NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

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

RECOMMENDATION CONCERNING FURTHER PROCEEDINGS

(Issued April 12, 2006)

JUDITH A. LEE, for Presiding Examiner ROBERT R. GARLIN,[1] and KEVIN J. CASUTTO, Associate Examiner:

INTRODUCTION

On April 1, 2004, Examiners Garlin and Casutto issued a decision recommending that the application of TransGas Energy Systems (TGE or the applicant) for a Certificate of Environmental Compatibility and Public Need be denied. Examiners Garlin and Casutto concluded, among other things, that construction and operation of the proposed facility would result in adverse visual impacts and would be incompatible with the City's future land use plans for the Greenpoint and Williamsburg waterfront.

In a letter dated May 27, 2004, TGE submitted photosimulations of "further visual and land use mitigation for its proposed cogeneration project at the [proposed facility's] site." TGE described the mitigation as follows:

> The mitigation would be to remove both contaminated and clean soil from the site down to bedrock and to place as much of the project as practicable underground. By so doing, the facility could also be

[1] Department of Public Service Judge Robert R. Garlin presided over this case and prepared this recommendation as presiding examiner, with Department of Environmental Conversation Judge Kevin J. Casutto as associate examiner. Due to the unexpected and untimely death of Judge Garlin on March 30, 2006, this document is being issued by Department of Public Service Chief Administrative Law Judge Judith A. Lee on his behalf.

> hardened for added security, with one to four acres employed above ground for the exhaust tower and various other facilities and four to seven acres dedicated to parkland. To enable this design once-through cooling using wastewater from the Newtown Creek Water Pollution Control Plant would be required.[2]

In a subsequent letter dated June 8, 2004, TGE argued that "[t]he proposed redesign dispositively resolves the issues raised by the parties in opposition to the TGE facility; namely, visual and land use, parkland and proposed rezoning." On June 30, 2004, TGE submitted an "Underground Facility Engineering Feasibility Report."

The Siting Board received comments from the parties and other interested persons concerning TGE's pro forma design drawings. On September 15, 2004, the Board ruled that "if TGE intends to pursue a major change to the proposed facility's design in this proceeding, it must file an amendment to its application." The September 15, 2004 order directed the examiners to review any amendment submitted by TransGas Energy Systems (TGE or the applicant) and to "submit a recommendation addressing whether the amendment justifies scheduling additional evidentiary hearings."

As explained below, the application of TransGas Energy Systems, as amended, should be dismissed, for the following reasons:

1. TGE requires revocable consents from the City of New York in order to construct water import and steam export pipelines to and from the proposed facility's site. The City has indicated that such consents will not be granted, and the Board cannot compel the City to grant them. In a pipeline certification case where an analogous situation obtained, the Public Service Commission concluded that "[a]ny certificate that would be granted would be useless and, in such

[2] TGE's Letter of May 27, 2004.

circumstances, the Commission is not required to issue a certificate."[3]

2. TGE has stated that it will not construct the proposed facility without steam export contracts, because "steam export is needed for a topping cycle cogeneration plant to be technically feasible."[4] No such contracts (or precedent agreements) are pending, nor have genuinely prospective steam purchasers even been identified. Without such contracts, TGE will not operate the proposed facility, and there would be no basis for a finding by the Board that construction and operation of the proposed facility would result in benefits to the public that outweigh its adverse environmental impacts.[5] The Board is not required to continue holding this proceeding open on the basis of speculation that one or more steam sales contracts might be entered into sometime in the future.

3. TGE has now become affiliated with an electric corporation established under Article 2 of the Transportation Corporations Law (TransGas Energy Services Corporation, or "TESC"). TESC has the power of eminent domain, and it has commenced a proceeding to acquire the proposed facility's site on behalf of TGE. Given the relationship between TGE and TESC, the Board can reasonably conclude that TGE no longer fits the definition of a "private applicant" set forth in its regulations,[6] and, therefore, the discussion of alternatives to the proposed facility in TGE's application (as amended) is no longer adequate.[7]

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[3] Case 05-T-0089, Fortuna Energy, Inc., Order Requiring a Hearing and Extending the Time Required to Render a Decision Pursuant to Public Service Law Section 121-a(7) (issued March 23, 2005), pp. 5-6.

[4] TGE's Interlocutory Appeal, July 27, 2005, p. 4.

[5] Public Service Law §168(2)(e).

[6] 16 NYCRR §1000.2(o) defines a private applicant as "an applicant that does not have the power of eminent domain."

[7] 16 NYCRR §1001.2 sets forth the requirements for the description and evaluation of reasonable alternatives to a proposed facility.

4. In light of a recent decision of the Kings County Supreme Court staying the eminent domain proceeding in which the City of New York is attempting to acquire the proposed facility's site, in the course of implementing the Greenpoint and Williamsburg Land Use and Waterfront Plan, delay in the conclusion of this proceeding to would adversely affect the public's and the community's planning.[8]

ADDITIONAL PROCEDURAL HISTORY

TGE's Amendment

The September 15, 2004 order directed TGE to file an amendment to its application, if it wished to have its mitigation proposal considered in this proceeding. The order directed that any such amendment meet all pertinent requirements of the Siting Board's regulations governing the content of applications.[9] TGE was required to include in the amendment, among other things, (i) new Market and Production Simulation (MAPS) analyses reflecting updated fuel costs and assuming the operation of the alternative plant(s) proposed in the amendment; (ii) documentation to support claimed benefits such as voltage support, congestion relief, and line loss reductions, including a thorough analysis of technological alternatives that could achieve comparable benefits; and (iii) a discussion of the feasibility of the mitigation proposal, in the event that the City decides against granting the revocable consents required for cooling water mains. In addition, the order directed TGE to include in the amendment a plan for seeking new or amended State Pollutant Discharge Elimination System (SPDES) and air permits,

[8] Case 99-F-1835, Glenville Energy Park, LLC, Ruling on Motion to Dismiss (issued August 27, 2004), pp. 12-17, and Ruling on Motions to Dismiss (issued October 10, 2003), pp. 11-16, citing Cortlandt Nursing Home v. Axelrod, 66 NY2d 169 (1985).

[9] 16 NYCRR Part 1001.

if required, that could be provided to the Board prior to its decision regarding the amendment.[10]

The order provided that the other parties would be given an opportunity to comment on any amendment. The examiners were (i) directed to evaluate the adequacy of the application amendment, (ii) authorized to call for the submission of such additional information as might be reasonably required to reach a decision on the issues identified in the September 15, 2004 order or any issues specified by us,[11] and (iii) authorized to establish procedures for examination of the amendment.

TGE's amendment was filed on November 12, 2004. The preferred facility proposed in the amendment ("Case 1") was essentially the same as the facility described in the June 30, 2004 feasibility report. Under Case 1, an exhaust tower (consisting of a building-like enclosure housing all of the facility's exhaust stacks), specified openings for stairs, a vehicle ramp portal, and air circulation ducts would be the only above-ground structures. All other components would be enclosed in an underground concrete structure that would be covered with a concrete roof on which park-like landscaping and amenities would installed.

The amendment contemplated that the same combined-cycle production plant components as proposed in the original application would be installed in the underground facility, with the exception that the cooling tower contemplated for the above-ground plant would be eliminated. As noted earlier, a large volume of water would be required for the underground facility's once-through cooling; the amendment contemplated using wastewater from the Newtown Creek Water Pollution Control Plant.

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[10] Public Service Law §172(1).

[11] 16 NYCRR §1000.8.

In response to the Board's directive that TGE discuss "the feasibility of the mitigation proposal, in the event that the City decides against granting the revocable consents and/or authorizing the interconnections required for use of Newtown Creek WPCP effluent as cooling water," TGE proposed that it be authorized "to substitute non-condensing 'topping' turbines for the steam turbine generators, which would eliminate the need for condenser cooling and once-through cooling water."[12] In that configuration, TGE asserted, sufficient water supplies for the production of electricity and steam could be obtained from dewatering effluent from subway stations at Marcy Avenue and Nostrand Avenue and/or back-up supplies from the City's water system. Revocable consents would be required for installation of the new force mains that would carry the dewatering effluent to the facility's site.

Comments on the Amendment

Comments on the amendment were filed by Department of Environmental Conservation (DEC) Staff, Department of Public Service (DPS) Staff, the City, the Brooklyn Borough President, jointly with the Greenpoint Williamsburg Waterfront Task Force and New York Public Interest Research Group (the Brooklyn Parties), and Greenpoint Landing Associates (GLA). TGE was authorized to file a response to those comments on or before

[12] Amended Application §1.1. This alternative would be analyzed in a subsequent submission as "Case 5."

January 28, 2005. The parties' comments and TGE's responses are discussed in turn.[13]

1. DEC Staff

a. Air Permit

DEC Staff noted that TGE renewed its original proposal to construct an exhaust stack tower 325 feet tall, even though the plant structure that dictated that height under Good Engineering Practice (GEP), the 130-feet-tall dry cooling tower, would not be a part of the underground facility.[14] TGE contended that a 325-feet-tall stack tower would still be GEP-compliant, because the rezoning contemplated in the City's then-pending June 2003 Greenpoint and Williamsburg Land Use and Waterfront Plan (LUAWP) would have permitted a 240-feet-tall residential building about 700 feet from the tower.[15] DEC Staff disagreed, pointing out that potential structures may not be taken into account in GEP calculations unless there are firm plans and dimensions for such structures. Accordingly, DEC Staff stated that a tower could not be taller than the GEP default height of 213 feet; and "[s]ince this lower stack height results in a lower plume height, the air quality impact analysis in the application should be resubmitted."[16]

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[13] Comments whose pertinence has been superceded by the elimination of the ExxonMobil site as a potential alternative site for the proposed facility (see Amended Application §1.4), the adoption of the City's rezoning proposal, and the selection of a city other than New York as the site of the 2012 summer Olympic Games are not discussed.

[14] Given the site plan for the originally proposed facility, GEP would require an exhaust stack that is 2.5 times the height of the cooling tower, or 325 feet.

[15] The rezoning proposal was approved by the New York City Council on May 11, 2005.

[16] DEC Staff's Comments, December 15, 2004, p. 2.

In response, TGE stated that it would amend its amended site plan by constructing an aboveground administration and maintenance building topped with "an innovative artistic concept consisting of an ovoid structure,"[17] for a total height of 130 feet. As this building would be within 150 feet of the stack tower, the GEP height of the tower would be 325 feet. Thus, the need for a new air quality impact analysis would be eliminated.[18]

b. SPDES Permit

DEC Staff pointed out that TGE's proposal to use wastewater from the Newtown Creek Water Pollution Control Plant would need to be supported with a revised application for a SPDES permit for the discharge of industrial wastewater and storm water. DEC Staff stated that the revised application would need to include an executed contract with the City and revised analyses of dissolved oxygen and five-day biochemical oxygen demand. Moreover, DEC Staff added, the City would need to amend its SPDES permit for the outfall from the water pollution control plant. DEC Staff also requested additional or revised thermal discharge modeling.

TGE responded that "[b]ased on the comments received from the parties, and the refusal of [the City] to recycle the wasted effluent from its Newtown Creek Water Pollution Control Plant ("WPCP") by selling it to TGE, TGE is hereby deleting from this Amendment the proposed operation of the Project employing

[17] TGE's Response to Comments, January 27, 2005, p.8.

[18] TGE contended as well that its newly-proposed site plan modification was part of "an effort to optimize the configuration of the Project's aboveground structures," and that it would accommodate potential Olympics and recreation facilities.

once-through cooling using Newtown Creek WPCP effluent." TGE continued:

> The Project is now proposed to solely operate in cogeneration mode. It will use the Metropolitan Transit Authority wells, supplemented by [City] municipal water as the sources of water, as proposed in the Application and considered in the record and the Recommended Decision (RD). Accordingly, the information requests concerning once-through cooling no longer require a response."[19]

c. Remedial Action Work Plan

TGE stated that it would seek permits issued by City agencies for construction-period sanitary sewer discharges. DEC Staff commented that dewatering actions during construction, including the identification of treatment technologies and disposal options, would need to be part of the proposed facility's site's Remedial Action Work Plan, which would be subject to DEC's approval.[20] TGE did not respond to this comment. As of August 12, 2005, a Remedial Action Work Plan had not been approved.[21]

2. DPS Staff

a. Excavation and Construction Impacts

The amendment stated that "[w]ith the underground design, pile driving will not be necessary and the associated potential impacts due to vibration will be avoided," and that "slurry wall construction does not impose any vibrations." The

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[19] TGE's Response to Comments, p. 3.

[20] As discussed in the Recommended Decision (p. 2), TGE has proposed to construct its facility on an eight-acre site currently operated as a fuel oil distribution terminal by Bayside Fuel Oil Depot Corporation (Bayside Fuel). The site is contaminated with hydrocarbons in the subsurface soils.

[21] TGE's Response to DPS Staff Interrogatory DPS(RHP)-33.

amendment went on to state that "[d]uring final design for the TransGas Facility and slurry wall, the additional distributed lateral soil pressure from the CitiPostal buildings foundation that may superimpose on the slurry wall will be carefully studied."[22]

DPS Staff commented that "[c]onsideration of bedrock excavation and blasting controls necessary to avoid [impacts on nearby structures] will be necessary for the underground facility design."[23] In response, TGE asserted that the blasting plan set forth in the original application would be followed, and that it would conduct a pre-construction survey of neighboring structures, install vibration monitoring instruments, and conduct a post-construction survey.

b. Flood Protection

DPS Staff commented that the record would require additional information about water infiltration, pump capacity and redundancy needs, and related engineering criteria. In response, TGE stated that "[t]he referenced information is not available at the conceptual design level but is typically developed as part of the final engineering and design." TGE suggested that "[t]his information could be provided as a Compliance Filing following issuance of the Certificate but prior to the start of slurry wall construction."[24]

c. Aboveground Structures

Under the original amendment to the application, certain structures remained above ground: the exhaust tower, stairwells, a vehicle ramp portal, and air circulation ducts.

[22] Amended Application, §6.2.1.

[23] DPS Staff's Comments, p. 4.

[24] TGE's Response to Comments, p. 10.

As noted earlier, TGE, in an effort to avoid remodeling air quality impacts, amended the amendment by proposing to construct an aboveground administration and maintenance building topped with an egg-shaped ornament, for a total height of 130 feet.

Commenting on the original amendment, DPS Staff stated that the discussion of aboveground facilities should address their compatibility with then-proposed (now approved) land use and site development plans. In its response to comments, TGE asserted that "the TGE site and layout of aboveground facilities . . . can accommodate a soccer field, tennis courts, basketball courts and playground equipment," and that "[t]his potential layout of recreational facilities is but one example that demonstrates the compatibility of the TGE aboveground facilities with proposed development plans that include a City Park with active recreational uses."[25]

d. Excavated Soil Disposal

DPS Staff commented that more details were required about the following:

- The methods and locations for disposal of contaminated and uncontaminated soils.
- The assumed weight and volume capacities of surface vehicles used to haul excavated materials.
- The means for loading excavated materials on barges.

In response, TGE stated that "[t]he information requested by DPS Staff cannot be provided with certainty at this time since the Remedial Action Work Plan has not yet been prepared." TGE added that "general information regarding the excavation, dewatering and disposal procedures, including the

[25] Id., pp. 13-14.

planned use of barge transport of excavated materials, was provided in the Application."[26]

In response to Interrogatory DPS(RHP)-28, TGE supplied a "conceptual construction 'means and methods' plan." The conceptual plan identified "areas that can be used to assist in drying of the soils that are excavated from below groundwater level." In a June 17, 2005 response to the examiners' May 3, 2005 ruling requiring additional information (discussed more fully below), TGE re-submitted amended application §3.10.2.1 stating that "[a]ll barges will be walled in a manner sufficient to contain both saturated soil and any free water during material transportation." DPS Staff Interrogatory DPS(RHP)-32 asked why barges hauling treated and dried soils would have to be walled. In response, TGE stated that "[d]epending on the eventual destination of the excavated material, determined in part by the contamination level and disposal or use of the material, the excavated material may or may not be dried prior to loading on barges."[27]

e. Decommissioning

DPS Staff commented that TGE should have provided a decommissioning cost estimate for the underground facility, including supporting analyses but excluding any assumed salvage values for scrap materials. In response, TGE stated that its decommissioning cost (without credit for salvage) would increase

[26] Id., p. 14.

[27] In response to DPS Staff Interrogatory DPS(RHP)-31, TGE stated that "[t]he amount of saturated soil that must be treated prior to transport by truck from the site cannot be accurately determined at this time," and the "[t]he amount of soil to be remediated at any one time will be addressed in the Remedial Action Work Plan."

from $9.4 million[28] to $21.6 million.[29] The decommissioning plan contemplates the removal of power generation equipment and related facilities, but the hollow underground box would be left intact for "adaptive reuse," such as parking, storage, or storm water collection. TGE would also leave the steam tunnel in place as an "infrastructure link."

f. Waivers of Local Laws

DPS Staff commented that the amendment did not explicitly state why waivers of local laws would be sought, particularly if the basis for waivers would be that the laws are unreasonably restrictive in view of existing technology.

In response, TGE noted that the redesign of the amended site plan submitted in the January 27, 2005 response to comments would comply with New York City Zoning Resolution §43-42, and that a waiver of that provision would no longer be sought. However, TGE continued, the height of the redesigned aboveground administration and maintenance building topped with an egg-shaped ornament (130 feet) would require a 30-foot setback under Zoning Resolution §43-43. Without the topping ornament, a 20-foot setback would be sufficient. TGE argued that a 20-foot setback would maximize park space, and that "the basis of the waiver [of Zoning Resolution §43-43] is the state of technology and the needs of the public." TGE added that should the Board not grant its request for a waiver, "TGE will modify its site development plan to ensure compliance with the zoning resolution."[30]

[28] Recommended Decision, p. 78.

[29] TGE's Response to Comments, p. 18.

[30] TGE's Response to Comments, p. 24.

g. Odor Control

DPS Staff commented that TGE should provide a discussion of the potential means for controlling odors arising from the excavation and handling of contaminated soils. TGE replied that a detailed "Odor and Vapor Control Measure Plan" would be a part of the Remedial Action Work Plan that remains to be prepared and submitted to DEC for review. Possible measures would include (i) odor and vapor controlling work practices (minimizing size, number, and area of excavations, prompt backfilling, and minimization of stockpiles of excavated soils); (ii) use of odor-neutralizing foam, encapsulants (crusting agents), and tarps on exposed soils; (iii) removal of soils in closed or semi-enclosed trucks; and (iv) monitoring of odors and organic vapors at the site boundaries and at various receptors in the community.

h. Flooding and Erosion Control

DPS Staff commented that the construction plan for the revised proposed facility would need to include detailed implementation plans for controlling flooding and preventing erosion, as the construction period would involve an increased duration of excavation, an increased amount of site disturbance, and additional spoil. The objective would be to "prevent construction debris, mud and any other fluids from translocating off-site into aquatic resources."[31]

TGE replied that an erosion and sedimentation control plan would be included in the construction storm water and site management plans that would be part of the Remedial Action Work Plan that remains to be prepared and submitted to DEC for review. TGE added that the construction site would be protected

[31] DPS Staff's Comments, p. 7.

from water penetration, because the slurry wall and top slab would be completed before large-scale excavation began.

i. Off-Site Mud Tracking

DPS Staff commented that "measures must be implemented to prevent the tracking of mud off site by construction vehicles and cement trucks." Staff asserted that a truck wash-off area must be developed at the project site.[32] TGE replied that the site management plan in its to-be-developed Remedial Action Work Plan would provide for a "truck wash-off and/or decontamination area" for dump trucks. According to TGE, "[t]hat area may also serve as a wash-off area for concrete trucks."[33]

j. Jurisdiction Over "Remediation" vs. "Construction"

DPS Staff commented that "[a]n issue which arises in this matter is where the [Remedial Action Work Plan] cleanup ends and additional site excavation continues."[34] In response, TGE concedes that the amendment was "inartfully worded," and states that all excavation and clean-up at the project site would be conducted pursuant to the Remedial Action Work Plan.

k. Construction Traffic Impacts

DPS Staff commented that the amendment did not analyze the increased noise and exhaust fumes resulting from idling concrete trucks. Staff estimated that 10 to 20 trucks might operate at idle while waiting to deliver their loads.

TGE replied that it expected five or six concrete deliveries per hour, and that neither the construction manager nor the concrete vendor would tolerate the "inefficient"

[32] Id.

[33] TGE's Response to Comments, p. 28.

[34] DPS Staff's Comments, p. 7.

situation where 10 to 20 trucks were waiting to make their deliveries. TGE stated that the noise generated by three or four trucks waiting to deliver concrete would be less than daytime ambient levels and only slightly higher than nighttime ambient levels. TGE added that concrete truck traffic would be less than current truck traffic associated with the Bayside Fuel oil terminal currently operating at the project site, so the level of exhaust fumes would be lower.

l. Vehicles Used to Haul Excavated Materials

DPS Staff commented that the amendment should describe the weather conditions and special circumstances in which TGE would rely on trucks, instead of barges, to remove excavated materials. TGE, while noting that specific guidelines about what vehicles would be used to haul excavated materials would be set forth in the to-be-developed Remedial Action Work Plan, stated that the transport mode (barge or truck) and the type of truck (trailer, box container, or dump truck) would be determined by the type of materials, their level of contamination, their destination, and weather conditions.

m. Number of Truck Hauls of Excavated Materials

DPS Staff commented that TGE should identify the capacities of trucks used to haul excavated materials and provide a worst-case scenario for the number of truck trips that would be required. TGE replied that removal by truck of all excavated materials, estimated to be 1.07 million cubic yards after construction of the slurry wall, would require more than 40,000 trips. TGE noted that each barge-load would be equivalent to more than 100 truckloads, so in the worst case – inclement weather when a barge could not be used – there would be 100 daily trips.

n. Number of Concrete Truck Trips

DPS Staff observed that there is a discrepancy between assumed capacities for concrete trucks: in one section of the amendment, a capacity of eight cubic yards was assumed, while in another section the assumption was 12 cubic yards. DPS Staff commented that TGE should resolve the discrepancy and develop a worst-case scenario for the number of concrete truck trips.

TGE replied that the 12-cubic-yard figure is correct (it falls between the capacities of trucks available in the City, namely, 10 cubic yards and 15 cubic yards), and that the eight-cubic-yard figure is not correct. Depending upon which capacity figure is assumed, average daily concrete truck trips, assuming a six-day work week, would be 68 round trips (10 cubic yards), 57 round trips (12 cubic yards), or 45 round trips (15 cubic yards). According to TGE, these traffic levels would be lower than the traffic level associated with the Bayside Fuel oil terminal's current operations (as many as 400 trips per day).

In its response to Interrogatory DPS(RHP)-28, served May 16, 2005, TGE supplied a "conceptual construction 'means and methods' plan," including a series of 16 drawings showing various stages of construction. Several of the drawings show where an on-site batch concrete plant could be located during construction. In its June 17, 2005, response to the examiners' May 3 ruling requiring additional information, TGE re-submitted amended application §§3.10.2.1 and 3.10.2.2, which state that concrete would be delivered by truck. In an August 12, 2005 response to Interrogatory DPS(RHP)-31, however, TGE stated that the amended application "was not further revised to reflect the current construction plan that was provided in response to DPS(RHP)-28, which incorporates a concrete batch plant at the

Bayside site rather than delivery of redi-mix concrete by truck."

o. Scheduling of Concrete Deliveries

DPS Staff commented that TGE should provide an explanation of how it would arrange the work schedules of different construction crews so that concrete deliveries would be evenly distributed throughout the construction schedule.

In response, TGE provided the following explanation:

- The slurry wall would consist of 128 20-foot panels.
- Each 20-foot panel would require three days for excavation, installation a reinforcing cage, and filling with concrete.
- There would be simultaneous construction of six panels at any given time.
- "To evenly distribute the concrete truck traffic, the work effort of the individual crews would be staggered such that not all six panels would be at the same stage of construction at the same time (e.g., the two panels would be excavated at the same time that reinforcing cages are installed in two others, while concrete would be poured at two others)."[35]

As noted earlier, TGE's response to Interrogatory DPS(RHP)-31 states that the amended application "was not further revised to reflect the current construction plan that was provided in response to DPS(RHP)-28, which incorporates a concrete batch plant at the Bayside site rather than delivery of redi-mix concrete by truck."

[35] TGE's Response to Comments, pp. 32-33.

p. On-Site Concrete Batch Plant

TGE's amended application discussed the possibility of using an on-site concrete batch plant instead of relying on concrete delivered by trucks. DPS Staff requested that TGE provide an analysis of the advantages and disadvantages of each approach.

In response, TGE noted that delivered concrete is relatively easy to use, but requires frequent truck trips through local neighborhoods and would not be subject to the purchaser's quality control process prior to delivery. On-site production, on the other hand, would provide greater flexibility for use as needed and greater quality control, but the on-site plant would take up space and on-site production would result in fugitive emissions (which, TGE asserted, could be controlled). TGE stated that a separate contract package for concrete work would be issued, and it expects that bidders would propose what they consider to be the most economical mix of delivered concrete and/or on-site production.

As noted earlier, TGE's response to Interrogatory DPS(RHP)-31 states that the amended application "was not further revised to reflect the current construction plan that was provided in response to DPS(RHP)-28, which incorporates a concrete batch plant at the Bayside site rather than delivery of redi-mix concrete by truck."

q. Amounts of Concrete Required

DPS Staff asked TGE to provide a table showing the amounts of concrete that would be required for the two slurry wall construction methods discussed in the amendment – with and without temporary tiebacks. TGE's response states that the former method would require 5,500 fewer cubic feet of concrete, because the depth of the slurry wall trench would be seven feet

shallower below the top of the bedrock at the project site (three feet versus ten feet).

3. City of New York

a. Aboveground Structures

The City observed that there would be six to eight surface structures, occupying up to 300 square feet and standing up to 15 feet tall, scattered throughout the project site. The City argued that those structures would not be compatible with its plans to develop a public park with active recreational facilities. In response, TGE stated that new artist renderings of the site submitted along with its response show that "the aboveground TGE facilities can be compatible with a wide range of active recreation facilities at the Bayside site."[36]

b. Air Quality and Noise Impacts

The City commented that the amendment did not include analyses of the revised proposed facility's impacts on air quality and noise levels at the new sensitive receptor, namely, the park that would be developed on the facility's roof.

In response, TGE argued that "the air quality impact around and within the [area occupied by the planned] park was examined in minute detail" in the original application. TGE stated that "the air quality concentrations at all ground level receptors were determined to be below the DEC and EPA recognized levels of significance."[37] According to TGE, air quality impacts at the park would also be insignificant. TGE's amended application states that post-construction noise monitoring would include "noise measurements . . . at locations around the

[36] TGE's Response to Comments, p. 38.

[37] Id., p. 39.

ventilation shafts on the Facility roof (i.e., the proposed park)."[38]

c. Cogeneration Mode Operation

Because the City has stated that it will not allow TGE to use effluent from the Newtown Creek Water Pollution Control Plant as cooling water for a combined cycle generation plant with once-through cooling (condensation) of process steam (the aforementioned "Case 1"), TGE would be constrained to operate the revised proposed facility as a cogeneration plant with steam topping turbines and no condensation of process steam ("Case 5"). The steam used to generate electricity would have to be exported; TGE presumed that it would sell steam to Consolidated Edison Company's steam business unit or to customers connected to Con Edison's steam system. TGE has stated, since it filed the amended application, that it "would not build the proposed facility without steam export contracts."[39]

The City commented that the amended application's discussion of cogeneration mode operation is "extremely cursory," consisting of brief descriptions distributed through four sections. According to the City, the amendment is "devoid of any information that would allow the Board to make the required findings under [Public Service Law] §168 with respect to the topping turbine alternative." The City noted that "electric generation will be necessarily coupled with steam production," because "[i]f less steam is delivered to [Con Edison's steam] distribution system, electric generation at the TGE plant must be reduced."[40]

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[38] Amended Application §11.2.6.

[39] TGE's Interlocutory Appeal of Ruling Directing Submission of Additional Information, July 27, 2005, p. 2.

[40] The City's Comments, p. 3.

In response, TGE argued that the amendment included "ample information regarding operation of the TGE facility in cogeneration mode using topping turbines." Nevertheless, TGE continued, that information has been "supplemented" in its response to comments.[41] The supplement, which consists of an approximately four-page restatement of §3.4.6.2 of the amended application, confirms the City's argument that electricity production from the revised proposed facility operating in cogeneration mode would have to be decreased as the demand for steam decreased. TGE described facility operations as follows:

> At base load, the TGE plant can produce two million pounds per hour of process/export steam. In this mode, the [combustion turbine generators (CTGs)] produce full load power according to the ambient temperature and combustion turbine performance curves. Depending on Con Edison steam system requirements, the facility will increase or decrease load mainly by varying combustion turbine power output. Assuming the facility is at full load and burning natural gas, as the Con Edison steam flow demand decreases, one of the four CTGs will begin to decrease load, producing less steam in its [heat recovery steam generator]. At a certain point, approximately 75 percent load, the first CTG will stop decreasing load to maintain the proper air emissions and [the] remaining three CTGs will be operating at full load. As [steam] load decreases further, the process repeats itself sequentially for the remaining three CTGs until all four CTGs are at 75 percent of full output load and maintaining emissions. If further export steam reductions are required, each CTG will be turned off sequentially, and the load in the remaining CTGs will be incrementally increased to meet the export steam flow demand. When steam demand decreases to approximately 375,000 pounds per hour, only one CTG will be running at 75 percent load. Below this level, the last CTG will be turned off and auxiliary boilers will be used. As steam demand drops further below 375,000 pounds per hour, the auxiliary boilers that

[41] TGE's Response to Comments, p. 39.

> [meet the steam load demand] will decrease output until they are shut down.[42]

4. The Brooklyn Parties

The Brooklyn Parties have continued to press their general argument that the proposed changes to the TGE facility are too extensive and different from the original facility design to warrant treatment, collectively, as an amendment to the application. The Brooklyn Parties also commented on certain specific matters.

a. Work Force Traffic

The Brooklyn Parties commented that the amendment states that the number of worker trips could be held down by staggering starting times to avoid rush hours, and suggests that a shuttle bus program might be operated. The Brooklyn Parties argued that because the amendment mentions potential measures for traffic reduction but has no commitment to any of them, there cannot be a complete assessment of the environmental impacts resulting from construction of the revised proposed facility. TGE did not respond to this argument.

b. Concrete Trucks

The Brooklyn Parties commented similarly that TGE had not committed to using an on-site concrete batch plant to hold down the number of concrete truck deliveries to the project site. The Brooklyn Parties argued that limiting the number of such deliveries would be desirable, because concrete trucks are a significant source of emissions of fine particulate matter ($PM_{2.5}$). TGE initially responded that $PM_{2.5}$ emissions from vehicles with diesel engines will be subject to stringent

[42] TGE's Response to Comments, p. 7.

regulations, and that, in any event, there would be fewer truck trips during construction than now occur with a fuel oil terminal on the proposed project site. TGE's subsequent response to Interrogatory DPS(RHP)-31 stated that its current construction plan, provided in response to DPS(RHP)-28, incorporates a concrete batch plant at the Bayside site rather than delivery of redi-mix concrete by truck.

c. Groundwater Removal

The Brooklyn Parties questioned the adequacy of TGE's examination of construction impacts on nearby structures, especially given the fact that excavation at the project site would entail the removal of 55 million gallons of groundwater. The Brooklyn Parties argued that TGE's promise to conduct a detailed preconstruction survey is not in compliance with the Board's directive that this issue be addressed in the amended application. TGE did not specifically respond to this comment.

d. Feasibility of Park Proposal

The Brooklyn Parties commented that "the amendment seriously calls into question the feasibility of having a park above the facility." The Brooklyn Parties argued that the security requirements and plant operations would "render it highly unlikely [that] the promised 7.0 acres of open space will be a usable city park above the '6.8 acre . . . enclosure' in which the power-plant is to sit." Given the intensive security procedures that would be employed to screen employees of and visitors to the facility, the Brooklyn Parties questioned "whether people can play in and enjoy recreation in a public park when only 'several feet of soil' . . . stands between the roof of the facility and the park." Moreover, the Brooklyn Parties continued:

> Further calling into question the feasibility of a public park above a very high security power-plant [is the fact that] TGE will have a 'security force [that] will patrol both the aboveground park and the underground plant at all times.' . . . In addition, '[t]he first line of defense will be the perimeter protection of certain inaccessible areas of the site, totaling approximately 1 acre.' . . . While such precautions are obviously necessary for such a high-risk facility, they are not compatible with the contemplated 'park' but rather with a high-security zone above a power-plant.[43]

TGE did not specifically respond to this comment.

5. Greenpoint Landing Associates

a. Revocable Consents

As discussed earlier, the Siting Board's September 15, 2004 order directed TGE to address, in its amendment, the issue of the feasibility of the revised proposed facility, in the event that the City decides against granting the revocable consents required for cooling water mains. One or more consents would also be required for construction of the proposed steam export tunnel that would run under the East River to the Borough of Manhattan.

GLA commented that TGE did not comply with this directive; instead, TGE asserted that the Board could simply override the City's refusal to grant such consents. GLA disagreed with that view, contending that Public Service Law §168(2)(d) simply authorizes the Board to refuse to apply local laws and permitting requirements that would unreasonably restrict the construction or operation of a proposed facility that the Board finds should be certificated as environmentally compatible and consistent with public need. GLA argued that

[43] The Brooklyn Parties' Comments, pp.19-20.

§168(2)(d) does not authorize the Board to appropriate or otherwise assume control over the City's property rights in order to abrogate the City's authority, as the owner of those rights, to refuse to allow a private developer of a generation facility to use public property.[44]

In response, TGE argued variously that (i) "the Siting Board would not be condemning NYC property because TGE's use of NYC-owned property does not require TGE's ownership of the property"; (ii) "[a] revocable consent for TGE's use of NYC's property is a license or permit and not an ownership interest in real property"; and (iii) "[t]he Board possesses the authority to allow TGE to construct a water main and steam line and other facilities necessary for the operation of the Facility under NYC-owned property."[45]

b. Depiction of Parkland

GLA observed that there would be six to eight surface structures, occupying up to 300 square feet and standing up to 15 feet tall, located throughout the project site. GLA argued that the park TGE would construct "will constitute a high-security space punctuated by several tall, hardened structures that will totally undermine the intended use of the project site under the rezoning – active recreational space for the Greenpoint/Williamsburg community."[46] In response, TGE stated

[44] GLA also argued that TGE has not demonstrated that it would have property rights to the land beneath Bushwick Inlet, which is not owned by Bayside Fuel. TGE did not respond to that argument. However, as noted earlier and discussed below, TGE has now become affiliated with an electric corporation established under Article 2 of the Transportation Corporations Law (TransGas Energy Services Corporation, or "TESC"). TESC has the power of eminent domain, and it has commenced a proceeding to acquire the proposed facility's site on behalf of TGE.

[45] TGE's Response to Comments, pp. 53-54.

[46] GLA's Comments, p. 3.

that artist renderings of the site submitted along with its response to comments show that "these emergency stairwells can be integrated with active recreation facilities . . . ."[47]

c. Fuel Storage

GLA, noting that the revised proposed facility would have a 2-million-gallon oil storage tank, commented that "TGE's claim that the storage will be 'hardened' does not overcome the fact that it presents a real danger to have public access on top of a facility with such enormous amounts of combustible material."[48] GLA argued further that the precedents cited by TGE for constructing parks on platforms over public works involve facilities (e.g., water treatment plants and water storage) that are not comparable in terms of risks to the public.

In response, TGE argued that the underground fuel oil storage tank would meet the City Fire Prevention Code's storage, cover, and size limitations. Should the City Fire Commissioner not approve the proposed tank height of 68 feet, TGE continued, two 40-feet-high tanks with a combined capacity of 1.24 million gallons could be constructed. TGE stated that the tank designs include hardened concrete vaults sized to allow tank wall inspection and maintenance, and to serve as secondary containment vessels. TGE asserted, nevertheless, that to allay concerns expressed about the proximity of parkland to oil storage, it would "permanently keep the tanks empty . . . during the spring, summer and fall months, when gas curtailments are generally considered a remote possibility."[49]

DPS Staff Interrogatory DPS(ACD)-15 asked TGE to describe the extent to which public safety, public access and

[47] TGE's Response to Comments, p. 40.

[48] GLA's Comments, p. 3.

[49] TGE's Response to Comments, p. 41.

recreational use would be affected by deliveries of oil by barge. TGE responded that the revised proposed facility would continue to receive fuel oil from Buckeye Pipeline Company, and that barge deliveries "are expected to be infrequent and limited to winter months when oil firing is most likely during periods of natural gas curtailment." TGE stated that "[a]ccess can be restricted in this area through the use of temporary bollards or some other type of removable barrier incorporated into the final design of the park." According to TGE, "[r]ecreational use of the park will not be significantly affected since the restricted area will be small relative to the overall park area, and public use will be lower during the winter months when barge deliveries are most likely."

Rulings Requiring Additional Information

1. Additional MAPS Analysis

After reviewing the amendment, the parties' comments on the amendment, TGE's responses to the comments, and TGE's responses to DPS Staff's interrogatories, the examiners issued a ruling, on May 3, 2005, directing TGE to provide an additional Market and Production Simulation (MAPS) analysis showing the electric system economic benefits and air quality improvements, if any, resulting from operation of the revised proposed facility as an "electric-only" generation plant, i.e., assuming no steam sales. As noted in that ruling, the lack of an electric-only simulation "is a critical omission, because TGE has not yet found a purchaser for steam production even though it has used a substantial amount of steam sales revenues to derive an 'effective heat rate' for use in the MAPS analysis associated with a facility at the Bayside Terminal site."[50]

[50] Ruling Direction Submission of Additional Information (issued May 3, 2005)("May 3 ruling"), pp. 2-3 (footnote omitted).

Specifically, TGE assumed that it would sell all the steam it would be capable of producing (2 million pounds per hour) in every hour of the year (8,760 hours).

In its June 17, 2005 response to the May 3 ruling, TGE refused to provide the requested analysis, arguing that its second revised proposal, a cogeneration facility with steam topping turbines, "would not be applicable to an electric-only plant, and TGE is not proposing an electric-only plant." TGE added that "the Article X certificate requested for the proposed topping cycle cogeneration plant would need to be conditioned upon the delivery of steam to one or more users."[51]

As discussed earlier, TGE's response to a comment by the City set forth a description of the manner in which electricity production at the cogeneration facility would be reduced along with reductions in steam demand from the hypothetical customer(s). Instead of directing TGE to provide MAPS analyses for each stage of the electricity production reduction schedule, the examiners issued a ruling, on July 12, 2005 that repeated their directive to the applicant to provide a MAPS analysis in which the electricity production heat rate was not contrived by using steam sales revenues to offset electricity production costs. The examiners explained that the results of the additional MAPS analysis "will presumably define the opposite end of the range of potential benefits (vis-à-vis the benefits projected to result from selling 2,000 mlb/hr of steam at a price of $15.20/mlb)."[52]

TGE again refused to provide the requested information, and it filed an interlocutory appeal of the July 12

[51] TGE's Response to May 3 Ruling, p. 3. TGE did not propose a deadline for meeting that condition.

[52] Ruling Directing Submission of Additional Information (issued July 12, 2005)("July 12 ruling"), p. 2.

ruling. In that appeal, TGE stated directly that it "would not build the proposed facility without steam export contracts."[53]

2. Corrected Steam Revenue

The July 12 ruling directed TGE to explain its calculation of "steam revenue of $319,564,000" and "the total cost of electricity generated" of 3.58¢/kWh.[54] In its response to the July 12 ruling, dated August 22, 2005, TGE stated that the corrected amounts should be $266,304,000 and 4.59¢/kWh. These corrections were carried through to revised amended application §16.2.3.2, where the heat rate used in the revised MAPS analysis was increased from "3,670/Btu/kWh" to "3,890/Btu/kWh" and assumed hourly production was reduced from 878,000 kWh to 824,000 kWh.

Notwithstanding these changes, revised Tables 16-7 and 16-8, showing, respectively, the MAPS-modeled emissions reductions and variable cost savings resulting from operation of the Case 5 revised proposed facility, are the same in the response to the May 3 ruling and the response to the July 12 ruling. The response to the latter ruling does not explain why the results of the MAPS analysis for Case 5 would not change along with the input changes.

3. Construction and Decommissioning

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[53] TGE's Interlocutory Appeal, July 27, 2005, p. 2. Although no provision of the applicable rules of procedure provides that the filing of an interlocutory appeal results in a stay of a directive to provide information, TGE, to date, has not responded to the directive or proposed to provide other information that would satisfy the stated purpose of the information request in the July 12 ruling.

[54] The July 12 ruling referred TGE to page 16-9 of Attachment A to the response to the May 3 ruling. The same figures appear in the discussion pertinent to "Case 5" (page 16-12), which would have been the proper reference.

In the May 3 ruling, the examiners noted that TGE cited the Boston Central Artery/Tunnel project ("Big Dig") as a "precedent" for underground and below-water-table construction, as is contemplated for the revised proposed facility. The examiners observed that the Big Dig project has been plagued by numerous leaks, some which have been major, and financial responsibility for repairs had not been determined. The examiners directed TGE to provide information about (i) efforts it would undertake to attempt to avoid the structural failures experienced in Boston; (ii) financial arrangements it would enter into to ensure that unanticipated structural failures can be repaired quickly without risk to workers' and the public's health and safety; and (iii) decommissioning costs in the wake of a major structural failure. Moreover, the examiners stated that they would not consider sufficient a bare response that the applicant will have better management and quality assurance/control.

a. Prevention of Water Intrusion

In response to the May 3 ruling, TGE asserted that "[t]he slurry wall at the Central Artery/Tunnel Project in Boston has had water leakage problems but has not experienced any structural failures and none are anticipated."[55] According to TGE, the Big Dig's problems stemmed from two causes. First, TGE noted, as a result of inadequate quality control procedures, soil caved into a slurry wall excavation before, or as, concrete was poured. TGE stated that a "possible prevention measure[]" against a soil cave-in would be "[i]mplementation of strict

[55] TGE's Response to May 3 Ruling, Attachment C, p. 8. Apparently in TGE's view, "a fissure in the concrete created by debris" through which "an eight-inch gusher" flowed (Portsmouth Herald, December 3, 2004) is not a sign of "structural failure."

quality control procedures during pouring of concrete into the slurry wall excavation."[56] TGE also stated that the construction specification would "clearly define the testing requirements prior [to] and after concrete placement in the slurry wall excavation."[57]

Second, TGE continued, the numerous smaller leaks in the Big Dig's tunnel resulted from lack of enforcement of a requirement in the construction specification that points of leakage or seepage be repaired upon discovery. TGE asserted that its construction specification would "clearly state the requirements that the contractor is to perform immediate repairs of all leakage and seepage upon discovery,"[58] and that the requirements would be strictly enforced by "quality control personnel." TGE also stated that it would apply a "cold joint treatment" between slurry wall panels that was not employed with "earlier" slurry wall installations. TGE stated, finally, that "[i]n some cases where seepage or leakage cannot be sealed completely . . . a secondary block wall may be installed in front of the slurry wall, with drainage at each floor level to collect this water into one or more sumps."[59]

TGE's response stated that one of the firms participating in the preparation of its June 2004 "Underground Facility Engineering Feasibility Report" has designed several projects with slurry wall construction. However, TGE did not identify that firm, or any other firm(s), as the party or parties who would assume legal and/or financial responsibility for assuring that the quality control requirements it would

[56] Id., p. 10.

[57] Id., p. 12.

[58] Id.

[59] Id., p. 10.

adopt to avoid the Big Dig project's water intrusion problems would be met.

b. Financial Arrangements for Repairs

In response to the May 3 ruling, TGE noted that the Big Dig tunnel has not been decommissioned, and that no other facility with a slurry wall design has reported the problems experienced with that project. Accordingly, TGE stated that it "does not believe it is necessary to enter into special financial arrangements to address unanticipated structural failures . . . ." TGE added that "[a]s with other possible failures in structures or equipment, [it] will have comprehensive property and liability insurance to help defray or cover the costs of unanticipated events."[60]

c. Emergency Decommissioning

In response to the May 3 ruling, TGE stated that the costs of emergency decommissioning would be $22.4 million, slightly more than its estimate of the costs of conventional decommissioning ($21.6 million). The major tasks under emergency decommissioning would be structural stabilization, repairs, and clean-up; removal of aboveground structures; removal of hazardous wastes from the underground equipment; sealing or bypassing utilities; repair or backfilling of "the damaged area" of the underground structure; and restoration of the park space. TGE noted that it considered "major structural failure that is judged technically unfeasible to repair, or uneconomical to repair due to in adequate coverage from insurance proceeds or other claims" to be a "highly improbable event."[61]

[60] Id., p. 18.

[61] Id., pp. 16-17.

EMINENT DOMAIN PROCEEDINGS

Background

In 1989, Community Board 1 of Brooklyn began a process of public outreach and community participation that resulted in the preparation of two development plans, one for Greenpoint and one for the Williamsburg Waterfront. On October 14, 1998, Community Board 1 approved the plans for review pursuant to City Charter §197-a, and on October 21, 1998 the plans were submitted to the Department of City Planning.

The plans were approved by the City in January 2002. Among others, those plans articulated the following principles:

- "Achieving waterfront access. Both plans place the highest priority on new and improved public spaces along their waterfronts.

- "Facilitating housing and local commercial development. Recognizing the need for new housing to serve diverse income levels, both plans propose new development on vacant and underused land, at a scale compatible with surrounding neighborhoods.

- "Pursuing rezoning actions. Both the Greenpoint and Williamsburg 197-a Plans encourage expeditious rezoning actions to address these issues and opportunities."

In June 2003, the Department of City Planning issued a Greenpoint-Williamsburg Land Use and Waterfront Plan (LUAWP) in which zoning changes were proposed "to allow for housing and open spaces, in tandem with light industry and commercial uses, along two miles of Brooklyn's East River waterfront and upland neighborhoods." The Department, building on the foregoing principles from the 197-a plans, set forth the following objectives:

- "Reflect changing conditions. Enact comprehensive zoning changes to address the dramatic changes that have taken place in recent decades, and to prepare the communities for the twenty-first century.

- "Promote housing opportunities. Capitalize on vacant and underused land for new housing development, addressing both local and citywide needs.

- "Fulfill the city's commitment to affordable housing. Under the Mayor's housing plan, New York City is committed to investment in affordable housing, particularly in areas rezoned for residential use.

- "Address neighborhood context. New development should fit in with its surroundings, building on the strong character of the existing neighborhoods.

- "Protect important concentrations of industrial activity. While industry in the area has been declining sharply for decades, manufacturing zones should be retained where important concentrations of industrial activity and employment exist.

- "Create a continuous waterfront walkway and maximize public access to the waterfront. Establish a blueprint for a revitalized, publicly accessible East River waterfront.

- "Facilitate development that will reconnect the neighborhood to the waterfront. Taking into account the difficulties of waterfront redevelopment, shape new development so that it connects the inland neighborhoods to the waterfront."

As part of the proposed zoning changes, the Bayside Fuel site was included in a 28-acre parcel mapped as parkland amidst the continuous waterfront walkway.

The Department of City Planning issued a positive declaration, environmental assessment statement, and draft scope of work for the proposed action on October 8, 2003. The Department held a public hearing to solicit comments on the draft scoping document on November 13, 2003. After receiving public comments, a final scoping document was developed and released on June 4, 2004. The final scope of work was used as a framework for preparing a draft environmental impact statement (DEIS). A public hearing on the DEIS was held by the City Planning Commission, in conjunction with the City's Uniform Land Use Review Process, on January 19, 2005. Public comments on the DEIS were received for a 10-day period following the January 19 public hearing.

A final environmental impact statement (FEIS) was prepared, and a notice of completion of the FEIS was issued on March 4, 2005. On May 11, 2005, City Council adopted, with some modifications, the zoning map and text changes proposed in the LUAWP. In particular, City Council approved the proposal to include the Bayside Fuel site within Waterfront Access Plan BK-1 Parcel 20, which is mapped as parkland.[62]

TransGas Energy Services Corporation

On June 8, 2005, about four weeks after the conclusion of the LUAWP approval process, the law firm representing TGE in this proceeding filed a certificate of incorporation of "TransGas Energy Services Corporation" (TESC) with the New York State Department of State. The certificate states as follows:

> The TransGas Energy Services Corporation shall be an Electric Corporation as defined in Article 2 of the Transportation Corporations Law of the State of New York, and shall carry on operations for the production

[62] New York City Zoning Resolution §62-831.

> and supply of electricity within Kings, Queens, Bronx, Richmond and New York Counties, State of New York.
>
> The Corporation, in furtherance of its corporate purposes above set forth, shall have all the powers enumerated in Section 11 of the Transportation Corporations Law of the State of New York, subject to any limitations provided in the Transportation Corporations Law or any other statute of the State of New York.

Transportation Corporations Law §11(3-a) states that an electric corporation "shall have power and authority to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law."

On five consecutive days, June 22 through June 26, 2005, notices of a July 7, 2005 hearing to be conducted by TESC pursuant to §§201-204 of the Eminent Domain Procedure Law were published in the New York Daily News.[63] Specifically, the notices stated that the hearing would be held by TESC in connection with the acquisition of the Bayside Fuel site "for the purpose of developing, constructing, owning and operating an electric cogeneration facility." At the hearing, which was conducted by counsel for TGE[64] acting as a representative of TESC,[65] three speakers spoke in support of the proposed condemnation and seven spoke against it.[66]

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[63] The notices were classified advertisements consisting of approximately five column inches (single-column) of small (seven-point or smaller) type.

[64] Condemnation Hearing Transcript, p. 2

[65] Id., p. 24.

[66] Five of the seven speakers opposing condemnation stated that they had not seen the published notices of the hearing but had heard about it through word of mouth in the community.

On two consecutive days following the hearing, August 6 and 7, 2005, a "Notice of Determination and Findings" was published in the New York Daily News.[67] The notice stated that TESC, "by resolution dated July 28, 2005, determined and found" among other things that (i) the revised proposed facility ("the Project") "will serve the public uses as determined herein"; (ii) "[t]here are no alternative locations for the Project"; and (iii) "[t]he Project will not have any significant adverse environmental impacts on the environment or on the residents of the locality." The "public uses" identified in the notice include "providing needed electric generation, increased competition and reliability." The notice states that "the Project" would "remediate a highly contaminated site for use as a public park, provide air quality benefits, reduce oil imports, create jobs, increase earnings and foster economic development, foster [State] Energy Plan and [City Waterfront Revitalization Plan] objectives[,] reduce potable water consumption and provide electric and steam savings to ratepayers." The notice goes on to state that "TESC recognizes the authority of the Siting Board to review, analyze and modify any aspect of the proposed project, particularly as it relates to environmental matters, and TESC acknowledges that it does not have the power or authority to bind the Siting Board by any determination it makes on environmental matters."[68]

On August 30, 2005, the City commenced a proceeding in the Appellate Division, Second Department, seeking (i) a

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[67] The notices were classified advertisements consisting of approximately seven column inches (double-column) of small (seven-point or smaller) type.

[68] On August 11 and 12, legal notices were published in the Daily News stating that the transcript of the hearing conducted on behalf of TESC would be available for public inspection at TGE's offices.

judgment rejecting the determination and findings issued by TESC; (ii) an injunction against TESC's acquisition of the Bayside Fuel site through condemnation; and (iii) a preliminary injunction preventing TESC from commencing an eminent domain proceeding to acquire title to the Bayside Fuel site. On October 24, 2005, TESC commenced an eminent domain proceeding. On November 4, 2005, the Appellate Division denied the City's motion for a preliminary injunction.

As noted above, Transportation Corporations Law §11(3-a) states that an electric corporation "shall have power and authority to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law." Eminent Domain Procedure Law §402(B)(3)(g) states that "if the property is to be used for the construction of a . . . major steam electric generation facility as defined in section one hundred forty of [the Public Service Law] with respect to which a certificate of environmental compatibility and public need has been issued under such law," the condemnor shall include in its petition to the Court "a statement that such certificate relating to such property has been issued and is in force."[69]

DPS Staff Interrogatory DPS(ACD)-17(a) inquired about the corporate relationship between TGE and TESC. In response, TGE stated that "TGE's principal shareholder is Adam Victor and TESC's only shareholder is Adam Victor." Interrogatory DPS(ACD)-17(e) asked whether TGE had any plans for TESC to assume TGE's position as applicant in this proceeding. TGE

[69] The Notice of Determination and Findings published on August 6 and 7, 2005 includes a declaration that the Bayside Fuel site is "currently zoned for heavy industry." Given the adoption of New York City Zoning Resolution §62-831 on May 11, 2005, that statement is not correct.

responded that "[t]here are no such plans yet," and that it "is willing to discuss the necessity of such a change with DPS Staff."

City of New York

On July 20, 2005, the City filed, in Kings County Supreme Court, a notice of petition, verified petition, and notice of pendency of proceeding, to institute a proceeding for acquisition of title to the Bayside Fuel site under the Eminent Domain Procedure Law. The purpose of the City's filing is to acquire the Bayside Fuel site and convert it to parkland, pursuant to the LUAWP.

On September 2, 2005, TGE, its parent corporation, and the owner of Bayside Fuel filed an action in Kings County Supreme Court seeking a decision to set aside the various resolutions and processes resulting in the approval of the rezoning proposed in the LUAWP. According to the Court, TGE et al. alleged that "the City failed to disclose or discuss the significant adverse impacts on air quality associated with the proposed rezoning; failed to recognize the improvements in air quality that the Facility would provide by displacing emissions of older plants in the City; and failed to disclose that the City would not fully remediate the Site, while TransGas would." According to the Court, TGE et al. contended further that "the Siting Board is legislatively charged with the sole discretion and authority to site major electric generating facilities pursuant to the procedures set forth in Article X of the Public Service Law," and that "the proposed condemnation of the Site by the City would improperly divest the Siting Board of jurisdiction, thereby frustrating the legislative intent."[70]

[70] Matter of City of New York, 2005 Slip Op 52047(U), pp. 5-6.

Following the receipt of briefs and an oral argument, the Court issued an order and decision, on December 14, 2005, staying the eminent domain proceeding commenced by the City, pending a decision by the Siting Board on TGE's Article X application. In the Court's view, Article X "is intended to vest the Siting Board with exclusive jurisdiction to determine where major electric generating facilities will be located." According to the Court, "the City's actions are admittedly the result of the City's determination that a major electric generating facility should not be located at the Site," and that "the City's proceeding to condemn the Site is intended to circumvent the Siting Board's jurisdiction over the determination by taking the Property for use as a park." The Court held that "[s]uch a result cannot be permitted."[71]

Accordingly, the Court concluded that it is "without jurisdiction to resolve the issues raised herein at this stage of the proceedings." The Court found that "the City's commencement of the instant condemnation proceeding is an 'action' that must be approved by the Siting Board pursuant to

[71] Id., p. 18. The Court noted the City's argument that Article X does not authorize the Siting Board to override a judgment in a condemnation proceeding awarding title to a property, but responded that the argument "fails to acknowledge that in order to obtain such a judgment, [the City] passed numerous resolutions and amended its zoning ordinances, which provisions the Siting Board can refuse to apply" (Id., p. 19 n. 11).

the express language of [Public Service Law §166(1)(h)] in order to be enforced by this Court."[72]

DISCUSSION AND RECOMMENDATION

The introduction to this document included a summary of four reasons for the recommendation that TGE's application be dismissed. In this section, these reasons are discussed more fully.

Inability to Obtain Revocable Consents

A revocable consent is defined in the New York City Charter as "a grant by the city of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over inalienable property[.]"[73] The City Charter goes on to state that "[a] revocable consent shall not be granted for a

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[72] Id., p. 19. Public Service Law §166(1) identifies the entities that are entitled to party status in an Article X certification proceeding. Paragraph (h) states that a municipality entitled to receive a copy of an application may become a party if it serves a timely notice of intent to become a party. Paragraph (h) goes on to state that "any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof." The Court's decision, which appears to regard an early stage of a municipality's implementation of its own land use plan as a form of "enforcement" of a zoning ordinance, does not explain why the City's evidentiary presentation at the hearings in this proceeding is insufficient to satisfy §166(1)(h). In addition, the brief on behalf of TGE et al. did not discuss, and the Court's decision does not address, the fact that a municipality that did not meet the deadline for filing a notice under §166(1)(h) could be allowed to intervene under §166(1)(m), which does not have an evidentiary presentation requirement. See Case 99-F-1625, KeySpan Ravenswood, Ruling on Party Status (issued October 6, 2000).

[73] New York City Charter §362(d).

use that would interfere with the use of inalienable property of the city for public purposes."[74]

In the Rules of the City of New York (RCNY), Title 34, Chapter 7, there is an additional provision allowing the City's Department of Transportation (DOT) to deny a petition for a revocable consent if the Commissioner, in her sole judgment, determines that granting the consent "would otherwise not be in the best interest of the City."[75] Citing this regulation, the City asserted that "[g]iven the City's determination that the project is not in the best interest of the City, and its position in this case, it is unlikely that it would exercise its discretion to grant a revocable consent to TransGas for the water pipe, the steam tunnel, or any interconnection that would enter City property."[76] The City contended that the City DOT's regulation may not be overridden by the Siting Board, because the Board cannot condemn City-owned property for the water supply or steam pipes."[77]

The examiners initially concluded that the City's authority to grant or deny an application for a revocable consent is a municipal "consent" under PSL §172(1) that would not apply to the applicant without the Siting Board's permission. Were a certificate to be granted to the applicant, the examiners recommended that the Board allow the City to assume responsibility for conducting an inquiry into whether the proposed routing of the water supply line and steam export line "would interfere with the use of the unalienable property of the city for public purposes" (the City Charter standard), subject to Board's ongoing jurisdiction. The examiners concluded,

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[74] New York City Charter §364(a).

[75] RCNY §7-09(d).

[76] The City's Initial Brief, p. 29.

[77] Id., pp. 29-30.

however, that the standard in the City DOT's regulation ("not otherwise in the best interest of the City") could be brandished by the City as a means of undoing a Board decision to grant a certificate.[78] In circumstances the examiners thought were "analogous," the Public Service Commission (PSC) found that a law allowing for such discretion to be unreasonably restrictive, and it exempted a pipeline from its applicability under the provision in PSL Article VII equivalent to PSL §168(2)(d).[79]

The City excepted to the examiners' conclusion, arguing that this is not a permitting issue, but rather an issue pertaining to property rights. According to the City, "[w]hile Article X gives the Board authority to override local approvals, it clearly does not give the Board authority to issue a revocable consent over the objection of the Commissioner of Transportation, which would be equivalent to a condemnation of City property."[80]

TGE disagreed, arguing that a Board decision requiring the granting of revocable consents would not result in alienation of the City's title to its property. According to TGE, a revocable consent would grant TGE the revocable right only to use City-owned property for its interconnections without granting possession of any real property interest in the land. Thus, TGE asserted, a revocable consent is akin to a license: a revocable non-assignable privilege to do one or more acts upon the land of the licensor.

TGE argued in addition that leaving with the City the authority to refuse to grant revocable consents would nullify the State's control over determinations regarding the siting of

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[78] Recommended Decision, pp. 76-78.

[79] PSC Case 70350, Columbia Gas Transmission Corporation, Opinion No. 89-23 (issued July 20, 1989), pp. 32-38.

[80] The City's Brief on Exceptions, p. 1.

major electric generating facilities pursuant to Article X. According to TGE, one of the primary means by which the Legislature sought to assure the State's control over siting decisions was to grant authority to the Siting Board to waive municipal laws or regulations that could hinder the development of electric generating facilities.[81]

Upon further review of the applicable law, the examiners have concluded that their conclusion in the recommended decision is incorrect, and that the City's position is correct.

In PSC Case 70350, cited in the recommended decision, the applicant in that proceeding proposed to construct a segment of its planned pipeline on a parcel of real estate that was subject to an easement restricting construction and development. Because the easement was the result of a local law exchanging tax relief for the surrender of development rights (and the creation of the easement), the applicant requested the PSC to waive the easement. The PSC, noting that the applicant was requesting a waiver of the result of a local law, and not the law itself (which had since been repealed), declined to grant the request, concluding that "[i]t is sufficient for us to reach a determination regarding the route to be followed for the pipeline and leave to Columbia the method of acquisition for the necessary property."[82]

Certain types of real property held by the City of New York are impressed with a public trust and generally may not be alienated without approval of the State legislature. Among the

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[81] TGE's Brief Opposing Exceptions, pp. 12-14, citing Consolidated Edison Company of New York, Inc. v. Town of Red Hook, 60 N.Y.2d 99, 108 (1983) ("Red Hook").

[82] PSC Case 70350, supra, p. 31; see also PSC Case 00-T-1831, Cross Sound Cable Company, Opinion No. 01-2 (issued June 27, 2001), p. 15 and Appendix A, p. 15.

types of real property impressed with such a public trust are the City's waterfront properties, land under water, and public streets and avenues.[83] Inalienability is a requirement of both State and City law, for the purpose of preserving those lands for use by the people.[84]

But although the City may not transfer title to these lands, it is permitted under certain circumstances to grant leases, franchises, permits and licenses with respect to such property that do not interfere with the public's use.[85] Thus, TGE correctly characterizes a "revocable consent" as being essentially the same thing as a license, that is, "[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort,"; and,

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[83] General City Law §20(2); New York City Charter §383.

[84] The common law distinguishes between two forms of title to public trust lands: the jus publicum and the jus privatum. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287 (1913); Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548 (1894). Jus publicum means held by the sovereign for the public. Jus privatum means held by the sovereign for the sovereign. Title to streets and waterways is held by the government as the representative of and in trust for the people (jus publicum) and generally cannot be sold or alienated. Title to the lands under the streets and waterways is held as private property (jus privatum) and could be sold or alienated at common law (although alienation is prohibited by the General City Law and the City Charter). The public has a right to travel over public streets and waterways, but does not have a general right to lay pipes in the lands underneath said streets and waterways. A revocable consent to lay pipes does not include the right to occupy the land above the pipes or to possess such land to the exclusion of others, but it is nonetheless a right to use the land in a manner unique from the general right held by the public to use the land. Absent the exercise of the power of eminent domain, such a unique property right can be granted only by the holder of such right, the holder of the jus privatum, in this instance the City.

[85] New York City Charter §383.

in the context of real property, "a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property."[86] The City Charter defines a revocable consent, in pertinent part, as "a grant by the city of a right, revocable at will, . . . to any person to construct and use for private use pipes, conduits and tunnels under . . . inalienable property . . . or . . . to a public service corporation for facilities ancillary to, but not within, a franchise . . . ."[87]

The City is technically incorrect that the receipt of a revocable consent or license is similar to what can be obtained by condemnation. Condemnation concerns the alienation of real property (the transfer of ownership), and by its terms, a revocable consent cannot be used to alienate real property that the law has designated as inalienable. However, the City's argument is made by way of analogy, and, putting aside the use of the technical term "condemnation," the gist of the City's argument is that the Legislature has not given the Siting Board the authority to grant City property or the use of City property, however minor, to anybody.

In that regard the City is correct. The Siting Board discussed the lack of such authority in its October 16, 2003 order in this proceeding, in which it concluded that its jurisdiction extends to the siting of ancillary water lines, sewer and steam facilities, but does not preempt the jurisdiction of state and local agencies with respect to necessary easements.[88] Similarly, Public Service Law §172(1) preempts regulatory approvals (that control or restrict the

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[86] Black's Law Dictionary (5th Edition).

[87] New York City Charter §362(d).

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

time, place, or manner of exercising a right already possessed) for the construction or operation of a major electric generating facility, but does not pertain to the grant of a right to use property.[89]

TGE needs an overt grant of a property right from the City to allow it to use City property to construct underneath City-owned property a water pipe, steam line, and other plant necessary for the operation of the proposed facility. TGE has cited no authority to support its assertion that the Siting Board possesses the authority to allow TGE to use City property. The Siting Board can approve a route across or through City property, but that does not give TGE a right to enter upon the City property and install plant. Although TGE has cited the Red Hook case[90] for the proposition that the Legislature has preempted local prohibitions affecting the siting of Article X facilities, that case concerned an ill-considered local regulatory prohibition on site studies that had nothing to do with the property rights of the municipality.

Article X gives the Siting Board substantial power over local regulatory provisions that might otherwise frustrate the State's interest in constructing and operating major electric generating facilities. However, applicants must secure on their own the property rights necessary to construct their facilities. TGE has thus far failed to secure a property right to locate its water supply and steam lines on inalienable property owned by the City. This is not a failure of the regulatory scheme enacted by the State Legislature or implemented by the Siting Board. If there is any failure, it is

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[89] For the distinction between municipal permitting and contractual rights regarding the use of property, see Matter of Chambers et al. v. Old Stone Hill Associates et al., 1 NY3d 424 (2004).

[90] Footnote 80, supra.

on the part of TGE to anticipate and provide for its basic property needs.

In short, TGE would need to obtain revocable consents from the City, were it to construct the water supply and steam lines on the City's property. The City has stated, within its prerogative, that no revocable consents will be granted.

In PSC Case 05-T-0089, a Public Service Law Article VII gas pipeline certification case, the applicant proposed to locate 1,500 feet of its facility on State Reforestation Lands, and it asked the PSC to review DEC's refusal to issue a Temporary Revocable Permit (TRP) for the crossing. DEC took the position that it lacked the authority to issue a TRP, because the gas that would flow through the facility would not have been produced by wells on DEC land.

The PSC observed as follows:

> This case does not present a permitting issue, but rather an issue pertaining to property rights. The Reforestation Lands in question held by the State of New York under the jurisdiction of the DEC are impressed with a public trust and generally may not be alienated without approval of the State legislature. The requirement of inalienability is a requirement of State law. Its purpose is to preserve these lands for use by the people. While the DEC may not transfer title to these lands, it is permitted under certain circumstances to grant leases "for the purpose of aiding in discovering and removing any oil or gas upon such lands or storage of gas or oil thereon" in respect to such property [ECL §9-0507] that do not interfere with the operations of such reforestation areas. For administrative purposes, DEC has established a system using a [TRP] as a device to administer such leases, but the use of such a device does not change the underlying character of the act as a grant of real property rights, as opposed to a regulatory type "permit" that governs actions but does not involve the grant of property rights.
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> While [Public Service Law] §130 supplants other permitting procedures in Article VII cases, it does

> not supplant the need to obtain property rights from the State, if necessary. The [PSC] has the authority to issue a certificate authorizing construction and operation of the pipeline. It has no authority, express or implied, to grant land, easements, licenses, franchises, revocable consents to use real property, or any other kind of property or right to use property.

Because DEC did not (and believed it could not) issue a TRP to the applicant, the PSC concluded that "[a]ny certificate that would be granted would be useless and, in such circumstances, the Commission is not required to issue a certificate."[91]

Similarly, the Siting Board is not required to issue a certificate to an Article X applicant in circumstances where it is clear that the applicant will not obtain grants of rights to construct, on public property, facilities essential to the operation of a proposed generating station. It could be argued that the Board should grant a certificate with a condition requiring TGE to obtain such rights before it begins construction, but, as noted above and discussed further below, there is much additional work that TGE and the parties to this proceeding would need to do before a record supporting issuance of even a conditional certificate could be developed. Where an essential requirement cannot be met under any apparent circumstances, such additional work would be wasteful.

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[91] Case 05-T-0089, Fortuna Energy, Inc., Order Requiring a Hearing and Extending the Time Required to Render a Decision Pursuant to Public Service Law Section 121-a(7) (issued March 23, 2005), pp. 4-6 (footnotes omitted, emphasis in original). DEC subsequently determined that a well spacing unit that would be connected to the proposed pipeline is located on State Reforestation Land. Accordingly, a TRP was issued in April 2005, and only then did the Commission decide to issue an Article VII certificate to the applicant. Case 05-T-0089, Order Granting Certificate of Environmental Compatibility and Public Need (issued May 11, 2005).

Accordingly, if for no other reason, this proceeding should be discontinued.

Lack of Steam Sales Contract(s)

As noted earlier, TGE has stated that it will not construct the proposed facility without steam export contracts, because "steam export is needed for a topping cycle cogeneration plant to be technically feasible."[92] TGE has stated that it "has a representative attempting to find potential steam customers in Brooklyn," and it once identified the City's Newtown Creek Water Pollution Control Plant as "another large, potential steam user."[93] TGE received what it considered a "promising letter"[94] from the City's Housing Authority, but 10 days later the Authority stated that it was no longer interested in purchasing steam from TGE because of concerns expressed about the feasibility of the distribution system TGE had stated it would construct.[95] For the most part, however, TGE has stated that it expects to export steam to Con Edison, and has no current plans to develop its own steam distribution system.[96]

TGE contends that the PSC has "required" Con Edison to negotiate in good faith for the purchase of steam from "any producer that can offer pricing terms competitive with Con Edison's own avoided steam costs."[97] TGE suggests that "[a] contract has not been executed presumably because the Article X

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92 TGE's Interlocutory Appeal, July 27, 2005, p. 4.

93 TGE's Response to DPS Interrogatory DPS(MFC)-1.

94 Id.

95 Amended Application §16, Attachment A.

96 TGE's Response to DPS Staff Interrogatory DPS(MXP)-1.

97 Id.

proceeding has not been completed and a certificate issued."[98] TGE states that "[i]f Con Edison is unwilling to enter a contract, TGE would seek assistance from the [PSC] to help mediate any dispute over terms, and if necessary, direct Con Edison to enter into a contract on terms determined reasonable by the [PSC]."[99]

TGE's suggestion that the PSC has imposed, without qualification, a requirement on Con Edison to negotiate for the purchase of steam from other suppliers is not accurate. The question of whether a competitive steam market could be relied on by Con Edison to meet its system requirements was thoroughly examined in a planning proceeding conducted by the PSC.[100] The PSC cited an economic analysis showing "that a competitive steam market in New York City is not workable and that steam generation should remain regulated." The PSC observed further:[101]

> [The consultant] found that, although new entrants could be allowed to build steam plants, market power problems would not be mitigated because in a system where the ability to increase load or export to other markets is extremely limited, new entrants would force less efficient generators out of the market. Then, with the return to the same balance of production and load, the ability to exert market power would be restored. [The consultant] also stated that the configuration of the steam grid does not allow for the transfer of steam between different areas of the system, creating several load pockets where the number

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98 TGE's Response to DPS Staff Interrogatory DPS(ACD)-17. TGE has stated that it "is requesting that a certificate be conditioned upon obtaining steam sales arrangements" (id.).

99 TGE's Response to DPS Staff Interrogatory DPS(MXP)-1.

100 PSC Cases 96-S-1065 et al., Consolidated Edison Company of New York, Inc. – Steam Rates et al., Order Concerning Phase II Steam Plan Report (issued December 2, 1999).

101 Id., pp. 4-5.

> of suppliers would be extremely limited. Furthermore, [the consultant] found that any market power mitigation measures that would be necessary to constrain the ability of participants to exercise market power would be so extensive that practically no steam transactions could be considered unregulated.

The PSC concluded that "a competitive steam market is not feasible in New York City at this time,"[102] and it authorized Con Edison to proceed with repowering its East River station to meet future (now current) steam system requirements.[103] As to future purchases of off-system supplies, the PSC stated that "Con Edison should be willing to enter into negotiations with any producer that can offer pricing under terms that are competitive with Con Edison's own avoided steam costs, so long as doing so does not result in the new owner having excessive market power of the type discussed by [the consultant]."[104]

There has been no showing that New York City steam market conditions have changed at all, much less to the extent necessary, so that the PSC would now be inclined to require Con Edison to purchase steam from TGE. Moreover, TGE's position on how much steam would or should be purchased has changed, and not, apparently, as a result of negotiations with Con Edison. On April 30, 2001 (prior to the filing of the preliminary scoping statement in this proceeding), TGE prepared a "concept of agreement" stating that it would supply 1,500,000 lbs/hr of steam capacity, and that "actual hourly deliveries would be fully callable (on a priority basis) and dispatchable by Con Edison for use on its steam system."[105] TGE proposed a capacity

[102] Id., p. 6.

[103] Id., p. 12.

[104] Id., p. 7.

[105] TGE's Response to DPS Staff Interrogatory DPS(MXP)-1, question 4, Attachment p. 6.

charge based on "prospective avoidable labor, maintenance, taxes and capital costs at [Con Edison's] Hudson Avenue generating station," with "an appropriate discount of these avoidable costs so as to produce savings to Con Edison." TGE proposed a commodity charge equal to "95% of Con Edison's avoided steam production costs (including fuel, water, and chemicals)."[106] A memorandum following a meeting over one year later (June 5, 2002) indicates that Con Edison did not accept the capacity charge proposal.[107] A memorandum following a meeting on February 27, 2003, indicates that TGE would produce, on average, approximately 794,000 lbs/hr of steam.[108] However, in the amended application (and in subsequent revisions to the amendment), TGE states that it expects to sell 2,000,000 lbs/hr of steam to Con Edison in every hour of the year at a price equal to the sum of Con Edison's average fuel costs and average production-related non-fuel costs.[109]

In short, no contracts (or precedent agreements) for the sale of steam are pending, nor have genuinely prospective steam purchasers even been identified. Without such contracts, TGE would not build or operate the proposed facility, and there would be no basis for the required finding by the Siting Board that construction and operation of the proposed facility would result in benefits to the public that outweigh its adverse environmental impacts.[110] The Siting Board is not required to continue holding this proceeding open on the basis of

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[106] Id., p. 7.

[107] Id., p. 9.

[108] Id., p. 11 (6,956 mmlbs/yr divided by 8,760 hours).

[109] Amended Application §16.2.2 (and subsequent revisions); TGE's response to DPS Staff Interrogatory DPS(MXP)-1, question 1, Attachment.

[110] Public Service Law §168(2)(e).

speculation that one or more steam sales contracts might be entered into sometime in the future.

Affiliation with Transportation Corporation

The Siting Board's regulations define a "private applicant" as "an applicant that does not have the power of eminent domain."[111] The regulations state generally that applicants, "where appropriate," shall address alternative sites, technology, scale or magnitude, design, timing, use and types of action,"[112] and shall address a "no-action" alternative by evaluating "the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed facility."[113] The regulations provide, however, that the discussion of technical alternatives to a private applicant's proposed facility need not include demand-reducing measures, and that consideration of site alternatives may be limited to parcels owned by, or under option to, the applicant.[114]

From the outset of this proceeding, TGE has held itself out as a private applicant, or "merchant plant."[115] In accordance with the pre-application stipulations, the discussion of alternatives to TGE's originally-proposed facility was limited to alternative cooling technology, peaking capability, and capacity; the no-action alternative; and alternative air

[111] 16 NYCRR §1000.2(o).

[112] 16 NYCRR §1001.2(f).

[113] 16 NYCRR §1001.2(c).

[114] 16 NYCRR §1001.2(d).

[115] Motion for a Ruling That The Proposed TransGas Energy Facility Has Been Selected Pursuant to an Approved Procurement Process, December 2002, pp. 4, 7.

pollution controls, architecture, exhaust stack configurations, and fuels.[116]

As discussed earlier, a certificate of incorporation of "TransGas Energy Services Corporation" (TESC) was filed with the New York State Department of State on June 8, 2005. The certificate states the following:

> The TransGas Energy Services Corporation shall be an Electric Corporation as defined in Article 2 of the Transportation Corporations Law of the State of New York, and shall carry on operations for the production and supply of electricity within Kings, Queens, Bronx, Richmond and New York Counties, State of New York.
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> The Corporation, in furtherance of its corporate purposes above set forth, shall have all the powers enumerated in Section 11 of the Transportation Corporations Law of the State of New York, subject to any limitations provided in the Transportation Corporations Law or any other statute of the State of New York.

Transportation Corporations Law §11(3-a) states that an electric corporation "shall have power and authority to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law."

Insofar as "TGE's principal shareholder is Adam Victor and TESC's only shareholder is Adam Victor,"[117] it would make no sense to continue regarding TGE as a private applicant. The decision of Kings County Supreme Court, discussed earlier, treats TGE, TESC, and parent corporation Gas Alternative Systems, Inc., as one entity ("TransGas") and states that "the instant dispute concerns the proposed construction by TransGas of an electric generating plant on the Williamsburg/Greenpoint

[116] Application §17.

[117] TGE's Response to DPS Staff Interrogatory DPS(ACD)-17.

waterfront . . . ."[118] The briefs in that case were filed on behalf of both TGE and TESC. The notices of the hearing under the eminent domain procedure law concerning TESC's condemnation of the Bayside Fuel site stated that it would be acquired "for the purpose of developing, constructing, owning and operating an electric cogeneration facility." The hearing was conducted by counsel for TGE[119] acting as a representative of TESC.[120]

Furthermore, the continuing validity of TGE's professed intention to operate as a "merchant plant" is open to question. TGE has stated that "[i]f Con Edison is unwilling to enter a [steam purchase] contract, TGE would seek assistance from the [PSC] to help mediate any dispute over terms, and if necessary, direct Con Edison to enter into a contract on terms determined reasonable by the [PSC]."[121] In past Article X cases in which applicants sought determinations from Siting Boards that their proposed facilities would be "selected pursuant to an approved procurement process"[122] (namely, competition), the Boards specifically made note of statements by applicants that they would not seek to recover any costs from ratepayers under the Public Service Law, nor would they operate as qualifying facilities eligible for must-purchase contracts under the federal Public Utility Regulatory Policies Act of 1978.[123] By seeking to have an obligation to purchase steam imposed on Con Edison, TGE would essentially supplant the utility, given the PSC's finding in 1999 that that "any market power mitigation

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[118] Matter of City of New York, 2005 NY Slip Op 52047(U), pp. 1, 2.

[119] Condemnation Hearing Transcript, p. 2

[120] Id., p. 24.

[121] TGE's Response to DPS Staff Interrogatory DPS(MXP)-1.

[122] Public Service Law §§160(7) and 164(1)(b).

[123] See, e.g., Case 99-F-1625, supra, p. 21.

measures that would be necessary to constrain the ability of participants to exercise market power would be so extensive that practically no steam transactions could be considered unregulated," and that "a competitive steam market is not feasible in New York City at this time."[124]

In the East River Article X proceeding (Case 99-F-1314), Con Edison addressed demand-side management and distributed generation as alternatives to repowering a central steam generation station. Since TGE's affiliate TESC has acquired the power to take private property on which such a station would be constructed, and TGE's intention is to impose a purchase obligation on an incumbent utility, it should have, but has not, provided an evaluation of such alternatives.[125]

Prejudice From Delay

The comments of the parties and TGE's responses to information requests have revealed that the amendment to the application remains substantially incomplete. Until mid-December 2005, there was little apparent prejudice to the parties and the public from holding this proceeding open and allowing piecemeal supplementation of the amendment through responses to information requests, because the City was proceeding with the early stages of implementing its Land Use

[124] PSC Cases 96-S-1065 et al., supra, p. 6.

[125] The Board's September 15, 2004 order directed TGE to provide "documentation to support claimed benefits such as voltage support, congestion relief and line loss reductions, including a thorough analysis of technological alternatives that could achieve comparable benefits." The alternatives were briefly addressed in amended application §16.4.4. TESC's subsequently-filed certificate of incorporation authorizes it to engage in the "supply of electricity." TGE has given no indication, since the certificate was filed, about whether TESC could provide such technological alternatives.

and Waterfront Plan, which, the examiners had concluded in the recommended decision, constitutes a no-action alternative that is preferable, under the applicable coastal zone management policy, to construction and operation of the initially-proposed facility. Were the City's acquisition of the Bayside Fuel site to have been completed before TGE provided the information necessary for completion of the amendment, the only prejudice would have been to the applicant. However, in the wake of the recent decision of Kings County Supreme Court staying the City's eminent domain proceeding until the conclusion of this case, the delay resulting from TGE's failure to submit a complete amendment would, perversely, prejudice the parties and the public.

In another Article X case where proceedings were repeatedly delayed because of the applicant's inability to complete necessary revisions to its application, the examiners ruled that the application should be dismissed. The examiners concluded as follows:

> [T]he benefits associated with continuing review should extend only to applicants who can ensure an expeditious review of their certificate applications. Those circumstances do not exist here. If the review process followed the procedural schedule proposed by the Applicant at the June 29, 2004 conference, the Siting Board would not be able to make a final determination about the proposed facility until April 2006, four years after the Chairman issued the compliance determination in April 2002, and more than two years after the expiration of Article X. Even that schedule, however, is now outdated by two months. Moreover, any updates or supplemental materials to the certificate application will require substantial additional scrutiny, which we noted above would require the equivalent of a new compliance determination. The required de novo review of the Applicant's updated and supplemented certificate application, would likely entail more delay than contemplated in the proposed schedule. Delay of such

> a duration, we conclude, frustrates the underlying public policy objectives identified above.[126]

In the Glenville Energy Park ruling, the examiners noted that the consequences of the applicant's delay included "disruption of schedules, effects on property and community planning and services, and the ability to participate effectively in the proceeding."[127] In this case, the consequences are considerably more profound, because any further delays allowed to the applicant for the production of necessary information would now carry over to implementation of a land use plan that has the imprimatur of the City's elected officials pursuant to the New York City Charter.

TGE cannot ensure expeditious completion of the review of a complete amendment to its application. This shortcoming is not properly overcome by promises to flesh out skeletal plans in compliance filings, nor by proposals to accept a myriad of conditions precedent to the commencement of construction.

For example, given the urban setting of the Bayside Fuel site, mitigation of potentially adverse construction-period environmental impacts would need to be addressed in the course of deciding whether a certificate should even be issued. However, TGE's responses to requests for additional information about a number of issues – hauling and disposal of excavated soil, odor control, flooding and erosion control, and off-site mud tracking – stated that they would be addressed in a Remedial Action Work Plan that must be reviewed and approved by DEC before excavation can begin. In its August 12, 2005, response to DPS Staff Interrogatory DPS(RHP)-33, TGE advised that the last activity in connection with the review of a work plan occurred when it filed a response on May 17, 2004 to April 2004

[126] Case 99-F-1835, supra, Ruling on Motion to Dismiss, p. 16.

[127] Id., p. 13.

comments of the State Department of Health (DOH) and DEC. In other words, the applicant's last reported action occurred 10 days before it submitted the May 27, 2004 letter in which it unveiled a conceptual design for an underground generation facility. (The comments from DOH and DEC pertained to a draft work plan and report submitted in September 2003.) TGE has provided no information, such as supplements to the amendment or to its information responses, showing what, if anything, it has done to prepare a new draft work plan for the extensive excavation required for the revised proposed facility. As was the case in the Glenville Energy Park ruling, "the benefits associated with continuing review should extend only to applicants who can ensure an expeditious review of their certificate applications. Those circumstances do not exist here."

For certain issues where commenting parties identified the need for clarification or additional information, TGE has provided responses stating what it could do, not definite proposals. These issues include flood protection, slurry wall leakage and seepage, and, perhaps most significantly, the ultimate design of the public park it would construct. TGE has had sufficient time to develop firmer positions, but has not done so.

Finally, as noted earlier, TGE has stated unequivocally that it would not construct the revised proposed facility unless it had first entered into a steam sales contract (or contracts). There are significant doubts about whether an agreement or agreements for steam sales will be reached. In addition, there is insufficient information about how such sales would physically take place, or whether any sales at prices that would be economically attractive to purchasers would compensate TGE for its steam-related costs. It was noted in the

recommended decision, which was issued on April 1, 2004, that TGE had not conducted requested studies of interconnection costs.[128] Since then, no additional information has been provided, nor has there been any indication about how much time would be required to prepare a cost analysis showing that the steam sales that would be essential to the revised proposed facility's operation would be economically feasible.

Were this proceeding to remain open, the amount of time required to remedy TGE's lack of preparation of a complete amendment would be the minimum length of the delay in the implementation of an approved City land use plan. Such an outcome would be unreasonable and contrary to the public interest as envisioned by the elected representatives of the citizens of the City. Accordingly, the amended application should be dismissed as incomplete, pursuant to 16 NYCRR §1000.13.

JUDITH A. LEE KEVIN J. CASUTTO

[128] Recommended Decision, p. 124.