

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of a Renewal and Modification of a State Pollutant Discharge Elimination System (SPDES) permit pursuant to Environmental Conservation Law (ECL) article 17, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 704 and 750 *et seq.* by

Dynergy's New Information, and Motion for Reconsideration of March 25, 2004 Issues Ruling at Section II.A.12.

DEC No.: 3-3346-00011/00002
SPDES No.: NY-0006262

Dynergy Northeast Generation, Inc.,
On behalf of Dynergy Danskammer, LLC,
PERMITTEE.

May 11, 2004

(Danskammer Generating Station)

Proceedings

In a memorandum dated April 5, 2004, which was issued after a conference call on that same date, I reopened the record of the Issues Conference (*see* 6 NYCRR 624.4[b][1]) to allow Dynergy to submit new information about events related to a transformer located at the East Fishkill substation. The April 5, 2004 memorandum also allowed Dynergy to file a motion to reconsider the March 25, 2004 Issues Ruling (the Rulings) at Section II.A.12 concerning the requirements in proposed draft permit Conditions 13 and 15.¹ The April 5, 2004 memorandum suspended the appeals schedule for the Rulings and set a schedule for receipt of Dynergy's new information and motion for reconsideration. In addition, the April 5, 2004 memorandum provided Department Staff and Riverkeeper with the opportunity to review and comment about the new information provided by Dynergy, and to reply to its motion for reconsideration.

In a letter dated April 12, 2004, Dynergy timely filed the new information and the motion for reconsideration. With the April 12, 2004 letter, Dynergy included an affidavit by Martin W. Daley sworn to on April 8, 2004. Attached to Mr. Daley's affidavit were Exhibits A and B. According to Mr. Daley's affidavit, Exhibit A is copy of a letter dated April 8, 2004 provided to Dynergy by John W. Watzka, Section Engineer - Transmission Planning and Design, for Central

¹ Proposed draft permit Conditions 13 and 15 would require Dynergy to reduce entrainment by 80% from current levels and impingement by 90% from current levels if, after studying the feasibility of using a Marine Life Exclusion System™ (MLES™), an alternative technology, or combination of both, Dynergy cannot reduce entrainment and impingement at the Danskammer facility to levels that could be achieved through a closed-cycle cooling system. The terms of the proposed draft permit conditions do not expressly state how Dynergy would achieve these goals. The Schedule of Compliance attached to the draft SPDES permit and the biological fact sheet state, however, that Dynergy would have to schedule "additional fish protection outages" to meet these goals. In other words, the Danskammer facility could have to shut down periodically in order to reduce the amount of water it withdraws from the Hudson River.

Hudson Gas & Electric Corporation (Central Hudson). Exhibit B is a copy of the New York Independent System Operator (NYISO) Statement of Energy Policies, Planning Objectives and Strategies for New York State Energy Plan, dated September 21, 2000.

Riverkeeper and Department Staff filed timely comments and replies. In a letter dated May 4, 2004, Riverkeeper asserts that the new information offered by Dynegy is not relevant to the best technology available (BTA) determination required pursuant to the federal Clean Water Act § 316(b) (codified as 33 USC § 1326[b]).

In a letter-brief dated May 5, 2004, Department Staff commented about the information Dynegy provided on April 12, 2004, and replied to Dynegy's motion for reconsideration. Department Staff included two attachments with its filing. Exhibit A is a copy of the Transmission Power Agreement (TPA) by and between Central Hudson and Dynegy, dated January 30, 2001. Exhibit B is a copy of Department Staff's February 4, 2004 response to Dynegy's request to include electric reliability as an issue for adjudication.

Dynegy's New Information, and Comments from Department Staff and Riverkeeper

The new information presented by Dynegy relates to events at the East Fishkill substation, which is one of several substations that Central Hudson operates to deliver electricity to about 280,000 customers in the mid-Hudson Valley. To provide electricity to its customers, Central Hudson relies primarily on three power sources. The first source is a set of "remote" generators. Central Hudson imports electricity from these remote generators via five 345/115 kilovolt (kV) step-down transformers located at various Central Hudson substations including the East Fishkill substation. The Danskammer facility is the second power source, and contributes 500 megawatts (MW) of power. The Danskammer facility is located electrically in the center of the Central Hudson 115kV and 69 kV transmission system. The third source is a series of small generators located along the 69kV transmission system on the west side of the Hudson River. (*See Exhibit A to Mr. Daley's affidavit.*)

The Danskammer facility provides a direct feed to the East Fishkill substation. A 345/115 kV transformer at the East Fishkill substation failed on March 1, 2004. When the transformer failed, representatives from Central Hudson contacted representatives at the Danskammer facility, and inquired about the current and projected operating status of the Danskammer facility. (*See Daley affidavit, paragraph 4.*)

Depending on load level and other system conditions, Central Hudson relies on the three power sources identified above to provide the requisite level of electric reliability for its customers. The failure of the 345/115 kV transformer at the East Fishkill substation on March 1, 2004 limited the amount of electric power that Central Hudson could import from its remote power sources. To meet demand after the transformer failure, Central Hudson, therefore, relied upon the output from the Danskammer facility and the series of small generators located along

the 69kV transmission system (*i.e.*, the third power source identified above). The demand for electric output from the Danskammer facility continued until the failed 345/115 kV transformer was repaired. (*See* Exhibit A to Mr. Daley's affidavit.)

In addition to being a source of actual power (*i.e.*, megawatts of electricity), the Danskammer facility also provides "reactive power," which is necessary to maintain adequate voltage during both normal and outage conditions. Moreover, the Danskammer facility is considered a "backstart provider" for the Central Hudson system. Following a system blackout, the Danskammer facility would be restarted in an "isolated mode" and its output would be used to restore the local power grid. (*See* Exhibit A to Mr. Daley's affidavit.)

According to Mr. Daley's affidavit, if Danskammer cannot provide the necessary voltage support, Central Hudson would need to "shed load" by instituting targeted rolling brownouts. Given the transformer failure and the possibility of additional fish protection outages, Central Hudson has commenced a study to analyze load, and to model the potential results from loss of energy output from the Danskammer facility to the 115 kV transmission system. (*See* Daley affidavit, paragraphs 7 and 10.)

Dynergy argues that unexpected equipment failures as well as planned events that take transmission and electric generating equipment offline may raise reliability issues. Dynergy contends, therefore, that any circumstances which could increase the possibility of power failures or brown-outs negatively impact reliability. According to Dynergy, any additional factors that adversely impact electric reliability are unacceptable.

Department Staff contends that the only new information in Dynergy's April 12, 2004 filing is that one of the 345/115 kV transformers malfunctioned at the East Fishkill substation on March 1, 2004. Because Dynergy and Central Hudson are in the electric generation and transmission business, Department Staff argues that they should know that system failures "routinely take place for a variety of different reasons...." Department Staff concludes that Dynergy knew about the possibility of system failures before March 1, 2004.

Department Staff explains that the January 31, 2001 TPA is an agreement that requires Dynergy to supply Central Hudson with electric power, and Central Hudson to purchase the power from Dynergy. Schedules attached to the TPA identify the amount of electric power that Dynergy will provide to Central Hudson each month, and the price per kilowatt that Central Hudson would pay to Dynergy. The TPA outlines the contractual rights and remedies if Dynergy cannot supply the predetermined amount of electric power in a given month, as well as the circumstances under which Dynergy could be relieved of its obligation.

Department Staff notes that the Danskammer facility is one of three potential sources of electric power for Central Hudson's customers. Department Staff argues that Dynergy has over-estimated the potential impact to mid-Hudson Valley electric customers that may be associated with additional, planned fish protection outages, and contends that if any additional outages are

necessary, they would not be as significant as Dynegy asserts. Based on the terms of the TPA, Central Hudson's reliance on multiple sources of electric generation, as well as additional requirements imposed by the Department of Public Service (DPS) and the NYISO, Department Staff argues that Dynegy and Central Hudson already know the potential effects that may result when the Danskammer facility goes offline, and have planned accordingly.

Riverkeeper maintains that Dynegy's assertion that additional fish protection outages would adversely impact electric reliability is vague and speculative. Riverkeeper asserts that the information presented in Mr. Daley's affidavit is conclusory and superficial, and therefore unreliable. Riverkeeper acknowledges that the transformer failure on March 1, 2004 is new information. Riverkeeper argues, however, that the contribution of the Danskammer facility to the power grid, in general, and Central Hudson's dependence on output from the Danskammer facility, in particular, are not new.

Riverkeeper notes that additional sources of electric generation will be available before Dynegy could be required to implement additional fish protection outages. According to Riverkeeper, the availability of electric power from the Athens Generating Station, Bowline Unit 3, and the Bethlehem Energy Center could reduce Central Hudson's dependence on the Danskammer facility.

Dynegy's Motion for Reconsideration

I. Positions of the Parties

Dynegy seeks reconsideration of the Rulings § II.A.12. Dynegy argues that the new information related to the East Fishkill substation and the 345/115 kV transformer demonstrates that the requirements in proposed permit Conditions 13 and 15 for additional fish protection outages would adversely impact electric reliability. The issue initially proposed by Dynegy is:

Whether proposed draft permit Conditions 13 and 15, and the schedule of compliance relating to those conditions should be eliminated or modified in light of their direct and cumulative impacts on electric system reliability in New York State?

According to Dynegy, the need for additional fish protection outages is a dispute between Dynegy and Department Staff concerning a substantial term or condition of the draft permit (*see* 6 NYCRR 624.4[c][1][i]). Dynegy argues further that the potential negative impacts to electric reliability associated with the proposed permit conditions are "costs" that must be considered in making the required BTA determination.

Moreover, Dynegy argues that Rulings § II.A.12 mischaracterizes the proposed reliability issue as solely a SEQRA issue. Dynegy states that electric reliability is not linked exclusively to

the SEQRA determination. Therefore, Dynegy contends that it should not be precluded from adjudicating electric reliability as it relates to the terms of the proposed permit conditions.

Department Staff opposes Dynegy's motion for reconsideration, and argues that Dynegy's request to adjudicate electric system reliability is untimely. According to Department Staff, the first time that Dynegy attempted to link concerns about electric system reliability to any proposed draft SPDES permit condition was during the February 4, 2004 conference call. Contrary to Dynegy's assertions, Department Staff argues that the terms of proposed permit Conditions 13 and 15 do not pertain to electric reliability. Rather, Department Staff contends that the proposed permit conditions relate exclusively to the best technology available (BTA) determination.

Department Staff also questions the validity of the statements made in Dynegy's filings. Department Staff observes that Mr. Daley's affidavit and Mr. Watzka's letter are both dated April 8, 2004. Department Staff recalls that during the April 5, 2004 conference call, Dynegy's counsel stated that the new information, which included an affidavit, had already been prepared. By comparing the dates of the affidavit and correspondence included with Dynegy's filings, Department Staff asserts that the new information had not been prepared before the April 5, 2004 conference call. Department Staff also objects to Mr. Watzka's letter because it is not signed. Department Staff argues further that the information presented in Mr. Watzka's letter should have been presented in a sworn affidavit.

Riverkeeper does not expressly object to Dynegy's request for reconsideration. Riverkeeper argues, however, that any concerns about electric reliability and the potential need to implement additional fish protection outages would be resolved if Dynegy installed a closed cycle cooling system at the Danskammer facility. Riverkeeper explains that a closed cycle cooling system would ensure the continued operation of the Danskammer facility while benefitting the Hudson River ecosystem by substantially reducing water withdrawals.

Riverkeeper states that Danskammer Units 1 and 2 operate infrequently, and therefore, could not be considered significant sources of electric power for Central Hudson's customers. According to Riverkeeper, this leaves Units 3 and 4, which use coal to generate electric power. Riverkeeper requests permission to amend its petition for full party status to present evidence that would demonstrate the feasibility of developing and installing a closed cycle cooling system for Units 3 and 4.

II. Discussion and Ruling

Rulings § II.A.12 limits Dynegy's proposed issue to compliance with the BTA standard because the terms of proposed permit Conditions 13 and 15 could require additional fish protection outages to minimize entrainment and impingement. Rulings § II.A.12 states further that "the effect of additional fish protection outages on electric reliability in New York is not relevant to the BTA determination and, therefore, will not be adjudicated in this proceeding" (at 16). The basis for excluding from adjudication that portion of Dynegy's proposed issue related to the direct and cumulative impacts on electric system reliability in New York was that such impacts are related to SEQRA. In Rulings § I, I determined that the SEQRA process in this case was complete because Department Staff issued a negative determination, and Dynegy withdrew its request to review the negative determination pursuant 6 NYCRR 624.4(c)(6)(i)(a).

I am not persuaded by Dynegy's argument that statewide electric reliability is an element of the BTA determination for the Danskammer facility. Accordingly, I deny Dynegy's motion for reconsideration. I rely on the rationale provided in the Rulings.

I do acknowledge, however, that implementing additional fish protection outages should be considered a "cost." The costs that Dynegy may have to bear, but not those that Central Hudson may have to bear, are relevant to the BTA determination. I also realize that Dynegy may have a relationship with Central Hudson and that this relationship may be impacted by Dynegy's operation of the Danskammer facility.²

Rulings § II.A.12 states there are fact questions related to the availability of the proposed mitigation and "whether the costs associated with additional fish protection outages are wholly disproportionate to the environmental benefits to be gained compared to other available alternative technologies." The wholly disproportionate standard identified in the Rulings relies on the Commissioner's determinations in *Matter of Mirant Bowline, LLC* (Commissioner's Decision, March 19, 2002) and in *Matter of Athens Generation Company, LP* (Commissioner's Interim Decision, June 2, 2000).

As I explained during the April 5, 2004 conference call, the Phase II rule³ may provide for alternative "cost" analyses. During the adjudicatory hearing, the parties will have the

² In addition to the DEC, the DPS, the NYISO, and the New York State Reliability Council are among the agencies that regulate Dynegy's operation of the Danskammer facility.

³ The parties will have an opportunity to develop a factual record, as appropriate, and to present legal argument about the applicability of the Phase II rule to the Danskammer facility (*see* Rulings § III, and Clarification of Rulings III provided in the April 5, 2004 Memorandum).

opportunity to identify the cost analyses outlined in the Phase II rule that may apply to the Danskammer facility. The cost analyses outlined in the Phase II rule may be different from the “wholly disproportionate cost” standard previously applied by the Commissioner. To the extent necessary, the parties will have the opportunity during the adjudicatory hearing to develop a factual record to support the application of the alternative cost analyses outlined in the Phase II rule to the Danskammer facility. At the conclusion of the hearing, the parties will have the opportunity to present additional argument to support their respect positions.

III. Riverkeeper’s Request to Amend it Petition for Full Party Status

In its petition for full party status, Riverkeeper proposed several closed cycle cooling tower configurations that could be located on the Danskammer site. At the Issues Conference, Riverkeeper expanded this proposed issue, and asserted that space on adjoining property could be used for the cooling towers. The Rulings joined the former proposal and denied the latter proposal (*see* Rulings § II.B.1). For the first time in the proceeding, Riverkeeper now requests leave to present a closed cycle cooling configuration that would apply only to Units 3 and 4, and presumably would be located on the site.

I grant Riverkeeper’s request because it refines, rather than expands, the issue joined in Rulings § II.B.1.

Schedule for Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed to the Commissioner in writing within five days of the disputed ruling (*see* 6 NYCRR 624.6[e][1]).

With the approval of the Chief ALJ, the appeals schedule outlined in the March 25, 2004 Issues Ruling was suspended pending a ruling on Dynegy’s motion for reconsideration. My memorandum dated April 5, 2004 stated that a revised appeal schedule would be presented here.

Accordingly, any appeals from the March 25, 2004 Issues Ruling, the April 5, 2004 memorandum, and this ruling concerning Dynegy’s motion for reconsideration must be received by the Commissioner (NYS Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York, 12233-1010) before 4 p.m. on June 18, 2004. Replies are authorized, and must be received before 4 p.m. on July 9, 2004.

Send one copy of any appeal and reply to the Commissioner at the address provided above, and one copy of any appeal and reply to all others on the service list at the same time and in the same manner as transmittal is made to the Commissioner. Send three copies of any appeal

and reply to the Administrative Law Judge. The Commissioner will not accept submissions by e-mail, or telecopier (FAX).

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.

Please note that the Service List has be revised with Mr. Gordon's new address, telephone and fax numbers, as well as his new e-mail address.

Daniel P. O'Connell
Administrative Law Judge
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Dated: May 11, 2004
Albany, New York

To: Attached revised Service List dated May 7, 2004

Service List

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Danskammer Generating Station
DEC Case No. 3-3346-00011/00002

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