corresp

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C99-F-1835

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August 1, 2003

Administrative Law Judge J. Michael Harrison
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Administrative Law Judge Daniel P. O'Connell
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Re: *Case No. 99-F-1835 - Glenville Energy Park - Expiration of Statutory Deadline.*

Dear Presiding Examiner Harrison and Associate Examiner O'Connell:

This letter constitutes CARD's formal submission in response to Your Honors' July 1, 20003 letter requesting pleadings "on the implications of the expiration of the statutory deadline." with respect to the pending Article X proceeding on the Application of Glenville Energy Park ("GEP"). As set forth more fully below, CARD respectfully submits that the Siting Board cannot take further action on the application and must declare it to no longer have cognizable existence. Alternatively, the Siting Board must either dismiss it as being abandoned by GEP or deny it because it fails to meet the requirements of Public Service Law §168. Finally, CARD believes that fairness and equity requires that this application be dismissed.

Point I

The Statutory Time To Review GEP's Application Has Expired And The Siting Board Cannot Take Further Action On It

The time frame for an Article X proceeding is expressly prescribed by PSL §165(4) , which states, in pertinent part, as follows:

> Proceedings on an application *shall* be completed in all respects, including a final decision by the board, within twelve months from the date of the determination by the chairman that an application complies with section one Proceedings on an application *shall* be completed in all respects, including a final decision by the board, within twelve months from the date of the determination by the chairman that an application complies with section one hundred sixty-four of this article; ...The board *must render a final decision* on the application by the aforementioned deadlines unless such deadlines are waived by the applicant....
> [Emphasis supplied]

In this proceeding, the original statutory deadline was April 8, 2003. By letter dated July 12, 2002, Applicant requested a delay in the proceedings to allow it to submit supplemental materials and declared that, "...GEP waives the April 8, 2003 deadline, pursuant to PSL §165(4) until June 30, 2003." In your letter to the Applicant, Your Honors confirmed that the statutory deadline was "waived" until June 30, 2003.[1] Significantly, Applicant has failed to further waive (extend) the statutory deadline beyond June 30, 2003. Therefore, as set forth in your July 1, 2003 letter, Your Honors have now correctly declared the statutory deadline to have expired.

What is the implication of the expiration of this statutory deadline? To analyze that issue, the appropriate starting point is to determine whether the terms of PSL §165(4) are mandatory or directory. In *Matter of King v. Carey*, the Court of Appeals discussed the principle by reiterating the traditional rule of statutory construction that,

> 'prescriptions in regard to the time, form and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity and dispatch in the conduct of public business' (*citations omitted).*
> [57 N.Y.2d 505, 512, 457 N.Y.S.2d 216, 219 (1982)]

The Court then set out the criteria that are to be employed in order to determine whether particular statutory prescriptions are mandatory or directory:

> ... "the line between mandatory and directory statutes cannot be drawn with precision" (*citations omitted).* The inquiry involves a consideration of the statutory scheme and objectives to determine whether the requirement for which dispensation is sought by the government may be said to be an "unessential particular" (*citations omitted*) or, on the other hand, relates to the essence and substance of the act to be performed and thus cannot be viewed as merely directory ...
> [57 N.Y.2d at 513, 457 N.Y.S.2d 219]

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[1] We note that, although the term "waive" as set forth in PSL §165(4) is not defined, its meaning is made crystal clear by the practice of the applicant and Your Honors in this matter. Thus, "waive" essentially translates into an applicant's authority to reasonably "extend" the one year statutory deadline.

In *King*, the Court undertook such an examination, describing the Taylor Law penalty provisions relative to the obligations of the public employer, and the purpose of the statute, concluding that:

> In short, the time requirements imposed on public officials by the Taylor Law are not "unessential particulars"; they are an integral and central part of the statutory scheme which carries out the Legislature's judgment that swift punishment is essential to deter further strikes by public employees. [57 N.Y.2d at 514, 457 N.Y.S.2d 220]

In enacting Article X, the Legislature intended to ratchet down the time available for review, further streamlining the siting of electrical generating facilities even beyond the foreshortened, one-stop Article VIII process, for the deliberate purpose of expediting the process. The intent of the Legislature may be seen as a theme throughout the legislation [L.1992, c.519], including, for example, in the withdrawal of certain permitting authority from the Department of Environmental Conservation and placing it in the Siting Board in order to further reduce the potential for delay, and the elimination of considerations of need for the capacity sought in favor of recitations of consistency with the State Energy Plan. The intent was further evident in the legislative history. *See, e.g., Matter of New York Institute of Legal Research v. New York State Board on Electric Generation Siting and the Environment*, 295 A.D.2d 517, 519, 744 N.Y.S.2d 441, 443 (2nd Dept. 2002) and source materials cited therein. The demand of expedition was recognized generically by the Siting Board upon promulgation of its regulations. MEMORANDUM AND RESOLUTION ADOPTING ARTICLE X REGULATIONS (Case 97-F-0809, 1997) at 6.

Article X includes several provisions to accomplish this objective: §164 clearly outlines the minimum requirements for an certificate application; §167 demands that the adjudicatory hearing shall be conducted in an "expeditious manner" and outlines this process in detail; §168 gives the Siting Board authority to waive time-consuming local approvals if local requirement are unreasonably restrictive; and §165 sets forth, in great detail, schedules and procedures for the hearings on the application, including both an express directive to the presiding examiner to "hold a prehearing conference to expedite ... the hearing" and an express admonition to the parties that they be "prepared to proceed in an expeditious manner..."

Given the overall context of the chapter law and legislative history, and applying to it the use of time constraint phraseology throughout Article X, it is clear that the time frames set forth in PSL §165(4), including the statutory deadline for completion of the hearings and for rendering of a final decision, are not "unessential particulars". Rather, they are are an integral and central part of the statutory scheme of expeditious resolution. Those time constraining words and phrases thus go to "the essence and substance" of the Article X process, leading to the inexorable conclusion that they must be construed as mandatory.[2]

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[2] *Matter of County of Suffolk v. Gioia*, 96 A.D.2d 220, 468 N.Y.S.2d 371 (2nd Dept. 1983) and *Matter of Commonwealth of Massachusetts, et al. v. New York State*

... continued on next page ...

Accordingly, all certification proceedings on the GEP application including the issuance of a final decision by the Siting Board **must** have taken place within the statutory deadline. Therefore, Article X requires that all of the following actions take place before the expiration of the statutory deadline: (1) an issues conference be convened and concluded; (2) a ruling on adjudicable issues be issued; (3) testimony be submitted; (4) an expeditious adjudicatory hearing be convened and concluded at which a record is compiled adequate for making the requisite findings; (4) a recommended decision by the Hearing Examiner be issued; and (5) a final decision by the Siting Board be rendered.

Of course, there is no question that the June 30, 2003 statutory deadline has come and gone without any of the above actions taking place. The issues conference was indefinitely postponed. There has been no ruling on issues, no submission of testimony, no adjudicatory hearing and no recommended decision. Even importantly, the Siting Board has not issued a final decision in this matter.

Thus, as Your Honors noted, the statutory deadline has expired and the mandatory procedural steps have not been completed. The statute does not give, or even contemplate giving, the Siting Board additional time to carry out these mandatory duties beyond the deadline. As a result, the GEP application process has "expired," and, as a matter of law, the GEP application must now be considered to be a nullity, the Board being without statutory authority to take any further action upon it. *See, e.g., King, supra.*

Point II

The GEP Application Must Be Dismissed As It Has Been Abandoned By The Applicant

In the event the Siting Board determines that it has the authority to act further on this application, the only available action is dismissal by virtue of GEP's having affirmatively abandoned its application as demonstrated by its failure to act. Such failures are clear in the record.

... *continued from preceding page* ...
Board on Electric Generation Siting and the Environment, et al., 197 A.D.2d 97, 610 N.Y.S.2d 341 (3rd Dept. 1994) are not contrary to that conclusion. In those cases, Article VIII's language was explicitly cited as supporting the proposition that the time limit was directory exactly because the Siting Board had broad authority to extend in order to create a record; in contrast, Article X explicitly severely circumscribed the authority, allowing extension by the Siting Board for no more than six months and then only in *"extraordinary circumstances"*, a term that was undefined. It cannot reasonably be said that an applicant's failure diligently to prosecute its application by filing supplemental materials required for review to proceed constitutes *"extraordinary circumstances"*; however, it is eminently reasonable to construe the change in wording as a manifest declaration by the Legislature that the time limits were mandatory and an implicit declaration by the Legislature that *Gioia* and *Massachusetts* should not be followed insofar as the Article X time limits are concerned.

In its July 12, 2002 letter to Judge Harrison, GEP both sought a postponement of the issues conference until October 10, 2002 "in order to allow Applicant time to prepare and file a supplement to GEP's Article X Application and to allow for related discovery" and extended the statutory deadline to July 1, 2003. October 2002 came and went without any additional filings by the Applicant.

Apparently in response to such inactivity and silence by GEP, by letter dated November 14, 2002, Judge Harrison requested that the Applicant "provide an explanation in writing, by close of business December 5, 2002, of the Applicant's plans. Please provide expected dates for any supplemental filings or other pleadings, and to the extent possible a proposed schedule for the issues conference, flings and other future events." On December 5, 2002, GEP submitted a letter stating that it was allegedly carrying out some studies regarding cooling water supply and wastewater discharge issues. GEP stated that, "by mid-February, GEP will be in a position to provide target dates for regulatory submissions, including a target date for a supplemental filing in this Article X case." Shortly thereafter, by letter dated January 21, 2003, GEP stated that "GEP anticipates filing its next supplements submission on or about July 1, 2003."[3]

As Your Honors are well aware, mid-February and July 1, 2003 have passed and, in that time, GEP has not made any filings whatsoever. GEP has not submitted information of any kind about its studies. GEP has not submitted any supplemental materials. In fact, it has entirely failed to even provide the promised target dates for regulatory submissions, including any supplemental filing. And, most importantly, July 1, 2003 has passed and GEP has failed to extend the statutory deadline.

We respectfully submit that, given GEP's utter failure to act and its inability to proceed within any time frame (including the statutory one), the Siting Board must conclude that GEP has abandoned its application for a Certificate and, therefore, dismiss the application. This ruling is particularly appropriate in the Article X demand of an expeditious review process for the benefit of both the public and the applicant. To allow the application review process to continue in this case, after GEP affirmatively initiated the regulatory review process and thereafter -- without justification – simply ceased all action on it, would encourage delays and dilatory tactics from other applicants, in direct contravention of the clear intent and mandates of Article X.

Point III

Alternatively, The Siting Board Must Deny GEP's Application For Failing To Meet The Statutory Requirement of PSL §168

Again, if the Siting Board determines that it has the authority to rule on this application, despite the expiration of the statutory deadline, CARD respectfully submits that the application for a Certificate must be denied.

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[3] We note with some incredulity that GEP's promise to file its "next" supplement implies that it filed a previous one, which the record clearly reflects that it had not.

As noted above, the Article X statutory deadline has expired and GEP has not sought to extend the deadline. Moreover, within this time frame, GEP has entirely failed to provide additional materials to supplement its original application. As such, if the Siting Board were to rule on the record as it stands now[4], there is simply insufficient evidence in the record to grant a Certificate pursuant to PSL §168.

PSL §168 requires the Siting Board to make numerous findings before issuing a Certificate. These include findings as to whether the facility minimized adverse environmental impacts, whether it is compatible with public health and safety, that it will not contravene environmental standards and, whether the construction and operation of the facility is in the public interest. Such findings must be based solely on the record before the Siting Board.

Clearly, there is no record at all as demanded by Article X, so the "record" is so utterly deficient in regards to these required findings that the Siting Board's reasonable and legally supportable options are either to deny the application in its entirety or to dismiss the application pursuant to 16 NYCRR §1000.13[5], alternatives which are fundamentally equivalent, since either course would be premised upon the lack of even *prima facie* evidence that GEP could fulfill the statutory requirements or upon its suppositions having been untested by the crucible of cross-examination. Some of the more obvious deficiencies can be highlighted here. For example, the record reflects that GEP's original proposals for the supply of cooling water and the discharge of wastewater were rendered incapable of effectuation by the rulings of the elected officials of Schenectady and Scotia, respectfully. There is no dispute as to GEP's being unable to secure that water or those wastewater services; since GEP has not provided any information on its success in replacing these resources, despite its promise to do, it must be concluded that GEP has literally no source of water and no means of disposing of wastewater. Moreover, the other parties have not had the opportunity to demonstrate the flaws in GEP's suppositions regarding environmental and health impacts of the plant, nor have they had the opportunity to submit their own expert testimony on these issues. Indeed, Your Honors have not even had the opportunity to rule on which issues must be adjudicated.

We note, by way of analogy, that the DEC has authority under 6 NYCRR 621.15 (b) to deny a permit application if it does not receive from the applicant, after an explicit and reasonable request, any additional information reasonable necessary to make the findings

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4 To do so would be contrary to detailed application review scheme outlined in Article X.

5 "Whenever it shall appear in the absence of any genuine issue as to any material fact that the statutory requirements for a certificate cannot be met, the board may dismiss the application seeking such certificate and terminate the proceeding in question upon the motion of any party or upon its own motion."

required by law. *See also, In the Matter of the Denial of Application for Bath Petroleum Storage Facility*, 2000 WL 1697729 (DEC Interim Decision, November 6, 2000). Similarly, by the Applicant's own admission, additional, supplemental information must be submitted in order for the Siting Board to make a decision. Despite this and GEP's promises, no such information has been supplied. Accordingly, the Siting Board should deny the application on the ground that it does not possess information reasonably necessary for it to make the requisite finding under PSL §168.

Point IV

Fairness And Equity Requires That the Application Be Dismissed

As Your Honors are well aware, CARD is comprised primarily of people residing in the immediate vicinity of the proposed facility. CARD members have been genuinely and personally prejudiced by GEP's actions (or lack thereof) in this proceeding.

As we have noted in previous submissions to Your Honors, when this application was first presented to the public, CARD members essentially put their normal lives on hold in order to first evaluate and then oppose GEP's proposal. From the outset, CARD members held out hope that the Article X process would not only allow them to meaningfully participate in the review of the application but to do so within a clear and expedited time frame. In other words, they knew that such disruption, however unpleasant, would be limited in time.

Of course, the reality of the process has been the exact opposite of what was anticipated. CARD has not been able to meaningfully participate, because GEP has prevented the adjudicatory process from moving forward. Although CARD has obtained experts, it has been unable to use their skills to frame issues at an issue conference or to dispute and defeat GEP's assertions with respect to the facility's health and environmental impacts. Moreover, the one year time frame has been completely obliterated. Including the pre-application process and the presentations by GEP principals theretofore – all of which were very much part of the application process for the membership of CARD and the residents of the community – the spectre of GEP is now in its fifth year of affecting Scotia, Glenville and Schenectady County; the formal process alone is now well into its fourth year. Your Honors have given parties until early September to reply to submissions regarding the expiration of the statutory deadline. In short, there still seems to be no end in sight. Although this is somewhat different than the nature of the substantial prejudice asserted in the *Gioia* case which resulted in the Court's determining that the Siting Board had lost the jurisdiction to continue to review the application, it is substantial prejudice nonetheless. Therefore, even if it were to be determined that Article X's time constraints are directory, and not mandatory, the application should be terminated by virtue of that prejudice. *Gioia, supra; see also, Matter of Sarkisian Bros. v. State Div. of Human Rights,* 48 N.Y.2d 816, 818, 424 N.Y.S.2d 125 (1979).

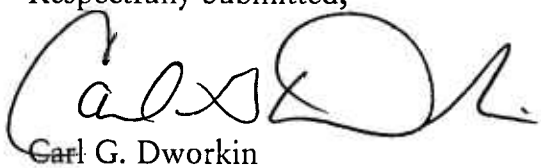
Accordingly, in light of the hardships GEP's delays have worked on CARD members, we respectfully request that, in fairness and equity, the Siting Board immediately dismiss GEP's application and put a final end to this tortured and ineffective proceeding.

Conclusion

There is ample basis for Your Honors to recommend to the Siting Board that GEP's application for an Article X Certificate be declared a nullity, be dismissed or be denied.

Thank you for your thoughtful consideration of this matter and the foregoing discussion.

Respectfully Submitted,



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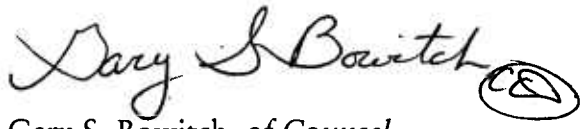

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