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September 21, 2007

VIA HAND DELIVERY

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

Re: Case 01-F-1276 – Application filed by TransGas Energy Systems LLC for a
Certificate of Environmental Compatibility and Public Need to Construct and
Operate a 1,100 Megawatt Generating Facility in the Borough of Brooklyn,
New York City.

Dear Secretary Brilling:

Enclosed for filing in connection with the above-referenced proceeding, are an
original and twenty-five (25) copies of the *Reply Brief On Exceptions On Behalf Of
TransGas Energy Systems LLC*.

Respectfully submitted,


John W. Dax

JWD:lm

Enclosure

cc: Hon. Judith A. Lee (*Via E-Mail*)
Hon. Kevin J. Casutto
Attached Service List (*Via Email & Regular Mail*)

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

Case 01-F-1276 Application filed by TransGas Energy Systems LLC for a
Certificate of Environmental Compatibility and Public Need to
Construct and Operate a 1,100 Megawatt Generating Facility in the
Borough of Brooklyn, New York City.

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

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Attorneys for TransGas Energy
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Dated: September 21, 2007

PRELIMINARY STATEMENT

TransGas Energy Systems LLC (“TransGas”) has received a Supplemental Brief on Exceptions filed by the Brooklyn Parties (“BP SBOE”) in response to the “Notice Establishing Briefing Schedule”, issued July 11, 2007 (the “Notice”). This brief is filed in reply.

DISCUSSION

I. THERE IS NO NEED TO SPECULATE ABOUT TRANSGAS ENERGY’S PROPOSED PLANT CONFIGURATION

In seven pages of seemingly endless repetition the Brooklyn Parties argue that they are unable to provide informed comment in response to the Board’s Notice because, they argue, TransGas’ proposal to eliminate steam production from its proposed plant configuration is “indeterminate” (BP SBOE at 2), has yet to be “defined” (p. 3), is “unclear” (p. 4), is “far from clear” (p. 5) and represents a proposal “to change plans altogether” (p. 6). Repetition employed to mislead an audience into accepting as true something that is false is an age-old rhetorical device of demagogues. In spite of their attempts to distort the truth about the well-defined nature of TransGas’ proposal, the Brooklyn Parties cannot hide from what TransGas made clear in its letter to the Board of July 6, 2007: TransGas is eliminating steam production from its proposal and will build the originally proposed plant with air-cooled condensers. *See* July 6, 2007 letter at 2. As stated by TransGas in its Supplemental Brief on Exceptions (“TransGas SBOE”), the proposed electric-only cogeneration 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 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 backup oil storage in a hardened underground structure. The underground proposal for oil

storage is already detailed in the November 12, 2004 Amendment. Both changes reduce alleged environmental and land use impacts. There are no other changes to the Project.

TransGas SBOE at 4-5 (footnote omitted).

TransGas proposes a plant configuration previously examined on the record minus above-ground oil storage. The Board should dismiss the Brooklyn Parties' efforts to find confusion and uncertainty where neither exists.

The Brooklyn Parties attempt to sow additional confusion by claiming that TransGas' petition for rehearing on the scope of the Board's Section 172 authority is evidence that TransGas has not settled on a proposed configuration (BP SBOE at 7); they request that TransGas "be held to a proposal, once and for all." *Id.* The Brooklyn Parties offer no authority for the notion that an applicant must choose between pursuing its right to seek rehearing of an interlocutory ruling, which may be final and dispositive on a critical legal issue, and continuing to pursue its application in a manner that responds to the Board's limited view of its own authority.

II. THE VISUAL IMPACT OF THE AIR COOLED CONDENSORS HAS BEEN MINIMIZED BY THE CONSTRUCTION OF NEW BUILDINGS

The Brooklyn Parties argue that building the 130-foot air-cooled condensers above-ground "*will* cause irreparable harm to the residents of Greenpoint and Williamsburg" because it will obstruct certain views towards Manhattan. BP SBOE at 9 (emphasis in original). The Brooklyn Parties argue there is no mitigation available but fail to engage the fact that the proposed 332 new building sites – some of which are discussed by the Brooklyn Parties later in their brief (BP SBOE at 10) – will obstruct many more views than the air cooled condensers, especially because the buildings are taller and wider. TransGas SBOE at 8. Rezoning by the City of New York ("NYC" or "the City") to allow development of the neighborhood with

buildings up to 350 feet tall on footprints as large as 11,000 square feet has mooted the argument that TransGas will cause a significant adverse visual impact. Indeed, the Brooklyn Parties concede that the neighborhood “is being rapidly developed pursuant to the rezoning.” BP SBOE at p. 10.

III. TRANSGAS IS CONSISTENT WITH THE NEW WATERFRONT CONSTRUCTION

The Brooklyn Parties argue that the above-ground facility will make the “28-acre waterfront park impossible” (BP SBOE at 9) and “would irreparably harm the City’s plans for development.” *Id.* at 11. NYC’s Final Environmental Impact Statement,¹ which was prepared for the proposed rezoning, states that if the TransGas facility is built, a 15.9-acre park would be built and new recreational areas would be added or existing ones rehabilitated.² Furthermore, TransGas has proposed installing a walkway within the site boundaries at its perimeter to allow (1) continuous access from any park built to the south of the site and (2) access to any walkway NYC installs along Kent Avenue along the Bushwick Inlet, north of the site.³ The Brooklyn Parties have simply ignored the City’s conclusion that its waterfront park plans and the TransGas facility can co-exist.

The Brooklyn Parties’ observation that construction is occurring all along the waterfront belies its “irreparable harm” claim. The building boom has a momentum all its own and has already reconfigured the waterfront that the hearing examiners in 2004 were convinced required protection from such development. The real estate developers and their financiers have long ago factored in the possibility of a power plant at the Bayside site before credit agreements were

¹ <http://www.nyc.gov/hm/dcp/html/greenpointwill/eis.html>.

² In fact, TransGas would only occupy 8 acres, allowing a 21-acre park to be built.

³ Brief on Exceptions on Behalf of TransGas Energy Systems LLC , dated April 6, 2004 at 54.

executed and bulldozers started clearing sites. What is happening is exactly what Kenneth Patton, Dean of the New York University Real Estate Institute, testified would happen: the TransGas facility will not obstruct planned development along the waterfront. Tr. at 2185-2187. The NYU study presented concrete evidence of thriving commercial and residential neighborhoods that developed adjacent to NYC's power plants. Tr. at 2393-2401. As explained previously, the NYC FEIS also concluded that the rezoning and the TransGas facility can co-exist. TransGas SBOE at 10.

The Brooklyn Parties' assertions, therefore, are thoroughly baseless.⁴

IV. ANOTHER ALTERNATIVE SITE STUDY IS NOT NEEDED

The Brooklyn Parties argue that if TransGas dissolves its affiliate, TransGas Energy Services Corporation ("TESC"), it should nevertheless be compelled to perform an alternative site analysis. The recommendation should be rejected.

First, TransGas *is* dissolving TESC, as explained previously. TransGas SBOE at 17. Under Public Service Law § 164.1(b), and the Board's regulations, 16 NYCRR § 1001.2(d), there will be no obligation on the part of TransGas to do an additional site study because it will be a private applicant once the dissolution is complete.

Second, the Brooklyn Parties neglect to mention that they were allocated nearly \$30,000 from the intervenor fund to find an alternate site, reviewed approximately 75 sites and failed to identify any reasonable alternative site.⁵

⁴ The Brooklyn Parties' last argument (BP SBOE at 14) is merely a repeat of this last contention. TransGas explained previously why no party would be prejudiced by considering the Electric-Only Facility. TransGas SBOE at 18.

⁵ See, DEC Case No. 2-6106-00149/00014, *et al.*, TransGas Energy Systems LLC – *Interim Decision of the Commissioner*, dated March 12, 2004, at 19.

Third, the Brooklyn Parties fail to critique the site studies TransGas presented in the record.⁶

Last, the Brooklyn Parties continue to repeat falsehoods about TransGas' motivation for organizing TESC and initiating condemnation proceedings. Those proceedings were undertaken in direct response to NYC's threats to condemn the Bayside site for which TransGas had a legal option, had spent at that point approximately \$11.5 million on development costs and for which the Article X proceeding was still in progress. The City's condemnation was determined to be illegal,⁷ underscoring that TransGas' action was thoroughly justified. Because NYC's illegal condemnation has been stayed, there is no reason for TransGas to maintain TESC nor is there is a rational basis for punishing TransGas because it sought to resist NYC's illegal acts. Accordingly, there is no factual or legal basis supporting the Brooklyn Parties' position that a new alternate site study should be performed.

CONCLUSION

For the reasons stated herein, the Brooklyn Parties' assertions should be rejected.

Respectfully submitted,
COHEN & DAX, PC

By: 

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⁶ Exhibit I, Att. 4-4.

⁷ *In Re City of New York*, 10 Misc. 3d 1060(A) (Sup. Ct., Kings County 2005).