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ORIGINAL

Briefs  
01-F-1276

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August 24, 2007

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

Re: Case 01-F-1276- Application of TransGas Energy Systems, LLC for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100-Megawatt Natural Gas-Fired, Cogeneration Plant in the Borough of Brooklyn, New York City

Dear Secretary Brillling:

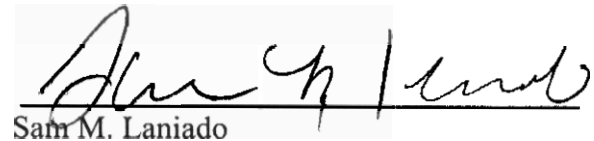
Enclosed please find an original and 25 copies of the *Supplemental Brief on Exceptions on Behalf of TransGas Energy System LLC* for filing in the above-captioned proceeding.

Respectfully submitted,

READ AND LANIADO, LLP

Attorneys for TransGas Energy Systems LLC

By:

  
Sam M. Laniado

SML/lac  
Enclosure

cc: Active Parties List (Via Electronic & Regular Mail)

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NEW YORK STATE BOARD ON ELECTRIC  
GENERATION SITING AND THE ENVIRONMENT

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2007 AUG 24 PM 2: 54

Case 01-F-1276 – Application of TransGas Energy Systems  
LLC for a Certificate of Environment Compatibility  
and Public Need to Construct and Operate a 1,100-Megawatt  
Natural Gas-Fired, Cogeneration Plant in the Borough of  
Brooklyn, New York City

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**SUPPLEMENTAL BRIEF ON EXCEPTIONS ON BEHALF OF  
TRANSGAS ENERGY SYSTEMS LLC**

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Dated: August 24, 2007  
Albany, New York

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NEW YORK STATE BOARD ON ELECTRIC  
GENERATION SITING AND THE ENVIRONMENT

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Case 01-F-1276 – Application of TransGas Energy Systems  
LLC for a Certificate of Environment Compatibility  
and Public Need to Construct and Operate a 1,100-Megawatt  
Natural Gas-Fired, Cogeneration Plant in the Borough of  
Brooklyn, New York City

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**TRANSGAS ENERGY SYSTEMS LLC**  
**SUPPLEMENTAL BRIEF ON EXCEPTIONS**

**Introduction and Request for Preliminary Findings**

TransGas Energy Systems LLC (“TransGas” or “the Applicant”) submits this Supplemental Brief on Exceptions as directed by the New York State Board on Electric Generation Siting and the Environment (“Board”) in its “Notice Establishing Briefing Schedule,” issued July 11, 2007 (the “Notice”). The Board issued the Notice in response to the Applicant’s proposal to construct an above-ground, combined-cycle, electric-only generating facility (“Electric-Only Facility” or the “Project”), obviating the need to obtain from the City of New York (“NYC” or “City”) revocable consents to use City property.

The Board had identified a decision by the City to deny or grant the consents as a decision that would be determinative of the fate of TransGas’ proposed steam/electric generating facility.<sup>1</sup> The Board adopted this approach after a surprising and complete reversal by the

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<sup>1</sup> Case 01-F-1276 – TransGas Energy Systems LLC – *Order Concerning Further Proceedings*, Issued June 25, 2007 (“June 25 Order”) at 2, 12, 28.

hearing examiners of their prior ruling that the City held no such ultimate authority.<sup>2</sup> TransGas has preserved its rights to challenge the Board's view that its authority is trumped by the City's permitting role,<sup>3</sup> and declined the Board's invitation to ask the City to issue those permits.<sup>4</sup> Instead TransGas reconfigured the facility design within the bounds established by the existing record so as to eliminate the City's purportedly overriding permitting function. The Notice states:

In its brief on exceptions the Applicant must explain the extent to which its proposal differs from that evaluated in the RD, whether the evidentiary record is stale and how to address any such staleness, whether the proposal is an amendment to TransGas' application that is material and substantial as set forth in 16 NYCRR § 1000.12(a), and whether consideration of such proposal would create substantial prejudice that would deprive the Board of jurisdiction.

Notice at 2.

As described below, the evidentiary record is not stale, the proposal now before the Board is by no means a material or substantial amendment and consideration of the proposal by the Board will prejudice no one.

In addition to responding to the Notice, TransGas will address the following questions that the Board posed in its *Order Concerning Further Proceedings*, issued June 25, 2007, p. 84.

We acknowledge, however, that in any further hearings, the Article X record will have to be updated concerning: (1) whether there are any alternative sites available in view of changing circumstances, including TransGas' affiliate's eminent domain authority and recently announced plans to dissolve that affiliate; (2) recent changes in land uses in the local community. . . .

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<sup>2</sup> Case 01-F-1276 – *Recommended Decision By Presiding Examiner Robert R. Garlin and Associate Examiner Kevin J. Casutto*, Issued April 1, 2004 (“2004 RD”); *Recommendation Concerning Further Proceedings*, Issued April 12, 2006.

<sup>3</sup> Case 01-F-1276 – *Petition for Rehearing On Behalf of TransGas Energy Systems LLC*, dated July 25, 2007.

<sup>4</sup> *See*, Letter from Sam M. Laniado to Secretary Brilling, dated July 6, 2007.

As discussed herein, the proposed Electric-Only Facility is substantially identical to the facility assessed on the record of this proceeding in terms of its potential impacts on the environment, human health and safety and land use and in terms of the public benefits it will create. If the Board concludes there is a need to supplement or update any portions of the record, before TransGas is required to file additional information requiring the substantial expenditure of time and funds, TransGas respectfully requests that the Board preliminarily indicate whether it believes the Electric-Only Facility can meet the findings required to be made prior to the issuance of a certificate of environmental compatibility and public need. *See*, PSL § 168(2). If the Board concludes that there are one or more, as-yet unidentified, barriers to certification similar in effect to the issue of City-granted consents, they should be identified now.

It is TransGas' view that, except for the additional information the New York Department of Environmental Conservation Staff ("DEC Staff") may request in order to process the permits and approvals DEC administers,<sup>5</sup> all the information necessary for the Board to make the Article X findings is in the evidentiary record or in pleadings filed with the Board. For example, considerable information about the significant build-out related to the City's rezoning of Greenpoint-Williamsburg has been included in prior pleadings filed with the Board. Whether there now exist important views of the East River and Manhattan Skyline to be protected can be gleaned from such information and from the "facts on the ground" that the Board could examine firsthand by conducting a site visit. Similarly, information concerning the benefits to be gained in terms of local and regional air quality, greenhouse gas reduction, site clean-up, electric system reliability and energy market competitiveness can be taken directly from the existing record.

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<sup>5</sup> *See*, letter from William G. Little, Esq. to Secretary Brilling, dated May 8, 2007.

TransGas has a legitimate interest in not being required to conduct expensive and time-consuming studies only to be surprised by a Board decision that some other fundamental impediment to certification exists such as occurred in this proceeding regarding the revocable consent issue. In its September, 2004 Order, the Board provided guidance for the filing of a comprehensive, time consuming and expensive amendment (“2004 Amendment”), to be followed 15 months later by a stunning reversal by the hearing examiners on the fundamental authority of the Board to oversee NYC’s issuance of revocable consents, which reversal was subsequently endorsed by the Board. Before TransGas devotes any more time, money and effort, it requests the Board to preliminarily indicate whether the Electric-Only Facility could satisfy the Article X statutory findings or not.

If the Board indicates, based on the record and pleadings before it, that the Electric-Only Facility could satisfy the Article X statutory findings, TransGas will make the necessary filings in order to supplement the evidentiary record in order to allow the Board to render a final decision concerning whether to issue the certificate and, if so, upon what conditions.

## **I. DISCUSSION**

### **A. The Characteristics And Potential Impacts Of The Electric-Only Facility Are Substantially Identical To Those Evaluated In The Recommended Decision Issued on April 1, 2004**

The TransGas application filed with the Board in December 2002 presented the option of certifying a generating facility with and without the ability to sell steam.<sup>6</sup> The Electric-Only Facility is identical to the original project with two exceptions. First, the proposals to purchase water from the Metropolitan Transit Authority (“MTA”) for steam process requirements, and to

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<sup>6</sup> Exhibit 1, pp. 1-1, 3-2, 3-25, 7-1.

install water supply lines into, and steam lines out of, the Facility, have been eliminated.

Second, to eliminate a concern identified in the 2004 RD (p. 72), TransGas proposes siting back-up oil storage in a hardened underground structure. The underground proposal for oil storage is already detailed in the November 12, 2004 Amendment.<sup>7</sup> Both changes reduce alleged environmental and land use impacts. There are no other changes to the Project.

The Electric-Only Facility has been designed using renewable materials, presenting a museum-like appearance, thereby shedding the traditional industrial-smokestack look of a typical power plant. The multiple-smokestack configuration was eliminated by housing them in a distinctive, elliptically-shaped exhaust tower. The exterior surface of the exhaust tower would be wrapped in a modern, glass-like material, and equipped with up to 600 kW of solar power capacity, making it the largest solar plant in NYC (Exh. 1, Section 1.3.2; Tr. 1258; Tr. 2214; Exh. 1, p. 10-76). This architecturally-inspired design will be completely harmonious with the complex multi-story, urban setting taking hold along the Greenpoint-Williamsburg waterfront.

**B. The Evidentiary Record Remains Valid and Substantially Up-To-Date**

The 2004 RD found that the potential environmental impacts from the proposed facility are largely insignificant and accordingly that the proposal satisfied the Article X standards. TransGas therefore did not submit exceptions to most of the 2004 RD's discussion of potential environmental impacts. Because the Electric-Only Facility reduces potential environmental impacts by eliminating the steam tunnel and MTA water lines and relocating the oil storage tank, the evidentiary record concerning these potential sources of impact remains current. The record evidence concerning the potential for impacts in the following areas remains valid: noise,

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<sup>7</sup> Amendment, pp. 3-10, 3-14; *See, also*, "TransGas Response to Comments Submitted by Parties on December 15, 2004" dated January 27, 2005, p. 40.

geology, terrestrial ecology, archeological and cultural resources, compliance with local requirements, water quantity, traffic, site remediation, aquatic biology, fuel requirements, electrical interconnection, and socio-economic impacts.<sup>8</sup>

With respect to potential air quality and water quality impacts, DEC issued draft air and water permits for the Facility. The DEC Administrative Law Judge, Kevin J. Casutto, ruled that there were no issues to be adjudicated with respect to the permits. Certain parties appealed and the DEC Commissioner affirmed Judge Casutto's ruling and directed that the air and water permits be issued.<sup>9</sup> Although those permits were not issued, because the Electric-Only Facility does not alter the potential air and water impacts, their eventual issuance can be presumed. Although there have been changes in the regulatory framework since then (as discussed in Mr. Little's letter of May 8, 2007), which may require new and/or updated analytical work,<sup>10</sup> there is nothing to be gained from pursuing such work now if the Board should determine that it simply cannot make the findings required by Article X to grant a certificate. Because the Project proposes to use state-of-the-art control technologies, and was previously found by DEC's Commissioner, ALJ, and Staff to comply with all air and water requirements, it is reasonable to

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<sup>8</sup> Unless otherwise noted herein, the exceptions taken by TransGas to the 2004 RD remain valid as they apply to the Electric-Only Facility.

<sup>9</sup> DEC Case No. 2-6106-00149/00014 SPDES No. NY0006301 (PSC Case No. 01-F-1276) -TransGas Energy Systems LLC-Interim Decision of the Commissioner, dated March 12, 2004.

<sup>10</sup> On May 8, 2007, responding to the Board's Notice concerning the proposed underground facility configuration, DEC Staff submitted a letter to the Board stating that it believed the air and water permits, and the underlying applications, will require revisions. In particular, DEC stated, *inter alia*, that additional conditions addressing PM 2.5 emissions would apply, that updating prior analyses may be required and that EPA may need to issue the Prevention of Significant Deterioration permit. TransGas and DEC met thereafter to discuss these issues on June 14, 2007. TransGas sent a letter, dated June 15, 2007, to DEC, copying all parties and the Board, following the meeting. In that letter TransGas agreed to review the application and draft permits to ascertain where updating/revisions may be necessary and submit the results of this review so DEC may determine whether new or revised applications will be required. DEC stated that whatever the outcome, public notice and comment will be required.

believe that the Electric-Only Facility will also comply with any new air requirements and procedural steps that may eventually be found applicable and that the Electric-Only Facility will receive air and water permits for purposes of the preliminary indication of certifiability that TransGas requests herein. If that indication provides a reasonable basis to believe that the Electric-Only Facility can satisfy the PSL § 168(2) findings, TransGas will proceed with the analyses requested by DEC and agreed to in our letter of June 15, 2007.

C. The RD's Two Land Use/Visual Concerns Are Now Moot

1. Oil Tanks

As explained above, the 2004 RD finding (2004 RD at 72) that the then-proposed above-ground oil tanks were inconsistent with M1 district requirements and the installation of public waterfront walkway is fully addressed by re-locating the oil tanks to a hardened underground structure.

2. The Greenpoint-Williamsburg Building Boom will Obstruct Many Views

The 2004 RD found that TransGas might obstruct “traditionally available views of the Manhattan skyline at certain locations in the Greenpoint and Williamsburg communities. . . , and no mitigation. . . [is] possible” (2004 RD at 60). This concern, however, has been resolved by NYC itself by rezoning the area and allowing the construction of 332 buildings ranging between 65 feet and 350 feet in height. The permissible building footprints range from 8 to 11 thousand square feet. The TransGas exhaust tower footprint is only 3 thousand square feet (Tr. 1552; 220). With the radical change of the Brooklyn waterfront – which will resemble the “Manhattan-East River” congested network of high-rise buildings – the concern about blocking views has been mooted. Simulations in the evidentiary record show that the Electric-Only Facility would

hardly be notable.<sup>11</sup> This issue is also discussed below with respect to consistency with coastal zone policies.

D. The 2004 RD Recommendation on Coastal Zone Consistency Has Also Been Mooted

The 2004 RD's recommendation that the Project is inconsistent with NYS's coastal zone program, as contained in NYC's New Waterfront Revitalization Program ("NYC New WRP"), has also been resolved by NYC's own rezoning efforts. TransGas anticipated the approval of the rezoning and submitted considerable evidence in the record on the proposed construction in the neighborhood of the 332 sites, with many 65, 85, 250 and 350 foot buildings forever obstructing views from far more locations than the Project would obstruct and altering the very character of the waterfront and neighborhood that the RD sought to "protect."<sup>12</sup>

In this regard, the 2004 RD concluded that TransGas substantially hinders policies 1, 8, and 9 of the NYC New WRP because NYC's rezoning, as the "no action alternative," is more consistent with the NYC New WRP policies. TransGas explained why the Examiners applied the wrong legal standards in reaching its conclusions (BOE 45). The Applicant also explained why TransGas does not hinder any policy, including policies 1, 8, and 9, and thereby satisfies all coastal zone requirements. But, even assuming, arguendo, the 2004 RD's legal reasoning to be sound, NYC's rezoning Final Environmental Impact Statement ("FEIS") demonstrates that the massive construction resulting from the NYC rezoning – the 2004 RD's "no-action alternative" – and the TransGas above-ground plant, can easily co-exist and that the legal standards in the NYC New WRP would be satisfied if both developments proceed to fruition.

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<sup>11</sup> Exh. 2, Vis-3, Vis-4A, Vis-4B, Vis-93 through 9E.

<sup>12</sup> TransGas Brief on Exceptions ("BOE") p. 57.

Indeed, construction of the Project will advance the City's policies because, without the Project, clean-up of Bayside Oil Terminal site will not likely take place in the foreseeable future, if at all, condemning the site to be a continued blight on the waterfront. Recent correspondence from Project opponents who are leading the not-in-my-backyard charge, breezily speculate that KeySpan Energy will fund the clean-up.<sup>13</sup> Such speculative efforts to wish away a serious contamination issue should be ignored. The likelihood is simply too remote that a clean-up will occur in the absence of a private entity that is prepared to reuse the site for an industrial facility, given the high cost of the clean-up and the potential for protracted litigation among potentially responsible parties.

TransGas submitted an extensive analysis of the FEIS's evaluation of the compatibility of the rezoning and proposed for the facility.<sup>14</sup> The FEIS found very few instances where the facility constituted an adverse impact, and in those instances, effective mitigation was proposed by NYC. Based on its own FEIS, the City reached the legal conclusion that its coastal zone policies would be satisfied if the TransGas Project and the rezoning build-out were both completed.<sup>15</sup>

Accordingly, events subsequent to the issuance of the 2004 RD demonstrate that the rezoning does not supplant the TransGas Project but instead is very compatible with developing this new source of generating capacity that NYC needs. Once an Article X facility satisfies the standards for certification, the concept of the "no-action alternative," as applied in the 2004 RD,

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<sup>13</sup> See, Letter from Adam Perlmutter, Esq. to Secretary Brilling, dated August 16, 2007.

<sup>14</sup> See, TransGas Submission of Additional Information in Response to May 3, 2005 ruling, dated June 17, 2005, pp. 6-16.

<sup>15</sup> *Id.*

is irrelevant. The Examiners in Case 00-F-2057 (Besicorp-Empire Development Company LLC) reached a similar conclusion about the role of the “no action alternative:”

[t]he public interest consideration here devolves upon resolution of all of the other issues: *If the proposed facility meets the standards required for certification, then by definition the “no action” alternative can be dismissed.* The Applicant, by virtue of its ownership of the property, has the right to seek approval of its proposed project without demonstrating that it should engage in alternative pursuits, or that the property need not be put to some other, alternative use. . . .<sup>16</sup>

The 2004 RD also failed to apply the New York Department of State (“DOS”) “backstop” regulations that provide for further review of a project in the event it is determined to substantially hinder a policy. As explained in the TransGas BOE (58), the Examiners incorrectly recommended applying standards that the United States Secretary of Commerce may apply when reviewing a state coastal zone determination in the context of a federal permit application, a situation not relevant here. Under the Secretary of Commerce’s standards, in order to reverse a state determination, a finding must be made that no alternative site is available (BOE 60). The Examiners, despite finding that the Exxon/Mobil site was neither reasonable nor available (RD 92), stated that, for purposes of the Secretary of Commerce’s standards, TransGas should expend additional resources to prove, what is now crystal clear, that the Exxon/Mobil site is neither reasonable nor available.

Subsequent events have mooted the RD’s inapposite recommendation. As explained in the 2004 Amendment, NYC reneged on its offer to buy the Exxon/Mobil site for use by

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<sup>16</sup> Recommended Decision by Examiners J. Michael Harrison and P. Nicholas Garlick, Issued January 9, 2004, p. 53. (Emphasis added)

TransGas, a condition precedent established by Exxon/Mobil to any transfer of the site.<sup>17</sup>

Furthermore, private lawsuits seeking approximately \$65 billion in damages and enforcement litigation initiated by the New York Attorney General have also occurred since the issuance of the 2004 RD, rendering the site untouchable for development of a power plant by a private developer.

E. New York Needs New Generating Capacity

Like the project evaluated in the 2004 RD, the Electric-Only Facility would add 1,100 MW of electric generating capacity to the NYC load pocket. Since the filing of exception briefs on the 2004 RD, TransGas has filed a number of pleadings with the Board summarizing the latest forecasts of capacity deficiency in the State. In its April 30, 2007 letter to the Board, TransGas summarized the New York Independent System Operator Reliability Needs Assessment, which concluded that between 1,500 and 2,000 MW of new capacity is needed statewide, in the 2011-2016 timeframe.<sup>18</sup>

The Building Trade Congress also determined in 2006 that, “New York City will need between 6,000 to 7,000 megawatts (MW) of new electricity resources over the next twenty years to satisfy the demands of the comprehensive residential and commercial development proposed Citywide, and to support continued economic growth and increasing population.”<sup>19</sup>

NYC maintains that, “[d]espite the generally tenuous capacity situation in New York City, and the high energy costs, very little merchant resource development has occurred. Of

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<sup>17</sup> Amendment, p. 1-5, Att. A.

<sup>18</sup> [http://www.nyiso.com/public/webdocs/newsroom/press\\_releases/2007/pr\\_rna\\_final\\_031907.pdf](http://www.nyiso.com/public/webdocs/newsroom/press_releases/2007/pr_rna_final_031907.pdf).

<sup>19</sup> New York Building Congress: Electricity Outlook: Powering New York City’s Economic Future, available at, <http://www.buildingcongress.com/code/research-analysis.htm>.

some 6,500 MW of generation proposed for Zone J, about 1,970 MW has been built.” The City noted that 86% of the 1,970 MW was constructed by load serving entities (Con Ed and NYPA) and that no generation is currently under construction.<sup>20</sup>

In the recently issued “PLANYC,” dated April 22, 2007, NYC reiterates the energy goals articulated in its filing with the Commission. The Electric-Only Facility satisfies the “PLANYC” supply-side energy goals. According to PLANYC, the recent Queens power outage “. . .betrayed the weaknesses in our aging grid,” forcing NYC to rely upon its “. . .dirtiest and least efficient power plants” and “. . .the City’s electricity prices – already among the highest in the nation – soared by 500% that day.” PLANYC also observes that:

[o]ur existing fleet of power plants averages more than 30 years old, and uses mostly out-of-date technologies. These older plants use 30% to 60% more fuel and produce several times the air pollution of newer plants to generate the same amount of electricity. But by 2012, even this supply will not be enough. We are continually setting new records for energy usage. As the summer of 2006 showed, our ability to reduce demand in a coordinated efficient way is limited.

These power plants guzzle 62% more fuel and release 140% more CO<sub>2</sub> than newer plants. They are also more expensive to run. Our new, natural gas power plants cost \$74 to produce one MWh, while our oldest plants, which were designed in the 1960s and 1970s and run on oil, cost over \$250 to produce the same amount of electricity.

Among other initiatives, PLANYC recommends the following to reduce prices and CO<sub>2</sub> emissions by displacing high-cost inefficient plants:

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<sup>20</sup> Case 06-M-1017 – Proceeding on Motion of the Commission as to Policies, Practices and Procedures for Utility Commodity Supply Services to Residential and Small Commercial and Industrial Customers, *Comments by the City of New York* (November 17, 2006) p. 8.

- Facilitate repowering and construction of new clean power plants and dedicated transmission lines – 3,400 MWs.
- “To accelerate the retirement of the older, less efficient plants, we will build 2,000 to 3,000 MW of new electric capacity by as early as 2015.”
- “The new efficient plants will displace generation from older plants, help drive down prices in the wholesale market and enable us to retire 1000-2000 MW of capacity.”<sup>21</sup>

There is no question that the Electric-Only Facility would serve the public interest by satisfying electric capacity needs identified by the City.

F. Reducing Market Concentration in the Capacity Market

DPS’s witness Harvey’s conclusion that TransGas would reduce market concentration remains accurate today. He recommended increasing the number of suppliers owning generation in NYC, opining that TransGas would be “. . . a positive addition into the statewide generation mix” (Tr. 1425), and by adding TransGas to the market, even after assuming other projects enter service, the Project still reduces market concentration in NYC. Mr. Harvey concluded that TransGas would contribute to the development of a more effective competitive market in NYS and NYC, calling TransGas’ contribution “significant” and “an important step forward” (Tr. 1430) and emphasizing “[t]he real concerns of finding suitable sites for these facilities” (Tr. 1428). No new projects have been built in NYC that were not already included in his analyses and in the record evidence presented by TransGas (Tr. 1224).

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<sup>21</sup> See, [http://www.NYC.gov/html/planNYC2030/downloads/pdf/full\\_report.pdf](http://www.NYC.gov/html/planNYC2030/downloads/pdf/full_report.pdf).

G. Other Reliability Benefits

TransGas also filed exceptions (BOE 14) concerning the 2004 RD's conclusion that the Project's other reliability benefits<sup>22</sup> – reduction of transmission losses and congestion, new in-City voltage support – were not “required.” The Board should scrutinize very carefully the hearing examiners' proposed “not required” standard, given the recent series of actual events that informs us that the electric system in NYC has grown extremely precarious.<sup>23</sup> The Electric-Only Facility would offer all the reliability benefits discussed by TransGas previously (but unreasonably discounted in the 2004 RD) and, accordingly, the record is current in this regard.

H. Projections of Air Quality Benefits and Electric Cost Reductions Are Current

In its September 2004 Order, the Board directed TransGas to update the projections of air emission reductions and electricity price reductions as forecasted using the General Electric Multi-Area Production Simulation (“MAPS”) model. Thousands of tons of emission reductions for NOx and SOx are presented in the November 2004 Amendment.<sup>24</sup> The Project is also forecasted to reduce the emission of carbon dioxide by 730,000 tons per year.<sup>25</sup>

Local Project opponents continue to argue that the Project should not be approved simply because the area in which it would be located already hosts other infrastructure such as water treatment control facilities.<sup>26</sup> These opponents ignore that the Electric-Only Facility will result in cleaner air quality in the immediately surrounding area by displacing energy production from

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<sup>22</sup> 2004 RD at 122.

<sup>23</sup> Amendment, p. 16-17.

<sup>24</sup> Amendment, pp. 16-14, 16-17.

<sup>25</sup> Although these projections are assumption driven, they provide accurate indications of the *magnitude* of the benefits the Facility would produce, and accordingly, do not need to be updated.

other, high polluting plants that directly contribute to air contamination in Greenpoint/Williamsburg and its vicinity. These opponents would condemn their neighbors to continue living with the same dirtier air, by sacrificing the opportunity to improve local air quality.

I. Economic Development, Jobs and Increased Earnings

With respect to facility operation, the magnitude of the estimates for increased employment, payroll, annual local operation and maintenance expenditures, and local economic output, earnings remains current.<sup>27</sup> As to facility construction, the estimates may be lower to reflect not building the steam tunnel and water supply lines, but higher because installing the oil tanks in a hardened structure underground will be more costly. On balance, the magnitude of the estimates for a preliminary indication by the Board is current and does not require updating at this time.

J. No Amendment is Required

As explained above, the proposed Electric-Only Facility is substantially identical to the proposed combined cycle facility described in the TransGas application, the on-site generating equipment is the same, the site is the same, and the expected emissions and potential environmental impacts are the same, except that relocating the reduced oil storage capacity underground reduces alleged land use impacts. Furthermore, offsite steam and water lines have been eliminated, reducing potential environmental impacts. Nor would any update, revisions, permit conditions or a new application that DEC may require TransGas to undertake for the air

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<sup>26</sup> See, letter dated August 16, 2007, from Adam Perlmutter, Esq. to Secretary Brillling

<sup>27</sup> See, Application, Exh. 1, pp. 12-18

and water permits, increase any potential environmental impacts. Accordingly, there are no changes to the facility design that would necessitate TransGas filing an amendment to the application. The Board's regulation cited in the Notice, 16 NYCRR § 1000.12(a) and the relevant definition at 16 NYCRR § 1000.2(r), provide that,

1000.12(a). Amendment of an Application: An amendment of an application is material and substantial within the meaning of PSL Section 164(6)(a) if it is a revision.

1000.2(r). Revision: An amendment of an application or Certificate proposing or authorizing a change in the facility likely to result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility as determined by the Board.

There is no change in the location of the facility nor is there any material increase in any environmental impact. To the contrary, potential environmental impacts will decrease.

K. There Are No Alternate Sites

No alternate sites have been made or can be made available for the Project. The Board requested that TransGas update the record concerning its efforts to dissolve TransGas Energy Services Corporation ("TESC"), its affiliate transportation corporation. TESC has filed a Certificate of Dissolution with the DOS and a Request for Consent to Dissolution of a Corporation with the New York State Department of Taxation and Finance. TransGas has been informed by its accounting firm that it has submitted the necessary tax returns and payments required by the Department of Taxation and Finance in order to obtain the consent to the dissolution. TransGas' accounting firm has been informed by the Department of Taxation and Finance that the consent should be forthcoming shortly, thereby allowing TESC to legally dissolve.

L. There is No Substantial Prejudice Caused by Considering the Electric-Only

As explained above, the potential impacts of the Electric-Only Facility have been reviewed by the parties in the normal course of the Article X proceeding. The parties have been accorded all the rights to which they are entitled under the law. The limited consideration by the Board requested by TransGas would not cause any prejudice.

In the June 25<sup>th</sup> Order, the Board determined that:

[i]ndeed, our reading of the Cortland Nursing Home case suggests that in order for dismissal to be warranted based on prejudice, there must be substantial delay by an applicant that interferes with the ability of others to be afforded a hearing within a reasonable time. This clearly is not the case here. Indeed, it is the City and Brooklyn Parties that do not want hearings to go forward. (p. 63).

TransGas is not seeking any delays in the consideration of the Electric-Only Facility. To the contrary, to avoid unreasonable prejudice to TransGas, as occurred with the 2004 Amendment, TransGas is seeking an expeditious, preliminary indication by the Board as to whether the Board believes the Article X statutory findings could be made for the Electric-Only Facility. Thus, TransGas is not attempting to delay at all.

Two court decisions applying the *Cortland Nursing Home* criteria support consideration of the Electric-Only Facility. In the *Matter of Commonwealth of Massachusetts*, 197 A.D.2d 97 (3d Dept. 1994), *appeal dismissed*, 83 N.Y.2d 999 (1994), the Court found that intervenors were not prejudiced by the Siting Board's decisions to grant Inter-Power more time to amend its application to submit additional air quality studies. The Court held that:

[p]etitioners' argument on this point is two-fold. First, petitioners contend that they were prejudiced by the Siting Board's decision to grant Inter-Power additional time to amend or correct its initial application and to submit additional air quality studies. Although

responding to the changes in Inter-Power's application and reviewing the revised air quality studies was no doubt costly and time-consuming, the record indicates that petitioners had the opportunity to and did indeed challenge Inter-Power's submissions in this regard, and we are therefore unable to conclude that petitioners were substantially prejudiced by this pre-certification delay. 197 A.D. 2d at 103.

The fact that petitioners had the opportunity to challenge the Inter-Power Amendment eliminated any substantial prejudice. In the instant case, all parties have had the opportunity to challenge the Electric-Only Facility in the hearings that were held and are being accorded further opportunities by the Board in this supplemental exception briefing.

In *Matter of County of Suffolk v. Gioia, et. al*, 96 A.D.2d 220 (2d Dept. 1983), the Court held that petitioners would be prejudiced because the Board extended the Article X proceeding but only because the applicant did not post new intervenor funds. The Court stated:

[b]y extending the proceedings before the Siting Board indefinitely, LILCO has avoided the necessity of filing a new application, and payment of a new application fee of \$150,000. As a result, petitioners have suffered prejudice, because they have been deprived of funds to contest the application (see, Public Service Law, § 142, subd. 6, par [a]). 96 A.D. 2d at 225.

In the TransGas case, the Board directed that an additional \$100,000 for the intervenor fund be deposited, the maximum amount authorized by PSL § 164.6(a), and TransGas complied. The Board notes that \$140,452 remains from the original \$300,000 deposit.<sup>28</sup> No funds have been disbursed from the \$100,000 deposit, so unlike *Matter of County of Suffolk*, petitioners in this case will have funds should they need to be made available. Accordingly, there is no prejudice that would be caused by considering the Electric-Only Facility.

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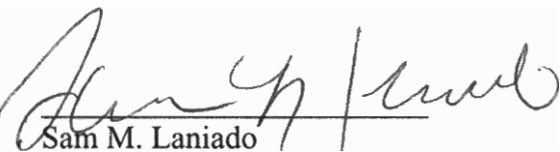
<sup>28</sup> June 25 Order, p. 69, fn 119.

CONCLUSION

For the reasons stated herein, TransGas requests the Board to indicate whether the Electric-Only Facility can satisfy the PSL 168(2) findings and to establish a schedule and procedures for reaching a final resolution.

Respectfully submitted,

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