PENDING PETITION MEMO

Date: ~~6/15/2006~~ 5/11/07

TO : Office of Electricity and the Environment
Office of General Counsel
Office of Hearings & Alternative Dispute Resolution

FROM: CENTRAL OPERATIONS

UTILITY: CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

SUBJECT: 06-T-0710

Application of Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need under Article VII of the New York State Public Service Law for the M29 Transmission Line Project.

MOTION TO STRIKE IMPROPER AND EXTRA-RECORD MATERIALS IN TIME WARNER CABLE'S REPLY BRIEF.

conEdison
a conEdison, inc. company

Jeffrey L. Riback
Assistant General Counsel

May 10, 2007

VIA E-MAIL AND OVERNIGHT MAIL

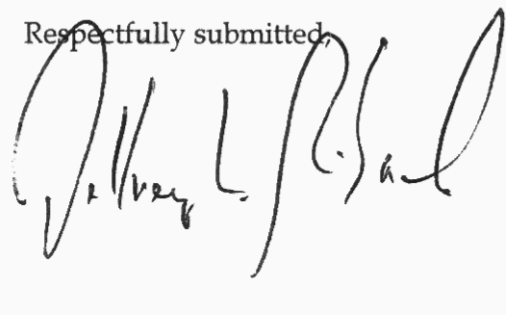
Hon. William Bouteiller
New York State Department
of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 06-T-0710 – Consolidated Edison Company of New York, Inc.

Dear Judge Bouteiller:

In accordance with Department regulations set forth at 16 NYCRR § 3.6, Con Edison encloses a Motion to Strike Improper and Extra-Record Materials contained in the reply brief of Time Warner Cable of New York City. Concurrently, Con Edison is providing an electronic copy of the motion to each of the parties on the current Active Party List, and five copies to the Commission's Secretary.

Respectfully submitted,



Enclosure

cc: Active Party List (2/27/07) (via e-mail)
Hon. Jaclyn A. Brilling ✓

Consolidated Edison Company of New York, Inc.
4 Irving Place New York NY 10003 212 460 6677 212 260 8627 fax ribackj@coned.com

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

IN THE MATTER of the Application of Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the Public Service Law for the M29 Transmission Line Project, New York, Bronx, and Westchester Counties, New York	:	CASE NO. 06-T-0710

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'S MOTION TO STRIKE IMPROPER AND EXTRA-RECORD MATERIALS IN TIME WARNER CABLE'S REPLY BRIEF

PRELIMINARY STATEMENT

This motion is submitted in accordance with Department regulations set forth at 16 NYCRR § 3.6. Consolidated Edison Company of York, Inc. ("Con Edison") respectfully moves to strike Section III of Time Warner Cable's ("TWC") May 8, 2007 reply brief. Section III of TWC's reply brief contains several numbered items (2-10) that, although raised in TWC's direct case, were not addressed in its initial brief and are not a proper response to the other initial briefs submitted in this proceeding on April 24, 2007. Section III of the TWC reply brief also includes extra-record materials (numbered items 1, 11-14) that were never offered in TWC's direct case, are raised for the first time in its reply brief, and must be precluded from Commission consideration in this case as a matter of law.

In Section III of its reply brief, TWC in large part repeats portions of the January 15, 2007 pre-filed direct testimony of its witness Manfred W. Bohms with respect to mitigation measures

TWC would like to see implemented during Project construction along Ninth Avenue in the vicinity of TWC's property. *See* Section III, Items 2-10. Con Edison addressed this testimony during the course of the evidentiary hearings in this proceeding, which ended on March 19, 2007. Neither Con Edison's initial brief, nor the initial briefs submitted by any other party, including TWC, discussed or referred to TWC's proposed mitigation terms and conditions for Project construction. Con Edison submits that these issues should have been addressed in TWC's initial brief and that raising them now, in its reply brief, is improper and prejudicial to the other parties, since no opportunity to respond now exists. Moreover, in the numbered list of proposed terms and conditions set forth in Section III, numbered items 1, 11, 12, 13, and 14 are completely new issues, never raised by Mr. Bohms in his pre-filed direct testimony, never raised on cross-examination, and as extra-record material, should now been stricken from this proceeding.

ARGUMENT

Putting aside the question of whether an Article VII certificate, rather than an environmental management and construction plan, is the appropriate vehicle for delineating the detailed terms and conditions of project construction, if TWC wished to address the proposed terms and conditions for construction offered in its direct testimony, then it should have properly raised that discussion in its initial brief, allowing Con Edison and other parties the opportunity to reply. TWC has offered no excuse for failing to raise these matters in its initial brief, and TWC should not be permitted the benefit of "gaming" the content of its briefing.

It is general practice in New York State courts that reply briefs are limited to points raised in the initial briefs of the opposing party. *See, e.g., Procedure in the Appellate Division (2007 Edition)*, App. Div. 2d Dept. at § 670.10.3(g)(4). Although Department of Public Service

regulations do not explicitly define the scope of initial and reply briefs, a four-square analogy can be drawn from the Department's regulations governing the scope of briefs on exceptions and briefs in opposition to exceptions to a recommended decision. There, at 16 NYCRR § 4.10(c)(3), the Department explicitly states that "[a] brief opposing exceptions shall be directed only at exceptions raised by other parties, and may not raise issues not raised on exceptions." The same principle must apply to arguments offered in reply briefs which do not respond to issues raised in the initial briefs of opposing parties. To permit otherwise would allow a party a second "initial" opportunity to brief issues, while denying opponents the opportunity to respond. For these reasons, Section III of the TWC reply brief should be stricken.

Moreover, as Con Edison stated in its April 26, 2007 Motion to Strike Extra-Record and Confidential Materials in certain initial briefs in this proceeding, it is long-established Public Service Commission practice that extra-record "evidence" cannot be entertained in the consideration of cases. *See, e.g.*, Case 89-E-166, *et al., Rochester Gas and Electric Corporation, Opinion No. 90-17* (issued July 6, 1990)("RG&E's 'ex-dividend date' adjustment must be rejected as extra-record and untimely"); Case 27811, *In re Long Island Lighting Co., Recommended Decision* (issued August 19, 1981)("Also disregarded are those portions of the petitioners' reply brief based on extra record evidence").

Here too, allowing the extra-record material contained in numbered items 1 and 11-14 of Section III of the TWC reply brief to remain would be contrary to the Department's administrative process and would be unfair to the other parties. TWC should not be permitted a back door through which new matters can be introduced. Accordingly, these materials must be stricken from the TWC reply brief and not considered in the Presiding Officer's and the Commission's review of this matter.

CONCLUSION

For the foregoing reasons, the improper and extra-record materials identified above and included in the TWC reply brief should be stricken and not considered.

Dated: New York, New York
May 10, 2007

Respectfully submitted,

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

By: _____

Jeffrey L. Riback
Assistant General Counsel
4 Irving Place - Room 1820
New York, NY 10003
Tel: (212) 460-6677

conEdison
a conEdison, inc. company

Jeffrey L. Riback
Assistant General Counsel

May 10, 2007

VIA E-MAIL AND OVERNIGHT MAIL

Hon. William Bouteiller
New York State Department
of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 06-T-0710 - Consolidated Edison Company of New York, Inc.

Dear Judge Bouteiller:

Con Edison requests that it be allowed to submit this response to the reply brief of the New York and Presbyterian Hospital ("NYPH") dated May 8, 2007. This response is necessary to correct a serious misstatement of law in that brief regarding the scope of the Commission's authority, especially because the appellate decision cited by NYPH involved an appeal from an unreported lower court decision, a review of which is necessary to an understanding of the holding of that appellate decision.

In its reply brief, NYPH claims that the Commission has authority to intrude into the dispute between NYPH and Con Edison regarding the acquisition of easements Con Edison needs on NYPH's property for the construction of the M29 transmission line (NYPH reply brief at pp. 2-4). NYPH cites a decision of the Appellate Division, Third Department,[1] and a decision of the Commission[2] in support of its position. But neither of these decisions provides that support.

The Third Department decision in the *Simonds* case was on appeal from an unreported order of Special Term of the Supreme Court in Franklin County. This was a case in which certain property owners challenged the condemnation of their properties by the Power Authority of the State of New York ("PASNY") in connection with its

[1] *Simonds v. Power Authority of the State of New York*, 64 A.D.2d 746, 406 N.Y.S.2d 639 (Third Dept. 1978).

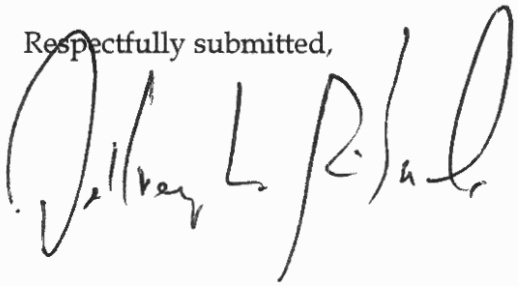
[2] Case 04-T-1687, *Long Island Power Authority*, "Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need," (issued and effective November 23, 2005) ("Order").

proposed construction of a 765 kV transmission line for which it was seeking an Article VII certificate in Case 26529[3]. As Special Term pointed out in its unreported decision (at p. 7), "there is no indication that petitioners [the property owners] were 'parties' to the Public Service Commission's siting hearing...."[4] Thus, it is clear that the Commission played no role whatsoever in the property dispute in the *Simonds* case.

Similarly, a review of the Commission decision cited by NYPH makes clear that the Commission had no role whatsoever in any property disputes in that case. *See* Order at 14. In fact, there is no indication in the Commission's opinion that there were any disputes at all regarding the Long Island Power Authority's ("LIPA") acquisition of property. What is clear is that the Commission expected LIPA to obtain the property rights it needed for its transmission line. *Id.*

In sum, the cases cited by NYPH do not support its position. To the contrary, as we discussed in our reply brief, NYPH's request that the Commission intrude into private party negotiations regarding property rights is unprecedented and is outside the scope of the Commission's authority.

Respectfully submitted,



Attachments

cc: Active Party List (2/27/07) (via e-mail)
Hon. Jaclyn A. Brilling

[3] Special Term's unreported order and opinion are attached to this letter.

[4] An examination of the appearances in the Commission's opinion in Case 26529 confirms that the property owners were not parties to the Commission proceeding. *See* 16 NY PSC 555, 556-58 (1976).

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At a Special Term of the Supreme Court of the State of New York, held in and for the County of Franklin at the St. Lawrence County Courthouse in Canton, New York, on the 23rd day of May, 1977.

PRESENT: HON. HAROLD R. SODEN
Supreme Court Justice

In the Matter of the Application of ROBERT W. SIMONDS AND BETSY E. SIMONDS: JERRIS C. MOELLER AND DORIS D. MOELLER: WILLIAM HARVEY AND JACQUELINE HARVEY: EARL SCHELL AND CONNIE SCHELL: JOHN LAUZON AND GEORGETTE LAUSON: FRANCIS DINEEN: JOSEPH LATULIPE AND LUCILLE LATULIPE, AND; HAROLD BARSE AND STELLA BARSE,

In the Nature of Prohibition,

vs.

THE POWER AUTHORITY OF THE STATE OF NEW YORK AND THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK.

ORDER
Franklin County
Index #76-638

St. Lawrence County
Index # 63360

POWER AUTHORITY OF THE STATE OF NEW YORK,

PLAINTIFF,

vs.

JERRIS C. MOELLER, DORIS D. MOELLER, GEORGETTE LAUZON, JUNE BLACK, and other persons unknown, intending to name all those persons present without authority upon a right-of-way lawfully held by the Power Authority of the State of New York, over lands in the Counties of Franklin and St. Lawrence, to be used for the proposed construction of electrical transmission lines,

DEFENDANTS.

ORDER
Franklin County
Index #76-605

SODEN, J. Upon reading and filing an Order to Show Cause dated October 13, 1976, together with the Petition in the first entitled action, duly verified October 9, 1976, the Affidavit of Allen E. McAllester, Esq., duly sworn to October 26, 1976, the Affirmation of Mahlon T. Clements, Esq., dated October 25, 1976, the Affidavit of Mahlon T. Clements, Esq., duly sworn to October 12, 1976, in support thereof, and the Notice of Motion to Dismiss on behalf of the Department of Transportation of the State of New York, dated October 27, 1976, the affidavit of Thomas Mead Santoro, Esq., Assistant Attorney General, duly sworn to October 22, 1976, in support thereof, and the Notice of Motion of the Power Authority of the State of New York, dated October 19. 1976, the Affirmation of Scott B. Lilly, Esq., undated, in support thereof, and after hearing The Clements Firm, Peter B. Lekki, Esq., and Allen E. McAllester, Esq., of Counsel, in support of the motion for a preliminary injunction and in opposition to the motions to dismiss, and after hearing The Power Authority of the State of New York, Francis X. Wallace, Esq. and David Demarest, Esq., of counsel, in opposition thereto and in support of the motion to dismiss, and after hearing the Attorney General of the State of New York, Thomas Mead Santoro, Esq., Assistant Attorney General, in opposition to the motion for a preliminary injunction and in support of the motion to dismiss, and

Upon reading and filing an Order to Show Cause, dated May 16, 1977, for a motion permitting filing of a supple-

mental petition and for a preliminary injunction and other relie in the first above entitled action, and the Affidavit of Mahlon T. Clements, Esq., in support thereof, and the Supplemental Petition duly verified May 19, 1977, and upon an Affirmation of David Demarest, Esq., undated, in support of an application to vacate a temporary restraining order dated May 16, 1977, and the order of this Court dated May 16, 1977, vacating said order, and the matter having come on to be heard for argument before this Court on May 23, 1977, and after hearing Mahlon T. Clements Esq., in support of the application, and the Power Authority of the State of New York, John R. Davison, Esq., and David Demarest, Esq., of counsel, in opposition thereof, and due deliberation having been had, and the Court having made and filed a written Memorandum of Decision dated July 5, 1977, and also:

Upon reading and filing an Order to Show Cause, dated May 16, 1977, directing the plaintiff in the second above entitl action, the Power Authority of the State of New York, to show cause why an Order should not be issued vacating and setting aside an Order granting a preliminary injunction previously issued by this Court on December 8, 1976, and dismissing the underlying action for a permanent injunction, and upon the affidavit of Stephen J. Easter, Esq., duly sworn to May 17, 1977 in support thereof, and the Affirmation of David Demarest, Esq., dated May 23, 1977, in opposition thereto, and the matter having come on for argument before this Court on May 23, 1977, and after hearing William D. Krebs, P.C., Stephen J. Easter, Esq.,

of counsel, in support thereof, and the Power Authority of the State of New York, John R. Davison, Esq., and David Demarest, Esq., of counsel, in opposition thereto, and due deliberation having been had thereon, and the Court having rendered a written Memorandum of Decision, dated July 5, 1977, now therefore, it is hereby

1. ORDERED that the Court has jurisdiction over this proceeding and the Petition and Supplemental Petition have been properly served and timely allege a cause of action either in the nature of a citizens/taxpayer action for declaratory and equitable relief or purely declaratory judgement causes of action, and it is further,

2. ORDERED that the application of the Petitioners herein in the first above entitled action for a preliminary injunction is hereby granted and the defendant, Power Authority of the State of New York, its agents, employees and assigns are hereby preliminarily enjoined from continuing further site preparation for the 765 kilovolt transmission line until such time as a certificate reviewable pursuant to Public Service Law, Section 128, and an application pursuant to Public Service Law, Article VII, are granted, and the applications of the Petitioner/Plaintiffs in the first above entitled action for all further relief are hereby in all respects, denied, and it is further,

3. ORDERED, that Petitioner/Plaintiffs in the first above entitled action are to give an undertaking for costs and disbursements in the amount of Two Thousand Five Hundred and no/100 Dollars ($2,500.00), and it is further

4. ORDERED that the motion of the Defendant/Respondent in the first above entitled action, The Department of Transportation of the State of New York, to dismiss the petitions/complaints as against it, is, in all respects, granted, and it is further

5. ORDERED, that the motion of the Defendant/Respondent in the first above entitled action, The Power Authority of the State of New York, to dismiss the petitions/complaints herein, is, in all respects, granted, except as to that cause of action contained in paragraph twenty-nine of the Supplemental Petition dated May 13, 1977, and the cause of action that the determination of necessity by Power Authority of the State of New York is so arbitrary and capricious and unreasonable that the taking of easements is not for a legitimate public purpose and is therefore illegal or unconstitutional, and it is further

6. ORDERED that the motion of the Power Authority of the State of New York to dismiss the Supplemental Petition of the plaintiffs/petitioners is granted as to the cause of action alleging that the entry and appropriation by PASNY violate due process of law and as to the cause of action alleging that PASNY and the Department of Transportation of the State of New York acted in excess of their authority, and in all other respects it is denied, and it is further

7. ORDERED that the motions of the defendants in the second above entitled action, are, in all respects, denied and it is further

8. ORDERED that in accordance with CPLR Section 5519 (a) (1) this Order will be automatically stayed upon the due and timely service of a Notice of Appeal by any party, and it is further

9. ORDERED that all of the foregoing is without costs to any party.

Dated: Lake Placid, N.Y.
4 August 1977

S Harold R. Soden
Justice Supreme Court

ENTER:

I HEREBY CERTIFY THAT THE DOCUMENT TO WHICH THIS CERTIFICATION IS ATTACHED IS A TRUE AND COMPLETE COPY OF THE ORIGINAL DOCUMENT FILED IN THE OFFICE OF THE CLERK OF THE COUNTY OF Franklin ON THE 8th DAY OF August 1977 THAT I HAVE COMPARED THE SAME WITH THE ORIGINAL AND FOUND IT TO BE SUCH: THAT I AM AN ATTORNEY AT LAW ADMITTED TO PRACTICE IN THE COURTS OF THE STATE OF NEW YORK AND I MAKE THIS CERTIFICATION PURSUANT TO SECTION 2105 OF THE C.P.L.R.

STATE OF NEW YORK

SUPREME COURT COUNTY OF FRANKLIN

21

In the Matter of the Application of ROBERT W. SIMONDS and BETSY E. SIMONDS; JERRIS C. MOELLER and DORIS D. MOELLER; WILLIAM HARVEY and JACQUELINE HARVEY; EARL SCHELL and CONNIE SCHELL; JOHN LAUZON and GEORGETTE LAUZON; FRANCIS DINEEN; JOSEPH LATULIPE and LUCILLE LATULIPE; and HAROLD BARSE and STELLA BARSE,

In the Nature of Prohibition

- vs -

THE POWER AUTHORITY OF THE STATE OF NEW YORK

and

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK.

POWER AUTHORITY OF THE STATE OF NEW YORK,

Plaintiff

- vs -

JERRIS C. MOELLER, DORIS MOELLER, GEORGETTE LAUZON, JUNE BLACK and other persons unknown, intending to make all those persons present without authority upon the right-of-way lawfully held by the Power Authority of the State of New York over lands in the Counties of Franklin and St. Lawrence, to be used for the proposed construction of electrical transmission lines,

Defendants

SPECIAL TERMS: Supreme Court Chambers
Lake Placid, New York
October 27, 1976

St. Lawrence County Courthouse
Canton, New York
May 23, 1977

APPEARANCES:

THE CLEMENTS FIRM
Attorneys in behalf of petitioners:
ROBERT W. & BETSY E. SIMONDS;
JERRIS C. MOELLER; WILLIAM & JACQUELINE
HARVEY; EARL & CONNIE SCHELL; JOHN &
GEORGETTE LAUZON; FRANCIS DINEEN;
JOSEPH & LUCILLE LATULIPE; and
HAROLD & STELLA BARSE;
2 Judson Street
Canton, New York

By: MAHLON T. CLEMENTS, ESQ.,
Of Counsel.

MANNING and DEMAREST
Attorneys for The Power Authority of
The State of New York
43 Market Street
Potsdam, New York

By: DAVID DEMAREST, ESQ.,
Of Counsel.

JOHN R. DAVISON, ESQ.
Attorney for The Power Authority of
The State of New York
10 Columbus Circle
New York, N. Y.

WILLIAM D. KREBS, ESQ.
Attorney for Defendants:
JERRIS C. & DORIS D. MOELLER,
GEORGETTE LAUZON and JUNE BLACK
9 Market Street
Potsdam, New York

By: STEPHEN J. EASTER, ESQ.,
Of Counsel.

HON. LOUIS J. LEFKOWITZ
Attorney General
Attorney for Respondent,
New York State Department of Transportation
The Capitol
Albany, New York

By: THOMAS MEAD SANTORO, ESQ.,
Of Counsel.

SODEN, J. In the first proceeding commenced in October, 1976, pursuant to CPLR, Article 78, the petitioners are property owners over whose lands respondents condemned easements for a 765 kilovolt power line. Such appropriations (Highway Law, Section 30, and Public Authorities Law, Section 1007 (10)), were completed no later than mid-August, 1976. Petitioners, in their "supplemental petition", which is permitted and deemed interposed (CPLR, Section 103(c), Section 3025(b)), request the following relief:

> 1. Enter an Order enjoining Respondent Power Authority of the State of New York or its agents from taking any further action to prepare for or begin construction of the proposed 765 thousand volt transmission facilities until it has a Certificate of Environmental Compatibility and Public Need from the Public Service Commission of the State of New York as required by §121 of the Public Service Law (hereinafter "the paragraph 29 cause of action"; see Supplemental Petition, paragraph 29 and Matter of UPSET v. Public Service Commission and Power Authority of the State of New York, 57 A.D. 2d 208 (3rd Dept., 5/5/77)).
>
> 2. Enter an Order enjoining the Respondents Power Authority of the State of New York and Department of Transportation of the State of New York or its agents from taking any further action in attempting to acquire an easement across Petitioners' land in the State of New York until PASNY has an enforceable contract for importation of power from the Province of Quebec.
>
> 3. Enter an Order declaring that no easement across the Petitioners' land for the construction of the 765 thousand volt transmission facilities has been vested in the State of New York.
>
> 4. Such further relief as the Court shall deem appropriate.

Respondents moved to dismiss. The parties were heard at Supreme Court Chambers in Lake Placid, New York, on October 27, 1976. Decision was reserved pending the decision of the Appellate Division Third Department in the Matter of UPSET, Inc., supra. A copy of this decision is set forth as Appendix A.

On May 16, 1977, petitioners sought, and this court granted, an order to show cause with a temporary restraining order or stay (see State Finance Law, Section 123-e-2; CPLR, Section 7805) restraining respondents from further clearing, constructing or condemning. This order also constituted a notice of motion to amend (CPLR, Section 402, Section 2215(d), 7804(d)) and for a preliminary injunction.

In the second entitled matter, commenced on December 3, 1976, plaintiff Power Authority of the State of New York (PASNY) sought to enjoin defendants and other parties from interfering with site preparation and erection of support structures and conductors for the 765 kilovolt power line. This court granted a preliminary injunction on December 8, 1976. This court granted an order to show cause to vacate this preliminary injunction (CPLR, Section 6314) and to dismiss PASNY's complaint on May 18, 1977.

All parties appeared and argued on May 23, 1977 at Canton, New York. The matter was finally submitted on June 24, 1977.

Petitioners argue:

1. PASNY's July 11, 1973 resolution determining public need (Public Authority Law, Section 1005-07, Public Service Law, Section 126-1-g) was: (a) quasi judicial; (b) unreasonable, arbitrary and capricious and without legal effect; (c) was not binding on the petitioners until July and August, 1976;

2. The attempted taking of easements by respondents is in excess of their legal authority (Public Authorities Law, Sections 1000 thru 1017, Highway Law, Section 30), not for a public purpose, and violates Article I, Section 6 of the New York Constitution and the Fourteenth Amendment of the United States Constitution;

3. PASNY is in violation of Public Service Law, Section 121;

4. The illegal clearing and construction is causing specified irreparable harm;

5. Assuming the court continues the stay, then only a nominal undertaking be required; and

6. The court should treat the order to show cause and motion for a preliminary injunction as a motion for summary judgment and grant a final judgment.

Defendants, in No. 2, argue in effect:

According to the Appellate Division's May 5, 1977 decision, plaintiff PASNY does not have a final "certificate for the construction" and "operation of a major utility transmission facility" (Public Service Law, Section 126-1, 121-1) and plaintiff PASNY's application for such a certificate has not been granted. The Public Service Law does not permit the granting of a partial certificate but only a final certificate in which the Public Service Commission may condition, limit, and modify the application. Without such a certificate, plaintiff and its agents are unlawfully upon defendants' and others' lands preparing the site and constructing supports. Therefore, it would not be illegal or unreasonable for defendants to interfere with such occupancy.

Respondent PASNY argues:

1. Petitioners claim that the July 11, 1973 determination of necessity is arbitrary and capricious or unreasonable is time barred since not commenced within four months of the determination (CPLR, Section 217);

2. The challenged acts of respondents Power Authority and Department of Transportation are not judicial or quasi-judicial acts and accordingly may not be challenged by petitioners in an Article 78 proceeding in the nature of prohibition;

3. Respondents did not act in excess of their authority in acquiring easements over the petitioners land (see also footnote on page 2 of PASNY's Reply Brief). The rights of the respondents to take the challenged action were in no way dependent upon any authorization by the Public Service Commission.

4. There are other similar proceedings pending.

5. That the petition herein fails to set forth a claim for relief against the respondents.

6. That petitioners are estopped from maintaining the within proceeding.

7. This court does not have jurisdiction of the subject matter of this proceeding.

Respondent Department of Transportation argues:

1. The petition should be dismissed pursuant to CPLR Rule 3211(a) (2), (5), (7) and (8);

2. The State is not a necessary or proper party.

DECISION

Initially, since the court has jurisdiction over all parties, it considers the petition and supplemental petition as timely alleging either citizen-taxpayer actions for declaratory and equitable relief or as alleging purely

declaratory judgment causes of action (CPLR, Sections 103(c), 3001, and 3017; State Finance Law, Article 7-a; Boryszewski v. Brydges, 37 NY 2d 361, 372 NYS 2d 623 (1975). Furthermore, since the supplemental petition was served on PASNY and PASNY vigorously opposed the paragraph 29 cause of action, no prejudice results if the court deems such pleadings interposed prior to granting leave to amend (CPLR, Section 2001, Section 3026).

This court has subject matter jurisdiction for the paragraph 29 cause of action pursuant to the final "except clause" in Public Service Law, Section 129. While there is no indication that petitioners were "parties" to the Public Service Commission's siting hearing and thus may not be "aggrieved parties" under Public Service Law, Section 128, they are, nevertheless, proper parties to enforce compliance with Public Service Law, Article VII thru Public Service Law, Section 129.

Furthermore, assuming arguendo, that the Public Service Commission is a necessary party that has not been joined (CPLR, Section 1001), such argument was not initially raised in the motion to dismiss by PASNY. While such grounds for dismissal are available to PASNY at any time (CPLR 3211(e)), this court will allow the action to proceed without the Public Service Commission being made a party. The court has considered those factors outlined in CPLR, Section 1001-(b)-1 thru 5.

The issue here is one of law only. Justice

Herlihy's opinion (Matter of UPSET, supra, at page 211), states: "As we construe the order of June 30, 1976, the order is not final and thus is not an order granting the application. It is a final order which is the certificate of environmental compatibility and public need referred to in section 121 of the Public Service Law and which would be reviewable pursuant to section 128."

Without a "granted application", PASNY clearly does not have the "certificate" required "to commence the preparation of the site for construction of a major utility transmission facility..." (Public Service Law, Section 121).

A preliminary injunction is granted restraining defendant PASNY, its agents, employees and assigns from continuing further site preparation for the 765 KV line until a certificate reviewable pursuant to Public Service Law, Section 128, and an application pursuant to Public Service Law, Article VII, are granted. Petitioners/plaintiffs are ordered to give an undertaking for costs and disbursements in the amount of Twenty Five Hundred ($2500.00) Dollars (State Finance Law, Sections 123-d, 123-e-2).

The essence of the remainder of both petitions is that private property has not been taken for a public use or purpose and that the finding of need for the taking was arbitrary and capricious or unreasonable. Such allegations are justiciable and question whether the taking is a violation of constitutional limitations (N.Y. Constitution, Art. I, Section

7; Fifth Avenue Coach Lines v. City of N. Y., 11 NY 2d 342, 349-50; 229 NYS 2d 400, 405-406 (1962); County of Orange v. Public Service Commission, 39 A.D. 2d 311, 319, 334 NYS 2d 434, 442 (2nd Dept., 1972), affd. 31 NY 2d 843, 340 NYS 2d 161 (1972); Yonkers Community Development Agency v. Morris, 37 NY 2d 478, 373 NYS 2d 112 (1975); Hallock v. State, 39 A.D. 2d 172, 174, 332 NYS 2d 762, 765 (3rd Dept., 1972), affd. 32 NY 2d 599, 347 NYS 2d 60 (1973); Amsterdam Urban Renewal Agency v. Bohlke, 40 A.D. 2d 736, 336 NYS 2d 725 (3rd Dept., 1972); Bottillo v. State, 53 A.D. 2d 975, 386 NYS 2d 475 (3rd Dept., 1976)).

Liberally construing the petitions/complaints and deeming them to allege whatever can be reasonably implied from their factual statements, the court must decide "whether a proper case is presented for invoking jurisdiction of the court to make a declaratory judgment (see e.g.: Hallock v. State, supra, 39 A.D. 2d 174, 332 NYS 2d 764). The court has also considered other "supporting proof" (CPLR, Rule 3211(c) and 3212(b)) submitted by both parties.

The court is aware that the question of "necessity" for a taking is ordinarily not a justiciable question in the absence of a statute so providing (19 NY Jur., Eminent Domain, Sec. 60; note also Public Service Law, Section 126-1-(g)). However, the petitions/complaints, together with all supporting proof (including Exhibits 63 and 63 A submitted by PASNY to the Canadian National Energy Board), state a cause of action that is a recognized exception to this general rule: viz. was the determination of necessity so arbitrary and capricious,

unreasonable, in bad faith, corrupt, or palpably irrational that the taking cannot be held to be for a legitimate public purpose? (Fifth Ave. Coach Lines, supra, 11 NY 2d 349-350, 229 NYS 2d 405-406; County of Orange, supra, 39 A.D. 2d 311, 318-320, 334 NYS 2d 434, 441-443, and cases cited therein).

Petitioners/plaintiffs are clearly not entitled to any other injunctive relief concerning defendants appropriation of easements or declaratory relief concerning the "vesting" of the easements at this stage of the action.

First, PASNY's determination of need is entitled to the presumption of regularity and constitutionality. Second, the allegations that PASNY's entry and appropriation, pursuant to Highway Law, Section 30, violate due process because of lack of prior notice are dismissed (Fifth Ave. Coach Lines, supra, 11 NY 2d 348, 229 NYS 2d 404, County of Orange, supra, 39 A.D. 2d 318, 334 NYS 2d 441; CPLR, Section 3211(a)(7)).

Third, the allegations, that PASNY and the Department of Transportation acted in excess of their authority by acquiring the easements before PASNY's application has been granted, are likewise dismissed. This transmission line project is an authorized project within the broad grant of powers in Public Authorities Law, Sections 1000 thru 1015, or by necessary implication from this grant. PASNY has the option of "taking" real property pursuant to Condemnation Law, Section 4, or Highway Law, Section 30 (Public Authorities Law, Section 1007). Here, it has chosen the latter method. Thus Section

4-3-b. of the Condemnation Law is inapplicable, and there is no requirement that PASNY obtain a final certificate pursuant to Public Service Law, Art. VII before appropriation.

Lastly, following recognized principles of statutory construction (McKinney's Statutes, Sections 221-240), the court holds that the Public Service Law, Section 121-1 ("no person shall . . . commence the preparation of the site . . .") does not prohibit appropriation prior to obtaining the certificate pursuant to Public Service Law, Section121 . The construction requested would be contrary to the legislative intent expressed in Public Authorities Law, Section 1007, sub. 10 and Public Service Law, Section 126-1.-g. Moreover, petitioners/plaintiffs and others similarly situated are not without relief should the takings ultimately be declared illegal.

In sum, other than the paragraph 29 cause of action, only a cause of action that the determination of necessity by PASNY is so arbitrary and capricious and unreasonable that the taking of easements is not for a legitimate public purpose and is therefore illegal or unconstitutional has been stated. Such a cause of action survives dismissal primarily on the basis of conflicting "cost data" contained in Exhibits 63 and 63-a (Appendix B) submitted by PASNY to the Canadian National Energy Board. Assuming arguendo, this court has the power to grant summary judgment on this cause of action at this stage, it would hold that there are questions of fact precluding summary judgment.

The petitions/complaints are dismissed as against the Department of Transportation (CPLR 3211(a)(10)).

Defendants' motions, in action No. 2 above, to vacate this court's December 8, 1976 preliminary injunction and to dismiss are denied. After orders pursuant to this memorandum decision are entered and, assuming PASNY serves a notice of appeal, this court's judgment or order is subject to an automatic stay of enforcement (CPLR, Section 5519(a)-1). PASNY would then be within its rights to continue site preparation (See DeLury v. City of New York, 48 A.D. 2d 405, 370 NYS 2d 600 (1st Dept., 1975)). Defendants, in No. 2, and petitioners/plaintiffs would not be within their rights to obstruct PASNY even if this court granted a permanent injunction against PASNY.

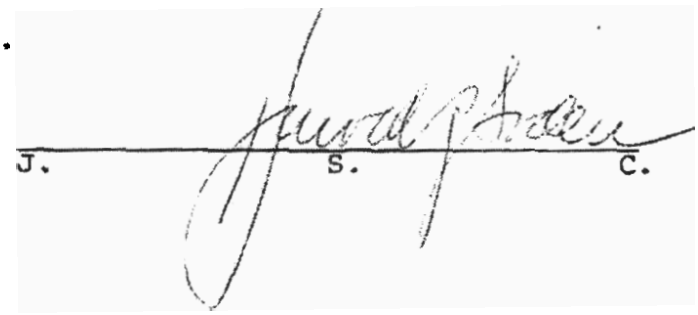
In conclusion, the controversy over this power line has been continuous and unabating. There are justiciable questions involved. Charges and countercharges have been exchanged by these parties in the press and broadcast media. Petitioners/plaintiffs have assumed the heavy burden of estab lishing that PASNY's determination of need was in "bad faith" or "palpably irrational". In this court's opinion, they should have their day in court. Similarly, respondents/defendants should have their day in court in the face of such serious allegations.

Submit order by stipulation of all parties, or

settle order on notice within ten (10) days from date hereof.

No costs are awarded.

Dated: July 5, 1977
Lake Placid, N. Y.



J. S. C.

Third Judicial Department

May 5, 1977. 29805

In the Matter of UPSET, INC., Petitioner,
v.
PUBLIC SERVICE COMMISSION, Respondent,
and
POWER AUTHORITY OF THE STATE OF NEW YORK, Intervenor-Respondent.

Petition dismissed, without costs, and without prejudice to the right of petitioner to seek review of any final decision and/or order of the Commission or to seek any other relief available to it.

Opinion per HERLIHY, J.

KOREMAN, P. J., GREENBLOTT, MAIN and LARKIN, JJ., concur.

APPENDIX A

#29305

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of UPSET, INC.,

Petitioner,

- against -

PUBLIC SERVICE COMMISSION,

Respondent,

- and -

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor-Respondent.

Argued, March 30, 1977.

Before:

HON. HAROLD E. KOREMAN,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. ROBERT G. MAIN,
HON. JOHN L. LARKIN,
HON. J. CLARENCE HERLIHY,
Associate Justices.

PROCEEDING pursuant to section 128 of the Public Service Law to review an order of the Public Service Commission, dated June 30, 1976, which authorized commencement of construction of support structures and conductors for certain high voltage power lines.

THE CLEMENTS FIRM (Mahlon T. Clements of counsel), for petitioner, 2 Judson Street, Canton, New York 13617.

PETER H. SCHIFF, for respondent, Public Service Commission, Empire State Plaza, Albany, New York 12223.

SCOTT B. LILLY, (John R. Davison of counsel), for intervenor-respondent, 10 Columbus Circle, New York, New York 10019.

OPINION FOR DISMISSAL

HERLIHY, J.

In September, 1973, the Power Authority of the State of New York (PASNY) applied for a certificate of Environmental Compatibility and Public Need, under article 7 of the Public Service Law, authorizing the construction and operation of transmission lines to connect the facilities of the Quebec Hydro-Electric Commission (Hydro-Quebec) with certain existing facilities of the Power Authority and Niagara Mohawk Power Corporation. Specifically PASNY proposes to construct (1) a single circuit 765 kilovolt (kV) transmission line, approximately 134 miles long, to connect a proposed substation in the Town of Marcy, near Utica; (2) a single circuit 765 kV transmission line, approximately 21 miles long, between Massena and the Canadian border; and (3) a double circuit 230 kV transmission line, approximately eight miles long, between the proposed Massena substation and the Moses switchyard.

The application led to a long series of hearings commencing December 11, 1973 before the Public Service Commission, and several recommended decisions and several orders. Original hearings, completed February 28, 1975, dealt with routing and land use impact of the proposed facilities. Also pending in 1975 was an application by Niagara Mohawk and Rochester Gas & Electric for a similar power transmission system in western New York. To avoid duplication, the PSC consolidated the two applications for the purpose of examining the health and safety ramifications of the proposed electrical lines. On February 6, 1976, the PSC granted a partial certificate of environmental compatibility and public need, authorizing PASNY to begin selective clearing of vegetation to prepare sites and commence construction of access roads; the order also required submission of an Environmental Management and Construction Plan (EM&CP). On June 30, 1976 the PSC authorized erection of support structures and conductors, conceding that approval of the lines would not be denied.

Subsequently, by orders dated August 30, 1976, the PSC granted the parties permission to present rebuttal testimony, but denied requests for rehearing and reconsideration of the June 30 order.

The order of June 30, 1976 expressly recited in paragraph 4 thereof:

> Subject to the conditions set forth in this Opinion and Order, the [PASNY] * * * is granted a certificate of environmental compatibility and public need for the construction of (a) a new 765 kV/345 kV substation * * * and (b) the 765 and 230 kV transmission facilities proposed for the [certain] locations * * *.

However, after granting the certificate of compatibility the order in paragraph 5 limits it to clearing and construction only and forbids the actual transmission of electricity; and, in paragraph 6 reserves the right to condition operation of the facilities upon various limitations related to health and safety, including the right to limit the amount of voltage which may be transmitted.

The petitioner, UPSET, Inc. (Upstate People for Safe Energy Technology) joined the proceedings before the Public Service Commission somewhat belatedly, but was made a party to the action. By prior order of this court, a motion to dismiss the petition based on UPSET's limited status was denied.

The proceeding is pursuant to article VII (section 128) of the Public Service Law and in its reply brief petitioner states that it does not rely upon all of the errors recited in its petition and frames the issue as "procedural only".

Section 126 of the Public Service Law requires the PSC to render its decision "upon the record" and upon review in this court one ground of review as limited by subdivision 2 of section 128 of the Public Service Law is "whether the order * * *is * * * (d) made in accordance with procedures set forth in this article * * *".

While the record establishes that the Commission has come to final conclusions as to the location of the facilities and the overall environmental compatibility of facilities utilizing transmission lines for 750 kV, without awaiting a final presentation to it of all evidence, the record does not establish a basis for a review by this

court of the subject order.

Section 129 of the Public Service Law limits our review of an order to those situations set forth in section 128 thereof. Section 128 provides that a party must be "aggrieved" by the PSC order to obtain a review. As we construe the order of June 30, 1976, the order is not final and thus is not an order granting the application. It is a final order which is the certificate of environmental compatibility and public need referred to in section 121 of the Public Service Law and which would be reviewable pursuant to section 128.

Considering the present application for review as limited by the petitioner, the petition must be dismissed; however, in so doing there is no determination on the merits and it is without prejudice either to future proceedings to review a final order herein granting or denying the application of PASNY or to any proceeding which might nevertheless be brought within the restrictions of section 129 of the Public Service Law.

The petition should be dismissed, without costs, and without prejudice to the right of petitioner to seek review of any final decision and/or order of the Commission or to seek any other relief available to it.

Alternative to Quebec Power
Assuming Planning Begins in 1976

N. E. B.
Date 16 Jun 76

No plans have been made for the construction of alternative electric generating capacity in New York State which would be necessary if Canadian power is not purchased. At this time a reasonable alternative to Canadian power would be installation of gas turbine capacity by 1980 to compensate for the lack of the 800 MW of Canadian power and the construction of a 1000 MW nuclear plant for service in 1986, the earliest reasonable date at which new nuclear capacity could be placed in service.

The attached table compares the cost of Quebec power with the cost of power from the alternative sources for the twenty year life of the contract based on the following assumptions:

(1) The cost of energy under the Quebec Contract for the years 1982-1997 will be the same as that for fuel replacement energy under the Interconnection Agreement, i.e., 20 percent savings based on the incremental cost of 3 billion KWH of energy in the New York System.

(2) The cost of energy without the Quebec purchase until the nuclear plant goes into service would be the same as in (1) without the twenty percent savings.

(3) When the Nuclear Plant begins service energy from that plant would be used in lieu of Quebec energy.

(4) Between 1980 and 1985 the cost of capacity without the Quebec power consists of the fixed charges for 944 MW of gas turbine capacity installed in 1980 and amortized over a 25 year period.

(5) Between 1986 and 1997 the cost of capacity without Quebec power consists of the fixed charges for a 1000 MW nuclear plant installed in 1986 less five-twelfths of the difference between such charges and the charges for 944 MW of gas turbine capacity installed in 1986.

The capital cost of a nuclear plant can be thought of as having two components. The first is that portion of the cost which provides the ability to serve load at the time of the peak system demand, which should be no greater than the cost of the gas turbines which would be used if meeting peak loads was the only objective. The second component is the additional cost which makes available low cost energy during all hours of the year in which the nuclear plant is in operation. The first component should properly be charged to the Quebec power alternative since Quebec power would be available at the time of the peak load in New York. Only seven-twelfths of the second component should be charged to the Quebec power alternative since firm Quebec energy would only be available during seven months each year.

APPENDIX B

Detailed Assumptions Used for Calculating Costs:

Demand charges for Quebec power are as specified in Contract.

. Energy Charge for Quebec Power:

a. Energy Charge for Quebec power is based on the Contract price for the period 1978-1981 and on 80% of the cost of energy from the mix of generation outlined in Exhibit 35 (25% gas turbines, 30% steam peaking and 45% base load). The 80% price is provided for in the Interconnection Agreement.

b. Oil price for New York State Generation is based on current posted price for oil at about $12.70 per barrel. Escalation of 5% per year was assumed.

c. Composite heat rate of 12,000 BTU/KWH was assumed for 1978 and it was assumed to improve by .5% per year through 1997.

d. Heat content of oil assumed to be 6 million BTU per barrel.

e. Energy costs are based on full 3.0×10^9 KWH per year.

II. Cost of Transmission of Quebec power is based on cost of 765 kV project presented in Exhibit 34. O & M charges are escalated at 8% per year to 1980 and 5% thereafter.

V. Wheeling Charges are assumed to be $.95 per KW-month as presented in Exhibit 34.

/. Transmission losses assumed to be 6% from the international boarder to Pleasant Valley.

/L. Present values are calculated based on assumed 7% cost of capital.

/IL. Value of Capacity in New York State:

a. Capacity is assumed to have no value to New York in 1978 and 1979.

b. In the period 1980 to 1985 it has been assumed that 944 MW of new gas turbines (includes 18% installed reserves) would have to be installed to meet peak load. Cost of gas turbines is based on New York Power Pool Economic Parameters prepared in 1975.

c. 1975 Cost of Gas Turbines was assumed to be $130/KW. Escalation of 7% per year was assumed to 1980. Interest during construction (IDC) was added based on 2 year construction period (1 year's interest at 7%). Annual capital charge is based on 7% for 25 years (Life of gas turbine) and 1.2 ratio of net revenues to bond service.

d. In 1986 Nuclear capacity installed to replace gas turbines:

(1) Capital Cost of Plant: $500/KW 1975
(2) Capital Cost of Cooling Towers: $55/KW 1975

(3) Transmission Scheme similar to Exhibit 34.
(4) Escalation of Capital Charges: 7% per year to 1980 and 5% thereafter.
(5) IDC for Plant: 3 years at 7%
Cooling Tower: 1 year at 7%
Transmission: 1 year at 7%
(6) O&M Expense $11.50/Kw 1 year 1985 esculated 5% to 1986.
(7) Nuclear Fuel Expense: 60¢/10^6 BTU in 1985 escalated at 5%
(8) Insurance: 0.25% of initial capital cost escalated at 5%.
(9) Heat rate: 10,300 BTU/KWH
(10) Annual Capital Cost based amortization at 7% for 35 years with 1.2 ratio of net revenues to bond service.

VIII. Energy cost of NYState alternative.

a. For the period 1978-1986 the energy charge is based on the generation mix in assumption II above.

b. For the period 1986-1997 the energy charge is based on 3.0×10^9 KWH from the nuclear plant.

Comparison of Quebec Power with [illegible]
Over 20 [illegible]ar Life of Quebec Contract
(Thousands of Dollars)

(1) Year	(2) Demand Charge for Quebec Power	(3) Energy Charge for Quebec Power	(4) Transmission Charge	(5) Wheeling Charge	(6) Total Quebec Charge	(7) Adjusted for Losses Total Quebec Charge
1978	7616	17709	25593	5320	56238	59828
1979	7616	18417	25690	5320	57043	60684
1980	7616	19155	25795	5320	57886	61581
1981	7616	19920	25867	5320	58723	62471
1982	8624	80076	25940	5320	119960	127617
1983	8624	83419	26019	5320	123382	131257
1984	8624	87377	26101	5320	127422	135555
1985	8624	91298	26187	5320	131429	139818
1986	8624	95406	26278	5320	135628	144285
1987	9800	99660	26373	5320	141153	150163
1988	9800	104132	26472	5320	145724	155056
1989	9800	108790	26577	5320	150487	160093
1990	9800	113668	26687	5320	155475	165399
1991	9800	118726	26803	5320	160649	170903
1992	11256	124042	26924	5320	167542	178236
1993	11256	129781	27050	5320	173407	184476
1994	11256	135381	27184	5320	179141	190576
1995	11256	141453	27325	5320	185354	197185
1996	11256	147808	27472	5320	191856	204102
1997	12468	154398	27627	5320	199833	212588
Total	---	---	---	---	---	2891873

(Thousands of Dollars)

(8) Year	(9) Present Value of Quebec Power Cost 1978$	(10) Cost of Replacement Capacity	(11) Cost of NYS Energy	(12) Total NYS Cost	(13) Present Value NYS Alternative Cost 1978$	(14) Savings to NYS from Quebec 1978$
1978	59828	0	84000	84000	84000	24172
1979	56714	0	87759	87759	82018	25304
1980	53787	19242	142180	161422	140992	87205
1981	50995	19242	146612	165854	135386	84391
1982	97353	19242	151252	170494	130069	32711
1983	93584	19242	155803	175045	124805	31221
1984	90326	19242	161130	180372	120189	29863
1985	87072	19242	168451	185693	115640	28568
1986	84289	89087	19500	103587	63199	(21090)
1987	81679	89538	20475	110013	59840	(21839)
1988	78823	90012	21499	111511	56687	(22136)
1989	76059	90509	22574	113083	53725	(22334)
1990	73439	91031	23702	114733	50943	(22496)
1991	70919	91579	24887	116466	48329	(22590)
1992	69123	92155	26132	118287	45874	(23249)
1993	66863	92759	27438	120197	43565	(23298)
1994	64555	93394	28810	122204	41395	(23160)
1995	62424	94060	30251	124311	39354	(23070)
1996	60386	94760	31763	126523	37434	(22952)
1997	58782	95494	33352	128846	35627	(23155)
Total	1437005	---	---	2825400	1509071	72066

$$\frac{72066}{1437005} = 0.050$$

(Quebec power is 5% cheaper than NYS alternative over life of contract)

Revised 6/[illegible] '76 - JWP

Exhibit No. 63A
N. E. P.
Date 28/6/76

Comparison of Quebec Power with New York State Generation
Over 20 Year Life of Quebec Contract
(Thousands of Dollars)

(8) Year	(9) Present Value of Quebec Power Cost 1978$	(10) Cost of Replacement Capacity	(11) Cost of NYS Energy	(12) Total NYS Cost	(13) Present Value NYS Alternative Cost 1978$	(14) Savings to NYS from Quebec 1978$
1978	59828	0	84000	84000	84000	24172
1979	56714	0	87759	87759	82018	25304
1980	53787	19242	91714	110956	96913	43126
1981	50995	19242	95809	115051	93916	42921
1982	97358	19242	100095	119337	91042	(6314)
1983	93584	19242	104274	123516	88065	(5519)
1984	90326	19242	109221	128463	85600	(4726)
1985	87072	19242	114122	133364	83052	(4020)
1986	84289	89087	19500	108587	63199	(21090)
1987	81679	89538	20475	110013	59840	(21839)
1988	78823	90012	21499	111511	56687	(22136)
1989	76059	90509	22574	113083	53725	(22334)
1990	73439	91031	23702	114733	50943	(22496)
1991	70919	91579	24887	116466	48329	(22590)
1992	69123	92155	26132	118287	45874	(23249)
1993	66863	92759	27438	120197	43565	(23298)
1994	64555	93394	28810	122204	41395	(23160)
1995	62424	94060	30251	124311	39354	(23070)
1996	60386	94760	31763	126523	37434	(22952)
1997	58782	95494	33352	128846	35627	(23155)
Total	1437005	---	---	2625400	1569071	(156,425)