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May 13, 2014

Via email

Hon. Kathleen H. Burgess, Secretary (secretary@dps.ny.gov)
NYS Board on Electric Generation Siting and the Environment
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Re: Case 13-F-0464: Application of National Grid for a Certificate of Environmental
Compatibility and Public Need Pursuant to Article 10 for the Repowering of its
E. F. Barrett Power Station in the Town of Hempstead, Nassau
Response to May 6 Email from Judge Bielawski

Dear Secretary Burgess and Examiners Bielawski, Phillips, Caruso and McClymonds:

I write in response to the May 6, 2014, email from Examiner Bielawski (Dkt. No. 25) regarding the eligibility of Citizens Campaign for the Environment (CCE) for intervenor funding in the above-referenced proceeding. Without ruling on the issue, Judge Bielawski's email alerted us to her concern that CCE may not meet the definition of "local party" under Article 10 and its regulations, so as to allow CCE an opportunity to supplement or resubmit its application.

We appreciate the opportunity to address this issue in more detail and to submit additional materials. As explained in Part I, below, CCE believes that it meets the definition of "local party" eligible to receive intervenor funding in this matter. We would like a ruling on that issue, so as to inform CCE and the public of the Examiners' interpretation of the applicable requirements for this and future cases. However, in the event that the Examiners rule that CCE is ineligible for funding, we have submitted herewith a second set of application materials.

Those materials, while identical with respect to the scope of work to be carried out with intervenor funds, replaces CCE's request with a request for intervenor funding made by Kyle Rabin. Mr. Rabin is a member of CCE who resides four miles from the E.F. Barrett plant, who may be affected by the proposed repowered facility (and is affected by the existing plant), and who intends to utilize any intervenor funding obtained in conjunction with, and in furtherance of, CCE's goals as expressed in its request for funding.

If CCE is ruled eligible for funds, then we ask that you please process CCE's April 25th request for funding (Dkt. No. 23) as supplemented by this letter. In the alternative, please consider Mr. Rabin's request for intervenor funding submitted herewith.

I.

CAMPAIGN FOR THE ENVIRONMENT IS A "LOCAL PARTY" ELIGIBLE FOR ARTICLE 10 INTERVENOR FUNDS

CCE is not a national organization, but a local/regional non-profit, non-partisan advocacy organization that works in two states, New York and Connecticut, to empower communities and advocate solutions that protect the public health and the natural environment. CCE is headquartered in Nassau County, Long Island, at 225 Main Street, Farmingdale, NY 11735, less than 13 miles from the E.F. Barrett plant as the crow flies.

CCE has 16,156 current members on Long Island, thousands of them in the Western Bays region, including hundreds in communities surrounding the plant; for example, CCE has 192 members in Oceanside (zip codes 11570, 11572 and 11576), 108 in Long Beach (zip code 11561), 126 in East Rockaway (zip code 11518), and 49 in Island Park (zip code 11558).

On behalf of its local members, CCE is very active in the Western Bays, a sub-region of the Long Island South Shore Estuary Reserve, extending from the western boundary of the Town of Hempstead to the Nassau/Suffolk County line. The Western Bays are a system of bays and marshes within the South Shore Estuary Reserve that provides critical habitat for birds and marine species, and offer abundant recreational opportunities. Once productive fishing and shellfishing grounds, the water quality and habitat of the bays has deteriorated in recent decades. CCE is a member of the Western Bays Collaboration Working Group, which is made up of elected leaders and stakeholder organizations with the goal of restoring the Western Bays. CCE presses for research and other measures sorely needed to diagnose and fix the ecological problems seen in this region. See <http://www.citizenscampaign.org/campaigns/western-bays.asp>. In addition, CCE chairs the South Shore Estuary Reserve Citizens Advisory Committee, whose input guides the South Shore Estuary Reserve Council, which was created by the New York State Legislature in 1993 and charged with developing and implementing a comprehensive management plan for the estuary. See <http://www.citizenscampaign.org/campaigns/south-shore-estuary.asp>.

One of the efforts CCE has championed, at least since 2009, is advocating for stringent cooling water intake and thermal discharge standards in the State Pollution Discharge Elimination System (SPDES) permit issued by the NYS DEC for the existing E.F. Barrett power plant. See discussion in April 25th cover letter in support of CCE's request for intervenor funding. CCE's members that reside in the vicinity of the plant are adversely affected by the operation of the current plant and will or may be affected by the operation of the proposed repowered plant because of the plant's air pollution and greenhouse gas emissions, its taking of fish, shellfish and other aquatic organisms at all life stages from the Western Bays, its discharges of thermal pollution and chemical pollution into the bays, and the negative visual and aesthetic impacts of this industrial use of waterfront land in an area frequently used for recreation.

CCE, in its own right, is an entity entitled to be a party to this Article 10 proceeding. PSL § 166[1] states that the "parties to the certification proceeding shall include: ... (l) any non-profit corporation or association, formed in whole or part to promote conservation or natural beauty [or] to protect the environment ... if it has [timely] filed a notice of intent to become a party...". (Indeed, Judge Bielawski's email notes that the Examiners have no objection to CCE being a party.)

Furthermore, we believe that CCE is a "local party" eligible for intervenor funding. Article 10 defines "local party" to mean "persons residing in a community who may be affected by the proposed major electric generating facility who individually *or collectively* seek intervenor funding..." PSL § 160[9] (emphasis added). The term "person" is defined to include "any individual, *corporation, public benefit corporation*, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate." PSL § 160[3] (emphasis added). By defining person to include not only individuals but also legal entities that represent or act on behalf of individuals, and by defining local party to include those that collectively seek funding, the State Legislature intended to include non-for-profit organizations that have members residing in the potentially affected community. Nothing in PSL sections 163 or 164, which set forth the process for requesting intervenor funds, provide to the contrary.

The Article 10 regulations also support the conclusion that CCE is a local party. 16 NYCRR § 1000.2[ab] repeats the statutory definition of "person" verbatim and Section 1000.2[s] provides that a "local party" is "[a]ny person residing in a community who may be affected by the proposed major electric generating facility at the proposed location, or any alternative location identified, who is a party to the proceeding." That provision goes on to state that "[f]or purposes of this definition, the term 'residing' shall include individuals having a dwelling within a community who may be affected."

Several principles of textual interpretation are relevant here, including that: (i) a regulation should not be deemed to be inconsistent with the statute which it implements; (ii) text should not be read to create an absurdity or render other portions of the text superfluous; and (iii) the term "include" is not exclusive unless it is accompanied by explicitly limiting words. Accordingly, the Article 10 regulations should not be deemed to exclude persons from the definition of "local party" that the Legislature intended to include. Further, because the term

“dwelling” makes no sense in relation to certain entities that are “persons,” but are not individuals (such as governmental agencies, trusts and estates), the term should be read to apply only to individuals. Nothing in the statutory or regulatory definitions provides that only individuals can be local parties; rather they provide for other entities to be local parties. In light of the intent to allow certain non-individual persons to be local parties, it would be an unreasonable construction of the text to suggest that the absence of a dwelling disqualifies an entity from intervenor funding. In other words, the term “residing” in Section 1000.2[s] was meant to refer to individuals having a dwelling within a community who may be affected by the proposed facility, but it is not limited to those individuals. It also refers to entities that include and act on behalf of those individuals, like CCE.

That principle is consistent with decades of well-settled law on the right of associations and organizations to be parties on behalf of their members in state and federal litigation and administrative proceedings. For example, an organization or association has standing to sue on behalf of its members where: (1) at least one member would have standing to sue in his or her own right; (2) the interests at stake in the case are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 775 (1991). CCE meets all of those tests here.

That result also comports with common sense. If any individual member of CCE seeks intervenor funding and meets the definition of local party, as Mr. Rabin does here, then he is eligible for those funds. Likewise, if a group of individuals – for example, the 49 CCE members in Island Park – joins together and seeks intervenor funds collectively, then it seems clear that they would also be eligible, whether they made the request in their own names or formed an association. Those individuals may also receive intervenor funds and use them in conjunction with the goals of an organization like CCE, which is itself a party to the proceeding. It would be illogical, then, to conclude that the Legislature intended to prohibit CCE, which is acting on behalf of those members and many more members that reside nearby the plant, from receiving intervenor funds merely because CCE also has other members, and works on other environmental issues, in other parts of New York State and in Connecticut.

For all of those reasons, we respectfully submit that CCE is local party entitled to intervenor funding.

II.

KYLE RABIN IS A “LOCAL PARTY” ELIGIBLE FOR ARTICLE 10 INTERVENOR FUNDS

In the event that the Examiners disagree with the above, please accept the application for intervenor funding of Kyle Rabin, a dues-paying member of CCE, which is submitted herewith. Examiner Bielawski’s email stated “We may grant funding to local parties who disclose an intent to utilize it in conjunction with the goals of a special interest organization.” As explained here

and in the cover letter submitted with Mr. Rabin's application, Mr. Rabin is a local party and has expressed such an intent.

Kyle Rabin lives at 934 Mayfield Road, Woodmere, New York, approximately 4 miles from the Barrett plant as the crow flies. He and his family live in an energy efficient home with a rooftop solar power system. Mr. Rabin uses and enjoys the land and waters near his home and near the Barrett plant for recreation and general enjoyment. Among other things, Mr. Rabin takes hikes along local beaches and frequently visits the Marine Nature Study Area in Oceanside, the Woodmere Dock in Woodmere and the Hewlett Point Park in Bay Park. He also enjoys kayaking, and rents kayaks from Empire Kayaks in Island Park.

Mr. Rabin also has significant expertise in environmental sustainability, water and energy. Mr. Rabin holds an M.S. in Environmental Science from the State University of New York (SUNY) College of Environmental Science and Forestry and a B.A. in Environmental Studies from Binghamton University. He currently acts as Director of Programs for a non-profit organization that works on food, water and energy sustainability issues. Prior to this position, Mr. Rabin served as Executive Director at Friends of the Bay (Oyster Bay, NY) and worked as a senior policy analyst and campaign director at Riverkeeper, Inc. He began his work in the environmental arena in 1998 as an air and energy program associate at Environmental Advocates of New York.

By discharging thermal and chemical pollution, withdrawing massive volumes of biologically productive bay water, and thereby killing aquatic organisms and otherwise impairing water quality, the operation of the existing E.F. Barrett Power Station directly damages the activities and enjoyment of Mr. Rabin and his interest in the marine environment of the Western Bays in the South Shore Estuary. Air pollution emitted by the plant also affect Mr. Rabin due to his proximity to the plant. Greenhouse gas emissions from the plant affect Mr. Rabin and millions of others. Mr. Rabin frequently sees the Barrett power plant looming in the background when he travels and recreates around his community, and the presence of this industrial facility on this waterfront land on the bay negatively affects Mr. Rabin visually and aesthetically. While the proposed repowered facility may reduce or even eliminate *some* of those impacts, if built, it will not eliminate all of them. Mr. Rabin seeks to have the environmental impacts of the proposed plant analyzed and minimized to the greatest extent consistent with law and science, and to have feasible alternatives thoroughly evaluated.

Mr. Rabin is therefore an "individual local party" who has "a dwelling within the community" and who is individually affected by the operation of the E.F. Barrett Power station facility within the meaning of Article 10 and its implementing regulations. See 16 NYCRR § 1000.2[s]. Mr. Rabin is therefore eligible to receive intervenor funding. Additionally, Mr. Rabin has expressed an intent to work and closely coordinate with CCE and to utilize any funding received in conjunction with, and in order to further, CCE's goals. Mr. Rabin's description of how he will use intervenor funds is identical to the description contained within the request submitted by CCE on April 25th. Mr. Rabin will work closely with CCE in this regard and they have jointly retained the legal and technical experts that the funding will support. The Long Island Sierra Club is also working closely with Mr. Rabin and CCE, and has submitted a letter of

Secretary Burgess and Hearing Examiners

May 13, 2014

Page 6

support of Mr. Rabin's application.

In these circumstances, there can be no doubt whatsoever that Mr. Rabin is a local party eligible for intervenor funding.

Should you have any questions, feel free to call me directly at 212-242-2273 or email me at reed@superlawgroup.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'Reed Super', with a stylized, cursive script.

Reed Super

Encls.

cc:

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