STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 11-T-0534 - Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need for the Construction of "Rochester Area Reliability Project," Approximately 23.6 Miles of 115 Kilovolt Transmission Lines and 1.9 Miles of 345 Kilovolt Line in the City of Rochester and the Towns of Chili, Gates and Henrietta in Monroe County.

REPLY BRIEF OF DEPARTMENT OF PUBLIC SERVICE STAFF

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I. FACTUAL AND LEGAL BACKGROUND

On July 31, 2014, initial briefs (IB) in this proceeding were filed by Rochester Gas and Electric Corporation (RG&E or the Certificate Holder); the Department of Agriculture and Markets (Ag&Mkts); 4545 East River Road, LLC; Thomas, Anna, David and Marie Krenzer (the Krenzers); and the Staff of the Department of Public Service designated to represent the public interest in this proceeding (Staff). In our reply brief, Staff will address points made in the parties' IB; however, our failure to discuss a point should not be taken to imply either agreement or disagreement therewith.

A. Petitions for Rehearing

In our IB, Staff focused on the Commission orders issued in this proceeding.[1] Given that the Commission deferred

[1] Case 11-T-0534, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued April 23, 2013) (the Certificate Order); Order on Petitions for Rehearing (issued August 15, 2013) (the Remand Order); Order Reopening the Record for the Re-Examination of Location of Substation 255 and the Route of Circuits 40, 940 and 941 (issued November 15, 2013) (the Reopener Order); and Order Approving Environmental Management and Construction Plan for Segment I in Part and Extending Comment Deadline (issued December 20, 2013) (the EM&CP Order).

final action on the petitions for rehearing pending the remand (Remand Order p. 2),[2] Staff will address herein the questions related to the petitions for rehearing.[3]

Public Service Law (PSL) §128(1) provides, in pertinent part: "Any party aggrieved by any order issued on an application for a certificate may apply for rehearing under section twenty-two within thirty days after issuance of the order…." PSL §22 provides that the Commission must grant and hold a rehearing if, in its judgment, sufficient reason therefore be made to appear. The Commission's regulations, in 16 NYCRR §3.7(b), provide:

> Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.

The Krenzers and the Town filed their Petitions, within 30 days of issuance of the Certificate Order as required by PSL §128(1); however, they were not parties aggrieved by the Certificate Order at the time they filed. While both the Krenzers and the Town were aware of the Rochester Area Reliability Project (RARP) before the Certificate Order was issued, neither the Krenzers nor the Town filed for party status

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[2] On May 21, 2013, the Town of Chili (Town) requested the reopening of the proceeding; on May 22, 2013, the Krenzers filed a petition for rehearing; and on May 23, 2013, the Town and the Krenzers filed requests for party status.

[3] See also, Staff's Response to Petitions (June 12, 2013).

prior to its issuance.[4] Subsequent to filing their respective petitions, both the Krenzers and the Town sought party status within the 30-day period specified for petitioning for rehearing. The Krenzers and Town did not become parties until August 15, 2013 when the Remand Order was issued, well after the 30 day time period had expired. Thus, in issuing the Remand Order and the Reopener Order, the Commission acted in its discretion, not because it was obligated to respond to petitions filed by parties aggrieved by the Certificate Order.[5]

Commission precedent is not to the contrary. In an Order in Cases 11-T-0401 and 12-G-0214, the Commission considered timely petitions for rehearing filed by persons who sought party status on the same day their petitions were filed.[6] In that order, the Commission also considered a timely petition filed by a party; it denied the relief sought in the petitions

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[4] The Town filed comments on December 14, 2011 and the Krenzers admitted, in a Reply to Responses to the Krenzers' Petition for Rehearing and for Party Status (June 26, 2013), that they were aware on February 6, 2013, that the RARP would cross their property.

[5] Neither the general rule of procedure set forth in 16 NYCRR §4.3(c)(2) that permission to intervene after the commencement of a hearing may be granted at any time nor the Commission's waiver of that part of the rule stating that a party intervening after the start of the hearing is bound by the record developed to that point may alter the statutory requirement stated in PSL §128(1) that a party aggrieved by a Commission order on an application for an Article VII certificate must apply for rehearing of such order within 30 days of its issuance in order to obtain judicial review thereafter.

[6] Case 11-T-0401, Bluestone Gas Corporation of New York, Inc., Order on Petitions for Rehearing (issued February 13, 2013).

on the merits;[7] the Commission did not discuss whether it could have denied any of the petitions on procedural grounds.[8]

In their IB, the Krenzers did not discuss the errors of fact or law set forth in their petition for rehearing. Similarly, Ag&Mkts did not address factual or legal errors in its IB. The Krenzers did discuss a new circumstance – the willingness of the current owner of the parcel now encumbered by the conservation easement to grant RG&E the easement necessary for the Certificate Holder to apply for a release from the conservation easement.[9] As the Certificate Holder notes (RG&E's IB p. 11), while this new circumstance may affect the route of Circuits 940 and 941, it does not affect the location of Station 255. Accordingly, even if the Krenzers are considered to be a party aggrieved by the Certificate Order, they have not shown a new circumstance relating to the location of Station 255 on Site 7. Their petition should be denied on the merits with respect to such location.

The Town did not submit an IB arguing any of the points it made in its petition for rehearing. As we pointed out (Staff's IB p. 22), the evidence shows that the Commission committed no error of fact or law with regards to the Town's 2030 Comprehensive Plan. Therefore, even if the Town is considered to be a party aggrieved by the Certificate Order, its petition should be denied on the merits.

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[7] Id. at p. 12.

[8] The order was issued in a combined PSL Article VII proceeding (where both §§ 22 and 128(1) apply) and §68 proceeding (where only PSL §22 applies). In contrast to PSL §128(1), PSL §22 gives the right to apply for rehearing of an order to "any corporation or person interested therein…."

[9] Krenzers' Petition for Rehearing, pp. 6-7.

B. Burden of Proof

The Krenzers suggested several times in their IB that RG&E had failed to meet its burden of proof. The Krenzers chided RG&E for failing to include any proposed sites for the location of Station 255 east of the Genesee River in its Article VII application (IB, p.2). The Court of Appeals, however, has held that an applicant need not present every conceivable alternative, but rather only those that it believes to be reasonable.[10]

The Krenzers argued (IB, p. 3) that RG&E bears the burden of proof throughout this proceeding and "must establish that Site 7, the certified route and proposed access road would impact the environment less than Site 20, its associated transmission route and its proposed access road would."[11] State Administrative Procedure Act (SAPA) §306(1) provides, in pertinent part:

> Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence.

Since the Commission authorized the Certificate Holder to construct and operate the RARP, and given that PSL §§ 128(1) and 22 grant the right to apply for a rehearing, those who applied for a rehearing of the Certificate Order bear the burden of

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[10] Tyminski v. Public Service Commission, 38 N.Y. 2d 156 (1975).

[11] Even if the Krenzers were correct as to the burden of proof, their statement does not fully reflect the language of the finding on minimum adverse environmental impact in PSL §126(1)(c).

proof in this phase of the proceeding. In any event, SAPA §306(1) provides that orders in adjudicatory proceedings must be made upon consideration of the record, as supported by and in accordance with substantial evidence.[12] As we explained (Staff's IB, pp. 14-23 and 25-33), the evidence adduced in this phase of the proceeding demonstrates that the Commission should affirm the location of Station 255 on Site 7 and the location of Circuit 40 as authorized in the Certificate Order, and authorize Circuits 940 and 941 to be installed along the route now encumbered by the conservation easement, provided it is timely lifted, or along the agricultural mitigation route. Such Commission decision is therefore supported by and in accordance with substantial evidence.

II. EVIDENCE ADDUCED IN THE REOPENED RECORD PHASE OF THE PROCEEDING RELATING TO STATUTORY FINDINGS OTHER THAN NEED

A. Probable Environmental Impact

For a thorough and balanced discussion of the probable environmental impact of the RARP components that are the subject of this phase of the proceeding, see Staff's IB (pp. 8-14).

[12] As the Court of Appeals stated in 300 Gramatan Ave. Associates v. State Div. of Human Rights, 45 N.Y.2d 176, 178 (1980, 181), substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . . More than seeming or imaginary, it is less than a preponderance of the evidence . . . [citations omitted]."

B. Minimum Adverse Environmental Impact Given Pertinent Considerations and Factors Set Forth in Public Service Law §126

1. State of available technology

See our IB (p. 15).

2. Nature of Alternatives

See Staff's IB (p. 15).

3. Economics of Alternatives

The Krenzers claimed (IB, pp. 15-16) that there is no evidence in the record upon which the Commission may rely to determine the relative cost difference between constructing Station 255 at Sites 7 and 20. Such assertion is incorrect (Staff's IB, pp. 16-18, 33).

4. Effect on Agricultural Lands

While the location of Station 255 on Site 7 will undoubtedly adversely affect the conduct of the Krenzers' agribusiness, our IB (pp. 19-20) shows that the impact on agricultural land can be minimized. Moreover, to the extent agricultural land must be used to mitigate the loss of wetland if Station 255 is located on Site 20, the adverse impact on agricultural land on and near Site 20 would be greater than would otherwise be the case.

5. Effect on Wetlands

According to Ag&Mkts (IB, p. 10), its witness testified that wetland mitigation is "feasible" and "relatively easy to do." On the contrary, while such mitigation is feasible, it is neither easy nor inexpensive, as the RG&E Environmental Panel of witnesses extensively testified on cross-examination (Tr. 742-59). This panel testified that the cost of creating new wetlands was $100,000 per acre (Tr. 754). The panel also explained in detail all the steps necessary to create

a wetland (Tr. 754-57). The steps include: performance of preliminary studies; installation of piezometers or groundwater wells; development of a water budget; conduct of geotech investigations, wetland design, and topographical survey; development of grading and planting plans; conduct of cultural resource investigations, and wetland construction and monitoring; and consultation and approvals from several federal and state agencies.

6. Effect on Parklands

See our IB (p. 19).

7. Effect on River Corridors Traversed

See Staff's IB (p. 19).

8. Other Environmental Impacts

a. Effects on Streams

See Staff's IB (p. 20). A drawback to choosing to locate Station 255 on Site 20, as the Certificate Holder pointed out (IB p. 13), is that the U.S. Army Corps of Engineers (USACE) may not permit the stream in the southeast corner of Site 20 to be relocated, which would then require that the Certificate be amended to take account of the USACE's decision. As Staff explained, however (IB, pp. 12, 20), the Commission could shift the location of Station 255 on Site 20 to avoid the stream and adjacent wetland.

b. Effects on Forests

See our IB (p. 20).

c. Effects on Wildlife

See Staff's IB (p. 20).

d. Access Roads

See our IB (p. 21).

e. Floodplains

See Staff's IB (p. 21).

f. Visual Impacts

See our IB (p. 21).

g. Future Land Use

The Krenzers asserted (IB, p. 28) that agricultural land is the cheapest to acquire by eminent domain because municipalities generally put a lower assessed value on agricultural land than on other land uses. This statement misconstrues the applicable procedure under the Eminent Domain Procedure Law (EDPL).[13] The EDPL requires just compensation be paid to the owner of the property and encourages negotiation and agreement among the parties. It requires the condemnor to have the property appraised by an appraiser and the offer, "in no event shall such amount be less than the condemnor's highest approved appraisal."[14]

See also Staff's IB (p. 22) and Subsection II. E., below regarding future land use.

9. Other Pertinent Considerations

See Staff's IB (p. 23) and Subsection II. F., below.

B. Undergrounding Considerations

See our IB (p. 23).

C. Conformance to Long Range Plans

See Staff's IB (p. 23).

D. Conformance with State and Local Laws and Regulations

In their IB (p. 26), the Krenzers contended that the construction of Station 255 on Site 7 conflicts with the Town's 2030 Comprehensive Plan. Such contention is incorrect as Staff explained (IB, p. 22). Even if the allegation were correct, the

[13] Eminent Domain Procedure Law Article 3.
[14] EDPL §303.

question presented relates to the adverse impact on land use,[15] not to the question of conformance with local substantive legal requirements.

The Krenzers similarly opined (IB, p. 26) that the taking of the agricultural land at Site 7 constitutes an irreversible and irretrievable commitment of the state's agricultural resources in contravention of the state's policy to preserve agricultural land set forth in §300 of the Agriculture and Markets Law. Again, while this policy should be respected, the protection of agricultural land is subject to the balancing findings in PSL §126,[16] rather than to the absolute requirement of conformance with applicable state laws set forth in PSL §126(1)(f).

F. Public Interest, Convenience and Necessity

1. Timing and Delay

The Krenzers and Ag&Mkts alleged (Krenzers' IB, p. 30; Ag&Mkts' IB, p. 21) that RG&E is solely responsible for the delay in the in-service date of the RARP if the Commission chooses Site 20 as the location for Station 255 and has taken no steps to minimize such delay. Until July 10, 2014 (when the Administrative Law Judges' Ruling Regarding Alternative Site 9 and Proposed Northern Routing from Alternative Site 20 became final when no party sought interlocutory review), numerous alternative sites and associated transmission line routes were being considered in this phase of the proceeding. Even now, the

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[15] Any adverse environmental impact on land use is subject to the balancing findings set forth in PSL §126(1)(c) and (g).

[16] The Legislature specifically required the Commission to consider the effects on agricultural lands in making the finding required by PSL §126(1)(c).

components being considered include two sites and eight transmission line routes. It would not be reasonable for RG&E to incur the cost of fully engineering all of these eight configurations. In any event, this is not a prudence proceeding, but rather a certification proceeding subject to the provisions of PSL Article VII.

No party sought to challenge the New York State Reliability Rules adopted by the Commission.[17] Moreover, no party has attempted to claim that RG&E is in compliance with such rules. Nevertheless, the Krenzers (IB, pp. 4, 32-33) and Ag&Mkts (IB, p. 22) opined that the risk of a critical contingency is negligible and that the lack of redundancy in RG&E's system during any delay caused by the selection of Site 20 as the location for Station 255 is appropriate given the value of permanently preserving agricultural resources. These parties focus on the low probability that a critical contingency will occur. This focus is misplaced. Whether a risk that a contingency(ies) will occur is acceptable depends not only on the probability of occurrence, but also on the consequences that would be experienced if the contingency(ies) were to occur. As we pointed out (IB pp. 28-29), without Station 255 in-service, the consequence of the occurrence of an N-1 contingency (the unavailability of Ginna due, for example, to a planned or forced

[17] Case 05-E-1180, Proceeding on Motion of the Commission as to the Reliability Rules of the New York State Reliability Council and the Criteria of the Northeast Power Coordinating Counsel, Order Adopting Modifications to New York State Reliability Rules (issued June 26, 2006); Order Adopting Second Modifications to New York State Reliability Rules (issued July 23, 2007); and Order Adopting third Modifications to New York State Reliability Rules (issued December 24, 2007).

outage) would be the shedding of load -- interrupting electric service to residential, commercial and industrial customers (perhaps including hospitals and other medical facilities) -- for some period of time. As we noted, moreover (IB, pp. 28-29), if an N-1-1 contingency were to occur (the outage of Ginna followed by system operator intervention to prepare the system for a subsequent contingency, followed by the unavailability of two transformers due to a stuck breaker), even more load would have to be shed. Such a situation would not impose a temporary inconvenience on residential, commercial and industrial customers; rather, because the contingency might well last for a significant period of time, it could create serious financial and health implications as well.

2. Comparison of Alternative Sites to Site 7 Regarding Impact to Public Interest, Convenience and Necessity

Staff has acknowledged the adverse environmental impact that would result from Commission affirmation of its decision to authorize Station 255 to be located on Site 7 (IB, pp. 18-22). Nevertheless, a Commission decision to authorize Station 255 to be located on Site 20 would result in a modest cost increase and, most importantly, significant adverse consequences to RG&E's customers if an N-1 or N-1-1 contingency were to occur on RG&E's system. Therefore, the Commission must balance all the factors affecting the public interest, convenience and necessity in favor of the affirmance of its decision in the Certificate Order, except that it should authorize Circuits 940 and 941 to be located along the conservation route if the easement is released on a timely basis, or along the agricultural mitigation route (IB, pp. 31-33).

III. APPROPRIATE CERTIFICATE TERMS, CONDITIONS, LIMITATIONS AND MODIFICATIONS

See Staff's IB (p. 34).

IV. CONCLUSION

For the reasons stated herein and in our IB, the Commission should promptly issue an order concluding the reopened record phase of this proceeding in accordance with the discussion herein and in Staff's IB.

Respectfully submitted,

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Dated: Albany, New York
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