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April 30, 2004

Hon. Jaclyn A. Brilling
Secretary
New York State Board on Electric
Generation Siting and the Environment
Three Empire State Plaza
Albany, NY 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 Combined Cycle Cogeneration Facility in the Borough of Brooklyn, New York City

Dear Secretary Brilling:

Enclosed please find for filing in the captioned proceeding an original and twenty-five copies of the Brief Opposing Exceptions On Behalf of TransGas Energy Systems, LLC ("TGE").

Respectfully submitted,

READ and LANIADO, LLP
Attorneys for TransGas Energy Systems, LLC

By: _____
Sam M. Laniado

Enclosure
cc: Hon. Robert R. Garlin
Hon. Kevin J. Casutto
Exhibit Exchange List (Via Electronic and Regular Mail)
Updated e-mail list dated 4/15/04 (Via Electronic Mail)

ORIGINAL

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

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

BRIEF OPPOSING EXCEPTIONS ON BEHALF OF TRANSGAS ENERGY SYSTEMS, LLC

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Dated: April 30, 2004
Albany, New York

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NEW YORK STATE BOARD ON ELECTRIC
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BRIEF OPPOSING EXCEPTIONS
ON BEHALF OF
TRANSGAS ENERGY SYSTEMS, LLC

INTRODUCTION

TransGas Energy Systems, LLC ("TGE") hereby replies to the exceptions raised in the briefs of the City of New York ("NYC") and the New York State Department of Public Service Staff ("DPS Staff"). TGE is not responding to the exceptions raised by CitiPostal, Inc., the only other Brief on Exceptions ("BOE") received by TGE.

In one of its exceptions, DPS Staff (DPS 8-9)[1] bases its argument on NYC's speculative and unapproved Land Use and Waterfront Plan ("LUAWP" or "rezoning proposal"). TGE has shown that, as a matter of policy and law, NYC's rezoning proposal should not control the decision to certify or not in this case.[2]

[1] References to ("DPS__") are to the Brief on Exceptions filed by DPS Staff, in this proceeding, on April 16, 2004.

[2] TGE BOE 39-44.

TGE's position is supported by Article X. PSL § 164 states that an Application shall state why the proposed site is best suited, among alternatives, to "promote public health and welfare, including the recreational and other concurrent uses which the site may serve, provided that the information required pursuant to this paragraph shall be no more extensive than required under article eight of the environmental conservation law [SEQRA]." (PSL § 164 (b)) [emphasis added] In turn, the New York State Department of Environmental Conservation 's ("DEC") SEQRA regulations state that potential significant adverse impacts may result from "the creation of a material conflict with the community's current plans or goals as officially approved or adopted." (6 N.Y.C.R.R. § 617.7) [emphasis added] In addition, the Siting Board's regulations state that an application need only assess a proposed facility's impacts considering "existing and approved" land uses. (16 N.Y.C.R.R. § 1001.2) Opposing parties have not produced any applicable law or precedent to support a contrary conclusion.

NYC's LUAWP is unapproved and is nowhere near being implemented or funded, and there is no evidence it ever will be. Unapproved land-use plans, such as NYC's rezoning proposal, are not, as opposing parties and the RD contend, part of Article X's execution but rather its genesis. Article X was intended to put a stop to local obstruction by allowing the state to weigh a project on its merits, not on its politics.

NYC's position in this case lacks credibility. They agree the plant is a great project but object to the location for political reasons. But in another forum, Mayor Bloomberg affirmed NYC's pressing need for power plants when he was asked about the local opposition to another Article X plant:

> Mayor Michael Bloomberg (R-NYC): We'll tell you we do need power in this city. You can't complain about blackouts and then say we don't want to build power plants.[3]

[3] Broadcast Transcript, NY1-TV, April 19th, 2004, 7:00 p.m.-8:00 p.m. Program: Inside City Hall. Location: New York City.

I. DPS STAFF'S EXCEPTION THAT TGE WILL ADVERSELY IMPACT RECREATIONAL RESOURCES SHOULD BE REJECTED

DPS Staff supports the use of the TGE site as a park and argues that the Siting Board should find that TGE would cause adverse impacts on the possible recreational uses of the Bushwick Inlet and a proposed East River park. (DPS 8) TGE explained in its rebuttal testimony (Tr. 2208-17, 2227-32), its Initial Brief to the Examiners ("IBE") (TGE IBE 75-76) and in Reply Brief to the Examiners ("RBE") (TGE RBE 36-45) why TGE would not interfere with any possible future recreational uses at either site. There are no public waterfront parks or existing recreational uses in the vicinity. DPS Staff's assertion is based upon a misinterpretation of the Department of Environmental Conservation's *2002 State Open Space Conservation Plan* ("DEC Open Space Plan")[4] and the requirements of Article X.

The DEC has been very proactive together with the Office of Parks Recreation and Historic Preservation ("OPRHP") in creating open space for recreation, but DEC has always stressed a systematic approach. For each open space proposed for stewardship and acquisition, a reason is also presented and documented in the Open Space Conservation Plan, from among the eight specific goals of that plan.[5] Specifically, DEC's proposed open spaces in the vicinity of the TGE site are the former Eastern District Terminal site and the Bushwick Inlet:

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[4] 2002 NYS OPEN SPACE CONSERVATION PLAN, *available at* http://www.dec.state.ny.us/website/dlf/osp/toc2002.html.

[5] The goals of the Plan are listed on page 8 of the Plan:

1. To protect water quality in New York State including the quality of surface and underground drinking water supplies and the quality of lakes, streams and coastal waters needed to sustain aquatic ecosystems and water based recreation.
2. To provide high quality outdoor recreation, on both land and water, accessible to New Yorkers regardless of where they live, how much money they have, or their physical abilities.
3. To protect and enhance those scenic, historic and cultural resources which are readily identifiable as valued parts of the common heritage of New York's citizens.
4. To protect habitat for the diversity of plant and animal species to ensure the protection of healthy, viable and sustainable ecosystems, as well as the conservation and preservation of biological diversity within the State.
5. To protect habitat to sustain the traditional pastimes of hunting, fishing, trapping and viewing fish and wildlife.

- Eastern District Terminal (or portions thereof): This site would provide active recreation and waterfront access in an [sic] community underserved by open space.
- Goal: Half-acre upland would provide public waterfront access to this vestige of Bushwick Creek.

(*DEC Open Space Plan*, at 319) [emphasis added]

Both sites are being proposed for recreation space to be made accessible in underserved areas; in other words, Goal 2 of the Open Space Conservation Plan. That is their purpose, and interference with that purpose should be the key question that is asked from the State's perspective. Nowhere in the DEC Open Space Conservation Plan is there a statement that the existence of open space should preclude land uses on other parcels. The evidence demonstrates that recreation would be unaffected by TGE, including a detailed shadow study, noise study, air quality and multiple analyses of views, together with an analysis of the likely users and their preferences. (TGE IBE 63; Tr. 2213-17; 2227-32; Exh. 1, pp. 4-33 - 4-39; 4-44 and 4-45; 4-49 - 4-50; Figures 4-17 through 4-20)

Furthermore, with respect to the need to investigate both sites and approve final remediation plans, TGE's Voluntary Cleanup Agreement with DEC should be of assistance in gaining knowledge about the Bushwick Inlet, as well as, to a lesser degree, investigation needs on the Eastern District Terminal site. This investigation work assists the State's interest in bringing urban open spaces to active or passive recreational use. It is also an overarching goal of the DEC Open Space plan that not all open spaces are to be created by the State's purchase of

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6. To maintain the critical natural resource based industries of farming, wood products, commercial fishing and tourism.
7. To provide places for education and research on ecological, environmental and appropriate cultural resources to provide a better understanding of the systems from which they derive.
8. To preserve open space, particularly forest lands, for the protection and enhancement of air quality.

land. Central to the recommendations of the Open Space Plan is active cooperation with private parties that can act as responsible stewards for recreational land. (DEC Open Space Plan, at 8) TGE's proposal to fund community projects creates the potential for furthering that recommendation. As long as the Eastern District Terminal and the Bushwick Inlet sites are able to provide outdoor recreation, the State's interest, at least as far as the DEC Open Space Plan is concerned, is unaffected.

The record evidence refutes DPS Staff's position; if two parks are identified, even if for different purposes and with different aims, they should become one park by filling in the gap in between them. This scheme, however, is not likely to be conducive to a mixed-use waterfront, where success is drawn from a *variety* of views and experiences. Successfully revitalized waterfronts do not thrive on uniformity. They thrive on variety. (Tr. 2209) One need only think of such notable examples such as the non-linear commercial, residential, industrial and park spaces of Old Town Alexandria, Virginia; which nevertheless allow bicycle and pedestrian access for the entire Potomac River shoreline – including a well-used pathway between a 500 MW coal plant and the river (Tr. 2209; Exh. 2, VIS-8B). There is not necessarily any greater value in assembling a single large 49-acre park than there might be in redirecting the 8 acres occupied by the Project toward locations along the waterfront, closer to actual residences in Greenpoint. (Tr. 2209-10)[6]

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[6] In addition, the Section 168.2(c) finding concerning aesthetic impacts relates to the "interests of the state." The intermittent views of Manhattan from Brooklyn that the RD sought to preserve are not "state interests." Case 97-F1563, Athens Generating Comp., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (Issued and Effective June 15, 2000), p. 72; Citizens for The Hudson Valley v. New York State Bd. on Elec. Generation Siting, 281 A.D.2d 89, 99 (3d Dep't 2001).

With respect to DPS Staff's concern's regarding TGE's impacts on NYC's 2012 Olympic bid, the record demonstrates that TGE would not inhibit but further NYC as an Olympic Venue. Notably, it was NYC, in its midstream change of position on the Project, that created the conflict between the Bayside site and the possible Olympic venue by shifting it to North 7-14th Streets. (Tr. 2211-2212) NYC can easily avoid the conflict by using its originally proposed site at North 5-12th Streets. (Tr. 2211) If, as according to NYC (Tr. 1572; TGE IBE 72), the Bayside site was needed to accommodate the wishes of a private developer at North 7th Street, NYC could easily relocate portions of the beach volleyball and archery fields to Coney Island, Van Cortland Park or other venues. (Tr. 2212-13) Nevertheless, as TGE previously explained in its Initial Brief to the Examiners (TGE IBE 72), and its Reply Brief to the Examiner (TGE RBE 43) the Facility would advance the principles for which the Olympics stand and would have the mitigating effect of reducing 200 trucks per day with their concomitant air, noise, odor and traffic problems, not to mention being a significant and symbolic, visible renewable energy development (being the largest solar panel installation in New York City). (Tr. 2213-15; TGE BOE 12, fn. 4)

Article X only requires an evaluation of "predictable" or "probable" impacts. (PSL § 168 (2)(b)) As discussed, *supra*, Article X directs what information should form the basis of the Board's statutory findings. PSL § 164 states that information required in an application "be no more extensive than required under article eight of the environmental conservation law [SEQRA]." (PSL § 164 (b)) [emphasis added] In turn, the DEC's regulations, promulgated pursuant to SEQRA, requires impacts be assessed based upon a "community's current plans or goals as officially approved or adopted." (6 N.Y.C.R.R. § 617.7) (emphasis added) The sentiment contained in SEQRA's regulations is mirrored in the Siting Board's regulations which require consideration of only "existing and approved" land uses. (16 N.Y.C.R.R. § 1001.2)

This statutory and regulatory scheme authorizes predictions of impacts based on circumstances as they exist and not on unlikely events such as NYC's rezoning proposal.

As explained previously (TGE BOE 40-42), the record evidence shows that approval of the rezoning proposal is not guaranteed or even probable. NYC has not initiated the condemnation proceedings that are required under the New York City Charter and New York Eminent Domain Procedure Law to establish a public park at the project site. (Tr. 1578-79; TGE BOE 40-42) A draft environmental impact statement ("DEIS") is currently being prepared under CEQR. There is no deadline for completion of the document. Although NYC's witness testified that the CEQR would be completed by March 2004, the DEIS has still not been issued for public comment. If and when the DEIS is issued, the ULURP process begins, with reviews and public hearings at the community board, borough president and City Planning Commission levels. It then must go to the City Council for approval. (Tr. 1551) The Council may approve, reject or make modifications to it. The Mayor can then veto it, which veto can be overridden by the City Council. (*Id.*) If the City were serious about the use of the Bayside property for a public park, then it would have included in the current package of land use changes the rezoning of the Bayside site, the required approval for acquisition, and the initiation of condemnation proceedings.

In addition to this welter of approvals, NYC's witnesses acknowledged that a change in administration could result in the proposals being rejected. (Tr. 1499, 1576) According to NYC's witness Chan, the Senior Policy Advisor to the Deputy Mayor for Economic Development and Rebuilding, "there are no guarantees we can make [it] there." (Tr. 1499)

There is a good reason why site selection and condemnation proceedings have not been initiated. The City has not allocated in its present capital budget or any future budget the funds

that will be necessary to acquire, remediate and develop this heavily contaminated industrial site. (Tr. 1579)

The NYC Executive Budget for 2005 was just released and once again there is no funding proposed for the Bayside site.[7] The proposed budget shows that even sites *presently* owned by NYC in the Greenpoint-Williamsburg area, such as the old WNYC transmitter site, are not funded for conversion to parkland. Nor is there any funding for the Neighborhood Park and Playground Restoration Program (Community Board Priority Request no. 2, page 1 and no. 15, page 7); the Greenstreets program, which provides fencing and planting on traffic islands and triangles in the area; or the Green Thumb program or for tree pruning (Community Board Priority Expense Request no. 8, page 14; no. 17, page 16; no. 19, page 17). The theoretical condemnation, clean-up and development of the Bayside site into a park is far more costly than these projects combined. NYC's proposal for the site lacks all credibility and should not be relied upon by the Board.

Even the NYC 2012 proposal for the Bayside site was short-lived, and now its website simply states that "[t]he city has proposed a zoning change for the area; should it be enacted, NYC 2012 will make appropriate modifications to the site." The Bayside property, however, is not included in the City's proposed zoning and mapping changes. NYC intends to merely "remap" the site as parkland. (Tr. 1575)

A park overlaid onto land zoned M3 heavy industry, however, is not authorized by the NYC Zoning Resolution. Section 62-27 of the NYC Zoning Resolution does not authorize the overlay of parks in M3 areas except in specific portions of Manhattan. Furthermore, the

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[7] COMMUNITY BOARDS REGISTER by Borough, *available at* http://www.nyc.gov/html/omb/html/finplan04_04.hyml

definition of a public park (§12-11) requires that it be "publicly-owned." Hence, the M3 zoning that NYC would retain for the Bayside site would only cease to apply if and when NYC *acquires ownership* of the Bayside site. Even if the rezoning were complete, until NYC commits funds to an eminent domain taking, and is successful in the condemnation proceeding, M3 zoning applies.

NYC's speculative actions should not be the basis to reject certifying TGE. The only hope for the reclamation of the Bayside site is the Project because, as shown above, the City will not have the financial capacity to acquire and clean-up the site, let alone develop and maintain it as a public park. All NYC has done is to draw a line on a map, and as DPS recognized in its Initial Brief to the Examiners, provided absolutely no information about any plans it may have to remediate the site, much less any City Council approval to do so. (DPS IBE 49, including footnote) Since it is quite simple for NYC to create alternate plans for parks at other, less contaminated sites by altering slightly its proposed rezoning and park-mapping plan (Tr. 2210), the Board should discount any notion that there exists an unresolved conflict between TGE and recreational uses (Olympic or otherwise). It is a false choice.

II. NYC'S EXCEPTION THAT THE SITING BOARD CANNOT AUTHORIZE THE CITY TO ISSUE REVOCABLE CONSENTS SHOULD BE REJECTED

Because TGE's proposed steam tunnel and water line would be constructed on or under the public streets of NYC, as well as land underwater that has been transferred to NYC (a 300-foot buffer around Manhattan), § 7-09 of the Rules of the City of New York ("RCNY") requires that TGE obtain revocable consents from the City Commissioner of Transportation to construct these facilities. The RD determined that if the Siting Board issues a certificate, RCNY § 7-09(d) should be declared unreasonably restrictive. According to the RD (RD 77), the "best interest" standard of § 7-09 (d) could be "brandished by the City as a means of undoing a Board decision

to grant a certificate."[8] NYC (NYC 1)[9] excepts to the Examiners' decision claiming that this is not a permitting issue but a property rights issue and that such a declaration by the Siting Board would equate to a condemnation of City property – something, NYC states, the Siting Board is not authorized to do. NYC, however, does not except to the RD's point that the "best interest" standard would be unreasonably restrictive. DPS Staff (DPS 4) also requests the Board determine whether this is a permitting or property issue.

As explained below, the Board would not be condemning NYC property because TGE's *use* of NYC-owned property does not require TGE's *ownership* of the property. A revocable consent for TGE's use of NYC's property is a license or permit and not an ownership interest in real property. The Board possesses the authority to allow TGE to use NYC property to construct a water pipe and steam line and other facilities necessary for the operation of the Facility under NYC-owned property. Furthermore, as the RD found (RD 77), NYC's attempt to block construction of the facility by refusing to grant revocable consents to TGE would nullify the State's control over determinations regarding the siting of major electric generating facilities pursuant to Article X.

A. The Board Is Not Exercising Eminent Domain Authority By Allowing TGE To Use NYC-Owned Property For A Water Pipe And Steam Tunnel

NYC (NYC 1) argues that the Board does not have the authority to issue a revocable consent over the objection of the NYC Commissioner of Transportation because to do so would constitute a condemnation of City property. NYC's argument is wrong and should be rejected.

[8] The RD notes (RD 76) that NYC has already made clear that it is unlikely that the City would grant a revocable consent given its position that the Project is not in the "best interest" of the City.

[9] References to ("NYC __") are to the Letter, in lieu of a Brief on Exceptions, submitted by the NYC Law Department on April 16, 2004.

NYC failed to address in its exceptions the legal arguments or precedent on this issue previously made by TGE or those contained in the RD. (*See* TGE IBE, pp. 79-87; RD 77-78)

The power of eminent domain requires the acquisition of real property. The General Construction Law states that "the term 'condemnation' when used in reference to the acquiring of any title to, right or interest in, real property through the exercise of the power of eminent domain, shall be deemed to mean acquisition." Gen. Constr. § 16-(b); *see also*, Em. Dom. Proc. Law § 103(A). TGE does not seek to acquire any NYC-owned property. TGE merely seeks *to use* NYC-owned property by way of a grant of a revocable consent.

The revocable consent is a license equivalent to a revocable permit which does not confer any ownership interest in real property. In Mauldin v. New York City Transit Authority,[10] the court found a permit issued by the New York City Department of Water Resources to the New York City Transit Authority did not confer any ownership interest in real property. The NYC Charter, and the Rules of New York City define a revocable consent as "a *grant of a right, revocable at will* (1) to any person *to construct and use for private use pipes, conduits and tunnels* under, railroad tracks upon, and connecting bridges over *inalienable property.*" (NYC Charter § 362(d); 34 RCNY § 7-01 [emphasis added]) TGE's use of NYC-owned property would not be an ownership interest in such property and would not require NYC to alienate any of its real property. Similarly, New York Jurisprudence defines a license as "a revocable nonassignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest in the land." (24 NY Jur., Easements and Licenses in Real Property §214) Like a license, the NYC's revocable consent would grant TGE the revocable right only to use city-owned property for its interconnections.

[10] 64 A.D.2d 114 (2d Dept. 1978).

B. Allowing NYC to Deny Revocable Consents To TGE For Use Of NYC-Owned Property Would Be Inconsistent With And Frustrates The Purpose Of Article X

When the New York State Legislature enacted Article X's predecessor, Article VIII, it made clear that its fundamental purpose was to reduce delays in construction of needed electric generating facilities by giving the State exclusive and preemptive control over facility siting decisions. The Legislature stated that the existing practice of uncoordinated regulation had resulted in "delays in new construction and increases in cost which are eventually passed on to the people of the state in the form of higher utility rates," and that "there is a need for the state to control determinations regarding the proposed siting of major steam electric generating facilities within the state."[11] The Legislature stated the express purpose of Article VIII was "to provide for the expeditious resolution of all matters concerning the location of major steam electric generating facilities presently under the jurisdiction of multiple state and local agencies, including all matters of state and local law, in a single proceeding."[12] Governor Nelson A. Rockefeller's memorandum approving the bill stated that "the establishment of a unified certificating procedure under the jurisdiction of the new State Board" was to "replace the current uncoordinated welter of approvals, procedures and agencies that have virtually paralyzed the construction of needed new power plants."[13]

In its reenactment of Article VIII in 1978, the Legislature reaffirmed the legislation's purpose was to have the Board balance all interests, including local interests, on a State-wide

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[11] L 1972, ch. 385, § 1.

[12] *Id.*

[13] McKinney's 1972 Session Laws of NY, at 3391.

basis in a single proceeding.[14] When Governor Mario Cuomo approved Article X in 1992, he stated that the purpose of Article X, like that of the expired Article VIII, was to provide a "comprehensive review of the benefits and impacts anticipated from proposed facilities without unreasonable delay."[15]

> One of the primary means by which the Legislature sought to ensure the State's control over siting decisions was in its grant of authority to the Siting Board to waive municipal laws or regulations that could hinder the development of electric generating facilities.

Accordingly, section 172(1) of the PSL provides that no municipality or agency thereof may, except as expressly authorized under Article X by the Siting Board, "require any approval, consent, permit, certificate or other condition for the construction or operation of" the Project.

As discussed in TGE's Brief on Exceptions (TGE BOE 49), over two decades ago the New York Court of Appeals confirmed the Board's exclusive authority over electric generating siting decisions in a ruling invalidating a town law that required an applicant to procure a license from the town before undertaking a site study. Consolidated Edison Company of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99, 108 (1983) ("*Red Hook*"). The law required applicants to submit a detailed application to the town and provided that the town could deny the application if it found the proposed project to be detrimental to the town or inconsistent with the town's zoning laws. After reviewing the history and scope of Article VIII, the Court found that the Legislature had preempted local regulation in the field of electric generating facility siting and that the

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[14] L 1978, ch 708 § 1.

[15] Memorandum of Governor Mario M. Cuomo approving Laws 1992, chapter 519, State Energy Planning Board-Siting of Major Electric Generating Facilities, McKinney's 1992 Session Laws of New York, at 2898 (1993).

State's regulation of siting would be frustrated by the town's law. The Court, noting that a neighboring town had enacted a similar law, stated "[o]bviously, the proliferation of such local laws would lead to the very 'uncoordinated welter of approvals.' Article VIII was meant to replace, and thereby defeat the purpose and operation of the State regulatory scheme." (*Id.* at 107)

The Court also ruled the town law was inconsistent with Article VIII because it enabled local communities to keep applications from electric generating facilities from ever being filed with the Board. The Court stated "[o]nce the Legislature has set down the factors to be considered in determining the siting of proposed major steam electric generating facilities and the forum where such determinations are to be made, [the municipality] cannot by local law abort that plan." (*Id.* at 108)

Like the town law in *Red Hook*, allowing NYC to block construction of TGE's facility by denying revocable consents for use of NYC-owned property would effectively "abort" the Board's decision to grant TGE a certificate to develop a generating facility on TGE's site. If NYC were allowed to deny TGE revocable consents, Article X would be reduced to a wasteful and fruitless exercise for applicants proposing projects that are opposed by municipalities. All generating facilities require use of at least some municipal-owned property or facilities for purposes of its interconnection lines (water, sewer, etc.). Municipalities that fail to convince the Board that a proposed project is not in the State's interest could still thwart development of projects by simply following NYC's example.

Accordingly, NYC's exception should be denied.

III. THERE ARE NO UNRESOLVED ISSUES REGARDING PROPERTY RIGHTS ALONG THE BUSHWICK INLET

DPS Staff claims there is an ongoing dispute as to property rights along the southern shore of the Bushwick Inlet upon which TGE proposes to construct a public walkway. DPS Staff requests that the Siting Board "memorialize the fact that [TGE] has not shown that it has acquired the necessary property rights along the south shore of the Bushwick Inlet. . . ." (DPS 6-7) The issue is now moot. TGE stated in its Brief on Exceptions that it would agree to an additional certificate condition requiring the site plan be revised by adding a walkway fully within the undisputed portions of the Bayside site. (TGE BOE 54; *See* Att. B to TGE BOE, Condition IV.3)

IV. DPS STAFF'S ARGUMENT THAT TGE SUBSTANTIALLY HINDERS NYC NEW WATERFRONT REVITALIZATION PROGRAM POLICY 2 SHOULD BE REJECTED

DPS Staff alleges that the RD, in considering the no-action alternative, "essentially" found that TGE is inconsistent with NYC New WRP Policy 2. DPS Staff requests the Siting Board's decision make a specific finding with respect to TGE's consistency with Policy 2. Contrary to DPS Staff's assertions, the Examiners did not do an "extensive policy-by-policy analysis" but merely reiterated arguments made by the parties. The Examiners made no independent analysis and made no conclusions either way. A finding of inconsistency with Policy 2 cannot be read into the RD.

Regardless, DPS Staff misinterprets the standard for a coastal zone consistency determination. A proposed action or project is consistent with the policies and intent of the NYC New WRP "when it will not substantially hinder the achievement of any of the policies and, where practicable, will advance one or more of the policies." (NYC New WRP at 6) (emphasis added) As such, the Siting Board must find TGE substantially hinders the goals of Policy 2, not that TGE is inconsistent as DPS Staff asserts.

TGE, in Attachment M to the Application (Exh. 1, Att. M), and in its Initial (TGE IBE 59) and Reply (TGE RBE 56) Briefs to the Examiners, demonstrated TGE's advancement of the goals contained in Policy 2. Policy 2 focuses on "[s]upport(ing) water-dependent uses and industrial uses in New York City coastal areas that are well suited to their continued operation." (NYC New WRP p. 13) Two different uses are encouraged. The TGE facility qualifies as a water-dependent use and as an industrial use. (Tr. 2198; Exh. 1, pp. 4-177 to 4-178, Att. M, pp. 8, 23-25) The introduction to Policy 2 recognizes that the New York City waterfront supports various industrial uses and "municipal and public utility services, including energy generation, storage and distribution facilities. These working waterfront uses have locational requirements that make portions of the coastal zone especially valuable as industrial areas." (NYC New WRP p. 12) [emphasis added] The evidence shows that TGE is especially well-suited for siting along the East River waterfront because it can interconnect to the electric grid that has run along the waterfront for many decades, use both construction-phase and operations-phase barging (equipment, soil removal, and backup fuel); discharge effluent to the East River under its SPDES permit; and connect to the steam system in a safe manner by avoiding city streets (an advantage enabled by the site's waterfront location). (Tr. 1793) The site is also unique in that it offers all of the above characteristics as well as a connection to the Buckeye oil pipeline for backup fuel. (Tr. 2198)

The RD notes (RD 102) that opposing parties question whether TGE is a water-dependent use and, therefore, is inconsistent with Policy 2. There is no requirement, however, that an activity on the coast be water-dependent -- Policy 2 supports water-dependent and industrial uses. (Tr. 2198; NYC New WRP p. 12) Nevertheless, the record shows that the Project is water dependent for the reasons stated above (Tr. 2198), as well as using the description of water-dependent uses found in the New York State Coastal Policy 2. (Exh. 1, Att. M, pp. 23-25) Moreover, the definition in Article VI of the NYC Zoning Resolution, § 62-211, states that land uses "that ship or receive materials or products by water as evidenced by

operational docking facilities" are water-dependent uses. The NYC Zoning Resolution's Article VI is incorporated into the NYC New WRP.

Policy 2 recognizes that not all development will occur in designated Significant Maritime Industrial Areas ("SMIAs"). Policy 2 breaks down the siting of water dependent and industrial uses into two areas, those within SMIAs in Policy 2.1 and those outside SMIAs in Policy 2.2. The SMIAs, designated primarily with an eye toward optimal areas for barge-rail or barge-truck transfers, are not optimally situated from the standpoint of electric and steam generation. It is no coincidence that while *all but one* electric and steam generating facility in New York City is in the coastal zone,[16] only 10% of existing and approved generating capacity is in a designated SMIA. (Exh. 1, Att. M, p. 9) This crucial distinction does not merely apply to previously existing facilities. *Not a single one* of the plants approved in 2000-2002 under Article X within NYC are in a designated SMIA, although all are within the coastal zone. (Tr. 2389-90) A prime example is the SCS Astoria Energy Project, which has NYC's full support and which was approved by the Siting Board. This is a new industrial facility that replaced an oil storage terminal in an area *outside* any SMIA. Despite DPS's assertion, TGE is entirely consistent with this pattern.

Outside the designated SMIAs, pursuant to Policy 2.2, suitability of a particular area for use as a working waterfront will depend on the "compatibility of these uses with surrounding uses and natural features, and an evaluation of the area's long-term best use." (NYC New WRP p. 13) TGE is compatible with surrounding uses – existing and proposed. As the record shows (Exh. 1, § 4; Tr. 2131-41, 2172-79; TGE IBE 46-53, 73-76; TGE RBE 33-40, 43-45; TGE BOE 42-43, 51-53), the Project is compatible with the existing industrial character of the area immediately surrounding the Bushwick Inlet. If the area's long-term best use was ultimately determined to be retention of an industrial sanctuary, the Facility is compatible. If the area's

[16] The lone exception, West 59th Street Station, occupies a nearshore site, separated from the Hudson River only by the West Side Highway, which the facility predated.

long-term best use was determined to be that contained in NYC's proposed rezoning initiative (housing and parkland), TGE would again be compatible because it fits all the bulk and performance standards of a new a high performance M1 light manufacturing use on this site (Exh. 2, LUZ-1-text). TGE, therefore, advances the goals of this Policy.

Policy 2.2.A, entitled "[e]ncourage working waterfront uses at appropriate sites outside the [SMIAs]," lists criteria for determining appropriate uses outside SMIAs including "suitable hydrologic and site conditions; presence and condition of waterfront infrastructure; appropriate zoning; proximity and access to truck and railroad transportation routes; suitable access to markets, customers and delivery networks; adequate and appropriate buffering from surrounding residents; and existing development patterns." (NYC New WRP p. 13) Attachment M to the Application details how TGE satisfies each of these criteria.

To summarize, the proposed site has suitable hydrologic and site conditions and there is currently present considerable waterfront infrastructure and a platform/pier which TGE will repair or replace, a rip-rap wall and an onsite pipeline. (Tr. 2201; Exh. 1, Att. M, pp. 9-11; 3-32 to 3-35A; TGE IBE 59-60) TGE also complies with the site's current M3 zoning and, as discussed above, also meets the M1 high performance standards that would be applicable to the Facility were it proposed next to an existing park. Note that M1 zoning is proposed by NYC for a long stretch of parcels immediately adjacent to waterfront housing and parkland (Calyer to North 9th Streets), and directly across the street from the Bayside site.

The proposed site is also in an ideal location with respect to delivery networks as the site provides the Facility close proximity to Manhattan for the delivery of steam via an underwater tunnel, is located in proximity to the underground electric transmission grid running along the waterfront and the Buckeye pipeline runs onto the site. The immediately surrounding area, at present, is industrial with only 50 people living within the nearest 70 acres from the Project site boundary. Only seven or eight buildings in the area appear to have any residential uses (and many of those are coexisting with industrial uses in the same building). (Tr. 2182) There are no

"surrounding" residents to which the criterion applies. With respect to existing development patterns, the Bayside site is within an industrial pocket showing job growth, while intense gentrification and residential loft conversions occur at somewhat more distant, inland areas. (Tr. 2185-86)

Should the NYC rezoning proposal come to fruition, TGE demonstrated that the Project's design and operation as an M1 high performance industry makes it perfectly compatible with such existing development patterns. NYC, DPS and Brooklyn witnesses acknowledged that M1 uses are compatible with residential uses. (Tr. 1577, 2576)

Lastly, Policy 2.3 recommends uses that provide infrastructure improvements to support the working waterfront. TGE clearly advances this policy as it will rehabilitate the dilapidated platform/pier and replace dolphins and docks to restore this working waterfront to active use again. (Exh. 1, Att. M, p. 10).

For these reasons, DPS Staff's exception should be denied.

V. NYC ACKNOWLEDGES THAT PLANTS CANNOT BE BUILT IN THE NEWTOWN CREEK SMIA

NYC declined to except to the RD's recommendation that the Exxon/Mobil site was neither available nor reasonable. NYC reiterated, however, that its criteria for appropriate sites are those "located in an area planned for heavy manufacturing uses and designated as a significant maritime industrial area (SMIA)." We have already noted above NYC's inconsistency with its stated criteria in this case, in its support of the SCS Astoria Project, which is outside an SMIA. More critical for the Board's consideration, however, is that the nearest (and biggest) SMIA to the Bayside site – the Newtown Creek SMIA – is severely compromised by the poor flushing characteristics of Newtown Creek.

TGE's analysis of the plant's discharge of effluent at the ExxonMobil site showed that *any* site with discharge into the Newtown Creek could not be demonstrated to comply with water

quality standards, nor obtain a SPDES permit. (Tr. 1796-1800) While the Newtown Creek SMIA may be a perfectly suitable location for non-effluent discharging industries, it is inappropriate for power plants like TGE. Newtown Creek cannot be used as an open sewer. As stated in testimony of the TGE panel, "NYSDEC's charge is to ensure that rivers and streams are in compliance with their designated uses. The rationale that industries be allowed to discharge to a degraded stream, because it will not impact the limited number of pollution tolerant species present, is inconsistent with the goals and objectives of the SPDES program." (Tr. 1800) Since that testimony was offered, local City Council Members and the Riverkeeper organization have filed lawsuits for the cleanup of Newtown Creek,[17] only further pointing to the problematic nature of NYC's suggestion that SMIAs should be the criterion for good siting of power plants. At opposite, new plants need to be sited on the riverfronts outside of SMIA's, as are virtually all existing generating facilities and all approved in-City Article X projects.

As noted, *supra,* Mayor Bloomberg readily chastised the local opposition to the SCS Astoria Project outside an SMIA, citing the need to protect against another blackout as occurred on August 14, 2003, but NYC is acquiescing to the local opposition in the instant case. Blackouts, however, can affect all of NYC and the State.

[17] http://riverkeeper.org/campaign.php/pollution/we_are_doing/805 (last visited April 29, 2004).

CONCLUSION

For the reasons stated herein, the exceptions raised by DPS Staff and NYC should be denied.

Respectfully submitted,

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