

COUNTY OF SUFFOLK



ROBERT J. GAFFNEY
SUFFOLK COUNTY EXECUTIVE

petition

ROBERT J. CIMINO
COUNTY ATTORNEY

DEPARTMENT OF LAW
ADDRESS ALL COMMUNICATIONS
IN THIS MATTER TO:

February 10, 2003

Hon. Gerald Lynch
NYS Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Hon. Susan J. DuBois
NYS Department of Environmental Conservation
625 Broadway – First Floor
Albany, New York 12233-1550

ORIG FILES
C00-F-1356
COPIES:
ALI LYNCH
MR. P. AGRESTA
MR. R. POWELL
MR. F. ULRICH

Re: Case 00-F-1356 –Application by Kings Park Energy, LLC for a Certification of Environmental Compatibility and Public Need to Construct and Operate a 300-megawatt Facility in the Town of Smithtown, Suffolk County, New York

Dear Judge Lynch and Judge Dubois:

Enclosed please find Suffolk County's Motion to Immediately Suspend Or Stay The Proceedings In The Article X Application Of Kings Park Energy, LLC. Copies of the Motion are being served today via e-mail and via first class mail upon all active parties tomorrow, as authorized by Examiner Lynch.

Sincerely,

ROBERT J. CIMINO
Suffolk County Attorney

By: Phyllis Seidman
Assistant County Attorney

c: Active Parties
Secretary Deixler

2003 FEB 13 PM 1:28

LOCATION
H. LEE DENNISON BLDG.
100 VETERANS MEMORIAL HIGHWAY ♦

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NEW YORK STATE BOARD
ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

Application by Kings Park Energy, LLC for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 300 Megawatt Simple-Cycle Generating Facility in the Town of Smithtown, Suffolk County, New York

Case 00-F-1356

MOTION OF SUFFOLK COUNTY TO IMMEDIATELY SUSPEND OR STAY THE PROCEEDINGS IN THE ARTICLE X APPLICATION OF KINGS PARK ENERGY, LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE A 300 MEGAWATT SIMPLE-CYCLE GENERATING FACILITY IN THE TOWN OF SMITHTOWN, SUFFOLK COUNTY, NEW YORK

ROBERT J. CIMINO
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Dated: February 10, 2003

Hauppauge, New York

NEW YORK STATE BOARD
ON ELECTRIC GENERATION
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I. PRELIMINARY STATEMENT

Suffolk County hereby moves to immediately suspend and or stay the procedural schedule in this case, including the Examiners' Recommended Decision on express authorization, briefs on exceptions, briefs opposing exceptions, a Board decision on this issue and all outstanding procedural milestones set forth in the Examiners' December 20, 2002 "Ruling on Motions and Adopting Revised Schedule." Suffolk County so moves as a result of 1) Kings Park Energy's (KPE's) January 22, 2003 public announcement that it would not proceed with development of its proposed 300 MW facility in Kings Park, New York; and 2) KPE's January

31, 2003 responses to questions propounded by the Examiners on January 24, 2003 regarding KPE's decision to discontinue the project. Accordingly, this motion will also serve as the County's response to KPE's replies to the Examiners' inquires.

II. KPE SHOULD NOT BE PERMITTED TO WASTE PUBLIC TIME AND RESOURCES FOR ITS PRIVATE INTERESTS

KPE indicated in its January 31, 2003 responses to inquires by the Examiners that it will not proceed with development of its proposed 300 MW power plant in Kings Park, New York. KPE has not sold the project. Accordingly, all future plans that KPE might have for the project are speculative, at best. Nevertheless, KPE has requested continuation of all aspects and procedural milestones of this case that it believes will facilitate the sale of its project, regardless of the potential for an appalling waste of municipal time and resources. It is inconceivable that KPE could be permitted to go forward with various aspects of this case when it has, in fact, made a final decision to discontinue its project. Suffolk County submits that it is likewise inconceivable to require the County to expend scarce public resources to continue working on and monitoring the KPE Article X application in order to facilitate the sale of KPE.

The County, along with many of the municipalities within the County, is experiencing massive budget challenges this fiscal year. (Exhibit A, 12/3/02 County Press Release). Despite its budget woes, there are many viable projects, studies and mandates that the County is responsible for overseeing and administering. The County's motion to suspend or stay the proceedings herein seeks to save valuable County resources by relieving the County of the need to expend limited taxpayer dollars on an illusory Article X application. Indeed, KPE has not even named a bona fide buyer for its project; instead, KPE is asking the Siting Board, the

examiners, the municipal and other active parties to become "brokers" to facilitate its private transaction. Public funds should not be misused in such a manner.

In addition, with regard to the express authorization issue, KPE contends in its January 31 responses, that "the avoidance of delay if any application for local approval is required are the main reasons for KPE's desire to pursue the final resolution of this issue." Nevertheless, KPE does not consider that its project may never be sold or alternatively, it may be sold well after the local permitting decision is issued by the Siting Board. If this is the case, will the County Department of Health Services (DHS) then be required to accept Suffolk County Sanitary Code Articles 7 & 12 applications from KPE on behalf of a "phantom" prospective buyer in order to avoid delay in the event that the project is eventually sold? Will DHS then be required, in the absence of a bona fide purchaser of the project, to review the applications and expedite decisions on whatever local waivers might be necessary? This scenario would result in a needless waste of public resources and further result in diverting services away from legitimate businesses seeking DHS permits. Yet, KPE's reasons for not deferring all proceedings herein make this scenario a possibility.

Moreover, at this stage, all KPE has provided to the Examiners and active parties are KPE's representations that there are four potential buyers for the project and that none of them will change the project in any way, deviate from KPE's legal positions or seek to delay the proceedings. Without sworn affidavits or affirmations supporting these representations, or at the very least, a detailed contractual obligation from a prospective purchaser, it is unreasonable to expect that all aspects of the project would remain the same. It is surprising that KPE expects the parties and the Examiners to rely on these unsupported assertions. The County submits that it is unreasonable for the Examiners or the Siting Board to require the active parties to go

forward with the proceedings based on speculation. Further, as set forth more fully in the County's Motion to Strike Portions of the November 15, 2002 Reply Brief of Kings Park Energy, LLC dated December 9, 2002, the County has reason to question the veracity of KPE's handling of certain procedural aspects of this case and requests suspension of all aspects of the proceedings in this matter pending verification of the sale of the project. If the project is sold, the buyer can seek restoration of the proceedings.

The County contends that KPE knew as early as October 30, 2002, when it suggested a one hundred and twelve (112) day adjournment of the proceedings that it would not continue with this project. Clearly, based on KPE's previous maneuverings in this proceeding, Suffolk County urges the Examiners to balance KPE's requests to continue various aspects of the project in order to sell its business against the rights of the County taxpayers to see that its tax dollars are spent on viable and legitimate issues as opposed to questionable business practices.

II. KPE HAS THE BURDEN OF PROVING WHY THESE PROCEEDINGS SHOULD NOT BE IMMEDIATELY SUSPENDED OR STAYED AND THE BURDEN OF SEEKING APPROVAL TO SELL ITS PROJECT

Suffolk County proposes that the Applicant, which has undeniably decided not to pursue the Article 10 application in this matter, should have the burden of proving why these proceedings should not be suspended or stayed pending sale of the project. *See, Delaney v. Public Service Commission*, 123 A.D.2d 861, 507 N.Y.S. 2d 471 (2d Dept. 1986). For the reasons set forth above, the responses provided by KPE to the Examiners on January 31, 2003 fall short of meeting this burden.

Moreover, KPE has failed to petition the Public Service Commission for authority to sell

its project. Without such approval, KPE cannot expect the proceedings in this case to move forward. See Case 97-F-2162, *Application by PSEG Power New York, Inc. (Bethlehem Case)*, Recommended Decision, February 1, 2002.

IV. CONCLUSION

Based on the foregoing, the motion of Suffolk County to immediately suspend or stay the proceedings in the Article X Application Of Kings Park Energy, LLC For A Certificate Of Environmental Compatibility And Public Need To Construct And Operate A 300 Megawatt Simple-Cycle Generating Facility In The Town Of Smithtown, Suffolk County, New York and such other further relief as is deemed just and proper should be granted.

Dated: February 10, 2003

Respectfully submitted,

ROBERT J. CIMINO
Suffolk County Attorney

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EXHIBIT "A"

Office of the County Executive

Robert J. Gaffney
County Executive

Eric A. Kopp
Chief Deputy County Executive

Press Releases Archive

FOR IMMEDIATE RELEASE
Dec 03, 2002

Cecilia Clausing
(631) 853-4000

Gaffney Calls for \$25 Million in Immediate Spending Cuts

County Exec Slashes Discretionary Accounts, Freezes Hiring and Vehicle Purchases

Suffolk County Executive Robert J. Gaffney today froze hiring and vehicle purchases, and called for \$25 million in spending cuts to offset a larger than anticipated increase in payments the County must make to the State Pension Fund next year. Failure to deal with the problem could result in an additional \$25 million property tax increase, warned the County Executive.

"Allowing this budget deficit to become a surprise property tax increase later is completely unacceptable," said Gaffney. "We need to take action now to protect Suffolk County taxpayers."

Gaffney outlined steps he had taken on an emergency basis in his capacity as the County's Chief Budget Officer to cut spending, including an immediate freeze on hiring and vehicle purchases, and a directive to Department heads to reduce discretionary spending by 10 percent.

But the County Executive noted that those cuts would total only \$13 million, and that finding an additional \$12 million in reductions will require the involvement and cooperation of the County Legislature. In a letter to the Legislature's Presiding Officer, Gaffney asked that the Legislature cooperate in developing a list of recommendations for consideration by December 19th.

"As I have been saying for weeks, protecting the taxpayers from a massive property tax increase should be the top priority of County government," said the County Executive. "Now that the Executive Budget staff and the Legislature's Budget Review Office agree that this \$25 million budget deficit exists, we need to move immediately to cut spending. Pretending the problem doesn't exist will only cost taxpayers more over the long run."

According to Gaffney, the \$25 million gap is a result of investment losses suffered by the State Pension Fund in the wake of the September, 2001 terrorist attacks. The problem is affecting all governments in New York.

County officials had learned in late August that the County's contribution would increase from \$16 million this year to \$51.5 million in 2003, an increase of \$36 million, or 217 percent.

Gaffney had included that figure in his Recommended Budget, which was submitted on September 20th.

But in an e-mail bulletin issued on October 16th, the New York State Government Finance Officers' Association warned that the cost would probably be much higher than the Pension Fund had indicated. Budget officials have since confirmed that the warning was accurate, Gaffney noted.

The County Executive Budget office and Legislature's Budget Review Office now agree that the cost will be at least \$76 million, meaning that the budget adopted is short by at least \$25 million. But budget officials point out that this figure assumes that a key stock market index will rebound significantly by March 31st, and that the actual gap could be as much as \$39 million.

In a letter to the Legislature's Presiding Officer, Gaffney requested that the Legislature work cooperatively with him to identify other ways to achieve the spending cuts necessary to close the gap without raising property taxes.

"One of the lessons learned during the recent budget process is the importance of the Executive and Legislative branches of County government working together cooperatively to find solutions to the challenges we face," said Gaffney.

"Accordingly, I am asking that the Legislature work cooperatively in focusing on this problem immediately, so that appropriate steps can be taken to protect the taxpayers. Ignoring the problem is not an option."

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