STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Case No. 97-F-0809 - In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, contained in 16 NYCRR -- Addition of a new Chapter X, Subchapter A, to implement Article X of the Public Service Law.

COMMENTS OF U.S. GENERATING COMPANY

Introduction

Pursuant to the July 22, 1997 Notice of Proposed Rulemaking, U.S. Generating Company (USGen) hereby submits the following comments on the proposed regulations to implement Article X of the Public Service Law (PSL). USGen will be directly affected by the proposed regulations. USGen is a national power company comprised of indirect wholly-owned subsidiaries of PG&E Corporation. USGen has ownership and management responsibilities in seventeen electric power plants, accounting for nearly 3,400 megawatts of generating capacity. Several of these facilities are located in New York State. In addition, USGen has acquired all of the New England Electric System's non-nuclear generating business. USGen is also developing new generating facilities that will be located in New York State and elsewhere. An affiliate of USGen, USGen Power Services, participates actively in the wholesale bulk power market and routinely engages in wholesale bulk power transactions in both the New York Power Pool as well as surrounding power pools. USGen is headquartered in Bethesda, Maryland and has offices in Albany, New York.

There are two serious problems with the proposed regulations that will deter the construction of merchant generating facilities that are critical to the development of the competitive electric market. First, the compliance filing process, contained in proposed Part 1003, is a relic from the era of non-competitive, rate-based generating facilities. The

compliance filing process also derives from, and is still used for, regulated transmission facilities under Article VII of the PSL. The process was originally designed to assure regulators and the public that the utility plant certified, and being paid for by the utility's ratepayers, is the plant being built. It is entirely appropriate to require this type of a process where the ratepayers are compelled to finance such a project. With an independent power plant, however, the economic risks are borne by the project developer and owner, not the ratepayers. Therefore, the protective purposes served by the compliance filing process are unnecessary in a competitive market place. Further, the heavy burdens imposed by the process will serve only to discourage competitive power producers which lack the awesome power of a franchised utility. Imposing the proposed, post-certification process that could reopen issues for public comment and evidentiary hearings and interrupt or suspend construction activities creates undue costs, delays and uncertainty. A project developer is essentially forced into trying to obtain financing without being able to represent that permitting is complete. This translates to unacceptable permitting risk for the lenders to merchant plants. Either these plants will not be built in New York State under Article X because of this increased risk, or they will be built at significant cost premiums, to the detriment of consumers. Accordingly, USGen proposes herein procedures that balance the State's interest in monitoring compliance with the issued certificate with the demands of the competitive market place to minimize permitting risk.

The second issue concerns the requirement for an applicant building a non-rate-based generating facility to demonstrate that its facility is superior to all possible alternative sites, designs, technologies, including consideration of need and its costs of producing power. This, too, is an artifact of the old Article VIII, where the State wanted to assure the public that the least cost plant, using the best technology, at the best site, was being certified. In the absence of a competitive market, it was necessary for regulators to make this decision. But in the restructured electric markets, competition forces these decisions and the financial

consequences of poor selection will be borne by the project developer, not the ratepayer. There is no longer any need for the regulator to substitute its judgment for that of the market place.

It is now implicit under the proposed regulations that an applicant can seek an interpretation from the Public Service Commission (PSC or Commission) that its plant has been selected pursuant to an approved procurement process and is thereby exempt from the need, alternatives and cost requirements. It is preferable, however, to streamline Article X itself now and for all future applicants to facilitate the development of the new highly efficient, clean and cost effective power plants that the nascent restructured electric industry will rely upon to reduce costs to consumers. Accordingly, USGen will propose that the regulations facilitate the recent and ongoing efforts by the Commission to restructure the electric markets. In the restructured markets, the Commission has determined that load serving entities (LSEs) will be procuring significant amounts of capacity from plants that must compete to sell their output and are not rate-based. It is extremely unlikely that any new rate-based plant will be built. The construction of new merchant plants, not subsidized by ratepayers, is one of the strategies selected by the Commission to create consumer savings in the future electric markets. Accordingly, USGen proposes regulations herein that reflect the Commission's policies that LSEs should procure capacity from competitive suppliers such as merchant plants, that an applicant proposing a merchant plant has been selected to supply capacity to the LSEs and therefore is exempt from the alternatives, need and cost requirements of Article X.

In our comments, we first identify the provision on which we are commenting. We then summarize the issues that these provisions raise. Finally we recommend modifications to resolve the issues.

Our comments begin with our proposed changes to the compliance filing process. Although it is the last part of the proposed regulations, it is the most significant area of comment.

COMPLIANCE FILING PROCESS

Relevant Provision: Part 1003

Issue:

The proposed Compliance Filing process is premised upon the notion that the regulatory agencies and the public must see every detail of construction to assure that the applicant is not deviating from the certificate. This level of post-permitting scrutiny for a new facility being built in a competitive industry -- *eg.*, a new chemical plant, or oil refinery -- is unheard of. Indeed, if Article X were not enacted and a major electric generating facility needed to obtain its permits from DEC, it would not be subjected to all the requirements and notice procedures resembling those in proposed Part 1003. There is no comprehensive "compliance filing process" in the DEC regulations. Rather, project-specific conditions may be adopted in permits. An extensive post-operational reporting regime is also authorized. (See, *eg.* 6 NYCRR Part 201-6.5).

Now that the electric industry is being restructured into a competitive market, the same type of post-permitting review procedures applied in historically competitive industries should be applied to generating facilities. To do otherwise would subvert the twelve month deadline contained in Article X to streamline the certification of power plants. Indeed, there is no explicit authority, other than the Board's general conditioning power for a certificate, to adopt a compliance filing process that would extend, and in some significant respects, repeat, the twelve month certification process.

The major problems with proposed Part 1003 are the following:

- The initial coinpliance filing and licensing packages, and subsequent changes thereto, are to be filed with the Commission for approval with copies to the public for comment. These filings extend the permitting process far beyond the commencement of construction. Since financing is normally put in place prior to, or soon after, construction commences, the project developer is essentially forced into trying to obtain financing without being able to represent that the permitting for the facility is complete. Complete permitting is a standard condition imposed by lenders prior to extending funds for a project. The lengthy duration of this process creates significant uncertainty and renders the certificate merely provisional. The contingent nature of the certificate created by the compliance filing requirement is significantly different, and has a very different risk profile, than a final certificate which is subject to revocation or suspension only, for example, for material noncompliance. While lenders are willing to share in construction risk, they rarely are willing to share in the permitting risk. The same reasoning will apply to capital investment of the project developer's own money. No one would make such a risky capital investment.

- Furthermore, the licensing packages continue to be filed during construction. Because of the immense detail required in these filings there is a significant likelihood that one or more times construction will have to be suspended while the licensing package is reviewed. Part 1003.3, as proposed, prohibits construction on any item which is the subject of a pending licensing package. Since there is a comment period and perhaps a hearing, these interruptions could be lengthy. The

result of interruptions in construction will be significant slips in schedule accompanied by potentially large cost increases (*e.g.* demobilization and remobilization, higher interest during construction, higher labor costs). These increased costs, by definition, occur prior to ever selling any power.

- The requirement to file cost information and cost control procedures is misplaced. This is highly confidential information and irrelevant to the agencies and public in a competitive market where the ratepayer no longer bears capital cost risk. Disclosure of cost information would allow the market place to misuse the data. Disclosure would seriously undermine one of the building blocks of a competitive market, the construction of merchant plants.

- The affirmative requirement to demonstrate that the engineering design plans and specifications of each major component of the facility are consistent with the certificate or that a modified design will produce electricity "at as low a cost and in as environmentally acceptable a way as possible" (Section 1003.4(d)(2)) is unnecessary. This demonstration, subject to comment, possible evidentiary hearings and Board approval, could literally repeat the Article X proceeding. In addition, a modified design (or change orders to a facility) are an applicant's cost responsibility. In a competitive market, an applicant's internal budget does not need to be reviewed. Conversely, a proposed revision to a certificate requirement affecting, for example, an effluent limitation, should be reviewed.

- There are onerous filing requirements that could be inapplicable to a particular facility. For example, Section 1003.4(e)(7) requires details about fuel contracts. A merchant plant may buy natural gas from the spot market or from many sources. Similarly, Part 1003 requires the applicant to repeat air and water demonstrations (*eg.* Prevention of Significant Deterioration - (1003.4(e)(5)); Clean Water Act 316(b) - 1003.4(b)) that have already been submitted and approved in the Article X process.

- The filing of minutia is not necessary for a merchant plant. For example, the regulations require the applicant to seek approval for a plan for displaying the applicant's signs (1003.4(i)(9)), and titles and qualifications of various supervisory personnel (1003.4(a)(3)). Similarly, there are requirements for generic studies that may be inapplicable to a proposed facility (*eg.*, the two, two-year aquatic ecology monitoring programs (1003.4(f)(2) and (3)); plans for ongoing socioeconomic studies; loss of attendance at recreational facilities, possible effects on property values (1003.4(i)(7), (9)). Unlike siting under the prior Article VIII regime, in a competitive market, the costs for incurring these studies will not come from the regulated rates of an electric corporation.

Taken together, the compliance filing process can create significant delays in commencing construction by attempting to secure approvals that were previously approved in the certification process. Delay and cost can also be created by interruptions in construction because licensing packages are not being approved in a timely manner or hearings are being called. Furthermore, the proposed regulations assume in many instances that it is necessary

for all facilities to file all the licensing packages, irrespective of the proposed facility's unique features. This generic approach may be administratively simple, but it unduly undermines an efficient construction schedule and creates significant permitting risks that can drive financing sources from New York State.

Recommended Solution

Article X applicants should be required to comply with post certification requirements that are similar to those required if the project were permitted under the ECL. Accordingly, regulations should be adopted that require the applicant to file final engineering plans and specifications and other plans with the Commission, for review solely by the DEC and DPS. These agency staffs should have the responsibility to review these plans and specifications, do on-site construction inspections and make inquiries of the applicant to assure that the final design materially comports with the certificate requirements. A schedule for these filings should be submitted by the applicant prior to or shortly after certification. They will be deemed approved by the Commission within thirty days of filing unless the DPS or DEC makes written objection to the Commission. A consultation process with the applicant should be provided to correct any objections within a short time frame. During the hearing process, any party may attempt to demonstrate on the hearing record of the certification proceeding that a post-certification study or plan needs to be filed as a condition of certification. These plant specific requirements would supplant the generic conditions currently proposed in Part 1003.

An applicant would also have the responsibility to submit for approval any proposed revisions (as defined in the regulations) to a certificate requirement. Review of the revision would comply with the procedures in Part 1000.15.

Failure to conform to a certificate requirement should result in the invocation of the suspension or revocation procedures contained in Section 1000.15(e). Throughout

construction and operation, the applicant should be subjected to this risk if it violates a certificate requirement. Furthermore, an applicant should periodically submit certificates of material compliance with the certificate requirements.

Accordingly, to simplify the compliance filing process, we propose that the following rules be substituted for proposed Part 1003:

Part 1003
Compliance Filing
General Procedures

1003.1

Prior to, or after receiving a certificate, the applicant shall submit to the Commission, with a copy to the DEC, engineering and layout plans and specifications of the major components of the certified generating facility. The plans and specifications shall be deemed approved by the Commission within thirty days after the filing thereof, unless within such period either the DPS or DEC raises a written objection thereto. Before an objection is raised, the DPS and/or DEC, as appropriate, shall consult with the applicant in order to resolve the objection within said thirty day period. In the event an objection is raised that cannot be resolved through said consultation, the applicant will be provided an opportunity to submit written comments to the Commission. The Commission will thereupon review the plans and specifications and approve, reject, or order revisions to the filing, within 45 days of the filing of the plans and specifications.

1003.2

The applicant shall file with the Commission prior to, or shortly after, issuance of a certificate, a schedule for the submission of engineering plans and specifications. The schedule may provide for one or a series of filings.

1003.3

In the event the applicant proposes a revision (as defined herein) to a certificate requirement, it shall comply with the requirements in Part 1000.15.

1003.4

No change shall be made in the filing requirements contained in this Part unless supported by substantial evidence in the hearing record and adopted by the Board in the certificate.

1003.5

A certificate may be suspended or revoked at any time pursuant to the procedures contained in Section 1000.15(e).

1003.6

The applicant shall periodically file reports certifying that it is in compliance with all material certification requirements.

COST, ENERGY SUPPLY SOURCE ALTERNATIVES

Relevant Provisions: Sections 1000.2(b), 1000.2(l), 1001.1, 1001.4, 1001.5.

Issue:

Article X provides procedures for the licensing of two types of electric generating facilities. The first is generating facilities that are selected pursuant to a procurement process approved by the Commission. The second is all other generating facilities. For the latter category of plants, Article X requires the applicant to submit more information than plants

selected pursuant to an approved procurement process. Article X requires an applicant to file with the Board:

> A description and evaluation of reasonable alternative locations to the proposed facility, if any, and with respect to a *facility that has not been selected pursuant to an approved procurement process*, a description and evaluation of reasonable supply source alternatives and, where appropriate, demand-reducing measures to the proposed facility; . . .

NY PSL § 164(1)(b)(emphasis added).

> *Except with respect to a facility that has been selected pursuant to an approved procurement process*, estimated cost information, including plant costs by account, all expenses by categories including fuel costs, plant service life and capacity factor and total generating cost per kilowatt-hour, including both plant and related transmission, and comparative costs of alternatives considered;

NY PSL § 164(1)(d)(emphasis added).

> A statement . . . [that] an applicant shall demonstrate that the construction of the facility is reasonably consistent with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan; or that the *facility was selected pursuant to an approved procurement process*;

NY PSL § 164(1)(e)(emphasis added).

The intent of the distinction in the statute seems evident. The Board requires more information from an applicant proposing a facility not selected pursuant to an approved procurement process so that it can protect ratepayers by reviewing the prudence of building the facility where competitive forces do not exist to force the selection of the most suitable facility. Since utilities are able to recover from ratepayers all of their prudent construction costs for new generating facilities, the Board has a duty to protect ratepayers from the costs of unneeded and/or overpriced generating facilities. In contrast, an applicant proposing a facility selected pursuant to an approved procurement process is not required to submit the additional information because the PSC already made its decision that the construction of the facility was prudent when it approved the procurement process that ultimately selected the facility.

The Board's proposed regulations should be amended because they fail to provide any standards for an applicant to determine whether their proposed generating facility was "selected" pursuant an approved procurement process. If the applicant is unsure whether its proposed facility was selected, then it may have to submit much more information than necessary, even though the additional information has no relevance or applicability to the Board's decision to certify the facility.

Section 1001.1(b) and Part 1001.4 of the proposed regulations require the submittal of economic considerations and cost information for the project. Part 1001.2 requires a discussion of reasonable alternative project sizes, technologies, designs, timing, uses, types of action and taking no action. Part 1001.5 mandates a showing of consistency with the State's energy plan. Alternatives must also be discussed in the pre-application report (Section 1000.4(c)(2)(v)).

The proposed regulations do exempt a private applicant from presenting an alternative site or demand reducing measures in the application. However, the regulations continue to subject an applicant to the cost, need and alternative filing requirements. To be exempt from these requirements, an applicant would have to demonstrate that the proposed facility was selected pursuant to an approved procurement process. That term is now defined in the proposed regulations by reference to PSC § 66-i (Section 1000.2(b)).

If necessary, USGen will file a petition for a declaratory ruling with the Commission seeking a declaration that the Commission's decision in Opinion 96-12[1], and its ensuing pronouncements and initiatives to establish a competitive electric market for LSEs to procure electricity from, *inter alia*, non-rate-based, generating facilities, constitutes a program or method of acquiring electric capacity referred to in PSL § 66-i. In addition, USGen believes that the Commission, through the policies it is promoting, has selected, *inter alia*, merchant

[1] Case 94-E-0952 - Opinion and Order Regarding Competitive Opportunities for Electric Service, Op. No. 96-12 (May 20, 1996) (Competitive Opportunities Order).

facilities to be the new plants built in the future to sell output to LSEs. USGen's proposed Athens Generating Project, therefore, is a facility that has been selected pursuant to an approved procurement process and should be exempt from the alternatives, need and cost requirements.

To obviate the need for every possible applicant under Article X to file a petition for a declaratory order, USGen would prefer that the Article X regulations incorporate this interpretation. As stated in the Introduction to these comments, we believe it is far preferable for the Board to reflect the Commission's restructuring efforts in its Article X regulations now so that the regulations would be applicable to new merchant plants proposed to be built under Article X. Moreover, it is very likely that a decision on this issue can be issued sooner by the Board than if a petition for a ruling were filed and noticed for public comment.

A private power developer proposing a merchant plant that will sell electricity entirely in the competitive electricity markets should be considered selected pursuant to an approved procurement process. Private power developers risk their own money to construct generating facilities. They do not seek recovery of their costs in regulated rates from ratepayers of New York State. In addition, private power developers must succeed or fail in a competitive market. When generation is deregulated, as proposed in the Commission's Competitive Opportunities Order, owners of generation will be price takers, i.e., rather than recovering the costs incurred for generation, a supplier will operate and profit only if it is efficient compared to other generators in the market.

Because ratepayers will not be required to pay in regulated rates for the construction or operating costs of a non-rate-based generating facility, the Board's function of protecting ratepayers will not be furthered by reviewing the developer's economic data (including, for example, construction costs, fuel costs, heat rate, financing plans, and the projected pricing of their electricity). This data is highly sensitive and should not have to be filed or litigated in an Article X application. Disclosure of the data could compromise an applicant's negotiating

positions with vendors, LSEs and other competitors and could be used improperly for price fixing, to the detriment of the competitive market. Finally, private developers cannot reasonably be expected to propose, let alone implement, alternatives to their projects.

The Board's proposed regulations go part way in exempting private power developers from submitting some of the additional information outlined above. Section 1001.2(d) exempts "private applicants" from having to submit a description and evaluation of demand-reducing measures to the proposed facility. In addition, site alternatives may be limited to parcels owned by, or under option to, the private applicant. The proposed regulations define a private applicant as "an applicant that does not have the power of eminent domain." Section 1000.2(l). As will be discussed in greater detail below, applicants proposing non-rate-based generating facilities that will sell strictly into the competitive electric markets should be deemed to be selected pursuant to an approved procurement process; thus, the definition of private applicant should be changed to make this point clear.

USGen believes the most direct resolution of the issue is for the Board's Article X regulations to recognize (1) that the Commission's policy to open the wholesale and retail electricity markets to competition, as first set forth in its Competitive Opportunities Order, constitutes an approved procurement process; (2) this approved procurement process is consistent with the most recent state energy plan; and (3) so long as the applicant for certification is a "private applicant" (i.e., an applicant that does not intend and will not seek to recover the costs for such facility other than through the sale of the facility's output in the electricity markets and not through regulated rates as an electric corporation), then the proposed facility will be deemed to have been selected within the meaning of Article X. Accordingly, USGen recommends changes to Sections 1000.2(b), 1000.2(l) and 1001.1 of the Board's proposed regulations.

The term "approved procurement process" is defined in Section 160(7) of Article X to mean "any electric capacity procurement process . . . approved by the commission as

reasonably consistent with the most recent state energy plan adopted pursuant to article six of the energy law." An approved procurement process is not limited to a formal bidding program established by a particular utility. The legislature gave the Commission great flexibility in deciding what constitutes a procurement process. It is any process that the Commission approves for the acquisition of electric capacity and energy.

While bidding programs are specifically mentioned in the law governing the Commission's authority to approve a procurement program, the legislative history of Article X makes clear that Commission-approved procurement programs are not limited to bidding programs. In commenting on the proposed Article X legislation, the New York State Energy Office stated:

> The siting process would also be modified to account for the existence of the energy process and bidding *or other Commission-approved procurement programs*, through which issues related to the need for additional capacity and the relative merits of alternative supply options would already have been considered. *As a result, fewer filing requirements would apply to facilities that were selected pursuant to a procurement program* approved by the Commission, and after May 1, 1994, approved by the Commission as reasonably consistent with the State Energy Plan.
>
> Most notably, applications for such facilities would not have to present information on need for the facility and reasonable energy supply source alternatives. They would, however, continue to be required to present evidence on the site-specific environmental impacts of the proposed facility and information on reasonable locations for such facilities.

Memorandum from New York State Energy Office to Counsel to the Governor (July 14, 1992) at 4 (emphasis supplied).

Section 66-i(2) of the PSL grants the Commission authority to "require each electric corporation to conduct competitive bidding auctions *or other procurement programs* for the purpose of satisfying electric capacity needs from reasonably available sources and suppliers of electric capacity." NY PSL § 66-i(2) (emphasis supplied). The breadth of the Commission's discretion in approving a procurement process was explained by the Chairman of the New York State Assembly Committee on Energy:

> Section Five [codified as Sec. 66-i of the PSL] is designed to leave the Public Service Commission with *a great deal of administrative flexibility. The Section does not mandate any particular mechanism; it simply prescribes a policy, and allows the Commission and the utilities to implement that policy in the most appropriate manner.* The intent is not to bind the Commission with procedural details, but nevertheless to require the Commission to enforce the basic competitive policies set forth in the section. The Commission's implementation of this section will also be guided by the state energy plan.

Letter from Paul D. Tonko, Chairman, New York State Assembly Committee on Energy to Governor Mario Cuomo (July 15, 1992) at 2 (emphasis supplied).

Accordingly, the Commission has discretion to determine what constitutes an approved procurement process. As will be discussed below, energy and capacity procurement in the competitive wholesale and retail electricity market meet the requirements for an approved procurement process.

Consistent with its authority under PSL § 66-i, the Commission has established a program for LSEs, such as electric utilities, to procure electricity other than through traditional bidding programs: reliance on a competitive market. In its Competitive Opportunities Order the Commission announced its policy and intention to deregulate the electricity market and encourage competition wherever feasible.[2] One of the Commission's goals articulated in its Order was to make the generation of electricity competitive. To achieve that goal, the Commission strongly encouraged utility divestiture of generating facilities to allay concerns about vertical market power and avoid anti-competitive behavior. The Commission stated:

> Critical to a movement toward a restructured industry is the need to avoid undue concentration of market power and particularly the use of monopoly power on the distribution side to unduly restrict choice on the generation side. . . . Divestiture may create a larger number of competing generating companies and ESCOs, which can result in a dynamic and aggressive market.[3]

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[2] Op. No. 96-12 at 30.

[3] Op. No. 96-12 at 59.

The Commission recognized that in the new competitive market, unregulated suppliers will bear more of the risks. Since ratepayers will not be harmed as a result of poor decisions made by electricity suppliers, much of the Commission's regulatory policies designed to protect ratepayers are no longer relevant or applicable. Where in the past, the decision to build new generating capacity was subject to close regulatory scrutiny, the Commission's policy now is to let the competitive market determine which plants will be built and which suppliers would be selected to operate. In its Competitive Opportunities Order, the Commission discussed how the competitive market would drive business decisions by electricity providers rather than traditional regulation by the Commission:

> First, competition should result in lower bills as competitors have a greater incentive to lower costs than do utilities under a regulatory regime. This has generally been the experience of the electric industry abroad and other deregulated industries. As customer choice increases, further pressure is applied to lower cost or provide customers with tailor-made options. And as prices fall, economic growth is encouraged. Additionally, innovation and the introduction of new products and services should be stimulated as competitors vie for customer business. *We also expect to see market-based solutions to public policy issues rather than regulatory mandates. Competitive providers (generators and energy service companies) would bear more of the risk of investment decisions, and customers less, than under regulation.*

Op. No. 96-12 at 29 (emphasis added).

The Commission explicitly found that the best way to reduce electricity rates in New York is to introduce wholesale and retail competition into the electric industry:

> We believe that introducing competition to the electric industry in New York has the potential to reduce rates over time, increase customer choice, and encourage economic growth; and we declare our intent to encourage competition wherever feasible.
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> Competition in the generation and energy services sectors of the electric industry will be pursued for its potential to reduce rates over the long term, to increase customer choices, and for other economic advantages.
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> In order to ensure an orderly transition to retail competition, a short wholesale competitive phase will be implemented. Wholesale competition is expected to begin in early 1997, and retail competition is expected to begin in early 1998.

Op. No. 96-12 at 30, 88, 89.

At the time the Commission issued its Competitive Opportunities Order, Chairman John F. O'Mara stated:

> These efforts have set the stage for a new era in which competitive forces will remodel the electric industry -- revitalizing New York's economy and providing customers lower prices and greater choices. . . . Competition and not regulation offers the most effective force for delivering energy to New Yorkers at reasonable prices and with diverse service options.

Case 94-E-0952 - Statement by Chairman John F. O'Mara (May 16, 1996 Session).

The Competitive Opportunities Order also follows the mandate of the most recent State Energy Plan adopted pursuant to Article 6 of the Energy Law, which specifically endorses the idea of acquiring capacity and energy on the open market. "The PSC should, consistent with its statutory responsibilities, encourage the development of competitive electric markets, rigorous performance-based regulation and measures designed to ensure that all consumer groups benefit from growing competitive pressure in the industry." New York State Energy Plan, Vol. I (1994) at 26.

To implement its policies, the Commission in its Competitive Opportunities Order directed each of the utilities to file restructuring proposals and rate plans including, *inter alia*, schedules for introducing retail access to all of the utilities' customers and unbundled tariffs consistent with the retail access program. In accordance with Opinion 96-12, five of New York's seven electric utilities filed proposed restructuring plans on October 1, 1996. A sixth electric utility filed in July, 1997. In several of the restructuring proceedings, separation, including divestiture, of utility fossil generation has been recommended by the administrative law judges to deal with market power and subsidization concerns. Through its Competitive Opportunities Order and its ongoing proceedings to deregulate the State's electric utilities, the

Commission has moved vigorously to implement the State Energy Plan's call for a competitive electricity market.

Since its Competitive Opportunities Order, the Commission also has issued orders to implement its vision and goals to bring competition to the wholesale and retail electricity market. On May 19, 1997, the Commission issued an order that laid the groundwork for the creation of a competitive retail energy services market.[4] The Commission ordered the electric utilities to file tariffs to implement retail access. The Commission has further implemented its goals of developing a robust competitive retail electricity market with the its orders approving the Dairylea pilot program and Orange and Rockland Utilities, Inc. retail access pilot program which were designed to facilitate the development of retail access to enable customers to choose their energy supplier.[5] Most recently, the Commission ordered the introduction of competition in the provision of metering services.[6]

In initiating steps to create competitive wholesale and retail markets, and deregulating the generation of electricity, the Commission has approved a procurement process for LSEs. By encouraging the divestiture of, and competition between, utility generating facilities and other generators, the Commission's policy is to let the competitive market decide not only the need for existing generating capacity, but the need for new generating capacity as well. New merchant plants are to be built, not rate-based facilities. Thus, so long as an applicant for certification will sell electricity from its proposed facility output on a merchant basis and does

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[4] Case 94-E-0952 - Opinion and Order Establishing Regulatory Policies for the Provisions of Retail Energy Services, Op. No. 97-5 (May 19, 1997).

[5] Case 96-E-0948 - Petition of Dairylea Cooperative Inc. to Establish an Open Access Pilot Program for Farm and Food Processor Electricity Customers, Order Establishing Retail Access Pilot Programs (June 23, 1997); Case 95-E-0491 *et al.* - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service, Order Concerning Settlement Agreements (May 3, 1996).

[6] Case 94-E-0952 - Opinion and Order Establishing Regulatory Policies for Competitive Metering, Op. No. 97-13 (Aug. 1, 1997).

not seek to recover the costs for its proposed facility through traditional rate regulation, the Article X regulations should provide that the project is deemed to be selected pursuant to a Commission-approved procurement process.

On a related issue, the proposed definition of private applicant (1000.2(l)) is too narrow to cover the broad and newly developing entities and alliances that will build merchant plants. The proposed definition includes only an applicant not possessing the power of eminent domain. This definition, however, fails to exempt an otherwise private applicant who enters into a partnership with a regulated utility, be it a water, gas, steam, or an electric corporation. Or, the applicant might be an unregulated affiliate of a regulated corporation within a holding company. Nor does it exempt applicants who rely upon Industrial Development Authority financing, which entity possesses the power of eminent domain.

The definition apparently was proposed to distinguish between the traditional applicant under the old Article VIII siting process -- a regulated electric corporation -- and the new unregulated applicant under Article X that is expected to build merchant plants, compete in the competitive markets and not seek rate recovery of any captive body of ratepayers. The proposed definition will discourage innovative and cost efficient joint ventures and other alliances, to the detriment of ratepayers.

Recommended Solution

Section 1000.2(b) should be amended as follows:

Approved Procurement Process: a program or method of acquiring electric capacity referred to in PSL Section 66-i. An applicant proposing a major electric generating facility that will offer to sell its output in the electric markets and will not seek, as an electric corporation, to recover its costs through regulated rates, is a facility selected pursuant to an approved procurement process for the purposes of this article.

Section 1000.2(l) should be amended as follows:

Private Applicant: ~~an applicant that does not have the power of eminent domain.~~ any person constructing a major electric

generating facility that will offer to sell its output in the electric markets and will not seek, as an electric corporation, to recover the costs of such facility from regulated rates. A private applicant's proposed major electric generating facility is deemed to have been selected pursuant to an approved procurement process.

Part 1001.1 should be amended as follows:

The application shall contain a description of the proposed site and facility to be built thereon, consistent with PSL Section 164(1)(a). Such description shall include:

(1) a discussion of the environmental setting,

(2) for facilities that have not been selected pursuant to an approved procurement process, an assessment giving supporting details of the economic considerations, reliability, and feasibility of the preferred source(s) of power.

COMMENTS ON OTHER PROPOSED REGULATIONS

Relevant Provisions: Section 1000.2(n); Part 1000.3

Issue:

Section 1000.2(n) defines the "Public Involvement Program" (PIP) in very general terms. Part 1000.3, captioned "Public Involvement Program", does not provide much more guidance. The provision states simply that it is the "responsibility of the applicant to seek stakeholders' participation actively throughout the certification and compliance filing process." Neither applicants nor the public can tell from these broad provisions what an applicant is expected to do or the extent of public participation to be undertaken. Applicants and members of the public will have different perspectives on the applicant's obligations. While proposed Section 1000.3(c) provides that an applicant may submit its proposed PIP to Staff for approval, this will not eliminate charges from other parties that the applicant has not done enough. As a result, the Board should clearly articulate its expectations so that applicants, intervenors and

the reviewing courts have standards against which requirements of public involvement can be measured.

In addition, two changes should be made in proposed Section 1000.4(e). First, the section should conform to the statutory language with respect to parties being bound to stipulations. Second, providing a mechanism for the arbitration of disputes arising during the consultation process would aid in the process of obtaining stipulations by avoiding lengthy and potentially intractable negotiations.

Recommended Solution

- Specific guidance should be provided concerning the consultation process required of an applicant. Specifically, Sections 1000.3(a) and (b) should be deleted and replaced with the following:

  Section 1000.3(a) should be amended to state:

  (a) To ensure that Article X decisions address the concerns of stakeholders and that the Board's consideration of an application is not delayed, it is the Board's policy to require applicants to seek actively public participation throughout the certification and compliance filing processes and to require stakeholders to articulate promptly any concerns they may have about the applicant's proposed project.

  (b) The Public Involvement Program has five components. First, the applicant is required to consult informally with the public pursuant to Section 1000.4(b). Second the applicant is required to consult formally with the public, various state agencies and municipalities pursuant to Sections 1000.4(c) and (d). Third, the applicant is required to meet the requirements of Part 1000.5. Fourth, the applicant is required to meet the requirements of Section 1003.3(e) and (f).

Fifth, the applicant is required to meet the notice requirements of Section 1000.6(e).

(c) If the applicant completes all five components of the Public Involvement Program, the applicant shall have satisfied its obligations to inform stakeholders adequately about the project and to afford them a meaningful opportunity for input on all phases of the certification and compliance filing. If a stakeholder claims that the applicant has failed to satisfy these obligations, the presiding officer or Board, as appropriate, shall take into account the timing and scope of all notices given by the applicant, the extent to which the stakeholder had an opportunity to participate in prior stages of the PIP, and the extent to which such stakeholder was actually a participant in such prior stages of the PIP.

Current Section 1000.3(c) should be redesignated as 1000.3(d).

In addition, Section 1000.4(e) should be amended as follows:

(e) In order to attempt to resolve any questions that may arise in the consultation process initiated pursuant to Subdivision (b) hereof, the Board shall designate a presiding officer, who shall mediate any issue(s) relating to the methodology or scope of any study or program of studies concerning which agreement cannot be reached and receive any stipulation setting forth any agreement that is reached. If, after such mediation, no agreement has been reached, the applicant and any other party with whom agreement has not been reached may jointly request that the presiding officer resolve the matter and issue a ruling on all parties requesting such arbitration. An original and ten copies of any such stipulation shall be filed with the presiding officer and with a copy to be served contemporaneously on the Chief Executive Officer of each agency and municipality listed in PSL § 164 (2) and on any other person who participated in the consultation process after having been notified thereof as a part of the public involvement

program discussed in Part 1000.4 of this part or otherwise. All parties to a pre-application agreement shall be barred from raising any objections to the scope of any stipulated studies or program of studies in any such agreement.

Relevant Provision: Section 1000.6(a)

Issue:

The proposed regulation is overly broad in that it would require publication of a notice in each municipality in which the proposed "or any reasonable alternative site is located". The problem is that there may not be an alternative site required to be listed in the application but the proposed language would require publication in each municipality, anywhere in the State, where a reasonable alternative site could exist. The proposed regulation needs to be qualified by limiting publication to the municipality in which an alternative site, if required to be listed in the application, is located.

Recommended Solution

Section 1000.6(a) should be amended to read:

(a) Publication of required notices shall be satisfied by publication both in the newspaper(s) designated for publication of official notices of each municipality in which the proposed or any reasonable alternative site listed in the application is located, and in the newspaper of largest circulation in county(ies) in which the proposed or any reasonable alternative site listed in the application is located, except that in cases of amendments or transfer of certificates, the appropriate site is that of the certified facility.

Relevant Provision: Sections 1000.6(c)(6); 1000.9(a)

Issue:

The proposed notice requirement should make clear that the Board cannot authorize an alternative site for a private applicant. The Board could approve or reject a private applicant's proposed site, or certify it based upon terms and conditions. But the proposed regulations permit a private applicant to limit consideration to the proposed site solely (Sections 1000.6(d) 1001.2(d)). Without the clarification, the notice will confuse the public.

Section 1000.9(a) also requires a similar qualification to make clear that "other local parties" seeking monies from the intervenor fund must represent persons in the vicinity of the proposed site only if the applicant is a private applicant.

Recommended Solution

Amend Section 1000.6(c)(6) to read as follows:

> (6) Except where the applicant is a private applicant, a statement that PSL Article X permits the Board to authorize a location for the facility different from the location(s) described in the notice;

Also amend the second sentence of 1000.9(a) as follows:

> The term other local party means any nongovernmental party which represents the interests of persons in the vicinity of the proposed or other alternative sites, except that if the applicant is a private applicant, the other local party must represent the interests of persons in the vicinity of the proposed site solely.

Relevant Provision: Part 1000.15

Issue:

Section 1000.15(a)(4) states by negative implication that a proposed change in facility output greater than twenty MW is a "revision", regardless of whether this change results from

a physical modification to the facility or an increase in output resulting from the construction of a facility that turned out to operate at a greater level of efficiency than that anticipated. We believe that any change which is not related to a physical change of the facility along the lines of that described elsewhere in Part 1000.11 should not itself constitute a "revision".

Recommended Solution

- Section 1000.15(a)(4) should be revised to state:

> (4) proposed change in facility output (given ambient temperature of 59F, an atmospheric pressure of H.7 psi and a relative humidity of 60%) is not likely to result in any material increase in environmental impact (and thus is a modification) if such increase does not result from any changes described in subsections (1), (2) or (3) of this regulation or if the change in facility output is less than five percent of the capacity set forth in the application or certificate, as appropriate.

Relevant Provision: Section 1000.15(e)

Issue:

The grounds upon which the Board may amend or suspend a certificate are too broad. USGen does not oppose the amendment or suspension of a certificate on the grounds articulated in (e)(1) or (2), *i.e.* making false statements in the application or noncompliance with a material term of the certificate or the PSL. However, subparagraph (3) provides that the discovery of information -- any information --, such as the discovery of new information on existing or developing technologies, that the applicant simply did not know about, could lead to an amendment or suspension. This provision creates an unacceptable degree of uncertainty. Uncertainty creates greater financing costs and therefore higher productions costs.

Moreover, limiting the applicability of the provision to the time before the initial compliance is approved does not remedy the problem. As explained, supra (Comments p. 4), USGen opposes the adoption of the proposed compliance filing process. Indeed, if an applicant violates (e)(1) or (2), the procedures contained therein should be invoked *anytime* after the certificate is issued.

Recommended Solution

Delete 1000.15(e)(3).

Relevant Provision: Section 1000.15(g)

Issue:

Section 1000.15(g) requires the permanent Board to hold an evidentiary hearing if a revision or revocation is being considered to a certificate but not a suspension or amendment. A proposed suspension or amendment can materially affect the rights of the applicant and the operation of the facility. Apart from the situation where a certificate is suspended under emergency conditions pursuant to Section 1000.15(g)(2), the applicant should be entitled to an evidentiary hearing if a suspension or amendment is proposed. Traditional principles of due process of law dictate that such a hearing be provided. Moreover, the statutes and regulations governing the issuance and administration of the State environmental permits to be issued by the Board require that an opportunity for a hearing be provided for all agency-initiated permit suspensions, modifications, revisions, amendments, or revocations. *See*, N.Y. Environmental Conservation Law § 70-0115 (1); 6 NYCRR § 621.14.

Recommended Solution

Amend Section 1000.15(g)(1) to read as follows:

(g) Notwithstanding the provisions of subdivision (f):

(1) the permanent Board will hold an evidentiary hearing after issuing the Order to Show Cause, if a suspension, revision, amendment or revocation is being considered;

Relevant Provision: 1000.16(b)(3):

Issue:

If a certificate is to be transferred, proposed regulation 1000.16(b)(2) requires service on each of the parties to the certification proceeding. In addition, subparagraph (3) requires notice on the statutory parties required to be served with an application under Article X. Both of these provisions are reasonable. Subparagraph (3) however; also requires notice to "property-grantors". The term is not defined and it is extremely ambiguous.

Recommended Solution

Amend Section 1000.16(b)(3) to state:

(3) an affidavit of service and publication of a notice concerning the petition on all property-~~grantors~~ owners that have executed agreements to convey property rights to the applicant and all other persons, municipalities or agencies entitled by law to be given notice of, or to be served with a copy of, any application to construct a major electric generating facility, which notice shall ...

Relevant Provision: 1000.16(a)

Issue:

If the applicant proposes to transfer the certificate to an Industrial Development Authority (IDA) for financing purposes, and the applicant remains the real party in interest, it should not be required to follow the procedures in 1000.16. A letter to the Secretary of the Board providing notice of the intended IDA financing should suffice.

Recommended Solution

Add the following sentences to 1000.16(a):

A certificate may be transferred to an Industrial Development Authority (IDA) without complying with the procedures specified in this provision as long as the original applicant builds and operates the facility. Notice of an IDA transaction shall be provided solely to the Secretary.

Relevant Provision: 1001.5

Issue:

Two typographical corrections are required. First, in subdivision (b), the reference to Subdivision (b), should be to Subdivision (a). Second, there are words missing before the word "detail". We suggest inserting the following phrase: "shall contain sufficient".

Recommended Solution

Make the corrections as stated above.

Relevant Provision: 1001.6(b)

Issue:

The reference to permits should be more precise. Permits to be issued as part of a certificate are those issued pursuant to a federally delegated program.

Recommended Solution

Amend 1001.6(b) to read:

The term of any federally delegated permits issued as part of a certificate shall be five years, unless otherwise specified by the Board.

Relevant Provision: 1001.7

Issue:

To avoid repetitive and unnecessary filings, several changes should be made to this provision. First, in Section 1001.7(a) only governmental consents or approvals should be identified, not corporate, private or financial. Second, only "material" changes in the status of each application should be the subject of a special notice.

In addition, the requirements of subdivisions (b) and (c) are redundant. An applicant should be prepared to post security such as a letter of credit that the state can draw upon, for reclamation or restoration of a site in the event the project is not completed. USGen would also offer the fund in the event reimbursement is necessary for decommissioning a plant after its useful life. Separate requirements to describe a "security fund", "insurance" and available "financing resources" are unnecessary.

Recommended Solution

Amend 1001.7 as follows:

1001.7 Additional Information Required.

(a) The application shall: identify any permit, governmental consent or approval or license which will be required for the construction or operation of the facility. The application shall specify the date application for any such approval was made or the estimated date on which it will be made. The applicant shall notify the Secretary, presiding officer and each party of any material change in the status of each such application.

(b) If required by the Board, ~~D~~describe ~~any~~ the security to be made available, such as a letter of credit or corporate guarantee, ~~fund and any insurance in place or to be obtained~~ by the applicant to restore any disturbed area(s) in the event the project cannot be completed or following the useful life of the facility.

(c) Delete.

Relevant Provision 1001.8

Issue:

Proposed Part 1001.8, adopting the substantive provisions of the Environmental Conservation Law and DEC's implementing regulations by reference, could be problematic with respect to the State Environmental Quality Review Act, which many construe as substantive in nature. The Legislature clearly intends that SEQRA be supplanted by an Article X proceeding. In addition, this section unnecessarily incorporates by reference DEC's air, solid and hazardous waste, and water requirements inasmuch as those are specifically referenced in the relevant sections of Part 1002. It would be preferable to rely on the Part 1002 references to cover the federally mandated air, hazardous waste, and water permitting requirements and processes, with Part 1001.8 only incorporating by reference specifically enumerated articles of the ECL and associated implementing regulations not otherwise covered by the references in the sections of Part 1002 (i.e. Articles 15, 23, 24, 25 and 40).

Recommended Solution

Part 1001.8 should be revised as follows:

> In connection with the content of applications, the substantive requirements of the ECL and implementing regulations not referenced in Part 1002 but which are otherwise applicable to a proposed facility (i.e., ECL Articles 15, 23, 24, 25 and 40, but excluding Article 8) shall be applied by the Board. ~~that are applicable to air, solid waste, hazardous waste, terrestrial and water resources which are potentially affected by a proposed facility shall apply in connection with certification proceeding under PSL Article X.~~

Relevant Provision: 1002.2(b)(2)

Issue:

The requirement to submit a study plan on the effect of the cooling water intake ninety days before the studies are proposed to begin may not always be practical. In connection with the Athens project, for example, the Company is planning to submit its application by year end 1997. It could not comply with this section and also make the filing by that date. Rather than delay the filing, USGen will attempt to secure a stipulation in the consultation process on the scope and method for the studies.

Recommended Solution

Delete (2) and amend (b)(1) as follows:

(b) The applicant shall:

(1) consult with the staffs of the department and DEC as to any study to be made to determine the effect of the proposed cooling water intake on aquatic life in the vicinity of the intake; and

(i) ~~a study plan describing~~ as to the methodologies and data to be employed to demonstrate that the cooling water intake structure proposed reflects the best technology available for minimizing adverse environmental impact as required by any regulations established by DEC to ensure compliance with section 316(b) of the Clean Water Act; and

(ii) a proposed list of CAO.

Relevant Sections: Section 1002.8, 1002.9, 1002.10 and 1002.11

Issue:

DEC's air permitting regulation no longer contemplates a two-step permitting process. See 6 NYCRR Part 201. Accordingly, references in these sections to permits to construct and

certificates to operate are no longer accurate. These terms should be replaced with the terms "State Facility Permits" and "Title V Permits." In the absence of Article X, a major electric generating facility would likely require one or the other of these permits.

In addition, sections 1002.8 and 1002.9 should reflect the possibility that the Board may not have received PSD authority from EPA by the time the first Article X applications are received and processed. Accordingly, sections 1002.8 and 1002.9 should reflect that possibility.

Finally, DEC's new permitting regulation sets forth a new process for Title V permit changes. This process needs to be reflected in section 1002.11.

Recommended Solution:

Existing Sections 1002.8(a)(5) and (b) should be deleted, and the remainder of Section 1002.8 should be revised to read:

1002.8 Requirements for Air Contamination Source State Facility, Title V and Prevention of Significant Deterioration Permits.

(a)The application constitutes a request for an air contamination source State Facility Permit Title V Permit, and/or a Prevention of Significant Deterioration (PSD) Permit, (provided PSD authority has been conferred on the Board by EPA), when an application for any such permit otherwise would be required. The application shall meet the substantive requirements of Title 3 of Article 19 of the ECL, the substantive requirements of regulations implementing such Title and any other requirements which the Board and commission may have agreed to meet to comply with Federal law, as set forth in any memorandum of understanding between the Board, the Commission and EPA regarding major electric generating facilities. The applicant shall file:

(1)the completed forms otherwise required by DEC;

(2)the relevant information required by Part 1001 of this Subchapter or needed to meet the substantive applicable requirements of DEC regulations;

(3)a brief description of the proposed air contamination source and its operation;

(4)a proposed air contamination source ~~construction~~ permit; and

~~(5)a proposed air contamination source operating permit;~~

(5)a proposal for the disposal of all air contaminants removed from the facility wastes which will prevent their reentry into the air or into surface or ground waters, except that the latter requirement may be satisfied by reference to provisions for their safe disposal in a proposed wastewater discharge permit.

Section 1002.9 should be revised to read:

1002.9 Procedures for Approval of Air Contamination Source State Facility, Title V and Prevention of Significant Deterioration Permits.

(a)Upon receipt of any request for advance consultation as to studies concerning ambient air quality conditions, the staffs of the department and DEC shall promptly meet with the applicant, review any proposed study plan, provide comments and identify any requirements which shall be met for their approval. If the Board has been delegated PSD authority, the staff of the department shall notify all affected Federal land managers and consider any comments received within 30 days from a Federal land manager for any facility which may affect Federal lands.

. . .

(c)The staffs of the department and DEC shall promptly review the filing and the staff of the department, after consideration of the views of DEC staff, shall provide the Secretary with a draft public notice indicating:

. . .

(4)that:

(i)the request for the State Facility, Title V and/or PSD Permits is complete;

(ii)a preliminary determination (including the degree of increment consumption that is expected from the source) as to whether the permits should be issued is available;

(iii)the State Facility, Title V, and/or PSD Permits for any emission source control facilities will be a part of the certificate, if issued by the Board;

(iv)for Title V and PSD Permit applications, written comment may be filed with the Secretary within 30 days; and

(v)an opportunity for further comment will be given in the hearings to be held on the application.

(d)The Secretary shall:

. . .

(2)serve copies of these documents on:

(i)each party to the proceeding;

(ii)the EPA administrator;

(iii)the chief executive officer of any city or county in which the facility would be located;

(iv)for Title V and PSD Permit applications, the director(s) of the air pollution control agency of any other state, any local air pollution control agency, or any comprehensive regional land use agency, any Federal land manager, the Federal official charged with direct responsibility for management of any land in a class I area, and any Indian governing body, the lands of which may be affected by emissions from the facility; and

. . .

(f)In consultation with DEC staff, the staff of the department shall:

(1)evaluate whether the proposed air pollution control facilities meet the substantive requirements of applicable DEC and EPA regulations; and

(2)provide the EPA administrator with copies of any public comments received and of the testimony containing its evaluation and recommendations.

(g)A final decision with respect to the substantive air pollution control requirements for the construction and operation of the facility shall be rendered as a part of the determination on the application, except that the decision whether a PSD permit is to be issued shall be made within one year of the determination that the application is complete. If such final decision cannot be rendered within one year, the Board may grant conditional approval based on the applicant's commitment to comply with all conditions of the certificate subsequently issued for the facility. A final decision with respect to air pollution control requirements issued as a part of the certificate for which EPA has reserved review authority shall not become effective until the EPA administrator has approved the decision in accordance with any memorandum of understanding with the Board and Commission.

(h)The air contamination source Title V Permit issued as a part of the certificate shall be in full force and effect for five years from the date of acceptance of the certificate as provided in section 1000.15 of this Subchapter.

Section 1002.10 should be revised to read:

1002.10 Procedures for Early Approval of Air Contamination Source State Facility, Title V, and PSD Permits.

(a)An applicant may make a motion to the presiding officer for an early determination on the air contamination source State Facility, Title V, and/or PSD Permits. The presiding officer shall rule on the motion and certify the motion, together with his ruling, to the Board.

Any early determination by the Board to grant such motion shall be void if objected to by the EPA administrator in accordance with section 1002.9(g) of this Part or the Board subsequently rejects the application for a certificate.

(b)A request for an early approval of a State Facility, Title V and/or PSD Permit or may be granted upon a showing by the applicant that:

(1)all applicable requirements of these regulations have been satisfied; and

(2)failure to grant such request will substantially delay completion of the proposed generating facility.

(c)A filing including a previously approved State Facility, Title V or PSD Permit shall:

. . .

Existing Section 1002.11(b) should be deleted, and the remainder of Section 1002.11 should be revised to read:

1002.11 Procedures for Renewal and Modification of Air Contamination Source State Facility, Title V and PSD Permits.

(a)A certificate holder intending to resume construction of a PSD source that has been interrupted for more than 18 months or, except as provided in section 1002.16 of this Part, to continue operation of a Title V source beyond the term of its certificate shall apply to the existing Board or, if its jurisdiction with respect to a certificate ceased, to the permanent Board for renewal of the permit at least 180 days prior to such expiration date. A certificate holder designating a change in its permit shall apply to the existing or permanent Board as the case may be) as soon as possible after it is determined that a change is necessary. Except as provided in subdivision (e) of this section, the applicant shall provide the existing or permanent Board, as the case may be, with:

. . .

(b)A request for a change in an air contamination source State Facility, Title V or PSD Permit shall be filed as described in section 1000.6 of this Subchapter.

(c)Except as provided in section 1002.15 of this Part, applications for renewal or for modification of an air contamination source permit, other than an administrative permit amendment or minor permit modification to a Title V permit as specified in subdivision (d) of this section, will be reviewed in accordance with the procedures set forth in section 1002.9 of this Part, except that the notice described in section 1002.9(c) of this Part shall indicate that a hearing will only be held if the chairman finds that a significant degree of public interest exists.

(d)Except as provided in section 1002.16 of this Part, a request for approval of an administrative permit amendment or minor permit modification in an air contamination control facility at a Title V source, its location or its operation, or a facility plan, as defined in the existing air contamination source permit, may be made by letter to the Secretary, with a copy to DEC and EPA. ~~and shall:~~

~~(1)describe the change(s) proposed;~~

~~(2)provide an estimate of the impact of the proposed change on the quantity and concentration of emissions and on the environment; and~~

~~(3)provide an estimate of the effect of any change on the visual impact of the facility.~~

(1)An administrative permit amendment is a change which:

(i)Corrects typographical errors;

(ii)Identifies changes in the name, address, or phone number of any person identified in the permit, or a similar minor administrative change at the source;

(iii)Requires more frequent monitoring or reporting by the permitee;

(iv)Allows for a change in ownership or operational control of a facility where the Board determines that no other change in the permits is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permitee has been submitted to the Board; or

(v)Incorporates into the permit the requirements from a preconstruction review permit, and the EPA and affected state review process for the preconstruction permit were equivalent to the review process and compliance requirements necessary for issuance of a Title V facility permit.

(2)A minor permit modification is a change which:

(i)Does not violate any applicable requirement;

(ii)Does not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit and are not otherwise a significant change in the permit;

(iii)Does not require or change a case-by-case determination of a federal emission limitation or other federal standard, or a specific determination for portable sources causing adverse ambient impacts, or a visibility or increment analysis;

(iv)Does not seek to establish or change a permit term or condition that the facility has assumed to avoid an applicable requirement to which the emission source would otherwise be subject. Such terms and conditions include a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of Title I of the Clean Air Act, including 6 NYCRR Part 231; and

(v)Is not a modification under any provision of Title I of the Clean Air Act, including modifications resulting in significant net emission increases as defined and regulated under 6 NYCRR Part 231 or the federal Prevention of Significant Deterioration program regulations at 40 CFR 52.21.

(e)A request for an administrative permit amendment shall be reviewed and acted upon by the Board in accordance with the time frames and procedures established below:

(1)Within 15 days of receipt of a request for an administrative permit amendment, the Board shall take final action on such request, and may incorporate such changes without providing notice to the public or affected States provided that it designates any such permit revisions as having been made pursuant to this Section.

(2)The Board shall make a copy of the revised permit available to EPA.

(3)The owner and/or operator of a facility may implement the changes addressed in the request for an administrative amendment after fifteen days from receipt of the request by the Board.

(4)The Board shall, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in 6 NYCRR Section 201-6.5.

(f)(1)An application for a minor permit modification shall meet the requirements of 6 NYCRR Section 201-6.3(d), and shall provide the following information:

(i)A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(ii)Certification by a responsible official that the proposed modification meets the criteria contained herein for use of minor permit modification procedures and a request that such procedures be used;

(iii)Completed forms for use in notifying EPA and affected States; and

(iv)a suggested draft permit in a format acceptable to the Board.

(2)The Board shall determine whether or not such application is complete within fifteen days after receipt of such application and notify the applicant as required under 6 NYCRR Part 621.

(3)The facility may proceed with the requested modification upon receipt of a notice of complete application from the Board confirming that the modification is minor. If, however, the Board fails to issue such notice, the application shall be deemed complete by default on the fifteenth day after receipt of the application and the permitee may proceed with the requested modification on the twenty-fifth day after the date that the Board received the application. After the facility owner and/or operator makes the change and until the Board takes final action, or notifies the permittee that the requested modification does not meet the minor modification criteria, or that EPA objects to the modification requested, the facility must comply with both the applicable requirements governing the change and any proposed permit terms and conditions. During this time period, the facility need not comply with the existing permit terms and conditions it seeks to modify. However, if the facility fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(4)The Board shall provide the notice of complete application, or provide an alternate form of notification approved by EPA, to EPA and affected states on or before the date that the applicant is notified. Such notification is not required if the modification involves only emission units or permit terms and conditions that are not subject to any applicable requirement.

(5)The Board must issue a final decision on a modification request not later than forty-five days after the date that the application was complete. However, the Department may not issue a final permit modification until forty-five days have elapsed from the date that the Board notified EPA under (6) above or until EPA has notified the Board that they will not object to issuance of the permit modification, whichever occurs first.

(6)Minor permit modification procedures may be used for permit modifications involving the use of economic incentives and marketable permits.

Relevant Section: Section 1002.12(a)

Issue:

The scope of this proposed section is overbroad. Non-Article X facilities are not required to obtain solid waste management facility permits solely because solid waste is "produced" onsite. See 6 NYCRR §§ 360-1.2(b)(158), 360-1.7(b)(4). Article X does not contemplate that Article X facilities be held to a higher permitting standard than non-Article X facilities. Accordingly, the first sentence of the section should be rewritten to conform the applicability threshold in an Article X proceeding to that applied to solid waste management facilities generally.

Further, the purpose underlying the references in the remainder of the section to "Federal law" and "EPA" is unclear. Federal law and EPA impose no direct requirements on solid waste management facilities, and thus USGen does not understand what is contemplated by these references. Absent a rationale for their existence, they should be deleted.

Recommended Solution:

Section 1002.12(a) should be revised to read:

(a)The application constitutes a request for solid waste management facility construction and operation permits when solid wastes will be managed at a proposed major electric generating station in a manner that otherwise would subject the facility to the requirements of Title 7 of Article 27 of the ECL. Such application shall meet the substantive requirements of Title 7 of Article 27 of the ECL and the substantive requirements of regulations implementing such title. The applicant shall file:

(1)the completed forms otherwise required by DEC;

(2)the relevant information required by Part 1001 of this Subchapter and any other information needed to meet the substantive requirements of DEC regulations;

(3)a brief description of the proposed solid waste management facility and its operation;

(4)a proposed solid waste management facility construction permit;

(5)a proposed solid waste management facility operating permit; and

(6)a proposal for the disposal of all surface runoff and leachate from the facility which will prevent entry of excessive amounts of contaminants into surface or ground waters, except that the latter requirement may be satisfied by reference to provisions for the safe disposal of such runoff and leachate in a proposed wastewater discharge permit required by section 1002.1(a)(4) of this Part.

~~(7)proof of service of the materials required to be filed by this subdivision on the Chief, Solid Waste Facilities Branch, U.S. EPA.~~

Relevant Section: Section 1002.12(b)

Issue:

The wrong title of the ECL is cited in this proposed section.

Recommended Solution:

In the sixth line of the section, Title 7 should be changed to Title 9.

CONCLUSION

We appreciate this opportunity to provide you with our comments on the proposed Article X regulations.

Respectfully submitted,

U.S. GENERATING COMPANY

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Dated: September 22, 1997.

What are some of the benefits of aggregation?

- Expand purchasing power in a commodity transaction
- Reduce administration costs
- Obtain diversity of demand benefits
- Financial performance guarantees

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97-m-0809
Copy to
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September 22, 1997

VIA HAND DELIVERY

Hon. John C. Crary
Secretary
Board on Electric Generation
Siting and the Environment
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 97-F-0809 - In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment contained in 16 NYCRR -- Addition of a new chapter X, Subchapter A to implement Article X of the Public Service Law

Dear Secretary Crary:

Pursuant to the July 22, 1997 Notice of Proposed Rulemaking in the above-referenced case, enclosed for filing are an original and five copies of "Multiple Intervenors' Comments in support of the proposed changes to 16 NYCRR." Kindly date-stamp the additional copy enclosed herein and return it to our messenger.

Very truly yours,

COUCH, WHITE, BRENNER, HOWARD & FEIGENBAUM, LLP

Robert M Loughney

Robert M. Loughney

MFG/glm
Enclosures
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