NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE: 01-F-1276

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

ORDER CONCERNING FURTHER PROCEEDINGS

(Issued and Effective June 25, 2007)

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of Albany on June 21, 2007

BOARD MEMBERS PRESENT:

Patricia L. Acampora, Chairwoman
New York State Public Service Commission

Keith Corneau, Alternate for
Daniel Gundersen, Commissioner
New York State Empire State Development

Alexander B. Grannis, Commissioner
New York State Department of
Environmental Conservation

G. Anders Carlson, Ph.D., Alternate for
Richard F. Daines, MD, Commissioner
New York State Department of Health

Jackie Jerry, Alternate for
Vincent DeIorio, Chairman
New York State Energy Research
and Development Authority

Alexandria Spanakos, Ad Hoc Member

Theodore Alatsas, Ad Hoc Member

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

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INTRODUCTION

This order primarily concerns what the next steps should be for this case. Options available include dismissing the case, holding the case in abeyance, requiring the submission of additional information, and establishing a process for bringing the case to a substantive conclusion concerning whether or not a certificate should be issued. For the reasons discussed below, we conclude that this proceeding will be held in abeyance while TransGas Energy Systems LLC (TransGas) seeks permission from the City of New York (City) to use City property for pipes that would bring water to and take steam from the proposed generation facility.

PROCEDURAL BACKGROUND

In very broad terms this case commenced in September 2001, when TransGas filed a preliminary scoping statement.[1] In June 2002, TransGas entered into pre-application stipulations with the City of New York (the City), the Department of Environmental Conservation Staff (DEC Staff), Department of Public Service Staff (DPS Staff), and Department of Health Staff (DOH Staff). In June 2002, TransGas also filed with DEC its applications for air and water permits.

On December 24, 2002, TransGas filed a request for a certificate of environmental compatibility and public need under Public Service Law (PSL) Article X.[2] (Details concerning the facility proposed at that time are discussed below, under "Steam

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[1] A more detailed procedural history is set forth in the April 1, 2004 Recommended Decision, pp. 3-5, and in the April 12, 2006 Recommendation Concerning Further Proceedings, pp. 1-6. Additional background information is presented below in connection with the issues discussed.

[2] The December 2002 filing is generally referred to as an application. However, there is a pending issue about whether the December 24, 2002 filing was an application. Our use of the word "application" here is not a determination one way or the other on that issue.

Sales Contract.") Public Service Law Article X expired at the end of the day on January 1, 2003, but remains in effect for applications filed on or before December 31, 2002.[3]

On February 24, 2003, the Chairman notified TransGas that additional information was needed before the application could be found to meet the minimum requirements of PSL §164(1). The information was filed on April 4, 2003, draft air permits were issued by DEC Staff for public comments on June 4, 2003, and the Chairman determined on June 5, 2003 that the cumulative TransGas filings to that date met the minimum requirements of PSL §164(1).

On August 4, 2003, the examiners issued a ruling specifying the Article X issues to be litigated. They modified that ruling on August 27, 2003 by eliminating, as an Article X issue, the consideration of steam transmission facilities from and water lines into the proposed generation facility. That was reinstated as an adjudicable issue in an order dated October 16, 2003.

Evidentiary hearings were held in the period November 12 through November 20, 2003. No DEC permitting issues were litigated in the hearings. Initial and reply trial briefs were filed by ten parties. The examiners and representatives of most active parties inspected the proposed site and nearby areas on March 26, 2004.

On April 1, 2004, the examiners' recommended decision was issued for exceptions and replies. The examiners recommended that TransGas be denied an Article X certificate for several reasons, including that construction and operation of the proposed facility would have adverse visual impacts and would be incompatible with the City's future land use plans for the East River waterfront in Greenpoint and Williamsburg, Brooklyn.[4]

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[3] L. 1992, C. 519, §16.

[4] Those plans include a change of zoning of the proposed facility site from M3 (heavy industrial) and inclusion of the site as part of a 28-acre park to be developed around the adjoining Bushwick Inlet.

Other concerns expressed in the recommended decision included that the steam portion of the generation facility proposed at that time could not be found to be consistent with the 2002 State Energy Plan under PSL §168(2)(a)(ii), that such facility would operate with on-site oil storage of up to two million gallons, contrary to proposed zoning and an existing City Fire Prevention Code provision applicable near park land, and that such facility, contrary to Executive Law §915(8), would not be consistent with the local coastal zone management policy, which is the City's New Waterfront Revitalization Plan.

Briefs on exception were timely filed by TransGas, DPS Staff, the City, and CitiPostal, Inc. Briefs opposing exceptions were filed by TransGas, DPS Staff, the City, Consolidated Edison Company of New York, Inc. (Con Edison), the Brooklyn Borough President, jointly with the Greenpoint Williamsburg Waterfront Task Force, and the New York Public Interest Research Group (the Brooklyn Parties), M&H Realty LLC, jointly with Kent Avenue Realty Company, LLC (M&H), Greenpoint Landing Associates, and CitiPostal, Inc.

On May 4, 2004, notice was given that the Board would meet to deliberate in this case on June 4, 2004, or the last day in the 12 months following the Chairman's determination that the cumulative TransGas filings had met the minimum requirements of PSL §164(1). On May 27, 2004, TransGas submitted a letter and photo simulations of further visual and land use mitigation of the proposed facility at the same site. The basic idea was that as much of the facility as practicable would be constructed underground, after significant quantities of contaminated soil were removed or replaced and that one to seven acres of the site's surface would ultimately be available for use as a park. TransGas also offered at that time to waive the 12-month deadline for a final decision and proposed a new deadline of July 8, 2004. DEC did not issue final air or water permits in that time period, nor has it done so subsequently.

In a notice issued May 28, 2004, parties were given until June 4, 2004 to comment on the May 27, 2004 TransGas submittal. On June 30, 2004, TransGas submitted an "Underground

Facility Engineering Feasibility Report." In a notice issued July 2, 2004, parties were given an opportunity to review the June 30, 2004 submittal and to submit comments on three specified issues by not later than July 9, 2004.

In an order issued September 15, 2004, this Board stated that if TransGas intends to pursue a major change in the proposed facility's design, it must file an amendment to its Article X application within 60 days.[5] The order explained in some detail the information to be included in the amendment and directed that parties be afforded an opportunity to comment on the amendment. The order also directed that any amendment be accompanied by a deposit of additional intervenor funds of $100,000.

In the same order, the examiners were directed to evaluate the adequacy of the application amendment, authorized to call for the submission of additional information as warranted, and instructed to submit recommendations concerning whether the amendment justifies scheduling additional evidentiary hearings.

TransGas filed its amendment on November 12, 2004 and comments on it were submitted in December 2004 by DEC Staff, DPS Staff, the City, the Brooklyn Parties, and Greenpoint Landing Associates. TransGas timely replied on January 27, 2005.

As of today, the primary TransGas proposal is to construct and operate a 776 MW electric generation facility capable of producing steam for export at a rate of two million pounds per hour.[6] Much but not all of the facility would be below ground. There would be no cooling towers and no use of water to condense steam. Accordingly, electricity could be generated as a technical matter only when and to the extent the proposed facility is exporting steam for use by others.

The examiners' Recommendation Concerning Further Proceedings was issued on April 12, 2006, shortly after the

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[5] The 60-day deadline was established in express recognition of the local communities' interest in having this proceeding brought to a reasonably prompt conclusion.

[6] August 22, 2005 correction to the Amendment, pp. 16-11 to 16-12.

unexpected and untimely death of Presiding Examiner Robert R. Garlin. The examiners recommend that the TransGas application, as amended and supplemented, be dismissed and that the case be closed. Three reasons for their recommendation include that TransGas (1) needs but will not likely receive the City's permission to use the City's land for pipes that would take water to and steam from the proposed generation plant; (2) must but will not likely be able to sell significant amounts of steam for the proposed electric generation facility to be built and operate, and, (3) now has the power of eminent domain, rendering deficient TransGas's presentation on alternatives that was prepared when TransGas had no such power.

The fourth key reason for their recommendation is that further delay in resolving this proceeding would adversely affect local community plans for the proposed facility site.

Initial comments on the examiners' April 2006 recommendation were filed on or about May 12, 2006 by TransGas, the Independent Power Producers of New York, Inc. (IPPNY), DPS Staff, and the Brooklyn Parties. Public comments supporting the TransGas project generally or urging that the case proceed to further hearings were submitted around the same time by Boilermakers Local Lodge No. 5, Newmark Knight Franks (a commercial real estate firm), Ronald Meltzer, Esq., and the Contractors' Association of Greater New York, Inc.

Responsive comments were filed on or about June 1, 2006 by TransGas, the City, the Brooklyn Parties, and DPS Staff. On June 13, 2006, TransGas filed a surreply and asked that it be considered given that certain arguments offered in the June 1 replies should have been raised in the initial, May 2006 comments.

In general, the comments fall into two categories. One category concerns the four key reasons the examiners gave in support of their April 2006 recommendation that the amended application be dismissed. These are discussed first. The other category concerns whether there are reasons beyond those given by the examiners that warrant dismissal. Arguments in the second

category are discussed second, followed by an overall discussion and conclusion section.

MOTIONS

Four motions were filed and served subsequent to the April 2006 recommendation.

In the first, dated April 28, 2006, TransGas asks that two additional issues be considered at the further evidentiary hearings it believes must and should be held in this case. TransGas asserts there are now good reasons to believe that the proposed site cannot or will never be used as a park and might, instead, be used as a townhouse complex. It likewise contends it should be allowed to establish in further hearings that a nearby ExxonMobil site can no longer reasonably be considered an alternative site, even under the standards of the Coastal Zone Management Act.

In its reply dated May 12, 2006, the City maintains there is no good reason to reopen the hearings on these or any topics. The City insists and provides an affidavit to establish that it still plans to use the proposed site as a public park. The City also maintains there is nothing new about the ExxonMobil site as the examiners concluded in the recommended decision (pp. 92-93) that the site was unavailable.

In a response dated May 24, 2006, that it contends meets the "extraordinary circumstances" criteria applicable to such pleadings, TransGas asserts the City's affidavit should not be accepted at face value, offering reasons why information in it is not believable. It also points out, correctly, that the City's second argument ignores the examiners' April 1, 2004 statement in the recommended decision (p. 96) that the ExxonMobil site might qualify as an alternative under the Coastal Zone Management Act. It insists hearings on these updated, material facts should be held as a matter of law and policy.

Similarly, in a motion dated April 30, 2007, TransGas renews its request that hearings be scheduled on its amended application. It contends that PSL §168(1) requires the Board's final decision to be made upon the record developed before the

presiding and associate examiners. TransGas opines, moreover, that sound regulatory policy dictates that evidentiary hearings be held before consideration is given to dismissing its amended application.

In a response dated May 8, 2007, the City reiterates its request that TransGas's application be dismissed. It asserts that the amended application is fatally flawed regarding TransGas's proposal to sell steam. The City maintains, furthermore, that the proposed power plant is incompatible with its on-going transformation of its Greenpoint-Williamsburg Waterfront area.

In a response dated May 8, 2007, DEC Staff expresses its concern that the draft permits it issued in connection with TransGas's proposal either are out-of-date or have lapsed due to changes in project description and the passages of more than three years. DEC Staff notes the existence of certain outstanding issues and points out that, on April 5, 2005, the United States Environmental Protection Agency identified the proposed project area as in non-attainment of the fine particulate matter (PM 2.5) pollutant standard. As such, DEC Staff explains that TransGas must make specific demonstrations before another Draft Air Permit may be issued.

In a reply dated May 11, 2007, TransGas argues that the issues mentioned by DEC are not outstanding. Regarding DEC Staff's concerns about the draft permits, TransGas states that it is seeking a meeting at which it plans to discuss the matters raised by DEC Staff.

We will not decide TransGas's motions now because, as discussed in greater detail below, there will be no further evidentiary hearings unless and until TransGas obtains permission to use New York City's land for essential steam and water pipes to be connected to the proposed generation facility.

In a motion dated May 24, 2006, TransGas also moves to compel the City to provide updated information about the City's plans to use the project site for a public park. The City provided a discovery response on June 6, 2006 and states that the motion to compel is moot. For this reason and as the case is

otherwise being held in abeyance, we conclude no action is warranted on the May 24, 2006 motion.

Finally, TransGas requests that oral argument be scheduled.[7] It notes that we can entertain such arguments under PSL §168(1) and points out that 16 NYCRR 3.8(a) states that oral argument will be allowed in unusual cases, where the issues are not adequately developed in testimony and written pleadings. TransGas claims this is an unusual case because the examiners' April 2006 recommendations are replete with errors and as the examiners would dismiss the case based in part on a lack of information no one ever asked it to produce. It also emphasizes that it has spent $15 million in development and permitting costs and expended significant time and effort, implying this justifies granting its request for oral argument. DPS Staff responds that oral argument is not necessary.[8]

We see no need for oral argument. TransGas and all other interested parties have been afforded a reasonable opportunity to comment on the pending issues. As to TransGas's suggestion that it is entitled to oral argument because it spent $15 million for project development and related costs, we observe that much of that cost was sunk prior to June 2004, at which time this Board was prepared to render a decision concerning TransGas's original Article X application. Moreover, while developmental costs might be significant, we do not see what bearing this has on whether oral argument is needed for purposes of deciding whether hearings are warranted on the amended application.

[7] TransGas's May 12 Comments, pp. 57-58.

[8] DPS Staff's June 1 Comments, p. 3 of 3.

ISSUES

Revocable Consents

1. Background

a. In General

Under State law, every city is empowered to sell and convey property. However, the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places are inalienable, except in limited circumstances that have not been the focus of any attention in this case.[9]

While a city cannot sell or convey certain property, it can allow others to use such property. The New York City Charter defines a revocable consent as "a grant by the city 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 [the city's] inalienable property[.]"[10] The City Charter also states that "[a] revocable consent shall not be granted for a use that would interfere with the use of inalienable property of the city for public purposes."[11]

The Rules of the City of New York (RCNY), Title 34, Chapter 7, state that the City's Department of Transportation Commissioner may deny a petition for a revocable consent if she, in her sole judgment, determines that granting the consent would interfere with the public use of the City's inalienable property or "would otherwise not be in the best interest of the City."[12]

The City has maintained that it is very unlikely that TransGas would be granted a revocable consent for water and steam

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[9] General City Law §20(2).

[10] City Charter §362(d).

[11] Id., §364(a).

[12] RCNY §7-09(d). The language about her "sole judgment" is misleading, however, given that City Charter §372 requires the separate and additional approval of the Mayor.

pipes that would be connected to the proposed generation facility.

b. The Recommended Decision

In their April 1, 2004 recommended decision, the examiners concluded that the City's authority to grant or deny a revocable consent is a power that the City could not exercise absent express authorization under PSL §172(1). Among other things, that statute establishes that no municipality or municipal agency, except as expressly authorized by a siting board, may require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility which is the subject of an Article X application. If an Article X certificate were granted to TransGas, the examiners recommended that we allow the City to conduct the inquiry into whether any uses of City land by TransGas would interfere with the public use of the City's inalienable property for public purposes (the City Charter standard), subject to our ongoing jurisdiction. The examiners also concluded, however, that the standard set forth in the City's rule could be used by the City in order to trump a board decision granting a certificate. The examiners noted that in circumstances they thought analogous, the New York Public Service Commission (PSC) found that a law allowing for such discretion would be unreasonably restrictive under PSL §126(1)(f), an Article VII, transmission facility provision comparable to PSL §168(2)(d) in Article X.[13]

The City timely excepted, seeking to distinguish issues of local permitting related to project construction or operation from those pertaining to real property rights. The City maintained that a Board decision granting a revocable consent

[13] PSC Case 10350, Columbia Gas Transmission Corporation, Opinion No. 89-23 (issued July 20, 1989), pp. 32-38 (Columbia). The referenced discussion concerns whether local zoning ordinances could be waived as unreasonably restrictive under PSL §126(1)(f).

over the City's objections would amount to condemnation of the City's inalienable property, contrary to State law.

TransGas opposed the City's exception, arguing that a Board decision requiring the granting of revocable consents for its interconnections would not result in alienation of City property. Rather, it likened the grant of a revocable consent to the grant of a license or a revocable, non-assignable privilege to do one or more acts on, under, or over the land of another. TransGas also opposed the City's exception on the policy ground that localities could otherwise nullify New York State control over the siting of major electric generating facilities.

c. The April 2006 Recommendation

The issue of revocable consents came up again in December 2004 when parties other than TransGas were offered an opportunity to comment on the November 2004 TransGas application amendment and in January 2005 when TransGas was permitted to respond to such comments. The examiners reviewed these pleadings and reversed themselves, concluding that the City's position is correct.[14] They stated that, if a revocable consent is to be obtained at all for the proposed project, TransGas must obtain it from the City. Given the City's position that a revocable consent would not likely be granted in this instance, the examiners concluded that an essential certificate requirement could not be met under any apparent circumstances and that further Article X proceedings would be wasteful.

In reaching their new conclusion, the examiners agreed with TransGas that a revocable consent is essentially the same thing as a license or permission for one to act in a way that would be improper in the absence of such permission. They also disagreed with the City's contention that the receipt of a revocable consent is similar to the alienation of real property through condemnation. However, they were persuaded by the City that the New York State Legislature has not given us authority

[14] April 2006 Recommendation, pp. 45-51.

to grant an interest in City property or the use of City property, however minor, to anyone.

The examiners provided various reasons in support of their new conclusion, as follows:

- In a 1989 decision under PSL Article VII, the PSC declined to waive an easement, stating that "[i]t is sufficient for us to reach a determination regarding the route to be followed for the pipeline and leave to Columbia [Gas Transmission Corporation] the method of acquisition for the necessary property.[15]

- In a prior order in this case, deciding issues raised on interlocutory appeal, we held that we do not preempt the jurisdiction of State and local agencies with respect to easements.[16]

- PSL §172(1) preempts local regulatory approvals that would control or restrict the construction or operation of a major electric generation facility but does not pertain to the grant of a right to use the property of another. The distinction between local regulatory approvals and the

[15] Columbia, p. 31.

[16] Case 01-F-1276, Order Concerning Motions for Interlocutory Review (issued October 16, 2003), p. 8, n. 15 (the 2003 Appeal Order).

grant of the use of property is made clear in a 2004 Court of Appeals decision.[17]

- TransGas provided no authority in support of the argument that the Siting Board can allow TransGas to use City property.

- A Court of Appeals decision cited by TransGas is inapposite as that case involved a local prohibition of preliminary site studies and had nothing to do with the property rights of a municipality.[18]

- Article X gives the Board substantial power over local regulatory provisions that might otherwise frustrate the State's interest in siting major electric generation facilities. However, applicants must secure, outside the Article X process, the property rights needed to construct a facility.

- The PSC, in similar circumstances in an Article VII proceeding, held that it could supplant other permitting procedures but not the need to obtain property rights,

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[17] Matter of Chambers et al. v. Old Stone Hill Associates et al., 1 N.Y. 3d 424 (2004). The Court of Appeals concluded that the Pound Ridge Town Board properly gave its approval for construction of a cell telephone tower given the information before it. Accordingly, lower court decisions upholding the town board's action were sustained. However, the Court also held that the town's authority to grant such approval is separate and distinct from the rights of neighbors of the cell tower site to enforce covenants or contract rights that limit the tower site to residential use. The Court also discussed whether the restrictive covenants are contrary to and preempted under the Telecommunications Act of 1996 (§332) that, in part, prohibits any state or local actions that would have the effect of essentially prohibiting personal wireline services. The Court concluded no such prohibition would occur if the restrictive covenants were enforced. Ultimately, Verizon Wireless was given a reasonable period of time to move the cell tower in conflict with the restrictive covenants. Judge Read dissented in a separate opinion.

[18] Consolidated Edison Company of New York, Inc. v. Town of Red Hook, 60 N.Y 2d 99 (1983), (Red Hook).

including a Temporary Revocable Permit from the Department of Environmental Conservation.[19]

2. Argument

a. Opposition to the April 2006 Recommendation

TransGas disagrees with the examiners' new conclusion and the reasons for it.

With respect to the PSC's decision in Columbia, TransGas asserts that decision provides no support for the examiners' latest recommendations. It states the PSC did not address in that Article VII case its power to grant the use of property rights because the applicant there had the option of asking the Town of Ramapo to relinquish a portion of an easement or acquiring land through condemnation.[20]

Turning to the 2003 Appeal Order, concerning our lack of authority to preempt jurisdiction over easements, TransGas argues that holding is inapposite. A revocable consent, it maintains, is like a license and a license differs from an easement in that an easement includes an interest in land owned by another and a license is merely authority to do an act upon land without an interest or estate in it.[21]

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[19] PSC Case 05-T-0089, Fortuna Energy Inc., Order Requiring A Hearing (issued March 23, 2005), (Fortuna). The PSC stated that it has no authority, express or implied, to grant land, easements, licenses, franchises, revocable consents to use real property, or any other kind of property or right to use property and that DEC's establishment of procedures to use state lands does not change that the underlying purpose of such procedures is to grant or deny real property rights (p. 5). The PSC also referred to its 2001 decision involving the Cross Sound Cable in which it had stated that New York owns the land underneath Long Island Sound and that construction of a transmission line could not begin until the applicant had obtained the necessary approvals from the New York Office of General Services under Article 6 of the Public Lands Law (p. 5).

[20] TransGas's May 12 Comments, pp. 11-12.

[21] Id., p. 10, citing Nemmer Furniture Co. v. Select Furniture Co., 25 Misc. 2d 895 (Sup. Court, Erie County, 1960).

TransGas does not dispute explicitly the examiners' finding that it had previously failed to provide precedent establishing that we can give TransGas permission to use the City's property. However, TransGas now refers to prior decisions that it believes are consistent with its position. For example, it points out that in the 2003 Appeal Order, we stated that our jurisdiction extends to electric transmission and fuel gas transmission lines not covered under PSL Article VII, including lines within cities for substantial distances, as well as to the use of state, county, and municipal rights-of-way. According to TransGas, this is a clear finding that Siting Boards have jurisdiction over water and steam lines, including the use of municipal rights-of-way.[22]

TransGas also cites three other Siting Board decisions allowing applicants to seek authorization directly from a Board in instances where a municipality unreasonably delays issuance of permits, approvals, or consents.[23] It emphasizes that the authorization in Wawayanda pertained to street and sidewalk permits and approvals for a potable water line.

As to the Court of Appeals' Red Hook decision, TransGas and IPPNY both argue it warrants rejection of the examiners' most recent recommendation. They argue that Red Hook stands for the proposition that localities cannot regulate whether a proposed major electric generation facility will be built. The implication is that if the City will not give TransGas permission to use the City's property, such action is preempted by PSL Article X.[24]

TransGas goes on to argue that the PSC's decision in Fortuna does not support the examiners' latest recommendation. According to TransGas, Fortuna is distinguishable as it involved

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[22] Id., p. 15, citing the 2003 Appeal Order, p. 7.

[23] Id., pp. 16-17, referring to siting board decisions in the Spagnoli Road (Case 01-F-0761), Wawayanda (Case 00-F-1256), and Brookhaven (Case 00-F-0566) Article X cases.

[24] Id., pp. 20-21 and IPPNY's May 12 Comments, p. 3. According to IPPNY's pleading, TransGas is not a member of IPPNY.

a proposal to construct a pipeline located in part in State reforestation land that is carefully protected from development by Article IV, Sections 1 and 3, of the New York State Constitution. TransGas goes on to say that Fortuna involved a situation where DEC believed it had no authority to grant a temporary revocable permit – the equivalent of a revocable consent here – and thus the PSC properly concluded that it had no such authority either. Here, in contrast, TransGas maintains the City has no underlying goal comparable to preserving constitutionally protected reforestation land. Moreover, TransGas argues that the City has authority to issue a revocable consent subject only to the condition that any use by TransGas cannot interfere with the public use of the City's inalienable property. Finally, TransGas argues in any event that Fortuna should be construed very narrowly, asserting that it conflicts with Siting board decisions in the previously referenced Spagnoli Road, Wawayanda, and Brookhaven cases.[25]

Turning from a point-by-point criticism of the examiners' latest reasoning, TransGas and IPPNY offer four additional arguments in opposition to the April 2006 recommendation.

To begin, TransGas and IPPNY assert that adoption of the latest recommendation would thwart Legislative intent that, vis-à-vis local government, the State should have exclusive jurisdiction over the siting of major electric generation facilities. They argue that the State intended to occupy the field of siting major electric generation facilities when it first enacted PSL Article VIII in 1972, renewed PSL Article VIII in 1978, and enacted PSL Article X in 1992. This Legislative intent is expressed in PSL §172(1), or the sine qua non of Article X, which, they contend, preempts municipalities and other localities from requiring any additional consents that would serve to interfere with the siting of a major electric generation facility. The

[25] TransGas's May 12 Comments, pp. 12-14. In its pleadings at the time, DEC had claimed its authority to manage the relevant reforestation areas is found in Articles 3, 9, and 23 of the Environmental Conservation Law.

examiners' latest recommendation is said to be contrary to this Legislative intent on the grounds that ultimate decision-making authority would rest with a locality in which the proposed facility would be constructed.[26]

Second, TransGas argues that a Kings County Supreme Court decision also supports its position. The referenced decision was issued in an action brought by TransGas to prevent the City from taking the proposed facility site for park land. The court concluded that the City's proposed taking was intended to circumvent the Siting Board's exclusive authority to decide whether to approve the TransGas proposal. The court said this could not be permitted and it stayed the City's condemnation action, pending the outcome of this case.[27]

Third, TransGas points to the City's pleadings in other litigation – another action brought by TransGas to prevent the City from rezoning the proposed project site – in which the City acknowledges that it cannot interfere with a Siting Board determination. In this context, TransGas questions how the City could be allowed to deny revocable consents and effectively circumvent our exclusive authority to site major electric generation facilities.[28]

Fourth, TransGas states that if the City is allowed to carry out its threat to deny revocable consents, Article X will be reduced to a wasteful and fruitless exercise for all applicants proposing projects that are opposed by a municipality, whether it be initially or at any time during project development. No project developer will spend millions of dollars on a project, it argues, with so much risk involved.[29]

TransGas concludes that the City should not have the final word, that the examiners' original recommendation should

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[26] Id., pp. 17-20 and IPPNY's May 12 Comments, pp. 2-3.

[27] TransGas's May 12 Comments, pp. 21-22, citing In Re City of New York, 10 Misc. 3d 1060(A)(Sup. Court, Kings County, December 2005).

[28] Id., pp. 22-23.

[29] Id., p. 23.

be adopted, and that the examiners' April 2006 recommendation should be rejected. [30] It argues that while we are capable of granting the revocable consents, we should authorize the City to conduct the necessary inquiries into TransGas's requests for revocable consents, subject to our ongoing jurisdiction.

b. Replies to the Opposition

In reply, the City and the Brooklyn Parties claim that the examiners' latest recommendation properly recognizes that the Legislature did not grant us authority to alienate City property -– something TransGas does not dispute –- or authorize the permanent occupation of the City's inalienable property over the City's objection.

The City argues the 2003 Appeal Order is pertinent as it concerns our lack of authority to grant easements. The City contends that, under New York law, the granting of permission to use one's property must come from the property owner and be subject to revocation by the property owner.[31] In this context, the City characterizes as illogical the notion that we could usurp the City's rights as a landowner. Moreover, it insists that any authorization by us for TransGas to use the City's inalienable property would necessarily be permanent, and that this would be a de facto alienation of its property.[32]

In the same vein, the Brooklyn Parties maintain that the 2003 Appeal Order says nothing about our authority to grant an interest in the City's inalienable property.[33] They also

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[30] As noted above, the examiners' original recommendation was that the City should review a TransGas petition for a revocable consent, applying the City Charter standard of whether a private use would interfere with public use of the City's inalienable property. (RD, p. 77).

[31] The City's June 1 Comments, p. 2, citing 24 New York Jurisprudence.

[32] This last point conflicts with the examiners' latest analysis and, thus, should have been submitted on May 12, 2006, so that TransGas could reply on the schedule set by the Secretary.

[33] The Brooklyn Parties' June 1 Comments, pp. 30-31.

state that to the extent the Legislature intended that we should be able to preempt the City, there is no proof that such preemption was intended to continue 3 ½ years after the expiration of Article X.[34]

The City argues that TransGas failed in its effort to cloud the distinction between local approvals that may not be required without express Siting Board authorization under PSL §172(1) and the City's rights with respect to its inalienable property. According to the City, not one of the cases relied on by TransGas is relevant to the question of whether we can authorize construction of facilities that would occupy permanently the City's inalienable property.

Turning to TransGas's reliance on the City's pleadings in a Kings County Supreme Court case, finally, the City denies categorically that it has in any way admitted that we can properly issue revocable consents for the construction of water or steam pipes on, over, or under the City's inalienable land.

c. TransGas's Surreply

In response to a new argument the City raises in its reply, asserting that Siting Board permission to use the City's inalienable property would be permanent or non-revocable, TransGas contends that who owns the land, and whether the permission to use it is revocable or not, are irrelevant because the City Charter is preempted by Article X. It otherwise repeats and expands on arguments made by it on May 12, 2006.[35]

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[34] Id., p. 31. The Brooklyn Parties do not discuss in this context L. 1992, C. 519, which states that Article X remains in full force and effect for applications filed on or before December 31, 2002. This topic is discussed in greater detail below, under the caption "Jurisdiction."

[35] The TransGas surreply will be considered solely to the extent it concerns arguments that disagree with the examiners' latest recommendations and that were raised for the first time in other parties' reply comments. Arguments raised in replies that agree with the April 2006 recommendation and do not join issue with comments submitted on May 12, 2006 are not considered nor is any related surreply.

3. Discussion

Public Service Law §172(1) limits the authority of other New York State agencies and New York municipalities and their agencies.[36] Pertinent here is that New York municipalities and their agencies, except with express permission of a siting board, may not require any approval, consent, permit, certificate, or other condition for construction or operation of a major electric generation facility for which an application has been filed under PSL Article X.

The legal issue presented is whether the limits imposed by PSL §172(1) extend to a revocable consent or revocable license to use the City's inalienable real property for project purposes where the likely effect of denying either is that the proposed TransGas facility will not be constructed or operate. For the reasons discussed below, we conclude that the reach of PSL §172(1) is not that broad. This in turn raises the regulatory issue of whether the high probability that the City will deny TransGas permission to use its inalienable land supports a decision to dismiss the pending application. We conclude it does not.

Our review of all the arguments leads us to conclude that this legal issue was neither discussed expressly nor resolved previously by a state siting board or court in any case, including in Red Hook (in an Article VIII context), Wawayanda, the 2003 Appeal Order, and in the December 2005 court decision In Re: City of New York.

Red Hook concerned a local law that required a license from a town board before any person could begin or allow a site study for a power plant within the Town. Red Hook did not consider the issue of whether Article VIII limited the ability of other state and municipal agencies to exercise their property rights and interests.

The 2003 Appeal Order concerned the extent of our jurisdiction to review the construction and operation of steam

[36] Municipality means a county, city, town or village located in this state, PSL §160(1).

and water lines and other facilities connected to the proposed electric generation facility that are not subject to the PSC's jurisdiction under PSL Article VII. While it decided that we had jurisdiction over such lines, it did not deal with our authority to limit property rights and interests. The 2003 Appeal Order by its terms only limited local regulatory control, insofar as we found that the "proposed water lines and steam facilities should be fully considered in the hearings being conducted by the Examiners, including whether state and local agencies should be authorized to grant permits pursuant to PSL §172(1)."[37] Further, we noted that "the jurisdiction of state and local governments with respect to necessary easements was not preempted" by PSL §172(1).[38]

This legal issue was also not considered in the context of adopting certificate conditions in other Article X cases. For example, a certificate condition in Wawayanda does state that the certificate holder may seek reconsideration or modification of the Board's authorization to a Town to require a permit prior to the commencement of construction activity in a Town road, street or right-of-way, if such authorization results in unreasonable delay. However, this condition is not and cannot reasonably be construed to be a determination on the legal issue presented here. The function of the Town of Wawayanda's law is to allow the Highway Superintendent to obtain security from the applicant sufficient to cover the estimated cost of restoration of the right-of-way should the applicant commence but not complete construction. Unlike the City's rules, Wawayanda's law assumes the Town has granted freedom to do construction work in the Town's right-of-way so long as sufficient restoration security is posted. The Highway Superintendent is not granting property rights or privileges. Rather, the Highway Superintendent's discretion in granting permits in Wawayanda appears to be limited to ensuring that the amount of the security is sufficient.

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[37] 2003 Appeal Order, p. 10.

[38] Id., p. 8, n. 15.

The Kings County Supreme Court's December 2005 order does discuss whether Article X prohibits a local agency from using condemnation of a project site, while an Article X proceeding is pending, to frustrate an applicant's ability to build an electric plant that might be certified by this Board. However, the Court discussed that issue in a context in which it concluded it had no jurisdiction to resolve the issues raised and assumed, incorrectly, that condemnation is an issue that can be resolved by a siting board.[39] What a municipality can do to acquire a project site while an Article X case is pending is also a separate question from whether PSL §172(1) limits municipal authority to exercise existing property rights and interests. In sum, we disagree with and reject all arguments to the effect that the legal issue presented was previously considered and decided in the context of Article X or its predecessor Article VIII.

To determine whether the limits imposed by PSL §172(1) extend to a revocable consent or revocable license to use the City's inalienable real property for project purposes, we have engaged in a realistic appraisal of PSL §172(1) to determine its meaning.[40] That appraisal starts with the statutory text, which precludes an "approval, consent, permit, certificate, or other condition" for construction and operation of a major electric generating facility. TransGas and IPPNY contend this language means the City cannot impose "revocable consent" requirements for the use of City property. Revocable consents do not, however, go to "construction or operation" of a facility. They bear on whether one has a legal right to be on the land in the first place. The "construction or operation" language suggests

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[39] 2005 NY Slip Op. 52047U; 2005 NY Lexis 2814, p. 18.

[40] 2003 Appeal Order at 7-10 (performing appraisal). See also, Uprose et al. v. Power Authority of the State of New York et al., 285 A.D. 2d 603, 606 (2nd Dept. 2001) (concluding that in challenge to whether "the Siting Board properly interpreted Public Service Law § 160(2), thereby exempting the project from compliance with the review procedures of Public Service Law article X, . . . the Siting Board's use of an operational standard was realistic and reasonable").

that PSL §172(1) is intended to supplant local procedural review processes that would be duplicative of state review under PSL Article X. But State review under PSL Article X does not concern itself with the granting of any property rights or interests, including permission to use the land of another. Article X creates the Siting Board as the single state agency for permitting of major power plants. It provides the procedural law for such permitting. Other than the State Environmental Quality Review Act-like criteria under PSL §168(2)(c), the substantive State law applied by the Board is the environmental, public health, and safety statutes enacted by the legislature, as implemented by duly promulgated regulations. [41]

Our appraisal is further supported by the long established and uncontested requirement that Article X applicants that need title to or easements in land in order to construct and operate major electric generating facilities must obtain such title or easements through negotiations or eminent domain procedures. This requirement applies regardless of who currently holds title to the needed land. Likewise, as PSL § 172(1) clearly does not limit the property rights of those that are not New York State or municipal agencies, any applicant that needs permission to go on the private property of one who is not a state or municipal agency must obtain such permission from the property owner or be liable in an action for trespass. Putting aside applicants that, unlike TransGas, have a franchise

[41] That PSL §172(1) supplants only procedural requirements is supported by our responsibility to consider the substantive regulatory requirements of state and local laws. Pursuant to PSL §168(2)(d), we have to find that the facility is designed to operate in compliance with applicable state and local laws and regulations, except that we may refuse to apply any local ordinance, law, resolution or other action, any regulation issued thereunder or any otherwise applicable local standard or requirement that we find unreasonably restrictive in view of factors set forth in the statute. TransGas and IPPNY seem to be arguing that PSL §172(1) precludes the City from deciding whether to deny revocable consents, even though PSL §168(2)(d) would not allow the Board to decide whether to apply or override the City's requirements for such consents.

in the area surrounding the proposed project, an applicant that cannot obtain the title, easement, or permission needed will not be able to complete its project. The failure to complete such a project in such circumstances might be very frustrating to the project developer. However, failure to complete a project in these circumstances would result from the exercise of real property rights and could not reasonably be perceived as contrary to the legislative intent that the State should have exclusive jurisdiction over whether to authorize the construction and operation of major electric generating facilities. The legislative intent was not inconsistent with making developers of such facilities responsible for acquiring all of the property rights and permissions to use the lands of others as are necessary to construct and operate those facilities.

We then turn to the question of why it is that PSL §172(1) is of no effect in any of these situations but that, as TransGas contends, it can simultaneously limit the authority of state and municipal agencies to exercise their property rights and interests, other than to the extent they are subject to eminent domain procedures. TransGas and IPPNY never address this directly, despite a clear opportunity to do so.

There are several factors these parties seem to rely on to address this point indirectly. One is that there are clear property law distinctions between granting title to or an easement in land, on the one hand, and granting the right to use land, on the other. That these legal distinctions exist does not explain why PSL §172(1) should be applied differently depending upon the type of property right, interest, or use involved. TransGas and IPPNY simply assume PSL §172(1) applies differently. Other factors TransGas and IPPNY seem to rely on are that the City has a process for granting the right to use its inalienable property in which it alone decides whether to permit such use, that the City is using its property rights and interests to defeat this Board's exclusive siting jurisdiction, and that any outcome other than the one they advance will make it impossible to site any future electric generation facilities

in New York. The second argument assumes the point in contention and the last one is debatable. Again, however, none of these arguments help resolve, or even address, the question of whether PSL §172(1) was intended to limit the ability of New York municipalities to exercise their property rights and interests vis-à-vis the ability of all other New York property owners to exercise theirs.

Further, we are aware that there are other State agencies with responsibility for exercising ownership rights over State land, including the Office of General Services, the Department of Transportation, the Department of Environmental Conservation, the New York State Thruway Authority, and its subsidiary, the Canal Corporation. TransGas and IPPNY implicitly ask us to assume that PSL §172(1) limits the ability of all such agencies to exercise the State's property rights in the context of Article X. This is too important a legal conclusion to be based solely on an assumption.

Finally, we have also considered the PSC's March 23, 2005 order in Fortuna. This order is not binding on us but is informative as it concerns the same legal issue presented in this case.

The PSC made a clear distinction in Fortuna between procedural requirements the PSC could supplant under PSL §130 (a section of PSL Article VII similar to PSL §172(1)) and property rights the PSC said it could not supplant. The PSC also clearly and unequivocally held that it has no authority, express or implied, to grant land, easements, licenses, franchises, revocable consents to use real property, or any other kind of property or right to use property.

The examiners relied on this precedent to support their April 2006 recommendation. TransGas seeks to distinguish this decision on the grounds that the land to be used there is constitutionally protected and that DEC thought that even it did not have authority to allow the use of state reforestation land. However, these arguments bear no relationship to, and do not inform the issue of, whether PSL §§130 or 172(1) limit the ability of the State or New York municipalities to exercise

their rights and interests as property owners vis-à-vis all other property owners. Again, TransGas fails to take advantage of its opportunity to address directly the legal issue presented.

Taking all of the above into account, we conclude that PSL §172(1) places no limits on New York City's ability to exercise fully its rights and interests as a property owner. As the examiners stated, and the City and the Brooklyn Parties argue, if TransGas wants to avoid liability for a trespass on New York City's inalienable property, it must first obtain the City's permission to use such land. While the effect of a denial would be that the proposed plant could not be constructed, having to obtain the revocable consent of the City for the privilege to use its lands is not the same thing as having to obtain the consent of the City for construction or operation of a major electric generating facility. PSL §172(1) supplants procedural review processes that would be duplicative of Article X review. It does not supplant the City's power to grant or withhold real property rights, interests, and privileges. The Legislature has not granted us such broad powers over New York City's property.

One other point here is that TransGas, in its surreply, makes clear that the relief it seeks under PSL §172(1) is not only a restriction on the City's ability to grant or deny a revocable consent, but also the imposition of a requirement on the City that the consent could be irrevocable. TransGas states that "[b]ecause Article X preempts the City Charter provision requiring revocable consents, rendering the provision inapplicable to TransGas, the issue of who owns the land and whether the permission is revocable is of no relevance."[42] To the extent we lack authority under PSL §172(1) to grant revocable consents, we necessarily lack it to grant irrevocable consents. This makes sense as well, given that granting TransGas an irrevocable consent is more like granting it an

[42] TransGas's June 13 Surreply, p. 15.

easement. TransGas admits this Board lacks authority to grant easements.[43]

Turning, finally, to the regulatory question of whether the pending application should be dismissed, we find that the lack of consents is not currently a basis for dismissal under 16 NYCRR 1000.13. That section provides "[w]henever 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 …." While it may be unlikely, based on the City's statements, that the City will give TransGas permission to use its inalienable property, this is not the same thing as showing no genuine issue as to how the City will respond to a request for such permission. It is the latter that is required before dismissal is appropriate under 16 NYCRR 1000.13. Given, however, that water pipes in and steam pipes out of the proposed generation facility are critical to its construction and operation, and given the certainty that an application to the City can provide, we will hold this proceeding in abeyance for such time as is necessary for TransGas to apply for a revocable consent and for the City to render a final nonappealable decision on such request. There is no reason to go forward with this proceeding unless and until TransGas obtains permission to use the City's land for its water and steam pipes. Given that the City is one of the active parties in this proceeding and that it has repeatedly indicated that the City will likely deny TransGas permission to use its land, there is good reason to believe that any further time, effort, or resources expended in the development of the record in this case would likely be wasted.

We will direct TransGas to advise the Secretary, within two weeks after issuance of this order, as to when it will submit a request for a revocable consent that would allow it to locate facilities on the City's land. We will also require TransGas to advise the Secretary within ten days after it receives a decision concerning whether the City will give

[43] TransGas's May 12 Comments, p. 9.

TransGas permission to use its unalienable property for water and steam pipes to be connected to TransGas's proposed electric generating facility. Moreover, we will direct TransGas to advise the Secretary within ten days after such decision becomes final and nonappealable. We will determine at that time whether the case should proceed or be dismissed.

Steam Sales Contract

1. Background

a. In General

Prior to the examiners' April 2004 recommended decision, TransGas was proposing to build an 1100 MW combined-cycle[44] electric generation facility that would also be capable of exporting steam for sale. Each of two power blocks of 550 MW would comprise two combustion turbines, two heat recovery steam generators, one steam turbine generator, and associated systems and facilities. Two auxiliary steam boilers would also comprise a portion of the facility, augmenting its steam production capability.

At that time, TransGas hoped to make steam sales to Consolidated Edison Company of New York, Inc. (Con Edison) of 1.5 million pounds per hour (MM lbs./hr.), although the facility would be able to export up to 2.0 MM lbs./hr.[45] Steam would be delivered to Con Edison through a pipe TransGas would construct under the East River, running to an interconnection with Con Edison's steam system in the vicinity of the East River Generating Station on Fourteenth Street in Manhattan. Steam generated but not used on site or exported for sale could be

[44] Combined-cycle facilities are those that generate electricity relatively efficiently, using combustion turbines and a combination of heat recovery steam generators and steam turbines.

[45] On an order of magnitude basis, the 1.5 MM lbs./hr. compares with winter steam production capacity, reserve requirement, and peak load projected for Con Edison in 2005 of 12.3 MM lbs./hr., 1.5 MM lbs./hr., and 10.3 MM lbs./hr., respectively. Steam Business Development Task Force, Steam Business Development Plan, August 21, 2005, p. 30, Figure 6.

condensed, employing in part two dry cooling towers that would comprise a portion of the proposed facility.

TransGas expected at the time that all water needed by the then proposed facility would come from existing and new wells used to dewater some New York City subway stations and, as necessary, from the City's potable water delivery system. It was projected that reliance on the City's water delivery system alone, assuming peak electric production at the then-proposed facility throughout each year, would amount to .71% of the City's total annual water deliveries.

TransGas also noted at the time that it would be seeking the PSC's permission to sell steam to Con Edison. It sought authorization to construct and operate the then-proposed facility in a manner that would allow it to make steam sales, subject to the condition subsequent that it could not sell steam unless the PSC grant it authority to do so.

b. The Recommended Decision

The examiners concluded that the then-proposed facility would likely have an adequate water supply.[46] For several reasons, however, the examiners recommended that we decline to authorize construction of the portion of the facility designed to make steam sales to Con Edison. One reason is that they could find no basis for making a required finding under PSL §168(2)(a) that the combined electric and steam facility would be consistent with the most recent State Energy Plan or that such a facility was selected pursuant to an approved procurement process.[47] Going beyond the referenced statutory requirement, the examiners saw no apparent need for the steam portion of the combined facilities, citing a January 2004 New York City Energy Task Force Report that said existing and committed steam capacity should remain sufficient throughout the

[46] RD, p. 47.

[47] Id., pp. 19-20. In the examiners' view, the record supported such a finding only with respect to the portion of the then-proposed facility related to electric generation.

planning period. Moreover, they were not satisfied that the proposed facility would have had any effect on restoring Con Edison's retail steam service following the August 14, 2003 blackout.[48]

The examiners were also not persuaded the Board should grant environmental approval of the project before the PSC authorizes TransGas to sell steam. They pointed out that in one case cited by TransGas, the PSC had granted a certificate to a petitioner that already had its environmental permits, but that the circumstances there were completely different.[49] The examiners likewise distinguished the KeySpan-Ravenswood case, one that TransGas had relied on for the proposition that other Siting Boards have authorized the construction of a steam export plant prior to the negotiation of a steams sales contract. According to the examiners, the September 7, 2001 decision in KeySpan-Ravenswood included a condition that excused the applicant from constructing steam export plant and, contrary to the recommendation of the KeySpan-Ravenswood examiners at the time, made no statutory findings with respect to the need for steam export plant. The examiners pointed out as well that by the time KeySpan-Ravenswood received a certificate, it was clear that Con Edison was proceeding with the East River Repowering Project that would augment Con Edison's steam supply and that

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[48] Id., pp. 21-22. See, also, "Initial Report by the New York State Department of Public Service on the August 14, 2003 Blackout," February 2004, pp. 104-115.

[49] In PSC Case 02-M-1443, a Certificate of Public Convenience and Necessity was granted to the Sithe Independence Partners Facility that was constructed at a time when the facility was not subject to the PSC's jurisdiction. However, the facility subsequently fell within the PSC's jurisdiction and could not operate without a PSC certificate. Case 02-M-1443, Sithe Independence Power Partners, L.P., Order Providing for Lightened and Incidental Regulation and Granting a Certificate of Public Convenience and Necessity (issued January 23, 2003).

there would be no steam sales from the KeySpan-Ravenswood facility to Con Edison.[50]

The examiners concluded as well that claimed public interest benefits of the facility devoted to steam export should be given no weight as compared with the adverse environmental impacts that would result from construction of the proposed electric and steam facility.[51]

In its briefs on exceptions, TransGas vowed it would not commence construction of the steam transmission line without first receiving the PSC's approval to sell steam. Because no party commented on the application's environmental assessment of the steam line's construction and operation, it continued, "[T]here is, therefore, no record basis to conclude that the steam transmission line should not be certified along with the electric generating facility."[52]

c. The April 2006 Recommendation

On May 27, 2004, following the submittal of briefs on exceptions and opposing exceptions in April 2004 and a final recommendation to the Board, and just prior to Siting Board deliberations scheduled to take place on June 4, 2004, TransGas proposed to further ameliorate the impacts of its initially proposed facility by placing much of it underground. The two dry cooling towers would be eliminated under the revised proposal and TransGas envisioned that wastewater from the Newtown Creek Water Pollution Control Facility (the Newtown Creek Facility) would be used for once-through cooling, to condense any steam remaining after electric generation and any steam sales. In September 2004, this Board held that if TransGas wanted to proceed with this revised proposal, it would

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[50] RD, pp. 82-83, discussing the Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued September 7, 2001) in Case 99-F-1625, KeySpan-Ravenswood.

[51] Id., p. 125.

[52] TransGas's Brief on Exceptions, p. 24.

have to file within 60 days an amendment to its Article X application.

TransGas filed an amendment on November 12, 2004. The amendment continued to envision underground construction of most of the originally proposed facility with a nominal capacity of 824 MW, no cooling towers, and the once through use of water from the nearby Newtown Creek Facility to condense steam.[53]

In the event TransGas could not obtain wastewater from the Newtown Creek Facility, the amendment proposed alternatively that TransGas be authorized to substitute "topping turbines" for the two steam turbine generators as this would eliminate the proposed facility's need for once-through cooling water.[54] The effect of this amendment alternative would be that all steam beyond that needed for electric production or other generating facility use could not be condensed and would have to be exported.

The interested parties were afforded an opportunity to comment on the amendment and DPS Staff and DEC were among those filing such comments. On January 27, 2005, in response to several comments, TransGas withdrew from its amendment the proposal to use wastewater from the Newtown Creek Facility.[55] The topping turbine alternative in its amendment thus became (and remains) its primary proposal. TransGas also clarified at that time how it could reduce steam output for the proposed facility by gradually reducing output of each of the combustion turbines to approximately 75%, followed by turning off each of the combustion turbines as necessary, followed by gradually decreasing output from the auxiliary boilers until they would be shut down.[56] In essence, the ability to export steam and the

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[53] Amendment, pp. 16-2 to 16-3.

[54] Amendment, pp. 3-12 and 16-25 to 16-26.

[55] TransGas's January 27, 2005 Response to Comments, pp. 4-7.

[56] Id., pp. 7-8. This explanation assumes the facility is burning natural gas. The facility would burn oil in the winter.

extent of such exports would now limit the proposed facility's ability to generate electricity.

In an interlocutory appeal filed on July 27, 2005, TransGas stated (p. 4) that it would not construct the latest proposed facility without one or more steam export contracts in place as "steam export is needed for a topping cycle cogeneration plant to be technically feasible."

In an August 22, 2005 correction to the November 14, 2004 amendment, TransGas identified its latest proposal as “Alternate 5” and stated that such facility would have a slightly reduced nominal capacity of 776 MW but still be capable of producing steam at a rate of 2 MM lbs./hr.[57]

In their April 2006 recommendation,[58] the examiners noted the following:

- TransGas will not build the proposed facility in the absence of a steam export contract.
- No entity has been identified that will likely purchase steam from TransGas.
- TransGas has no plans to build a system to distribute steam to retail customers.
- TransGas was incorrect to claim that the PSC had unconditionally required Con Edison in 1999 to negotiate a price for the purchase of steam from TransGas. Such a claim ignores that the PSC also made clear in 1999 that Con Edison could rely on alternative suppliers of steam only if doing so would not result in the exercise of market power. (The referenced 1999 order also authorized Con Edison to repower its East River Generating Station.)
- The amount of steam TransGas proposes to sell to Con Edison has changed over time, as have the pricing terms proposed by TransGas. The examiners contrasted, for example, earlier proposals to sell up to 1.5 MM lbs./hr. and an average of 0.794 MM lbs./hr., with the actual amount fully callable and dispatchable by Con Edison, to the amendment

[57] Amendment pp. 16-11 to 16-12, as revised August 22, 2005.

[58] April 2006 Recommendation, pp. 51-55.

proposal to sell 2.0 MM lbs./hr. in every hour of every year.[59]

- No steam sales contracts or precedent agreements are in place pursuant to which TransGas would sell steam produced at the facility.

- As TransGas will not build the proposed facility without a steam sales contract, the Board cannot reasonably determine under PSL §168(2)(e) whether the public interest benefits of the amended proposal outweigh its adverse environmental impacts.

The examiners concluded that there are significant doubts about whether an agreement or agreements for steam sales will be reached[60] and said that we are not required to hold this proceeding open on the basis of speculation that one or more steam sales contracts might be entered into sometime in the future.

2. Argument

a. Opposition to the April 2006 Recommendation

TransGas disagrees with the examiners' latest recommendation for four reasons.

First, TransGas argues that the latest recommendation is inconsistent with the September 15, 2004 order that allowed it to file an amendment. That order did not require it to file a steam contract with its amendment and TransGas argues it would be arbitrary and capricious to impose such a requirement 17 months later.[61]

Second, TransGas contends it would be unreasonably discriminatory and that there is no rational basis to require it to execute a steam sales contract as a condition precedent to our making the requisite findings under PSL Article X. It

[59] To be clear, this includes steam sales from auxiliary boilers in hours when the facility would not be generating electricity.

[60] April 2006 Recommendation, p. 61.

[61] TransGas's May 12 Comments, p. 25.

observes that Article X certificates have routinely been granted in other cases, subject to subsequent execution of interconnection agreements for electric, water, gas, sewer, and steam.[62]

Third, TransGas complains that the examiners' latest recommendation unreasonably relies on a 1999 PSC precedent and ignores what it describes as the PSC's recent (2005) efforts to have Con Edison obtain additional cost-effective steam supplies. In this connection, TransGas states that the PSC in December 2005:

1. Noted Con Edison's winter steam demand is approaching Con Edison's available capacity, i.e., total capacity less reserve requirements.

2. Endorsed an August 2005 Steam Business Development Plan recommendation that Con Edison should explore obtaining cost-effective and economic steam production capacity from itself or merchant cogeneration facilities.

3. Acknowledged that the need for and economics of increasing steam production are being evaluated in a steam production study.[63]

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[62] Id., pp. 25-26. TransGas refers to Astoria Energy LLC's Certificate Conditions I.B. (concerning the certificate holder's responsibility for obtaining all requisite approvals) and II.F. (requiring the certificate holder, among other things, to file a detailed design of the electric interconnection and water and sewer interconnection contracts or agreements); KeySpan-Ravenswood's Certificate Conditions V.A. (concerning prompt negotiations of electric, gas, and water interconnections) and V.B. (concerning electric interconnection requirements); and Wawayanda Energy Center's Certificate Conditions I.B. (concerning the Certificate Holder's responsibility for obtaining all necessary approvals) and I.I. (concerning subsequent execution and submittal as a compliance filing of an agreement to use treated effluent as process water for the project). None of the referenced certificate conditions refer explicitly to steam interconnections.

[63] Id., p. 27. The “Long Term Con Edison Steam Production Options Study – Phase I Final Report” was subsequently filed in October 2006.

TransGas goes on to state that it provided information to those preparing the steam production cost study and claims this information shows that it can sell steam to Con Edison at a significant discount from Con Edison's cost of production. In this context, TransGas argues that it is anticompetitive and makes no sense to eliminate a potential merchant supplier of steam at a time when "promoting" cost effective merchant steam plans is now State policy.[64]

Fourth, TransGas asserts that the examiners' latest recommendation ignores that when it sought the PSC's assistance to obtain a steam sales contract in 2004, the PSC allegedly held that TransGas should wait for such assistance until after it obtained an Article X certificate.[65]

b. Replies to the Opposition

The Brooklyn Parties respond that the examiners' April 2006 recommendation, based on the absence of a steam sales contract, need not be consistent with the September 15, 2004 order authorizing the filing of an amended Article X application. They state that it was not until late January 2005 that the primary TransGas proposal was changed to one to build a facility that could generate electricity only when and to the extent steam could be exported for sale.[66]

Turning to TransGas's second argument, the Brooklyn Parties respond that it would not be unreasonably discriminatory to dismiss the amended petition in the absence of a steam sales contract. They explain that the original proposal in this case, and the proposal in the KeySpan-Ravenswood case, was to generate electricity and sell steam as a by-product if possible. According to the Brooklyn Parties, this stands in stark contrast

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[64] Id., pp. 28-29.

[65] Id., p. 29, citing Cases 03-G-1671 and 03-S-1672, Consolidated Edison Company of New York, Inc.- Gas and Steam Rates, Order Adopting Terms of a Joint Proposal (issued September 27, 2004), p. 28.

[66] Brooklyn Parties' June 1 Comments, p. 9.

to the current TransGas proposal under which electricity can be generated as a technical matter only when and to the extent all steam remaining after electric production can be exported for sale.

Likewise, the Brooklyn Parties see a marked distinction between granting certificates subject to conditions subsequent concerning routine or non-controversial interconnections for electric, water, gas, and sewer lines and granting one that would be subject to very controversial conditions that would directly impact whether and the extent to which the proposed facility would generate electricity.[67]

DPS Staff points out that the KeySpan-Ravenswood facility was certificated subject to a condition excusing the construction of steam plant if a steam sales contract could not be negotiated. The facility proposed here, in contrast, cannot generate electricity without making contemporaneous steam sales. DPS Staff sees a distinction between the hotly contested issues surrounding steam interconnection in this case and the absence of any such issues concerning otherwise routine interconnections in other Article X proceedings.[68]

The Brooklyn Parties go on to disagree with the TransGas argument that the examiners unreasonably relied on stale PSC precedent and failed to consider an allegedly more recent policy to promote competitive sources of steam. As to the former, the Brooklyn Parties observe that the PSC concluded in 1999 that a competitive steam market was not workable in New York City and that the examiners properly concluded in their April 2006 recommendations (p. 53) that steam market conditions have not changed at all, much less to the extent to warrant requiring Con Edison to purchase steam from TransGas.[69] Likewise, and contrary to the assertion of TransGas, the Brooklyn Parties say that while the PSC's December 2005 order referred to a Steam Business Development Plan recommendation

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[67] Id., pp. 5-9.

[68] DPS Staff's June 1 Comments, p. 2.

[69] TransGas did not dispute this holding in its May 12 Comments.

about Con Edison obtaining additional capacity from itself or merchant plants, they deny the PSC adopted or endorsed that recommendation.[70] The Brooklyn Parties also dispute the TransGas claim that it can provide steam to Con Edison on reasonable terms. According to the Brooklyn Parties, Con Edison previously made clear that there is no steam sales agreement between it and TransGas.[71]

The Brooklyn Parties assert that TransGas's fourth argument also lacks support and is illusory. They explain, for example, that they find no discussion in the referenced PSC steam rate case order suggesting that TransGas was told it must obtain a certificate before it could obtain assistance in any contract negotiations with Con Edison.[72]

3. Discussion

We conclude that nearly all of the TransGas arguments on this topic have not overcome the reasons underlying the examiners' April 2006 recommendation to dismiss the amended application for want of one or more contracts to sell steam. Nevertheless, we conclude that while those reasons remain valid, it is premature to dismiss the amended application at this time despite the absence of such contracts.

TransGas's first, second, and fourth arguments all lack merit. The inconsistency between the September 2004 order and the examiners' latest recommendation is not a valid basis for rejecting the latter. As the Brooklyn Parties observe, the primary TransGas proposal in September 2004 was to build an electric plant that could operate as a technical matter even if

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[70] Brooklyn Parties' June 1 Comments, pp. 11-13.

[71] Id., p. 11, citing Con Edison's December 21, 2003 Post-Hearing Brief, p. 3.

[72] Id., pp. 13-14. The Brooklyn Parties' June 1 Response (pp. 14-21) includes other affirmative arguments in support of the examiners' April 2006 recommendations but which are not responsive to the May 12 comments of TransGas. These arguments and related surreply arguments are unauthorized and are not considered here.

no steam were exported for sale. The proposal pending now is to build a facility that, as a technical matter, will generate electricity only when and to the extent steam can be exported to a steam user. Moreover, TransGas states that the facility would be economic only if it sells steam.[73]

That other facilities received Article X certificates subject to conditions subsequent for interconnections generally or steam interconnections specifically does not compel any particular outcome in the present circumstances. There has been no showing by TransGas that the facts and circumstances in such cases were like those here and, in any event, none of the cited cases involved steam interconnections. The KeySpan-Ravenswood precedent is also irrelevant for reasons the examiners explained in their April 2004 recommended decision and as set forth in the June 2006 responsive comments of DPS Staff and the Brooklyn Parties. Simply stated, the KeySpan-Ravenswood proposal was to build a facility that would generate electricity regardless of whether one or more steam sales contracts would be negotiated. Again, this differs materially from what TransGas is now proposing.

The fourth TransGas argument, that the PSC previously offered to help it in steam sale contract negotiations only after it received a certificate, is likewise without merit. To begin, what the PSC actually said, on a different page than the one cited by TransGas, is that "[w]henever TransGas is in a position to provide steam that competes with Consolidated Edison's service, a proper determination of the utility company's avoidable costs will be necessary. However, until TransGas can offer steam to customers there is no need for us to consider any such cost calculations, nor any reason for us to specify the terms of any cost studies here."[74] It is possible to infer this means TransGas would have to have a certificate before DPS would assist it in negotiations, but other inferences

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[73] TransGas's May 12 Comments, p. 28.

[74] Cases 03-G-1671 and 03-S-1672, supra, Order Adopting Terms of a Joint Proposal (issued September 27, 2004), pp. 29-30.

could be drawn as well. In any event, this TransGas argument ignores the material change it made to its proposal in January 2005 as it pertains to the need to sell steam in order to generate electricity.

Much of TransGas's third argument is unpersuasive. With respect to the 1999 PSC precedent relied upon by the examiners, TransGas has not even attempted to show that the examiners were wrong when they concluded a competitive steam market in New York City remains unworkable. TransGas is also incorrect when it states that the PSC in 2005 "endorsed" a recommendation that Con Edison explore obtaining additional steam from itself or others. No such endorsement was given, nor would it be necessary as Con Edison is and remains under a continuing obligation to obtain the steam it needs to serve its customers safely and reliably under those terms that are most beneficial to its ratepayers.[75]

We also accord no weight to TransGas's conclusory contention that information it provided to those preparing the steam production cost study shows it can produce steam more cheaply than Con Edison. TransGas also provides no authority to support, and is incorrect in its argument, that it is State policy to promote cost-effective merchant steam plants. As discussed above, the relevant considerations are Con Edison's public service obligations as a steam utility, the PSC's determination that a competitive steam market is not feasible in New York City, and the PSC’s determination that Con Edison should not purchase steam from other providers in a manner that would afford market power to the latter.

Nevertheless, we decline to dismiss the amended application based on the absence of a steam sales contract. Dismissal of an Article X application is in order only when it is beyond dispute as a matter of fact that one or more statutory requirements for a certificate cannot be met.[76] While TransGas does not have a steam contract at this time, it cannot now be

[75] See PSL §§79(1) and 80(2).

[76] 16 NYCRR §1000.13.

said with certainty that it cannot obtain such a contract in the future. Indeed, the examiners did not conclude that TransGas, as a matter of fact, cannot enter into a steam sales contract. They only decided that such a contract is not likely (April 2006 Recommendation, p. 61). Moreover, unlike the issue of revocable consents, which can be addressed by requiring a TransGas application to the City, questions involving a steam contract cannot be so easily resolved. Accordingly, despite the general weakness of all of TransGas's arguments on this topic, we grant its request that its amended application not be dismissed based on the absence of a steam sales contract.

Consideration of Alternatives Under PSL Article X

1. Background

a. In General

Public Service Law §164(1)(b) and 16 NYCRR 1001.2 govern the information that must be included in an Article X application concerning alternatives. All applicants are required to provide information concerning reasonable energy supply source alternatives, a no-action alternative and, where appropriate, alternative sites, technology, scale or magnitude, design, timing, use, and types of action. Applicants who have the power of eminent domain, such as regulated utilities, must also present information, where appropriate, concerning demand-reducing alternatives. Applicants who do not have the power of eminent domain, called "private applicants,"[77] do not have to present any information concerning demand-reducing measures and need not present information concerning alternative sites beyond those owned by or under option to them. PSL §164(1)(b) and 16 NYCRR 1001.2 also provide guidance concerning the amount and quality of information provided. Notably, the information provided need not be any more extensive than required by the State Environmental Quality Review Act (SEQRA).[78] DEC's regulations implementing SEQRA require "a description of the

[77] 16 NYCRR §1000.2(o).

[78] Environmental Conservation Law Article 8.

range of alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor."[79]

It is uncontested that, since the beginning of this case, TransGas consistently claimed to be a private applicant. What is contested is whether TransGas should continue to be treated as a private applicant in light of its subsequent acquisition of the power of eminent domain.

b. The Recommended Decision

At the time of the recommended decision, there was no issue about whether or not TransGas was a private applicant. The primary focus of the recommended decision vis-à-vis alternatives was on whether an alternative site favored by other active parties is superior to the site proposed by TransGas. The examiners concluded the alternative site, referred to as the ExxonMobil site (a contaminated site located along Newton Creek in Greenpoint), is not feasible under PSL Article X.[80]

c. The April 2006 Recommendation

The examiners noted that on June 6, 2005, well after the November 2004 amendment was filed, a certificate of incorporation for the TransGas Energy Services Corporation (TESC) was filed with the New York Department of State. The certificate makes clear that the new corporation has the power of eminent domain. The examiners concluded that it makes no sense to continue to regard TransGas as a private applicant given that the new corporation is an affiliate of the applicant with common ownership and legal representation and that the Kings County Supreme Court considered these two entities and their common parent –- Gas Alternative Systems, Inc. -– as one entity, TransGas. The examiners also pointed out that the new

[79] 6 NYCRR 617.9(b)(5)(v).

[80] See below for a related discussion of alternatives in the context of a review of the project by the Department of State.

corporation issued a notice of a hearing to condemn the project site for the stated purpose of constructing and operating a proposed cogeneration facility.[81]

The examiners went on to say that TransGas is inconsistent to claim it is a private applicant or merchant plant while it contemporaneously seeks imposition of an obligation on Con Edison to purchase, and for Con Edison's steam customers to pay for, steam that otherwise would be generated in whole or in part by Con Edison.[82]

Finally, the examiners explained that in the East River Article X proceeding (Case 99-F-1314), Con Edison addressed demand management and distributed generation as alternatives to repowering a central steam generation station. In light of this and other factors summarized above, the examiners concluded that TransGas could and should have provided an additional evaluation of alternatives. The examiners added that in response to the September 15, 2004 order, TransGas provided information in its application amendment concerning claimed benefits such as voltage support, congestion relief, line loss reductions, and technological alternatives that could achieve comparable benefits. Given that the new corporation plans to "engage in the supply of electricity," the examiners questioned whether the affiliate could provide such technological alternatives.[83]

2. Argument

a. Opposition to the April 2006 Recommendation

TransGas argues the examiners are wrong on the facts and the law. As to the facts, TransGas explains, first, that its examination of alternatives throughout the case went beyond what is required of private applicants. Second, TransGas suggests that if anyone is at fault for insufficient information being available on certain alternatives, such fault rests with

[81] April 2006 Recommendation, pp. 56-57.

[82] Id., pp. 57-58.

[83] Id., p. 58, including n. 125.

the examiners, the Chairman, or this Board given that it was never notified under 16 NYCRR 1000.8 that it should provide such information. It says "[i]t is not an Article X applicant's obligation to guess whether the Board wants additional information."[84]

As to the law, TransGas argues demand management, distributed generation, and other alternatives are neither reasonable nor appropriate alternatives under the SEQRA standard. Demand management and distributed generation, for example, would not produce steam in the large quantities that TransGas proposes to sell nor do they allow the sale of large amounts of electricity into wholesale markets. According to TransGas, these alternatives also would not satisfy the objectives of the project and it would not be capable of providing these alternatives as it is not in the distributed generation, demand management, transmission line, or equipment business.[85]

TransGas concludes, observing that demand management and distributed generation were given very little attention in the East River Article X proceeding. Moreover, it says the recommendation in that case was against these alternatives given that they would not produce the electricity needed by Con Edison. If these alternatives were not reasonable for Con Edison, TransGas goes on, they can hardly be reasonable for an applicant that does not serve millions of retail customers who could implement such alternatives. In sum, TransGas claims it had no obligation to present more information on alternatives and, in any event, that such additional information would be immaterial.

b. Replies to the Opposition

The Brooklyn Parties respond that even if TransGas's prior consideration of alternatives went beyond that required of a private applicant, something they do not admit, the TransGas

[84] TransGas's May 12 Comments, p. 31.

[85] Id.

presentation on alternative sites is no longer adequate given that TransGas is no longer a private applicant. They contend that much broader consideration of alternative sites is required, including industry sites that are not for sale and sites containing old, inefficient power plants that could be replaced with one that is more efficient. These parties assert that this, in fact, is what the examiners held and argue that 3 ½ years after the expiration of Article X is too late for TransGas to be presenting such extensive additional information.[86]

c. TransGas's Surreply

TransGas denies the examiners recommended preparation of a new analysis of alternative sites and faults the Brooklyn Parties for failing to identify any such alternatives even after receiving $30,000 of intervenor funds for this purpose. It explains as well that alternative sites must be reasonable and that neither it nor any other party is aware of a reasonable alternative site. It also emphasizes that its ability to take a site by eminent domain is not as broad as the Brooklyn Parties suggest. For example, it argues it could not take sites already dedicated to a public purpose and that it would be too expensive and present too many operational problems for it to acquire sites where Con Edison already produces steam.

TransGas reiterates that only alternative sites that achieve its objectives and that are within its capabilities need be considered. It contends as well that its original application[87] considered all alternative sites proximate to the existing steam hub at East 14th Street in Manhattan and that all

[86] Brooklyn Parties' June 1 Comments, pp. 27-28. The Brooklyn Parties also go beyond responding to TransGas and offer new arguments concerning the implications of the newly obtained power of eminent domain on whether the proposed facility was selected pursuant to an approved procurement process. This argument and the related TransGas's surreply are untimely and are not considered.

[87] Exh. 1, Vol. 6, Attachment Y-4.

such areas have been rezoned by New York City for residential housing. It suggests it is therefore highly likely the City and the Brooklyn Parties would oppose any alternative site in these areas.

Finally, TransGas notes that a New York City appeal is currently pending in the Second Department that will determine whether TransGas must have an Article X certificate before being able to establish a valid public purpose under the Eminent Domain Procedures Law. If the Court rules against it, TransGas states, this aspect of the April 2006 recommendation and the associated arguments will all be moot as it would once again be a private applicant.[88]

d. TranGas's Further Pleading

In its motion dated April 30, 2007, requesting that evidentiary hearings be held on its amended application, TransGas notes that, as a consequence of recent court decisions,[89] it is proceeding to dissolve its affiliate, TESC.

3. Discussion

We conclude that, even if TransGas were no longer a private applicant, this circumstance would not warrant dismissal of the amended application, though it would require supplementation prior to hearings.

TransGas is no longer a private applicant to the extent that it has an affiliate with the power of eminent domain. TransGas does not contest the examiners' similar conclusion, though it now advises of a planned dissolution of its affiliate. That TransGas might seek assistance from DPS to

[88] TransGas's Surreply, pp. 8-10. The TransGas surreply is considered in this instance because the Brooklyn Parties raised for the first time in their responsive comments the new argument that the examiners recommended a new analysis of alternative sites.

[89] City of New York v. TransGas Energy Services Corp., 34 AD3d 466 (2d Dept. 2006) and Nash Metalware Co., Inc. v. Council of City of New York, 14 Misc. 3d 1211 (N.Y. Sup. Ct. 2006).

negotiate a steam sales contract or that TransGas might seek an order directing Con Edison to negotiate with it is not a factor in our determination.

Given that TransGas's status changed from that of a private applicant in June 2005, the next issue presented is who, in the first instance, has the obligation to provide additional application materials when circumstances render inaccurate part of a pending application. Notwithstanding its surprising argument to the contrary, that obligation is clearly and properly TransGas's. It, after all, is the one proposing to build a new facility to generate electricity and produce steam. Given that TransGas failed to meet this obligation in the first instance, a related issue is whether the appropriate remedy is to dismiss or to require TransGas to supply any needed additional information. In the circumstances presented, we conclude it is the latter.

Given that TransGas has an obligation to correct any part of its pending application that is inaccurate, the next issue concerns the extent of the additional information that should be provided. Based on our examination of the arguments on this issue alone, we find that TransGas would not have to provide additional information concerning distributed generation or demand management alternatives even if it had an affiliate with the power of eminent domain. TransGas offers persuasive reasons why such alternatives are not appropriate given its objectives and abilities. For the same reason, we are not adopting the examiners' suggestion that it might be appropriate for TransGas's affiliate to provide additional information on certain technological alternatives.

Turning to whether additional study of alternative sites is warranted, the Brooklyn Parties are plainly inaccurate when they claim that the examiners recommended such further study. The examiners said no such thing. But we are persuaded by the Brooklyn Parties' argument that consideration of alternative sites beyond that required of a private applicant is in order given the current existence of the TransGas affiliate. TransGas attempted to establish that such further evaluation

will not likely to be productive, and now claims it will dissolve its affiliate. However, we find it would be premature for us to so conclude, given the current existence of the affiliate. If the case is to proceed to a decision on the merits, TransGas will be required to augment its application on this topic, using the latest information available, including whether it has completed the dissolution of its affiliate.

The parties discussed two other related issues. The first is whether TransGas's treatment of alternatives was reasonable or better while it was a private applicant. This issue need not be addressed in order to determine what TransGas needs to do going forward. The second has to do with whether it is appropriate to allow TransGas to further augment its amended application years after the expiration of PSL Article X and whether there are any limits to the period of time during which an applicant should be able to amend its application. The first part is discussed below under the heading "Jurisdiction." The other part need not be addressed for us to decide if and how this particular case, with a specific proposed amendment, should proceed.

Amendment Completeness and Prejudice

1. Background

The April 2006 Recommendation cites incompleteness of the amendment, TransGas's failure to correct deficiencies, and resulting prejudice on other parties as their fourth and final reason why this case should be dismissed.[90]

This recommendation rests in part on five specific ways in which the examiners concluded the amendment is incomplete. The first has to do with a number of issues related to removal of a significantly increased amount of contaminated soil for construction of an underground facility, including the hauling and disposal of excavated soil, odor control, flooding and erosion control, and off-site mud tracking. TransGas's position has been that these issues would all be the subject of

[90] April 2006 Recommendation, pp. 58-63.

a Remedial Action Work Plan that must be reviewed and approved by DEC before excavation could begin and, thus, that information about them is not needed here. The examiners express dissatisfaction, however, as TransGas had taken no specific steps to update the referenced plan or to provide any updated information about it since May 2004.

Three of the examiners' other examples include instances where information TransGas provided to date describes what it "can" do and not what it "will" do. These three issues pertain to flood protection, slurry wall[91] leakage and seepage, and, perhaps most significantly, the ultimate design of a public park TransGas would construct for the City on top of the proposed underground facility.

The fifth and final topic relied on by the examiners has to do with steam sales from the proposed facility. As previously discussed, the examiners cite the absence of a steam sales contract as one of the other three reasons why this case should be dismissed. In the current context, however, the examiners criticize TransGas's failure to provide sufficient information about how steam sales would physically take place and whether any sales at prices that would be economically attractive to others would compensate TransGas for its steam-related costs. The examiners point out as well that TransGas also did not prepare requested studies of interconnection costs, as was noted in the April 1, 2004 recommended decision (p. 124).

In light of all of the above, the examiners conclude that the amendment is "substantially incomplete."[92] This was not much of a concern to them through December 2005, they say, because the City at that time was in the early stages of implementing its Land Use and Waterfront Plan. In the wake of a December 2005 Brooklyn Supreme Court decision staying the City's eminent domain efforts, pending the outcome of this case, the

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[91] This term refers to the walls that would enclose the underground facility, all of which would be constructed prior to the commencement of excavation and removal of heavily contaminated soils on the site.

[92] April 2006 Recommendation, p. 58.

examiners became convinced that TransGas's delay in completing the amendment "would perversely prejudice the City and the public."[93]

The examiners go on to explain how an Article X application in another case, involving the Glenville Energy Project, was dismissed on the grounds that the benefits associated with continuing review should extend only to applicants who can ensure an expeditious review of this certificate application.[94] In light of the five deficiencies summarized above, the examiners state that TransGas cannot ensure expeditious review of a complete amendment to its application. The examiners described as profound the consequences of this situation, pointing out that delays allowed to the applicant for the production of necessary information would now carry over to implementation of a land use plan that has the imprimatur of the City's elected officials pursuant to the New York City Charter.

2. Argument

a. Argument Concerning Completeness of the Amendment

(1) TransGas's Arguments and Replies

TransGas denies the amendment is substantially incomplete, describing at length information it provided on four of the five topics on which the examiners expressed concern.[95]

Turning first to the examiners' dissatisfaction with information provided that relates to the excavation and removal of substantial amounts of contaminated soil, TransGas claims that the amendment discusses in detail the mitigation methods it would use and states that the effect of its continuing plan to

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[93] Id., p. 59.

[94] April 2006 Recommendation, pp. 59-60, citing Case 99-F-1835, Glenville Energy Project, Ruling on Motion to Dismiss (issued August 27, 2004) p. 16.

[95] TransGas's May 12 Comments, pp. 41-54. TransGas does not discuss in the referenced pages the examiners' dissatisfaction with the level of detail provided concerning steam operations and related costs.

use barges means that increased excavation and removal of contaminated soil, albeit over a longer period of time, would not result in any material increase in truck traffic in and out of the project site.

Even if this were not the case, however, TransGas questions why the examiners insist it is proper to review issues surrounding the removal of contaminated soil given that both the examiners and this Board previously agreed such topics have no place in this case. TransGas points out, for example, that the examiners ruled on August 4, 2003 that matters pertinent to the Voluntary Clean-Up Plan for the project site – an agreement TransGas entered into with DEC in November 2002 – would be set forth in a Remedial Action Work Plan to be reviewed by DEC and would not be adjudicated in Article X proceedings. The examiners also said at that time that the proper practice is to adopt a certificate condition requiring that construction be conducted in accordance with an approved remediation plan. That ruling was upheld in the 2003 Appeal Order[96] and the examiners thereafter accepted a proposed certificate condition allowing the filing of a Remedial Action Work Plan post certification.[97]

In this light, and in the absence of anyone seeking to expand Article X review on this topic, TransGas maintains it is arbitrary and capricious to suggest it should have provided more information. Alternatively, should we change our minds and require the submission of additional information, TransGas offers to prepare and file it expeditiously.

As to flood protection, TransGas likewise maintains that a reasonable amount of information has been provided, especially in light of the fact that all the September 15, 2004 order (p. 9) said on the topic is that the issue would have to be considered. Information provided in the amendment about this topic includes that the project site falls within the 100-year and 500-year flood plains, that the project would be designed to

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[96] Case 01-F-1276, Order Concerning Motions for Interlocutory Review (issued October 16, 2003), p. 4.

[97] RD, p. 124.

meet Federal Emergency Management Agency (FEMA) and New York City Building Code requirements for a 100-year storm and, going beyond any existing requirements, to meet a storm surge for a Category 1 hurricane. The amendment materials, it continues, also show that by placing a park on top of the proposed facility, the park would be at an altitude higher than either the 100-year flood plain or its design storm surge height. Finally, TransGas points out that the only discovery requests related to flood control had to do with the proposed facility's pumping capacities and engineering specifications. TransGas said at the time that these are pre-construction details and properly addressed in compliance filings. In the absence of any other questions from the other parties or the examiners, it suggests it would be completely unreasonable to dismiss the case based on the absence of sufficient information on this topic.

The examiners also expressed concern about the amount of information provided concerning prevention and management of slurry wall leakage and seepage. TransGas is adamant that the concern is completely unwarranted, citing five specific ways in which it believes the examiners erred on this topic. With respect to the examiners' discussion (p. 31) about whether slurry wall problems experienced at the Boston Central Artery Tunnel Project (Big Dig) should be of concern, TransGas asserts that its amendment and June 17, 2005 response to the examiners' May 5, 2005 ruling together provide a reasonable amount of information concerning how these problems can be avoided and about (1) the financial arrangements it would enter into to ensure unanticipated structural failures could be repaired quickly; and (2) decommissioning costs in the wake of a major structural failure. Given the amount of information it provided, and the subsequent silence of the examiners and other parties on the topic, TransGas asserts it reasonably believed the information it provided was adequate. If more information had been requested, TransGas says, it would have been provided.

As a second example, TransGas asserts there is no basis for the examiners to conclude[98] a large leak at the Big Dig was the result of structural failure. TransGas states that the referenced leak was isolated and resulted from poor quality control. Moreover, it points to the opinion of its world-renowned expert on this topic, who is unaware of any catastrophic failures in any slurry wall project and who has assisted TransGas in identifying precisely what needs to be done to avoid a similar problem.

In the same vein, TransGas denies the preventative measures it identified are "possible," as the examiners described them.[99] According to TransGas, it specified three preventative measures that could be used. It also argues its proposals with regard to slurry wall construction are quite specific as follows:

Construction	Dispose of shallow contaminated soil and water as described in original application subject to a Remedial Action Plan to be approved by DEC.
Leakage	Avoid or minimize leak problems like those experienced at the Big Dig by designing and testing in accordance with standards adopted by ASTM (a forum that develops standards for international use) and the American Concrete Institute.
Emergency Decommissioning	Stabilize structural failure, make temporary repairs, install bracing to allow work underground, and clean up underground structure.

Finally, TransGas asserts that it is unfairly criticized for failing to identify a firm that would assume legal and financial responsibility that quality control requirements would all be met.[100] It says this information was

[98] April 2006 Recommendation, p. 55, n. 50.

[99] Id., p. 31.

[100] TransGas's May 12 Comments, p. 52.

never requested and suggests that it might rely in whole or in part on the Thorton-Tomasetti Group that was one of three firms responsible for preparing its June 30, 2004 Engineering Feasibility Report. Should we decide that a proposal is needed, it says one will be provided.

TransGas is also criticized for submitting too general a proposal for the development of a park over its proposed underground facility. TransGas disagrees and explains why. First, it outlines the information it provided on the topic in the amendment and in its January 27, 2005 response to comments on the amendment. The former includes what it describes as a firm proposal to build a park with 700 continuous feet along the south side of the project.[101] The January 27 submittal confirmed the offer to build whatever type of park is desired by the community and the City and included simulations of a variety of optional park designs, including one with walkways, fountains, and interactive educational exhibits above the underground facility, and others with a variety of arrangements suitable for basketball, tennis, table tennis, and shuffle board.

As no one ever asked for any further information from it and as it makes no sense for it to impose a particular park design on the City or local community, TransGas argues it would be completely unreasonable to dismiss this case based on the absence of additional information on this topic. It buttresses this point, referring to other Article X cases (East River Repowering, Athens, and Poletti) where general certificate conditions involving amenities to local communities were spelled out only in general terms, subject to firming up in the compliance process.

It concludes that it would be illegal, arbitrary, capricious, and bad policy to dismiss this case based on the adequacy of its park proposal. As to the bad policy argument, TransGas states that it incurred significant expense to develop promptly a collocation design for a power plant in New York City, a type of design already employed at other facilities in

[101] Amendment §§3.9, 4.1, and 1.7.

the area, in an effort to minimize the impacts of its proposed facility. It suggests this is consistent with the goals of Article X and that adoption of the examiners' recommendation would thwart legislative intent and impose standards that do not exist in law or precedent.

In its June 1, 2006 comments, DPS Staff points out that the November 2002 agreement between TransGas and DEC for a Remedial Action Work Plan pertains to an above-ground facility where there would be much less excavation and removal of contaminated soil compared to 1.07 million cubic yards now proposed to be removed. It suggests clarification is needed from DEC on whether the prior agreement can be amended, especially in light of the fact that since October 2003, DEC is no longer accepting Voluntary Clean-Up plans and is requiring instead compliance with its legislatively enacted Brownfield Clean-Up program. DPS Staff notes as well that the original TransGas agreement called for a cleanup that would meet the "restricted commercial use" standard. In DPS Staff's view, the cleanup should comply with an unrestricted use standard if the site is to be used as a park.

In its June 13 surreply, TransGas states that it has no objection to further DEC input on this topic and suggests, based on its experience in prior negotiations with DEC, that the latter would not likely object to remediation to the higher level proposed by Staff. The implication is that TransGas does not object to the higher level of remediation.[102]

(2) Other Arguments and Replies

In their comments dated May 12, 2006, the Brooklyn Parties express support for the recommendation to dismiss this case based on the absence of a sufficiently comprehensive amendment. They emphasize that TransGas was allowed to provide amended information in November 2004 that would meet the

[102] TransGas's June 13 Surreply, p. 11. This portion of the surreply is considered to the extent it responds to information raised for the first time in DPS Staff's June 1 Reply Comments.

requirements of PSL §164 and respond fully to the instructions of this Board's September 15, 2004 order. They rely on the examiners' analysis to conclude the requirements of the September 15, 2004 order were not timely met, and ask that we strictly enforce the November 2004 deadline, dismiss the pending application, and close the case.[103]

TransGas replies that these arguments were already reasonably addressed by it. It also provides a list of topics of concern to the Brooklyn Parties and specifies places where information on each can be found, including in the amendment, TransGas's January 2005 response to comments on the amendment, its response to discovery requests, its June 17, 2005 response to the examiners' May 3, 2005 ruling, and exhibits in evidence in this case. TransGas goes on to suggest it is unreasonable that the Brooklyn Parties engaged in no discovery on the amendment and that they nevertheless complain now that needed information is missing. It is not reasonable, TransGas says, for a party to lay in the weeds for 18 months and then surprise the applicant with accusations about missing information. Finally, TransGas reiterates that it will provide promptly any additional information that we believe is needed.[104]

In its May 12 comments, DPS Staff also suggests that if the case is remanded for further hearings, the record should be updated to reflect recent residential and park development in the vicinity of the project.[105]

TransGas replies that it has no objection to updating existing studies on land use, taking into account recent developments, and it says it will supply such information expeditiously upon our direction.[106]

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[103] Brooklyn Parties' May 12 Comments, pp. 43-45.

[104] TransGas's June 1 Comments, p. 25 and Appendix A.

[105] DPS Staff's May 12 Comments, p. 3.

[106] TransGas's June 1 Comments, p. 2

b. Argument Concerning Prejudice

In addition to arguing that its amendment is not deficient, TransGas also claims that the time it would take to conclude hearings on its amendment would not prejudice anyone, including the City in its efforts to convert a portion of the East River Waterfront to uses identified in the Greenpoint/Williamsburg rezoning plan.[107] It supports this argument, in part, denying there is any evidence to support a contrary conclusion and calling our attention to PSL § 168(1), which requires us to make the final decision on an application based upon the record.

Specific reasons why TransGas envisions no prejudice to anyone include the following:

- The City wants a riverfront park and TransGas is willing to build such a park and give it to the City for free, in an area where all contaminated soil and water on the site will have been removed properly at no expense to the City. Getting more than you want can hardly be considered prejudicial.

- The City's Final Environmental Impact Statement says that the park is needed to accommodate an increase in population from anticipated residential development, the first phase of which is expected to be completed in 2013.

- The City's environmental consultant has already concluded that the facility and a park could coexist. This argument rests on the fact that such consultant noted that other park land could be developed or modernized should the TransGas facility be built.

- The City's attempt to take the proposed project site via eminent domain was stayed in December 2005 and the City has done nothing since then to have the stay lifted.

- It is not even clear the City will build a park at the proposed site, for reasons already discussed in connection with one of its motions, as the City's

[107] TransGas's May 12 Comments, pp. 32-40.

> pleading in a pending court action discusses its own plans in terms of "if and when" the project site is acquired, and as the City's mayor budgeted the grossly inadequate amount of only $99 million to fund acquisition, remediation, and construction of a 23 acre park, even though TransGas's unrebutted estimate is that the cost to remediate only the project site, comprising only 8 of the 23 acres, is $338.5 million.

Turning to the examiners' reliance in part on a ruling dismissing the Glenville Energy Project application, TransGas contends such reliance is misplaced as that other project was plagued by chronic delays over a period of years in contrast to this case which initially moved along on a schedule consistent with the 12-month statutory period. This was followed, it continues, by a period in which it immediately redesigned the proposed facility to mitigate adverse impacts identified in the recommended decision, prepared and filed an amendment within the 60 days we allowed, and responded to all other requests for information except one which it appealed and on which a final decision was never rendered.

Finally, TransGas argues that there is case precedent that makes clear when delay causes substantial prejudice. The criteria applied in the Cortland Nursing Home case,[108] it continues, are as follows:

- The nature of the private interests allegedly compromised by the delay.
- The actual prejudice to the private party.
- The causal connection between the conduct of the parties and the delay.
- The underlying public policy advanced by governmental legislation.

[108] Cortland Nursing Home v. Axelrod, 66 N.Y. 2d 169 (1985).

Applying these criteria, TransGas observes that the City is not a private party and, in any event, is not prejudiced for the reasons summarized above. TransGas also denies it caused any delay, contending that the examiners and we failed to resume hearings in a timely fashion or to notify it if more information was needed. TransGas goes on to say the purpose of Article X is to have an orderly process by which those facilities warranting a certificate can be identified. Denying TransGas the hearing it wants, after it spent $15 million, would contravene these purposes.

In comments dated June 1, 2006, the Brooklyn Parties dispute TransGas's suggestion that any delays resulted from our or the examiners' failure to request additional information. They argue broadly that it was TransGas that failed to flesh out its amendment proposals adequately.[109]

The Brooklyn Parties also contend that the local communities have been and continue to be prejudiced to the extent they have not regained the ability to control local land use so long after the expiration of PSL Article X. They also remind us of the statement in our September 15, 2004 order (p. 10) that the local communities have a legitimate interest in having this proceeding brought to a reasonably prompt conclusion.[110]

The City offers one general and several specific responses on the prejudice issue.[111] As a general matter, the City explains how it plans to develop a 28-acre park is a key, if not the most important feature of the Land Use and Waterfront

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[109] Brooklyn Parties' June 1 Comments, pp. 26-27. A substantial portion of the Brooklyn Parties' June 1 Comments, pp. 21-26 do not reply to the arguments of TransGas but offer other reasons why they agree with the examiners' recommendation to dismiss and with DPS Staff's argument that further consideration should be given to a coastal zone consistency review. These other arguments are out of time procedurally and neither they nor TransGas's surreply to them are considered here.

[110] Brooklyn Parties' June 1 Comments, pp. 32-33.

[111] The City's June 1 Comments, pp. 5-ll.

Plan for Williamsburg and Greenpoint. That plan was developed over many years and adopted by the City Council on May 11, 2005. The City complains that this plan and its associated efforts to rezone have been and will continue to be stymied by TransGas while this case is pending. Examples of this include an order in a court action by TransGas that prohibits the City from acquiring the project site via eminent domain and another court action in which TransGas is seeking to have the City's rezoning efforts set aside for failure to consider the environmental benefits of its proposed facility. The City has also brought its own action to question findings made by TransGas's affiliate about the benefits of the proposed project and observes that if it is unsuccessful, TransGas will be able to proceed with its proposed taking of the project site while the City would remain barred from doing so. Given that the public record clearly establishes that TransGas is using this case at every turn as a sword in an effort to upset the City’s plans, the latter goes on, there is no need for hearings to conclude that it and the local communities are and will continue to be prejudiced while this case is pending.

Responding to a few of TransGas's specific arguments, the City:

- Insists there is no uncertainty surrounding its intention to create a 28-acre waterfront park as it is an essential element of the Land Use and Waterfront Plan.

- Disagrees completely with the notion the park is needed only to meet future population growth, stating the park is needed to respond to local communities that have been underserved.

- Acknowledges that other park spaces could be developed if the site is not available, but says it would be tragic if the centerpiece of its Waterfront Plan could not be developed.

Finally, without providing any citations, the City states that it has already explained thoroughly why a park on

the roof of an electric generation facility is not viable. Critical factors, in its view, include large access structures that would exist throughout the park, the looming stack, truck traffic, and potentially limited access due to security concerns with so much oil to be stored on site. Moreover, it concludes, the uncertainty surrounding TransGas's ability to construct or operate the proposed facility could prevent construction and use of a park for years, if not longer.

3. Discussion

We reject the examiners' recommendation to dismiss this case based on their reasoning that TransGas's amended application is incomplete, that TransGas has delayed this proceeding unreasonably by not providing complete amendment materials, and that such delay is prejudicial to other parties to an extent that it warrants dismissal.

We start with the general context that the topics that must be covered in the amended application in this instance are specified by statute, our rules, pre-application stipulations, and the September 15, 2004 order.

An overlay on this context is that, if we are going to dismiss an amended application on the basis of 16 NYCRR 1000.13, we must be satisfied that a deficiency in the amended application materials is such that it would necessarily bar us from granting a certificate. We conclude that the examiners did not apply this rule properly in their analysis.

The examiners cite five specific ways in which they believe the amended application is deficient. In four instances, however, TransGas offers thorough explanations of what it provided, why it provided what it did, why it believes the topic is reasonably covered in its amended application, and how it is willing to provide further information that is desired. Notably, no other party joins issue with any of these TransGas comments. Indeed, the only other comments on the comprehensiveness of the amended TransGas application are DPS Staff's contentions, agreed to by TransGas, that the Remedial Action Work Plan might have to be augmented or replaced by an

alternative and that recent changes in local land uses would also have to be considered in any further hearings. TransGas agrees with both of these comments.

As to the fifth deficiency relied upon by the examiners, the lack of a steam contract, it would, as discussed above, be premature to dismiss based on that reason, given that there is a dispute about whether such a contract can be obtained. We need only observe at this point that a steam sales contract does not now exist. We need not reach, in advance of any hearings, whether such a contract is required to evaluate the public interest for the facility under PSL §168(2)(e).

Finally, our review of the examiners' April 2006 recommendation and all the subsequent pleadings convinces us that TransGas has not attempted to delay this proceeding. It is clear its goal throughout has been to move forward. Moreover, many of the concerns expressed by the City and Brooklyn Parties are not relevant to the question of whether this case should be dismissed. We understand that there has been and continues to be strong local opposition to the original, amended, and revised-amended facility proposals. We also understand that frustration with the project's existence is perceived by many as prejudicial because it is interfering with local land use plans. However, such concerns, strong as they are, do not comprise a reasonable legal basis to dismiss the pending amended application. Indeed, our reading of the Cortland Nursing Home case suggests that in order for dismissal to be warranted based on prejudice, there must be substantial delay by an applicant that interferes with the ability of others to be afforded a hearing within a reasonable time. This clearly is not the case here. Indeed, it is the City and Brooklyn Parties that do not want hearings to go forward.

While we hold that dismissal is not warranted based on the incompleteness of the amendment or prejudice to other parties, we reject outright TransGas’s unconditional claim that this case must be decided on the merits under the standards of PSL §168.

As discussed previously, there is no good reason to proceed to a decision on the merits unless and until TransGas can obtain the City's permission to use the City's land to site water and steam pipes essential to the now-proposed cogeneration facility. To date, the City, an active party in this case, has given every indication that such permission will very likely be denied.

Jurisdiction

1. Background

After this Board's September 15, 2004 order was issued, advising TransGas to file an amendment within 60 days if it wanted to proceed with a primarily underground facility, petitions for rehearing were filed by the Brooklyn Parties, M&H, and CitiPostal, Inc. The petition for rehearing filed by the Brooklyn Parties was expressly supported by the Greenpoint Landing Associates and the City. All of the petitions for rehearing were opposed by TransGas.

The petitions for rehearing primarily called into question our authority to entertain an amendment given the anticipated extent of changes to the project that had been proposed on December 24, 2002. However, the Brooklyn Parties also argued that we lacked jurisdiction over the December 24, 2002 TransGas filing, as well as any amendment, given the standard another board applied in June 2004, when the Sunset Energy Fleet (Sunset) Article X application was dismissed.[112] TransGas opposed this argument. The three petitions for rehearing remain pending because the September 15, 2004 order did not grant or deny a certificate and, thus, the petitions did not meet the standard set forth in PSL §170(1).[113]

[112] Case 99-F-0478, Sunset Energy Fleet, LLC, Order Closing Proceeding (issued June 10, 2004), pp. 19-20 (Sunset).

[113] PSL §170(1) states that "[a]ny party aggrieved by the board's decision denying or granting a certificate may apply to the board for a rehearing within thirty days after issuance of the aggrieving decision."

In May and July of 2005, the examiners ruled that TransGas had not complied fully with the terms of our September 15, 2004 order and directed the applicant to provide additional information concerning the heat rate and Multi-Area Production Simulation runs for a generation facility that would not use cooling towers or once through cooling.[114] The examiners clarified these rulings in an electronic message dated July 22, 2005.

On July 27, 2005, TransGas filed an interlocutory appeal, claiming the information the examiners directed it to provide was irrelevant and immaterial. The Brooklyn Parties responded to the appeal on August 8, 2005, asking that the October 2004 petitions for rehearing be decided prior to TransGas's interlocutory appeal and, if review of TransGas's interlocutory appeal is still warranted, that it be denied. TransGas responded in opposition on August 19, 2005, arguing it was entitled to do so given that the Brooklyn Parties sought relief unrelated to the information the examiners had directed TransGas to provide.[115] No decision was rendered at that time concerning TransGas's interlocutory appeal or any of the pending petitions for rehearing.

As discussed above, the examiners' April 2006 recommendation to dismiss the pending amended application is based in large part on four findings, none of which are related to the Brooklyn Parties' contention that we lack jurisdiction over the December TransGas application. It is in this context that the Brooklyn Parties' primary comment on the examiners' April 2006 recommendation is that a dismissal is also warranted on the grounds that we lack jurisdiction to consider the

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[114] Case 01-F-1276, Ruling Directing Submission of Additional Information (issued May 3, 2005) and Ruling Directing Submission of Additional Information (issued July 12, 2005).

[115] Further rulings were issued on August 29 and September 14, 2005, concerning the information to be provided by TransGas. These rulings were withdrawn in another ruling issued September 23, 2004. These rulings are not discussed here as further jurisdictional arguments were not presented in connection with them.

original application. Alternatively, the Brooklyn Parties argue that the amendment, in fact, is a new application submitted after the expiration of PSL Article X. TransGas opposes both of these arguments.

2. Jurisdiction Over the December 2002 Filing

a. Argument

The Brooklyn Parties concede that Siting Board jurisdiction continues over Article X applications filed on or before December 31, 2002. They agree as well that TransGas made a filing on December 24, 2002. But they are adamant that the December 24, 2002 filing did not constitute an application.

As to this last contention, the Brooklyn parties rely primarily on Sunset, which stated that materials filed need not be perfect to be an application, but that to constitute an application, such materials

- Must be properly filed and served.
- Must provide the information needed by DEC to evaluate pollution control facilities and to reach a determination on the issuance of Federal air and water permits.
- Must not be missing any substantial information required by PSL §164(1) or pre-application stipulations.

The Sunset order also stated that failure to meet any one of these requirements is an independent basis for concluding that filed materials do not comprise an application.[116]

There are no express arguments about whether or not the December 2002 TransGas filing was perfect or about whether TransGas met all applicable filing and service requirements in December 2002.[117] As to the other two Sunset requirements, however, the Brooklyn Parties contend they were not met by TransGas on or before December 31, 2002. The Brooklyn Parties

[116] Sunset, p. 22.

[117] This is a significant distinction from Sunset, where the filings were intentionally not served on others.

emphasize, for example, that DEC sent letters to the Chairman and TransGas dated February 24, 2003 that made clear it still needed more information to make a determination of completeness and to draft the requisite permits. The letter from DEC to TransGas went on for more than five pages, enumerating deficiencies that had to be corrected before DEC could make determinations under the Clean Water Act and Clean Air Act.

The Brooklyn Parties argue as well that the December 2002 filing did not comply with a number of pre-application stipulations. Some of the deficiencies noted in DEC's February 2003 letters, for example, were also failures to comply with clauses in stipulations 1 (Air Resources) and 11 (Water Resources). In the same time period, the Brooklyn Parties go on, DOH sent a letter to TransGas dated February 26, 2003, listing four pages of requests for revisions, supplementation, re-evaluation, and clarification to the December 24, 2002 section on Air Resources. Finally, the Chairman's February 24, 2003 finding, that the December 2002 filing was not in compliance with PSL §164(1), made clear that part of the information missing was needed to comply with certain clauses in pre-application stipulations 5 (Land Use and Local Laws) and 10 (Visual Resources and Aesthetics).

That two requirements of the Sunset order were not met by TransGas in December 2002, the Brooklyn Parties state, is buttressed by the fact that TransGas filed in April 2004 some 300 pages of new and replacement application pages of text as well as numerous new and replacement figures and diagrams.

Anticipating the likely response of TransGas, the Brooklyn Parties argue that we are not bound by the statement in the Chairman's February 2003 letter to TransGas to the effect that the substantial filing made in December 2002 remains an application subject to review under PSL Article X. They quote from the Sunset order on the same topic which said

> Even if the Chairman's ... letter were construed as the Siting Board exercising subject matter jurisdiction, the question of subject matter jurisdiction can always be reviewed *regardless*

> *of any other actions that may have been taken in the proceeding. Subject matter jurisdiction is defined and conferred by the Legislature, and it cannot be expanded or restricted by action of the Board.* The Chairman's ... letter neither established irrevocable Siting Board subject matter jurisdiction over the Sunset filings, nor conferred upon the filing the status of an application.[118]

To the extent the Chairman's reference to a "substantial filing" was ever intended to be a standard for determining what is or is not an application, the Brooklyn Parties assert it was supplanted by the one applied in Sunset. In any event, they conclude, the Chairman's February letter found that the December 2002 TransGas filing did not meet the minimum requirements of PSL §164(1). Indeed, it was not until June 2003 that the Chairman determined that the TransGas filings to that date met the minimum requirements of PSL §164(1).

TransGas responds in part by suggesting simultaneously that the Sunset standard does not properly apply here and that the "substantial filing" standard referenced in the Chairman's February 24, 2003 letter to TransGas is basically the same standard applied in Sunset. As to the latter contention, TransGas notes that one requirement set forth in Sunset is that "substantial information" required by PSL §164 or pre-application stipulations cannot be missing for a filing to comprise an application.

Much of the balance of TransGas's response is to the effect that it clearly met the "substantial information" requirement while Sunset clearly did not. In this regard, it focuses on four key reasons why the December 2002 TransGas filing is an application while the Sunset filings through the end of 2002 were not.

To begin, TransGas states that Sunset made a total of five filings before it had an application compliant with PSL §164(1) and that three of these filings were made in 2003

[118] Brooklyn Parties' May 12, 2006 Comments, p. 15, quoting Sunset, pp. 20-21.

with one, needed to draft air permits, filed as late as November 2003. It contrasts this with the fact that it made only two filings, with the second in March 2003. Second, TransGas emphasizes that DEC issued a formal determination in February 2003 stating that the Sunset filings to that time were incomplete while no such determination was made with respect to TransGas. Indeed, TransGas goes on, the DEC's general counsel referred to the December 24, 2002 TransGas filing in February 2003 as substantial and a later DEC order, after its March 2003 filing, referred to the later filing as a mere revision.

Third, TransGas calls attention to the fact that the Sunset filings were dismissed quite early in the case, before any hearings were held.[119] In contrast, the Brooklyn Parties argue there is no jurisdiction years after the filings were made and after much effort and money has gone into the case. Fourth, TransGas sees a clear distinction between this and the Sunset case, given that the Chairman's February 24, 2003 letter in this case did not expressly reserve for later consideration the issue of whether the Board had jurisdiction. The Chairman's December 13, 2003 compliance letter in the other case, meanwhile, expressly reserved judgment on that issue.

The last part of TransGas's response is to the effect that it would be unreasonable for us to conclude at this late juncture that we have no jurisdiction, given that two findings to the contrary were previously made in this case. The first of these, according to TransGas, is when the Chairman referred to the December 24, 2002 TransGas filing as substantial and said it remains an application subject to review under PSL Article X. TransGas emphasizes that the Chairman made these statements after some had argued that the December 24, 2002 filing did not meet the minimum requirements of PSL §164(1) or comply with all

[119] TransGas claims, for example, that we have jurisdiction because it spent nearly $15 million to develop its project to this point and because nearly $300,000 of intervenor funds were dispersed. To date, $259,548 of intervenor funds have been paid out in this case. The fund balance is $140,452, including $100,000 that accompanied the amendment.

the applicable pre-application stipulations. The second of these findings was in the 2003 Appeal Order, when this Board asserted jurisdiction over the siting of steam and water lines and other interconnections not subject to PSL Article VII. As this Board found at that time that it has jurisdiction over related facilities, it suggests, this must also be a holding that we have jurisdiction over the entire project.

TransGas does not engage in a point-by-point argument with the Brooklyn Parties over whether its December 2006 filing met each and every one of the four requirements for an application set forth in Sunset.

b. Discussion

We conclude that the December 24, 2002 TransGas filing comprised an application that remains subject to our jurisdiction under PSL Article X. Accordingly, recent comments and pending petitions for rehearing to the contrary are rejected. Our reasoning is as follows.

At the outset, we acknowledge this Board's prior statements that it is obliged to consider jurisdiction as a threshold matter to ensure that its ultimate determinations will bind the parties[120] and that the City and the Greenpoint and Williamsburg communities have a legitimate interest in having this proceeding brought to a reasonably prompt conclusion.[121]

We disagree with TransGas's suggestion that it was previously determined definitely that its December 2002 filing was an application for purposes of conferring jurisdiction under PSL Article X. We give little weight to the fact that the Brooklyn Parties argued in February 2003 that the December 2002 filing did not comply with PSL §164(1) and that the Chairman nevertheless thereafter described the filing as substantial and an application that would be reviewed under PSL Article X. The compliance review process makes no provision for comments and, in any event, the Chairman's letter did not discuss any such

[120] 2003 Appeal Order, p. 3.

[121] September 15, 2004 Order, p. 10.

comments or give reasons why he agreed or disagreed with them. Moreover, as the Board's analysis in Sunset demonstrates, a Chairman's letter stating that a filing does or does not comply with the minimum requirements is but one factor we should consider when a party questions our jurisdiction.[122] TransGas has a better argument when it says that our 2003 Appeal Order concerning jurisdiction over associated water and steam pipes is a holding that we have jurisdiction over the entire project. However, this contention ignores that no arguments were presented to us at that time to the effect that the December 24, 2002 TransGas filing was not an application.

TransGas is unpersuasive as well when it suggests that jurisdiction can be conferred to the extent an applicant spends money, that proceedings progress through evidentiary hearings, and that intervenor funds are distributed. As the Board held in Sunset, "the question of subject matter jurisdiction can always be reviewed regardless of any other actions taken in the proceeding. Subject matter jurisdiction is defined and conferred by the Legislature, and it cannot be expanded or restricted by the Board."[123] Likewise, jurisdiction cannot be conferred by actions of an applicant or the other active parties.

TransGas is also incorrect when it argues the "substantial filing" standard in the Chairman's February 24, 2003 letter and the Sunset standard are necessarily the same thing. This argument assumes the "substantial filing" standard the Chairman applied is qualitative rather than, say, a reference to the size of the December 2002 filing. We lack a reasonable basis to reach such a conclusion.

Applying the Sunset standard, we note that the Brooklyn Parties are correct that a small amount of information required by several clauses of four of fifteen pre-application stipulations was not provided by TransGas on December 24, 2002. However, the Brooklyn Parties do not even claim, much less

[122] Sunset, p. 19-25.

[123] Id., pp. 20-21.

establish, that the missing information was substantial. Our assessment, unaided by anything offered by TransGas, is that the missing information, while needed, was not substantial enough to conclude then or now that the December 24, 2002 filing was not an application.[124]

As to the other prong of the Sunset standard, it expressly states that no information needed by DEC for permitting purposes can be missing. This requirement, however, has to be read in the context that a filing need not be perfect to be an application.[125] Taking this context into account, the fact that DEC did not render a determination of incompleteness in this case and that a later DEC order referred to TransGas's March 2003 filing as a revision, we conclude TransGas met this aspect of the Sunset standard as well in December 2002.

A final point here is that we conclude that the Brooklyn Parties unreasonably contend that the substantial filing standard does not apply in part because it may be a reference to the size of a filing. This argument is inconsistent with their separate contention that we should be persuaded that the December 24, 2002 filing was not an application based in part on the fact that 300 of pages of text had to be changed or added by TransGas in its April 2003 supplemental filing. Having argued, in effect, that the substantial filing standard was not met, the Brooklyn Parties cannot reasonably dispute that standard.

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[124] See Case 98-F-1968 – Application filed by Ramapo Energy Limited Partnership, Order Concerning Interlocutory Appeal on Intervenor Fund Amount (issued May 1, 2001), where the board applied a "seriously deficient" standard similar to that in Sunset and found that the applicant's filing was not an application.

[125] Id., p. 20. In contrast, any intentional failure to serve under PSL §164(3) is a jurisdictional defect.

3. Amendment or New Application?

a. Argument

If we determine that the December 24, 2002 TransGas filing is an application, the Brooklyn Parties assert, alternatively, that we lack jurisdiction over the November 2004 TransGas filing. They contend that the latter filing is a new application, filed after the expiration of PSL Article X, and not an amendment. Three major lines of argument are offered in support, two of which are that the project described in the November 2004 filing (1) differs significantly from the one originally envisioned, requiring substantial additional review, and (2) was submitted too late, after a recommended decision was issued. The Brooklyn Parties' third argument is that there is no precedent that supports consideration of the November 2004 TransGas filing as an amendment.

As to the extent of the differences between the December 2002 and November 2004 proposals,[126] the Brooklyn Parties observe, for example, that the latest proposal is for an underground facility (requiring further examination of geologic impacts; the effects of increased blasting, excavation, and earth removal; Tsunami activity in a flood zone; increased trucking to bring in concrete and to remove contaminated soil; and the removal of millions of gallons of ground water). Other significant changes are that there will no longer be cooling towers, that steam would have to be sold to generate electricity as a technical matter, and that alternatives will have to be considered further given that TransGas has obtained the power of eminent domain. The Brooklyn Parties maintain that, under the standard applied by the examiners who dismissed the Glenville Energy Project Article X application, these changes to the original TransGas proposal are too great to be considered an amendment.[127] The examiners in Glenville had stated, among other

[126] Brooklyn Parties' May 12 Comments, pp. 19-33.

[127] Case 99-F-1835, Application of Glenville Energy Park, Ruling on Motion to Dismiss (issued August 27, 2004) (Glenville). This ruling constituted a dismissal so long as it was not countermanded by the board, and it was never appealed.

things, that the PSL does not require continued consideration of an application which, due to substantial delay and/or amendment, effectively constitutes a new application.[128]

The Brooklyn Parties assert as well that, while one can seek to amend a certificate after it is issued, no one can properly seek to amend an application at any point in time after the conclusion of evidentiary hearings.[129] The Brooklyn Parties observe that the PSL calls for an Article X process involving an application, hearings, a recommended decision, and a board decision. The only common sense way to implement this process, in their view, is to require that the latter steps be limited to considering what is proposed and supported on the record by the time the evidentiary hearings are concluded. Otherwise, they go on, there could be a series of new hearings and new recommended decisions ad infinitum, every time one seeking a certificate wishes to modify its proposal. The latter cannot be what was envisioned by the Legislature, these parties continue, especially in the period following expiration of PSL Article X. The logical extension of a contrary holding, they state, is the absurd result that one seeking a certificate can continue to change its proposal indefinitely in order to remain subject to PSL Article X, including after a certificate is denied. It is suggested that Article X applicants should not generally be able to control the process to this extent.

The Brooklyn Parties' third argument is that there is no prior Article X case in which an application amendment was accepted after a recommended decision was issued.[130] According to these parties, the Bethlehem application was amended prior to any hearings. An alternate stack height and cooling technology were considered in the Athens case, but they say these were considered in supplemental hearings before the recommended decision was issued. The Brooklyn Parties go on to deny there was any Board discussion of an amendment for the KeySpan-

[128] Id., pp. 10-11.

[129] Brooklyn Parties' May 12 Comments, pp. 33-38.

[130] Id., pp. 38-42.

Ravenswood facility. The amendments in the Polletti and Brookhaven cases, the Brooklyn Parties continue, were submitted after certificates were issued. In the Besicorp case, finally, the Brooklyn Parties acknowledge that supplemental information was considered at hearings after a recommended decision was issued. In that instance, however, the supplemental information was requested by the examiners who were concerned the record was deficient on one topic, and was not needed as a result of an applicant's proposal to amend an application.

TransGas responds, offering procedural and substantive reasons why the Brooklyn Parties' arguments should be ignored or rejected on the merits.[131]

In a procedural argument, TransGas explains that, pursuant to a notice issued in this case on July 2, 2004, all interested parties were invited to comment on several issues, including whether the anticipated changes in project design, construction methods, and environmental impacts would be so significant that they should be considered an entirely new proposal. The Brooklyn Parties and others urged at the time that the new proposal should be considered a new application and this Board found to the contrary, citing PSL §165(4) and (5).[132] (The former section allows us to extend the usual 12-month case deadline by no more than six months if at any time subsequent to the commencement of the hearing there is a material and substantial amendment to an application, unless the 12-month deadline is waived. The latter section concerns amendments to certificates.) The Brooklyn Parties sought rehearing on this conclusion at the time and TransGas responded in opposition. In this light, TransGas asserts that the issue is already before us and should not be considered in the context of deciding whether to adopt the examiners' April 2006 recommendation to dismiss.

Should we nevertheless consider the Brooklyn Parties' comments on the merits, TransGas offers a variety of reasons why

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[131] TransGas's June 1 Comments, pp. 15-25.

[132] Case 01-F-1276, Order Concerning Submission of Amendment Application (issued September 15, 2004), p. 8.

it disagrees with those comments. To begin, it believes a comparison between the circumstances in this and the Glenville case is not needed, given that PSL §§164(6)(a) and 165(4)(a), as well as 16 NYCRR 1000.2(r) (the rule defining the term "revision") expressly contemplate material and substantial amendments to applications at any time.

Second, it contends the circumstances in this case and those considered in Glenville are not similar. Key differences, in its view, are: (1) that most of the Article X issues have already been litigated here (no issues had been litigated in Glenville); (2) the materials it was allowed to include in its amendment are narrow and specific and had to be filed within a finite 60-day period (the materials to be filed in Glenville were expansive and nebulous and there was no certainty over whether or when an amendment would be filed); and (3) TransGas was prepared to go to hearings immediately on the filing of its amendment (while the Glenville proceedings made no progress beyond a compliance determination for over nearly two years at the applicant's request and would continue to proceed at a very slow pace).

In this regard, TransGas criticizes the Brooklyn Parties for quoting selectively from Glenville and ignoring the many obvious differences between the two cases. TransGas notes finally, that Glenville was issued on August 27, 2004, prior to the September 15, 2004 order allowing an amendment to be filed within 60 days.

Third, even if some examination should be made now of the nature and extent of the issues that would be litigated going forward, TransGas argues that the Brooklyn Parties' assessment of the situation is wildly exaggerated. To prove its point, TransGas lists those aspects of the original application that would not have to be considered in further hearings.[133] Examples include state and local permits, major plant components other than the substitution of topping turbines and elimination of cooling towers, air emission control methods, water supply

[133] TransGas's June 1 Comments, pp. 19-20.

and waste water discharge, utility interconnections, disposal methods for contaminated soil, air quality impacts, stack height, socio-economic impacts, terrestrial ecology, and cultural and historical resources. Meanwhile, it says, land use, visual, coastal zone, and noise impacts would all be reduced because of the mitigation it now proposes. In this same vein, TransGas also disagrees with many of the Brooklyn Parties' specific assertions about the number and complexity of issues that would need to be considered in further hearings.[134] Significantly increased concrete truck trips would not be needed, for example, given plans to make concrete on site. Nor, according to TransGas, would any new DEC permit applications be required. Similarly, for reasons already discussed, TransGas asserts that further consideration of alternative sites is not needed or appropriate.

Turning to the question of whether amendments to an application can ever be entertained after a recommended decision is issued, TransGas argues that the Brooklyn Parties' argument is procedurally barred. It notes that the Brooklyn Parties made the same argument prior to our September 15, 2004 order and that we did not adopt it. While the Brooklyn Parties sought rehearing on a number of issues at that time, this was not one of them.

Even if not time barred, TransGas maintains the Brooklyn Parties' argument must be rejected to the extent it is inconsistent with various provisions of PSL Article X. Such provisions include PSL §165(4)(a), which expressly provides for a board to extend the time of a final decision by six months if a material or substantial amendment is "filed at any time." TransGas states that we are not authorized to ignore language in the statue that expressly permits amendments at any time. Similarly, TransGas contends that if we agree with the Brooklyn Parties we would have to read words into PSL §164(6)(a), concerning the applicant's submission of additional intervenor funds of not more than $100,000 in the event an application is

[134] Id., pp. 20-22 and Appendix A.

amended in a manner that warrants substantial additional scrutiny "at any time subsequent to the filing of the application." According to TransGas, there simply are no laws, regulations, precedent, or legislative history to support the tortured statutory interpretations that would have to flow from adopting the Brooklyn Parties' argument.

As to the final question of whether there is any precedent to the effect that amendments must be submitted prior to a recommended decision, TransGas says the Brooklyn Parties' examination of precedent establishes only that amendments have been made at various points in time in the process in other Article X cases. TransGas observes that this should not be surprising given that the statute contemplates amendments at any time. In any event, according to TransGas, the Athens case was one where the applicant had to present additional information on alternative cooling technologies following issuance of a recommended decision.

b. Discussion

We affirm the prior holding that TransGas could properly amend its application in November 2004 and all arguments to the contrary, including those set forth in a pending petition for rehearing, are rejected.

Turning first to TransGas's procedural arguments, we note that arguments in the pending petitions for rehearing, to the effect that an amendment with many changes should be considered a new application, were not previously considered by us. In this context, we see no good reason to decline to consider them here. That the Brooklyn Parties did not previously seek rehearing, on whether applications could be amended after issuance of a recommended decision, does not bar our consideration of that issue now given that the September 2004 order was not a final order.

Turning to the merits, there are a number of reasons why the Brooklyn Parties' arguments are incorrect. First, PSL §§164(6) and 165(4) both provide expressly for an application amendment at any time, including those that warrant

substantial additional scrutiny and that by their nature comprise material and substantial changes. The Brooklyn Parties imply that these express provisions should be ignored in the circumstances presented, arguing first that material and substantial filings are new applications and second that amendments have to be filed prior to a recommended decision. But the Brooklyn Parties do not offer reasons adequate to support such a conclusion.

Second, the Brooklyn Parties overstate significantly the extent to which the circumstances in this case and Glenville are similar. TransGas accurately points out a number of important distinctions between the two cases. The examiners in the other case were heavily influenced by a number of factors not present here, including that they could not determine what new or updated studies would be needed, a thorough re-examination would have to be made of the original application to determine what new information would be needed, the anticipated amendment went beyond what the statute allows in PSL §164(6), the equivalent of a new compliance determination would be needed, and the need to start at the beginning at an indefinite point in the future warranted treatment of any new filing as a new application.[135] Moreover, as TransGas emphasizes and the Brooklyn Parties appear to ignore, the chronology leading up to the Glenville ruling was replete with numerous instances over a period of years during which the applicant was not prepared to move the application from the point of a compliance determination by the Chairman to a final decision by a siting board. Repeated promises that updated material would soon be forthcoming from the applicant were never met and it was apparent to all that the applicant lacked the financial resources to go through the certification and permitting processes.

The arguments concerning other Article X cases are of little help in resolving this issue. We are unaware of any other case in which the parties expressly raised the question of

[135] Glenville, pp. 10-16.

whether an amendment can properly be submitted once a recommended decision is issued.

In reaching our overall conclusion to reject the Brooklyn Parties' arguments, there are two sets of arguments that we have not considered. The first has to do with whether an amendment to an application can properly be entertained after the application for a certificate is denied. This is an issue that need not be addressed in the present circumstance, where a certificate has not been denied. The other has to do with how many times an application can be amended, particularly after the expiration of PSL Article X. This too is an issue we need not resolve in the current context.

Department of State Review

1. Argument

In comments dated May 12, 2006, DPS Staff states that it has no exceptions to the examiners' April 2006 recommendations.[136] However, it contends there is one other issue that should be considered. That issue concerns whether TransGas should be required, prior to any final Board decision granting or denying an Article X certificate, to apply for and receive a determination concerning a needed Army Corps of Engineers permit.

In its argument, DPS Staff explains how a TransGas application to the Army Corps of Engineers will initiate a New York Department of State (DOS) review of the project under its Coastal Zone Management Program. It also explains how it and TransGas have disagreed for some time over whether a DOS review will be required in this instance. DPS Staff maintain that the recommended decision properly found in favor of DPS Staff in this regard. Finally, DPS Staff relies on a decision by the DOS concerning the St. Lawrence Cement Company, LLC – Greenport Project to argue that it is very likely that the TransGas project would be denied an Army Corps of Engineers permit.

[136] DPS Staff's May 12 Comments, pp. 1-3.

TransGas replies, making it clear that it understands DPS Staff to be arguing that further hearings should not be held until after TransGas applies for and receives a determination concerning a permit from the Army Corps of Engineers. TransGas objects to DPS Staff's proposal,[137] seeing it as an unreasonable basis for delaying its project further. TransGas believes the approach recommended by DPS Staff would transfer decision-making authority for the project from the Board to the Federal government. TransGas also argues that the DPS Staff proposal is contrary to consistent board precedent and, thus, unfair. There are at least three prior instances, it goes on, where boards certified projects subject to a condition requiring the applicant to obtain necessary approvals from the Army Corps of Engineers prior to construction, including in the Athens, Astoria, and Bethlehem Article X cases.

TransGas criticizes DPS Staff's reliance on the DOS evaluation of the St. Lawrence Cement Company project's consistency with New York's Coastal Management Program. TransGas says that finding was based on unique circumstances and that the circumstances in that case and this one are completely different. As just one example, it points out that the cement project encompassed 1,222 acres for mining and 547 acres of contiguous land with numerous large physical structures and with significant waterfront activities. Its proposal, in contrast, is to place a facility below an 8-acre site and to build a park on top of it.

TransGas reiterates that the ExxonMobil site, which the examiners concluded might be available solely for purposes of review under DOS's alternatives standards, is no longer available due to a change in circumstances. Finally, TransGas asserts DPS Staff is incorrect to rely on the recommended decision on this topic, arguing the examiners' analysis is faulty for reasons discussed in TransGas's brief on exceptions.

[137] TransGas's June 1 Comments, pp. 2-8.

2. Discussion

This issue is similar to the one raised about whether the absence of an executed steam sales contract is a basis to dismiss. DPS Staff is arguing that because it is very unlikely that an Army Corps of Engineers' permit will be received, it would be unreasonable to issue a certificate unless and until it is known exactly what the Corps will do. DPS Staff may or may not ultimately be proven correct in its assessment of what the Corps of Engineers may do, but as long as DPS staff can only speak about "likely" action, that uncertainty, like the absence of a steam sales contract, is not a basis for dismissal. It is not a matter of undisputed fact that the Corps of Engineers would deny the permit, nor can such a fact be easily ascertained.[138]

Moreover, we do not adopt the Staff proposal to require TransGas, prior to receipt of a certificate, to apply for and receive a permit from the Army Corps of Engineers. TransGas is correct when it says that other projects have been certified subject to a condition that an Army Corps of Engineers' permit must be obtained prior to the commencement of construction. That certificate condition has recognized the role of the Corps of Engineers in the review of projects under federal law. No reason has been shown to depart from that practice in this case. There has not been any indication by the Corps of Engineers that it would deny a permit. The only record bases for the conclusion that the Corps would deny a permit are those underlying the examiners' recommendation that this Board should decide that the originally proposed facility would not

[138] The uncertainty of whether TransGas will enter into a steam contract and receive a permit from the Army Corps are greater as compared with whether the City will grant TransGas permission to use unalienable property owned by the City. This difference exists because the City, an active party in this case, consistently maintains permission to use its inalienable property will not be granted. Moreover, it is the City that will decide whether to grant permission to use its inalienable property.

comply with the Coastal Zone Management Act.[139] However, the facility now proposed might satisfy the concerns expressed by the examiners at that time, after it is examined in hearings. For these reasons, TransGas will not be required, prior to our review of the evidence submitted in any further hearings, to apply for and receive a permit from the Army Corps of Engineers.

FINAL DISCUSSION AND CONCLUSION

As discussed in greater detail above, we conclude that TransGas's December 24, 2002 filing was an application and that its November 12, 2004 filing is properly considered an amendment that remains subject to our jurisdiction under PSL Article X.

We find that since TransGas needs permission to use the City's inalienable property to site water and steam pipes, and given that we have no authority to grant such permission, TransGas can only receive such permission directly from the City. While the examiners provide good reasons to support their conclusion that such permission will not likely be forthcoming, we need to know what the City will do with certainty before we can consider whether dismissal would be appropriate under the standard set out in 16 NYCRR 1000.13. We will require TransGas to apply to the City for any necessary permission to use the City’s land. Given the substantial probability that such permission will be denied, TransGas is required to seek and obtain such permission before this case would proceed to further hearings.

We have also considered carefully whether the absence of one or more executed steam sales contracts or of a permit from the Army Corps of Engineers are appropriate bases to dismiss the pending application and whether the circumstances in this case are such that these uncertainties must be resolved before we would be willing to grant or deny an Article X certificate to TransGas. Again, our conclusion is that, whatever doubts there are about whether steam contracts will

[139] R.D., p. 116.

ever be executed and whether an Army Corps of Engineers permit will ever be received, these uncertainties are not reasonable bases to dismiss the pending case under the standard in our regulations. The degree of uncertainty on these topics is also not great enough for us to require that the uncertainty be resolved before this case would proceed to further hearings, and there is not an easy way of obtaining certainty.

The final question we have considered, both generally and with respect to alternative sites specifically, is whether the amended TransGas application pending at this time is insufficient and whether continuation of the case is prejudicial to other parties to an extent that warrants dismissal. Our conclusion is that the pending amended application should not be dismissed for either of these reasons. We acknowledge, however, that in any further hearings, the Article X record will have to be updated concerning: (1) whether there are any alternative sites available in view of changing circumstances, including TransGas's affiliate's eminent domain authority and recently announced plans to dissolve that affiliate; (2) recent changes in land uses in the local community; and (3) whether DEC will continue to review a Remedial Action Work Plan for the project or will conduct this function in some other way.

We conclude that the proceeding should be stayed pending City action on TransGas' request for revocable consents to avoid any unnecessary expenditure of time or resources. Once the City acts finally on TransGas’s request, we will determine whether this case should continue and, if so, on what bases.

The New York State Board on
Electric Generation Siting and the
Environment for Case 01-F-1276 orders:

1. This proceeding is held in abeyance pending receipt of a final, nonappealable decision by the City of New York (City), concerning whether it will give TransGas Energy Systems LLC (TransGas) permission to use its unalienable property for water and steam pipes to be connected to the now-proposed electric generation facility.

2. TransGas shall advise the Secretary in writing, within 14 days after issuance of this order, as to when it will submit a request to the City for the revocable consent discussed in the body of this Order.

3. TransGas shall advise the Secretary in writing within ten days after it receives the decision concerning whether the City will give TransGas permission to use its unalienable property for water and steam pipes to be connected to TransGas's proposed electric generating facility.

4. TransGas shall advise the Secretary in writing within ten days after the decision referred to in Ordering Clause 3 becomes final and nonappealable.

5. This proceeding is continued.

By the New York State Board on
Electric Generation Siting and the
Environment for Case 01-F-1276

(SIGNED) JACLYN A. BRILLING
Secretary