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Brief

August 31, 2001

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VIA HAND DELIVERY

Hon. Janet Hand Deixler
Secretary
New York State Board on Electric Generation
Siting and the Environment
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 99-F-1191 – Application by Astoria Energy LLC for a Certificate of Environmental Compatibility and Public Need To Construct and Operate an Approximately 1000 MW Natural Gas Fired Combined Cycle Combustion Turbine Electric Generating Plant in Astoria, Queens County

Dear Secretary Deixler:

On behalf of Astoria Energy LLC, enclosed for filing in the above-referenced proceeding is an original and twenty-five copies of the Reply Brief on New York City Air Issue. A copy of this brief has been served on all parties via U.S. Mail.

Very truly yours,

COUCH WHITE, LLP

Leonard H. Singer

LHS/dp
Enclosures
cc: Hon. J. Michael Harrison (via e-mail & hand delivery; w/enc.)
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CASE 99-F-1191
ASTORIA ENERGY, LLC
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(As of 8/13/01)

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ORIGINAL

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

IN THE MATTER

- of the - **Case 99-F-1191**

Application of Astoria Energy LLC, for a Certificate of Environmental Compatibility and Public Need to Construct and Operate an Approximately 1000 Megawatt Facility in Astoria, Queens, New York

Department of Environmental Conservation Case No. 2-6301-00647/00001

REPLY BRIEF OF ASTORIA ENERGY LLC ON NEW YORK CITY AIR ISSUE

Dated: August 31, 2001

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I. Introduction

In accordance with the procedural schedule established by the Presiding Examiner at the July 18, 2001evidentiary hearing in this proceeding, Astoria Energy LLC ("Applicant" or "Astoria Energy") hereby files its Reply Brief on the New York City Air Issue. Astoria Energy received an Initial Brief regarding this issue from one party – the City of New York ("City"). In its Initial Brief the City argued that, pursuant to section 172 (1) of the Public Service Law ("PSL"), the Siting Board should authorize the New York City Department of Environmental Protection ("DEP") to require a local air permit for the Project. According to the City, in order to obtain this permit the Applicant would need to comply with the City Air Code and perform the City's cumulative air impact analysis. ("CAIA") (Initial Brief of the City of New York at 1.)

As Astoria Energy stated in its Reply Brief, dated August 24, 2001, the Joint Stipulations executed by the Applicant and the state agencies that are parties to this proceeding, state that notwithstanding PSL § 172 (1), the Applicant will request that the Siting Board authorize the City of New York and its agencies to issue certain specific permits and approvals that would otherwise be required by local regulations, subject to the continuing jurisdiction of the Siting Board. (Ex. 39, Tab A Land Use and Local Laws Topic Agreement at 5.) However, permits otherwise required under the New York City air pollution laws and regulations, including New York City Administrative Code § 24-120, et seq., ("Air Code") are excluded from the list of permits that the Applicant would seek from the City and its agencies. (Id. at ¶ I.C. 4. c)

The City's position is contrary to Siting Board precedent and the express terms of Article X of the Public Service Law. Accordingly, the Siting Board should approve the Joint Stipulations and, specifically, as it relates to the air issue raised by the City in its Initial Brief,

¶ I.C. 4. c of the Land Use and Local Laws Topic Agreement, which provides that an air permit is excluded from the City permits that the Applicant will seek. (Ex. 39, Tab A Land Use and Local Laws Topic Agreement at 5.)

II. The Siting Board Should Not Authorize the City to Require the Applicant to Obtain a Permit Under the City Air Code

The issue raised by the City clearly falls under PSL § 172 (1) which precludes the City from requiring that an Applicant obtain any approval, consent, permit, certificate or other condition for construction or operation of the Project unless specifically authorized by the Siting Board. The City has failed to provide any reasonable basis upon which the Siting Board should allow the City to require the Applicant to obtain a permit under the City Air Code and such authorization is directly contrary to Siting Board precedent. Accordingly, the City's request that the Applicant be required to obtain a permit under the City Air Code should be rejected.

A. The Issue Raised by the City Falls Under PSL § 172 (1) Not PSL § 168 (2) (d)

In different sections of its Initial Brief, the City confusingly refers to both PSL § 172 (1) and PSL § 168 (2) (d). (See Initial Brief of City at 8-9 and at 12-14). However, the basis for the City's request here falls under PSL § 172 (1) and not PSL § 168 (2) (d). Indeed, in its opening paragraph, the City states that it "requests that the Board exercise its authority pursuant to PSL § 172 (1) to authorize DEP to require a local air permit as set forth in the City Air Code." (Initial Brief of City at 1.)

PSL § 168 (2) (d) is not applicable to the relief being sought by the City. That provision provides that before granting a Certificate, the Board must first find and determine that, "the facility is **designed to operate in compliance with** state and local laws and regulations issued thereunder concerning among other matters, the environment, public health and safety..." unless the Board refuses to apply such local law or regulation. (Emphasis supplied.) Thus, PSL § 168 (2) (d) applies to local laws and regulations that govern the operation of a facility, such as the City Noise Code which limits operating noise levels of a facility. (See Ex. 39, Noise Topic Agreement at 10.) If a local law or regulation governing the operation of a facility is unreasonably restrictive, it may be waived by the Siting Board pursuant to PSL § 168 (2) (d).

On the other hand, PSL § 172 (1) applies to any requirement, imposed by, inter alia, a municipality, that an Applicant obtain an approval, consent, permit, certificate or meet other conditions prior to the construction or operation of a facility. Thus, any such local law, regulation or other requirement that must be satisfied prior to construction or operation of a facility cannot be enforced unless the Siting Board specifically authorizes the municipality or agency to enforce the requirement.

The requirement that the City is seeking to enforce is not governed by PSL § 168 (2) (d). The City is requesting that the Siting Board authorize the DEP to require the Applicant to perform a cumulative air impact analysis in order to obtain a permit from the City under the City Air Code. (Initial Brief of City at 8-9.) As the City stated, "DEP requires that certain applicants for an air permit perform the CAIA." (Id.) The City is not seeking to enforce a local law or regulation that governs the operation of the Project. The cumulative air impact analysis that the

City wants the Siting Board to require the Applicant to perform is relevant only insofar as it applies to whether the City will issue an air permit. Thus, the City's request fall squarely under PSL § 172 (1).

Moreover, PSL § 168 (2) (d) applies only to local laws and regulations issued thereunder. The City's alleged requirement that an applicant perform a CAIA cannot be found in any local laws or regulations duly adopted by the City. DEP's authority in this area (outside the context of Article X) derives from section 24-120 et seq. of the New York City Administrative Code. There is nothing in these provisions regarding a CAIA. To the contrary, to obtain a permit to install fuel burning equipment under the Air Code, an applicant is required to demonstrate compliance with a number of technical requirements, such as incorporation of state-of-the-art pollution control, stack and duct specifications and installation upon request of contaminant detector equipment. See NYC Admin. Code § 24-125 (Standards for granting permits). The Air Code, including its provisions related to the issuance of air permits, is entirely devoid of any CAIA requirement.

In its Initial Brief, the City failed to identify any provision of the Air Code or any regulation issued thereunder requiring a CAIA. (Initial Brief of City at 8-9.) Although the City points to sections of the Air Code that authorize the DEP Commissioner to adopt rules, regulations and procedures, the City did not, because it cannot, identify any such rule, regulation or procedure duly adopted by the Commissioner requiring a CAIA. A City department cannot, under the City's Charter, impose substantial new requirements for the issuance of a permit without any basis in law. To do so would constitute a rulemaking under the City Administrative

Procedure Act ("CAPA"), New York City Charter §§ 1041 et seq., and would require a public notice and comment period.[1] The City did not follow any of these requirements regarding a CAIA nor has the City produced any writing establishing that a CAIA is a duly authorized law or regulation. Consequently, the Siting Board cannot, under PSL § 168 (2)(d), authorize the City to require the Applicant to perform a CAIA.

B. The Siting Board Should not, Under PSL § 172 (1), Authorize the City to Require that the Applicant Obtain a Permit Under the City Air Code

Pursuant to PSL § 172 (1), the City cannot require that the Applicant perform the cumulative air impact analysis or that the Applicant obtain an air permit without express authorization by the Siting Board. As Astoria Energy stated in its Reply Brief, the language of the statute makes it clear that the default or presumptive case is that a municipality may not impede the construction or operation of an Article X facility by imposing a local permit or other requirement. To overcome this presumption, a municipality must present evidence to persuade the Siting Board to depart from the normal case of preclusion of municipal permitting authority. The burden on the municipality seeking to exercise permit authority is made express in PSL § 166 (1) (h), which provides, in relevant part:

> [A]ny municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from enforcement thereof.

---

[1] Under CAPA, a "rule" includes, but is not limited to, any statement or communication that prescribes "standards for the issuance, suspension or revocation of a license or permit." CAPA § 1041 (5)(a).

Here, the City has offered no evidence whatsoever to support a position that it should be allowed to impose a local permit obligation as set forth in the City Air Code. Thus, there is no basis in the record for a delegation of such authority to the City pursuant to PSL § 172 (1).

The City argues that the "unreasonably restrictive" requirement set forth in PSL § 168 (2) (d) should be applied to determine whether a municipality should be allowed to require a permit under PSL § 172 (1). (Initial Brief of City at 13.) Assuming, arguendo, that is the proper standard to apply, under PSL § 166 (1) (h) the City has the burden of establishing that its permit requirement is not unreasonably restrictive. However, because the City presented no evidence upon which such a determination could be based, its request to enforce its otherwise applicable permit authority should not be approved.

Indeed, the only basis offered by the City for enforcing its permit authority is its assertion that the City Air Code permitting process addresses issues not addressed by the DEC air permitting process. (Initial Brief of City at 13-14.) However, the City did not provide any evidence in the record to support the assertion that its permitting process will address issues or areas of concern not addressed by the DEC permitting process. For that reason alone, the City's argument should be rejected.

Moreover, even it was true that the City's permitting process addresses issues not addressed in the DEC permitting process, the City's request still has no merit. In Case 99-F-1164, Mirant Bowline, LLC, the Siting Board held:

> [w]e agree with DEC Staff that Article X comprehends the objective of the environmental review in these areas [environmental impacts related to air and water issues] to be coextensive with compliance with the federally delegated

> regulatory requirements. There is no reasonable basis, therefore, for us to consider the same environmental questions in a different manner.

(Id. Order Concerning Interlocutory Appeals, issued June 21, 2001 at 17.)

Thus, the requirement in Article X regarding the minimization of environmental impacts concerning air-related issues (See PSL § 168 (2) (b) and (c)) is satisfied by compliance with the federally delegated requirements. Compliance with those requirements is fully addressed through the DEC permitting process. Addressing additional or other air-related impacts, as the City claims its Air Code requires, is irrelevant to whether an Article X Certificate should be issued. Inasmuch as the Siting Board has held that it is unreasonable for it to address air-related impacts in a different manner than the DEC has addressed such impacts, it is likewise unreasonable for the Siting Board to authorize the City to address these impacts in a different manner, especially since any such analysis by the City is irrelevant to the Article X process.

In Case 99-F-1314, Application of Consolidated Edison Company of New York, Inc., Order Concerning Interlocutory Appeals, issued June 22, 2001 ("East River Order") the Siting Board also held that, as:

> the DEC permits ensure that impacts to air and water quality are minimized and are compatible with public health and safety... the Board must accept the specific findings and conclusions of the DEC Commissioner relating to the air emission and water discharge permits issued pursuant to federal delegation. In considering environmental issues that are subsumed by DEC's air and water permit, the Board must incorporate the DEC's resolution of these questions. Our responsibilities do not include consideration of issues addressed in the DEC permitting process.

(East River Order at 13-14.) Clearly, air permitting issues are within the exclusive jurisdiction of the DEC.

In essence, the City is seeking to enforce a stricter standard regarding air-related impacts than the standards enforced through the DEC permitting process. This is illustrated in the City's insistence that the Applicant "take practicable measures to address exceedances" (Initial Brief of City at 1) which may include "adjustments in plant operations or stack heights" (Id. at 6), which would result in operating conditions different from those approved by the DEC.

However, the Siting Board has rejected such an approach. In Case 99-F-1164, Mirant Bowline LLC, the Siting Board held:

> [w]e further reject the Presiding Examiner's view that we could, in some circumstances, impose stricter standards or conditions than those imposed by the DEC Commissioner. The Presiding Examiner relies on Matter of Harbert/Triga Company, Interim Decision of the Commissioner [Issued may 10, 1989], pp.3-4. He appears to regard an exercise of such discretion as a matter of state law arising under SEQRA, and therefore falling within the Board's jurisdiction under Article X. In our view, such discretion should be exercised by the permitting authority. Moreover, that decision arose in the context of the State Solid Waste Management Policy, itself a matter of state law. Discretion afforded under federally delegated permitting programs must, as DEC Staff argued in its April 6 letter, be exercised by the DEC Commissioner.

(Id. at 18, ftnt 46.)

Because the Siting Board cannot impose a stricter or different standard regarding air-related impacts than the standards imposed by the DEC Commissioner, the Siting Board should not allow the City to impose a stricter or different standard by authorizing it to require compliance with the City Air Code. It would be unreasonable, and contrary to Article X, for the Siting Board to allow the City to enforce a requirement, through delegation under PSL § 172 (1), that the Siting Board has held it could not itself enforce or require.

Furthermore, to the extent that the City is seeking to enforce a standard related to air impacts that is different than the standards applied by the DEC, the City should have raised those issues before the DEC in the proceeding regarding Astoria Energy's application for air permits before that agency. To the extent that the City believes that the DEC process does not examine "protection of individuals in close proximity to the proposed source" (Initial Brief of City at 13-14) – an allegation that is wholly unsupported by any evidence in the record – it should have sought such an examination in the DEC air permit proceeding. As the Siting Board has held, "[a]rguments about the standards DEC is required to apply must be raised to the DEC Commissioner, not in this [the Article X] forum." Case 99-F-1164, Mirant Bowline, LLC, supra at 18. The City did not even seek party status in the DEC proceeding, and thus it should not now complain that the DEC process does appropriately address local air-related issues.

III. Siting Board Precedent Establishes that the City Cannot Require an Article X Applicant to Obtain a Permit Under the Air Code

The City argues that Siting Board precedent does not require a determination that the Applicant should not be required to comply with the requirements of the City Air Code. (Initial Brief of City at 14-20.) However, all relevant Siting Board precedents reach the opposite conclusion. Indeed, Siting Board precedent dictates that the Siting Board does not have the jurisdiction to require an Applicant to satisfy standards encompassed within the DEC permitting processes that go beyond the standards required by the DEC as the permitting authority.

As Astoria Energy pointed out in its Reply Brief, in their Recommended Decision in KeySpan Energy, Case 99-F-1625, issued August 7, 2001, the Examiners rejected precisely the

same argument that the City has raised here. Nevertheless, the City argues that the Examiners in KeySpan Energy erroneously based their ruling on a determination that the DEP cumulative air impact analysis is duplicative of the DEC permitting criteria and, as such, the Siting Board should not follow that decision in this case. (Initial Brief of City at 15.) However, the City has misread the basis for the Examiner's Recommended Decision in KeySpan Energy.

First, the Examiners in KeySpan Energy did not reject the City's argument on the grounds that the DEP cumulative air impact analysis is duplicative of the DEC permitting criteria. Indeed, the Examiners stated that:

> There is no need to address the city's claims about the relative thoroughness of DEC's and DEP's permitting process, except to note that the parties opposing the City's position have raised significant doubts about the validity of those claims.

(KeySpan Energy R.D. at 47.) Rather, the Examiners rejected the City's position because the Siting Board has determined that it will not independently review or consider issues related to matters encompassed within the DEC air and/or water permitting processes.

In other words, the DEC air and water permitting processes fully address and resolve all of the environmental issues related to the air and water impacts of a Project that the Board is required to address pursuant to PSL § 168 (2) (b) and (c). In Case 98-F-1968, Ramapo Energy Limited Partnership, the Siting Board held that:

> "[a]s the DEC Commissioner alone will act on all matters related to air and water permits, evidence on such topics is neither relevant nor material under Article X as it will not impact any findings we will make or conclusions we will reach...

Accordingly, authorizing a further review of these issues by allowing the City to require a permit under the City Air Code under PSL § 172 (1), as the City requests here, is outside the scope of the Siting Board's authority.

The City attempts to distinguish all of the recent Siting Board precedents that dictate a finding that the Siting Board does not have the authority to authorize the City to enforce its Air Code, by asserting that the Air Code imposes requirements that are not duplicative of the requirements under DEC permitting criteria. (Initial Brief of City at 15.) However, as stated supra, even assuming that the DEP and DEC permitting processes are not the same, the Siting Board has determined that it cannot impose different or stricter standards with respect to issues encompassed within the DEC permitting processes, than those required by the DEC. By authorizing the City to enforce its Air Code, as the City requests, the Siting Board would be taking an action that is directly contrary to its prior decisions.

The City further argues that authorizing the City to require the Applicant to comply with the City Air Code permitting process will enable the Siting Board to fulfill its statutory obligation under Article X to ensure that potential health impacts of the Project are minimized. (Initial Brief of City at 9-12.) However, this argument also fails because the Siting Board's statutory obligation to ensure that environmental impacts related to issues within the DEC's permitting process, such as air impacts, is addressed solely by the DEC permitting process. As stated above, in Case 99-F-1164, Mirant Bowline, LLC, the Siting Board held that:

> [w]e agree with DEC Staff that Article X comprehends the objective of the environmental review in these areas [environmental impacts related to air and water issues] to be coextensive with compliance with the federally delegated regulatory requirements.

(Id. Order Concerning Interlocutory Appeals, issued June 21, 2001 at 17.) Thus, the findings that the Siting Board is required to make under Article X, as they relate to environmental issues that fall under the purview of issues addressed by DEC in the DEC permitting process, are addressed by that process and not independently by the Siting Board.

IV. An Air Permit Should Not Be Required Regardless of the Outcome of the Applicant's CAIA

As the City indicated throughout its Brief, the Applicant has been cooperating with DEP with respect to the CAIA. In fact, the Applicant has submitted a preliminary analysis to the DEP which is expected to be finalized early next week. It is important to note that while the Applicant agreed to conduct the CAIA, it did not do so in order to obtain an air permit from the City. In fact, as the Joint Stipulations illustrate, at no time has the Applicant agreed to waive its rights and/or request that the Board delegate authority to the City to require an air permit. On the contrary, the Applicant agreed to conduct the CAIA as a goodwill gesture to provide the City with additional information it is seeking relative to the cumulative impact of all the new power plants proposed to be located there.

In addition, the Applicant disagrees with the DEP statement that its requirement that the Applicant perform reasonable mitigation to address exceedances is not burdensome. Without knowing what form the mitigation might take, an applicant, who has no control over the background NAAQS levels but nevertheless is responsible for correcting them, is put at risk of major modifications to its own plant when, as is the case with Astoria Energy, the Applicant's contribution to the levels of pollutants in the air is de minimus. Therefore, the DEP's suggestion

that potential mitigation would not be burdensome, is unsupported and should be disregarded by the Siting Board.[2]

IV. Conclusion

For all of the foregoing reasons and the reasons set forth in Astoria Energy's Reply Brief, the Board should not authorize the City to require that the Applicant obtain an air permit under the New York City Air Code.

Dated: Albany, New York
August 31, 2001

Respectfully submitted,

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[2] Nevertheless, the Applicant agrees with the City's statement on page 9 of its Brief that it anticipates resolving issues with the DEP without adjudication by the Board. The Applicant fully expects to complete the CAIA showing no exceedances in the NAAQS by early next week, in which case, as the City states (also on page 9), it will certify compliance with the local Air Code. However, regardless of the outcome of the analysis and irrespective of the City's acceptance of it, in no event should the Applicant be required to comply with the local Air Code, address any exceedances that may appear in the analysis, or obtain an air permit from the City.