff conveniently ignores reality. The Project is designed to operate only when needed and as called upon by the NYISO. It will therefore only emit GHG emissions when renewable energy sources fall short. The proper analysis under Section 7(2) is the net impact to Statewide GHG emissions, which requires an evaluation of the Project's expected actual GHG emissions.

Part and parcel to this, when the Project operates, it will displace less efficient fossil fuel units. The adjudication of this issue will show that NYSDEC Staff improperly ignored the analyses prepared by Guidehouse of the Project's direct and indirect impact on Statewide GHG emission reductions. Guidehouse's methodology, assumptions and analysis are appropriate and supported by the record. Moreover, they are not altered by the State's Tier 4 announcements that occurred after their GHG-emission reduction study was completed and then later updated for the Draft SEIS. As will be demonstrated in an adjudicatory hearing, even taking into account the Tier 4 announcements and assuming they proceed as projected, the Project will still result in a substantial reduction in direct and indirect GHG emissions through 2039 of approximately 8.5 million tons. Such a substantial reduction in Statewide GHG emissions is exactly what the State needs to meet the CLCPA's targets and goals.

NYSDEC Staff also erred in finding that the Project will perpetuate a reliance on fossil fuels in contravention of the CLCPA. *See* Notice of Denial, pp. 11-12. To the contrary, as detailed in Section 3.2 of the Draft SEIS, the new unit's quick start and fast ramping ability will allow for an increase of renewable generation on the New York State and New York City electrical system by providing needed backup electricity supply when renewable resources are unavailable and/or when battery storage resources are insufficient to meet demand. This results in significant direct and indirect reductions in Statewide GHG emissions from the Project.

Because the Project will provide economic capacity in Zone J and displace higher cost generation when operating from 2023-39, capacity and energy costs in New York City will be lower due to the addition of the Project, resulting in significant savings for NYC electric customers. Importantly, the Project does not require any subsidy from New York ratepayers either.

The Project includes the proposed addition of an approximately 24 MWe BESS, which would ultimately replace the remaining P&W combustion turbines enabling black start capability for the site. The use of BESS to provide black start capability will result in GHG reductions from the shutdown of the aging, natural gas/ULSK fired P&W turbines in the amount of an additional 1,559 tons per year. The Project will also preserve the Site, including its valuable Zone J electrical interconnections, for future additional stand-alone battery energy storage capacity

In 2040, the Project's electric generating unit will either transition to a zero carbon fuel or stop operating (subject to the CLCPA provisions regarding safe and adequate electric service).

Accordingly, the proposed issue for adjudication is whether NYSDEC Staff erred in finding that the Project is inconsistent with the CLCPA or would interfere with the attainment of the Statewide GHG emissions limits.

2. *Emission Free By 2040*

Because the Project is well positioned to use zero-carbon renewable hydrogen ("green hydrogen") instead of natural gas by 2040 if commercially available at that time, or will cease operating subject to the CLCPA provisions regarding safe and adequate electric service, AGTP has sufficiently demonstrated compliance with the CLCPA's emission-free by 2040 requirement for electric generation. As part of its Application, AGTP provided the Department with information from General Electric ("GE"), the Project's turbine supplier, which confirms that the Project's Frame 7HA.03 combustion turbine already has the ability to operate on hydrogen fuel. *See* Draft SEIS, Appendix L. Regardless, even assuming that that the Project will not be able to operate emissions free in 2040 and beyond, the Project will cease operating subject to the CLCPA provisions regarding safe and adequate electric service. Nothing more is required by the CLCPA.

Accordingly, assuming the CLCPA requires it, the proposed issue for adjudication is whether AGTP's plans for compliance with the CLCPA in 2040 is sufficient.

3. *Project Justification*

The Notice of Denial concludes that there is no reliability need for the Project such that it is not sufficiently justified as required by Section 7(2) of the CLCPA. NYSDEC Staff's analysis and conclusion ignores key aspects of the Project while underestimating the capacity needs in Zone J. It also overstates the ability of pending renewable energy projects to obviate the need for the Project and completely overlooks the Project's important black start capability for system restoration in a complete system power outage.⁹

Despite other projects currently being proposed or considered for Zone J, the Project is still needed. The need for local generation in New York City is codified in the "Reliability Rules and Compliance Manual" published by the New York State Reliability Council ("NYSRC") (Version 45 July 17, 2020). NYSRC Rules Section A.2 establishes installed capacity requirements for load serving entities in the state:

The NYISO shall annually establish Load Serving Entity (LSE) installed capacity (ICAP) requirements, including Locational Capacity Requirements (LCRs), in accordance with NYSRC rules and NYISO tariffs.

Most recently, at the October 5, 2021 Installed Capacity Working Group, the NYISO provided a preliminary 2022 LCR value for New York City (Zone J) of 81.2%. Based on the NYISO's latest Gold Book summer peak forecast for New York City of 11,116 MW in 2022, over

⁹ By way of example, during the 2003 Northeast Blackout (August 14-16, 2003), Facility units were dispatched for 353 hours to provide critical system restoration service immediately following the blackout.

9,000 MW of local generation will be required. The calculation of this value specifically considers import capability to New York City including transmission security limits. In other words, taking into account all supply and demand resources, over 9,000 MW of local generation will be required to provide safe and reliable electric service to New York City in 2022.

The Notice of Denial's conclusion that recently announced new projects will alleviate the need for the Project due to their impact on reliability requirements in New York City is simply wrong. Each is addressed below.

Con Edison's Transmission Reliability and Clean Energy ("TRACE") Project – As discussed in Section 1.4.1 and Appendix M of the Draft SEIS, Con Edison has proposed the installation of a "6-mile-long, 345/138kV Phase Angle Regulator (PAR) controlled feeder" from the 345kV Rainey substation to the 138kV Corona substation (the TRACE Project). While the Rainey to Corona TRACE project is designed to address local reliability issues, it does not increase supply capability into New York City and therefore will not have any impact on the Locational Capacity Requirement in Zone J.

Tier 4 Transmission Projects – The recently awarded Tier 4 projects will have an impact on required in-City resources. First, the Tier 4 projects will become the largest single source of supply in Zone J. Since Zone J is "designed and operated for the occurrence of a second contingency" in accordance with NYSRC Rules Section G.1 (*i.e.*, the system must be operated as if the largest single source of supply has already failed), the Tier 4 resources will increase the need for in-City operating reserves (*i.e.*, backup/standby units) to ensure transmission line loadings are not exceeded. *See* NYSRC Rules Section C.

Nevertheless, the Tier 4 transmission projects, representing roughly 2,500 MW of new supply, will effectively count toward the locational installed capacity requirement in New York City as soon as they achieve commercial operation. However, given New York City's roughly 9,000 MW LCR requirement, the Tier 4 projects will only provide about 30% of the necessary supply. The other 70% (or about 6,500 MW) will still need to be provided by other in-City resources.

Currently, New York has awarded contracts to five offshore wind projects. As discussed in Draft SEIS Section 4.9.3, two of those projects (Empire Wind 1 and Beacon Wind) with a total expected installed capacity of 2,046 MW have proposed interconnection points in Zone J. However, as described in the Brattle Group's July 2020 report to the PSC and NYSERDA on Quantitative Analysis of Resource Adequacy Structures ("Brattle Group Report"),¹⁰ due to the intermittent nature of offshore wind, these resources will only receive credit for 20% of their total capability in Zone J capacity or less than 450 MW. *See* Brattle Group Report, Slide

¹⁰ Report accessible at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiuyP-9INnzAhUEmHIEHQYDClgQFnoECAIQAAQ&url=https%3A%2F%2Fdocuments.dps.ny.gov%2Fpublic%2FCommon%2FViewDoc.aspx%3FDocRefId%3D%257B9D20EBBD-4DF8-4E4E-BEC1-F4452345EBFA%257D&usg=AOvVaw2Tut7l66YZgt-bIUHDPSI7>.

21. Again, given the need for about 9,000 MW of in-City resources, the current offshore wind projects would account for less than 5% of the need.

Further, as the Project would be the most efficient backup/standby unit in New York City and operate only when not enough renewable energy resources are available, it is clearly still needed for the following reasons:

1. *It provides critical black start capability.* The Project has been designed to startup and operate without any external power supply source allowing it to help New York City recover in the event of a total electric grid outage (a service which cannot be provided by any of the other projects mentioned in the public comments). In accordance with NYSRC Rules Section F, the Project has already been accepted into Con Edison's System Restoration Program. *See, e.g.,* Draft SEIS Section 1.4.1.
2. *It results in the immediate reduction of statewide greenhouse gas emissions.* *See, e.g.,* Draft SEIS, Appendix E.
3. *It results in the immediate net reductions in other hazardous air pollutants including PM2.5.* *See, e.g.,* Draft SEIS Section 3.3.10.2.
4. *It provides numerous economic benefits for New York.* The Project will result in the creation of over 1,000 job-years during construction (\$156M of total benefit) and 70 jobs per year during operation (\$10.6M of total benefit per year). In addition, the Project results in substantial ratepayer benefits by providing economic capacity and energy in Zone J. *See, e.g.,* Draft SEIS Section 1.4.2.2.
5. *The Project is capable of future operation on zero-carbon fuels to support New York's electric grid after 2040.* The Project technology is already capable of using a 50% blend of zero-carbon hydrogen fuel today and GE is confident the technology will be fully capable of using 100% hydrogen fuel before 2040. *See* Draft SEIS Section 3.2.1.2. Of note, at the October 14, 2021 meeting of the Climate Action Council ("CAC Meeting Presentation"),¹¹ it was reported that even with an expansion of the CLCPA renewable energy targets, the state would still need between 21,000 and 25,000 MW of firm capacity provided by zero-carbon fuels (*e.g.,* hydrogen) to maintain reliability in 2050. *See* CAC Meeting Presentation, Slide 44.

In short and as will be fully developed at an adjudicatory hearing, a diversified portfolio approach, which includes the Project, is necessary to fully address the identified reliability issues in New York City, maximize the reduction of both direct and indirect GHG emissions, help New York achieve its climate limits, targets and goals, facilitate a stable and orderly restoration of the power system in the event of a partial or complete shutdown of the system and reduce costs for New York City electricity customers.

¹¹ Meeting presentation accessible at: <https://climate.ny.gov/-/media/CLCPA/Files/2021-10-14-CAC-Meeting-presentation.pdf>.

Accordingly, the proposed issue for adjudication, assuming arguendo that the Project is inconsistent with the CLCPA, is whether the Project is justified. This will include, among other things, adjudication of the State's current efforts to bring renewable energy projects online and the timing and sufficiency of these relative to the reliability needs in Zone J.

4. *Project Mitigation*

As part of its Application, AGTP offered a suite of mitigation options to address the Project's GHG emissions which included, but was not limited to, a declining carbon emissions cap, upgrades to the starting system for the two P&W combustion turbines being retained for black start service, future replacement of the two P&W combustion turbines with energy storage at the Site, or, the use of hydrogen or renewable natural gas once commercially available. This was on top of the projected reduction of Statewide GHG emissions. The Notice of Denial's analysis of just one aspect of AGTP's mitigation proposal was fundamentally flawed. Adjudication of this issue will establish that AGTP has offered substantial mitigation despite the Project being fully consistent with the CLCPA.

Accordingly, the proposed issue for adjudication, assuming arguendo that the Project is inconsistent with the CLCPA, is whether AGTP's proffered mitigation is sufficient.

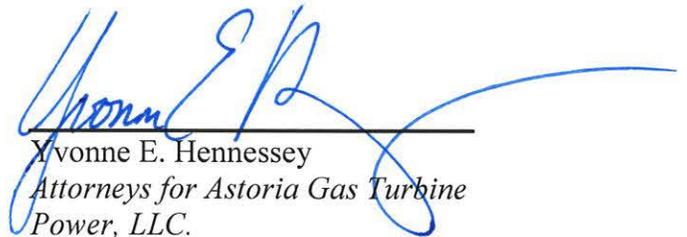
CONCLUSION

AGTP respectfully requests an adjudicatory hearing on NYSDEC Staff's Notice of Denial pursuant to 6 NYCRR § 621.10(a)(2) to resolve the legal and factual issues identified herein. AGTP reserves the right to modify or supplement these legal and factual issues prior to or at the issues conference or in any written submission authorized by the assigned Administrative Law Judge following the issues conference. In addition, nothing in this request should be deemed as waiving AGTP's right, either in conjunction with this hearing request or independently, to bring an Article 78 proceeding in New York State Supreme Court challenging NYSDEC's decision.

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Albany, New York

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