

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
50 Wolf Road  
Albany, New York 12233-1550

In the Matter of the Applications

- by -

Hydra-Co. Generations Inc. and Babcock &  
Wilcox Solvay Power Inc. for a proposal  
to commercially operate the so-called  
SALT CITY ENERGY VENTURE, ("Salt City"),  
in the Town of Geddes

DEC Application No. #70-86-0393

INTERIM DECISION

April 1st 1988

## INTERIM DECISION OF THE COMMISSIONER

This Interim Decision is in relation to the March 7 rulings of ALJ Francis W. Serbent concerning the issues for the captioned proceeding. The Interim Decision will also address the Department of Public Service ("DPS") appeal of an earlier ruling denying it party status.

A short accounting of the history of this case will be provided in order that this Decision be placed in proper perspective. ALJ Serbent had originally issued the ruling on issues and party status on December 1, 1987. On December 9, the Staff filed a letter with ALJ Serbent stating that the wrong standard for the sulfur content for the fuel was in the draft permit and a discrepancy in the Applicant's submittals had raised questions about whether the air impacts had been properly modeled and whether PSD requirements applied to the project.

Based on this letter, ALJ Serbent properly sought to clarify the impacts of these determinations on the draft permit. ALJ Serbent's action correctly reflects the importance of the draft permit conditions as a focal point for joining issues for adjudication. Staff responded to ALJ Serbent's request on January 14, 1988 and included a revised draft permit in that submittal. All parties were instructed to repropose issues based on the substituted draft permit. Based on these submittals ALJ Serbent issued revised rulings on March 7. Appeals to this ruling were filed by DPS and a coalition consisting of the Sierra Club, Rainbow Alliance for a Clean Environment, Thomas Martin and David Halpern (known collectively as the "Intervenors").

### Standard for Determining Issues for Adjudication

The standard for determining which issues are to subject to adjudication are set forth in DEC regulations:

"Following the conference, the ALJ will determine and advise the parties of the issues to which testimony and other evidence in the adjudicatory session will be limited or will determine that the hearing is to be adjourned or cancelled. The ALJ's determination shall be based upon whether the issues raised are substantive and significant, and resolution of such issues may result in permit denial, require major modification to the project or the imposition of significant permit conditions. The ALJ will enter his determination on the record." 6 NYCRR 624.6(c)

An elaboration of how that standard is applied in practice first appeared in the Matter of Halfmoon Water Improvement District No. 1 (Interim Decision, April 2, 1982). It states:

"The issues or pre-hearing conference is the point at which the subject matter for the adjudicatory hearing is defined. In situations where the Department Staff have reviewed an application and offer no objection to the issuance of a permit, the burden of persuasion that substantive and significant issues exist is on the intervening parties. In order to meet this burden an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues. Moreover, the issues conference is not the point at which an intervenor should be deciding that it will have to locate an expert to substantiate the allegations made at the conference. The assertions should arise from the opinions of the expert or other qualified witnesses.

Once an intervenor asserts that an issue exists, it is incumbent on an Applicant to rebut the assertion through reference to its application in order to assist the ALJ in ruling on the matter. The ALJ's rulings will take into account the arguments, offers of proof, the application documents and the Department's expertise in these matters."

This approach has been confirmed in numerous subsequent decisions. Thus in order to raise an issue for adjudication, an intervenor must allege facts that are either (1) contrary to what is in the application documents for draft permit; (2) demonstrate an omission in the application or draft permit; or (3) show that defective information was used in the application or draft permit. The intervenor must also allege that if its facts are correct a regulatory or statutory standard or criteria might not be met.

At the issues conference stage, an intervenor need not present proof of its allegations sufficient to prevail on the merits but neither can its allegations be mere assertions without support. The degree of proof necessary to meet an intervenor's threshold burden may vary depending upon the nature of the matters under consideration, and whether the applicant attempts to rebut the intervenor's offers of proof. However, after the question has been joined, an adjudicable issue exists only where there are

sufficient doubts about the applicant's ability to meet all statutory and regulatory criteria such that reasonable minds would inquire further.<sup>1</sup> Requiring a greater showing would affect an unfair burden on intervening parties; allowing a lesser showing would over burden the adjudicatory system with issues of dubious merit.

DPS Appeals/Applicant's Appeal of Potential Issues Offered by DPS

DPS appeals ALJ Serbent's denial of its petition for late party status. In addition to the standards for granting party status contained in 6 NYCRR 624.4(b), a late filer must demonstrate that good cause exists for failure to file on time, that no party will be unreasonably disadvantaged or otherwise prejudiced, and that the person's participation will materially contribute to a complete record.

It is clear that the initial filing by DPS does not make an adequate showing on all of these points. However the material contained in the December 4 appeal together with its February 11 letter is rightfully taken into consideration at this time since a person is entitled to party status under Part 624 at any time during the proceedings as long as the requirements cited above are met.

I find that DPS meets the standards for party status set forth in 6 NYCRR 624.4(b). It has adequately shown the nature of its interest and has also set forth the nature of the argument it intends to present with adequate specificity. DPS has pointed to specific aspects of the manner in which it contends that the construction costs were overestimated. The estimation of such costs is one of the underpinnings concerning the determination that the proposed facility is for regulatory purposes a reconstruction and therefore not subject to New Source Performance Standards ("NSPS"). There is nothing in the body of the record or within this agency's special expertise that makes it evident that the criticism are frivolous or non-meritorious. In fact, since the DPS is the state agency responsible for analyzing utility expenditures, the matters at issue are within its special expertise and hence such assertions carry added weight. The Applicant's rebuttal to the merits of the DPS argument take this issue beyond the preliminary screening process that is warranted at this stage and into matters that would better be adjudicated on the record.

<sup>1</sup> A similar standard was articulated by the Nuclear Regulatory Commission for hearings in its forum. This standard was later affirmed on appeal and found to not be overly burdensome on intervening parties, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554, 98 S.Ct. 1197, 1217 (1978).

Turning to the additional showing that DPS needs to make due to its untimely filing there appears to be little doubt that the participation of DPS would add materially to the proceeding. DPS, as the agency principally responsible for utility rate-making, has a wealth of expertise related to the assessment of the reasonable construction costs for the proposed project. As stated above, such assessment is crucial to the threshold question of whether the project is subject to NSPS standards.

Although the reason for the late filing of DPS is not as compelling as it might be, the fact that DPS is the implementing arm of the agency responsible for approving the power sale aspects of the project and has expertise concerning an issue that is central to the outcome of this case makes its participation as a party in the proceeding appropriate.

Finally, I find that the granting of party status to the DPS will not unreasonable disadvantage or prejudice the Applicant or any other party as the proceeding is still at a preliminary stage. As stated more fully below, the principal issue raised by DPS, the applicability of NSPS, would be adjudicated in this proceeding in any event.

For the reasons given above, I am determining that the DPS has made a satisfactory showing and may participate in this proceeding with full party status.

The issue identified as DPS proposed issue #1 in the March 7 ruling is subsumed in the legal questions which are to be addressed regarding the applicability of the NSPS. I note that the Applicant by letter dated March 24 has stated this issue is moot due to the DPS failure to submit any direct testimony on this point. Applicant's characterization of the issue as framed in ALJ Serbent's ruling is incorrect and therefore the matter as noted above will be adjudicated with others concerning the applicability of NSPS.

DPS proposed issue #2 relating to the calculation of reconstruction values is a factual issue for adjudication which will also bear on the the applicability of NSPS.

#### Intervenor Appeals

The Intervenors appeals filed March 11, 1988 are divided into two sections. Those issues that were not considered in ALJ's second ruling because they were not explicitly restated and those that were considered but ruled out. This Interim Decision will deal with these appeals sequentially in approximately the order in which they appear in the March 11 submittal unless otherwise noted.

1. Applicability of New Source Performance Standards in Attainment Areas. Review of the arguments of Intervenors

demonstrate that there are a number of substantive legal issues. Among the issues that have been raised are:

(a) Was the Allied facilities operation out of compliance with State regulations in terms of air emissions and, if so, what legal effect, if any, does this have on determining the status of the proposed construction for purposes of determining NSPS applicability; and

(b) What legal effect, if any, does the fact that the Allied facility when operational generated less than 73 megawatts, the minimum amount necessary to be considered an "affected facility" pursuant to 40 CFR 60.40a as incorporated into New York regulations via 6 NYCRR 200.9 and 212.4(e).

2. Applicability of PSD Requirements. I find that a substantial question over this issue has been raised. The question concerns the appropriateness of the baseline of emissions that were used in determining that the emissions from the proposed project represents a reduction in sulfur dioxide and oxides of nitrogen.

3. New York State Emission Standards. I find that there is an issue as to what legal effect, if any, does the non-operative status of the Allied plant have on the applicability of 6 NYCRR 227.5.

4. Status of Project as a Qualifying Facility under PURPA. Regardless of whether there is any substantial question on this point, this matter is outside of the Department's jurisdiction and therefore cannot be considered an issue for this hearing.

5. Application of GEP Stack Height Regulations. A substantial issue is raised concerning whether merging of the sulfur dioxide into a combined stack is a permissible dispersion technique pursuant to 40 CFR 51.1.

6. Need/Downsizing of Project. The present application is not to be judged by an absolute standard of need as would be the case if it were subject to PSL Article 8. Under the applicable statutory and regulatory criteria, need for the project is relative and concerns satisfaction of SEQRA. (6 NYCRR 617.14(f)). It is proportional to the unmitigatable adverse impacts of the project. (Matter of Pyramid Crossgates, Decision, November 28, 1980).

Intervenors raise the need issue in the context of the sizing of the project, arguing that the Applicant has not demonstrated a need for the 79.9 megawatt generating capacity of the project. In the past, sizing has been a concern in the context of municipal resource recovery plants. Since the planned fuel source and the financing of these plants was tied to the waste stream generated in the service area oversizing the plant would predictably result in importing wastes from other areas or in the economic failure of the plant. Such is not the case in the case of Salt City as there

is no dispute concerning limitations on Salt City fuel supplies or the economic viability of the project.

Intervenors argue that the Applicant has only demonstrated the need for less than one quarter of the total energy output by identifying industrial customers. Although Niagara Mohawk is required by federal law to purchase the remaining output, Intervenors argue that such output is not required to support Niagara Mohawk's needs or the system needs of the New York State Power Pool. This question relates to the absolute standard of need which appears in PSL Article 8 and is not an accurate framing of the need question that would be addressed under SEQR. The need for a facility of the size proposed at Salt City could only be investigated under SEQR if unmitigatable adverse project impacts were identified and there was an accompanying showing that downsizing the facility would mitigate those otherwise unmitigatable impacts. In such a situation, in order for the proposed project to be approved, the Applicant would have to demonstrate a need for the project proportional to the severity of those adverse impacts.

In this case, the Intervenors have failed to identify unmitigatable adverse impacts of the project of a severity that would trigger the need to adjudicate this issue. Nor is there any showing by Intervenors that downsizing the facility would mitigate any adverse impacts to any appreciable degree. Accordingly the need for the project will not be any issue for adjudication.

In a similar vein, intervenors argue that the air permits should limit the output of the facility to 79.9 megawatts of net capacity rather than gross capacity. There is no showing by Intervenors that such a change would have any environmental impact. Accordingly, no issue is raised.

7. Acid Rain Impacts. Intervenors argue that the effects of acid rain, by their very nature, are incremental. Thus although any given source is unlikely to have a severe effect on the environment, it still represents an environmental insult which, accumulated with stress from other sources, can have substantial adverse impacts.

Although Intervenors are correct about the nature of the acid deposition phenomenon, they have failed to properly take into account the policy established in the new State Acid Deposition Control Act ("SADCA"). That legislation recognizes both the incremental nature of the problem and the fact that many of the sources of the problem are beyond the borders of New York State. Accordingly, the legislation sets up a regulatory program in which New York sources are required to reduce emissions of acid deposition precursors in a ratable share to their contribution to the overall problem. This in essence represents the balancing between the mitigation of adverse environmental impacts and economic practicality that is required under SEQR.

Although SEQR does authorize the permitting authority to go beyond standards to respond to site specific conditions, there is no indication that the emissions that would be caused by the operation of the proposed project would result in any unusually site specific impacts. Such might be the case if, for instance, a body of water especially sensitive to acid deposition were in close proximity to the project. In this case there was no showing that mitigation beyond SADCA standards would be appropriate and no issue is raised for adjudication.

8. Presence of Inactive Hazardous Waste Site. Intervenors have not presented any evidence to show that there is any problem that will be caused or exacerbated by the construction of the project respecting the inactive hazardous waste sites located in the project vicinity. Accordingly, no issue is raised.

9. Onondaga Lake Effects/Impact on Metro STP. Intervenors have not shown how the loadings of phosphates and sulfates to Onondaga Lake in the quantities proposed will violate any water quality standard or create any environmental problem. Neither is there any showing as to how the discharge of the collected leachate from the coal ash pile will create a problem with respect to the Metro STP. No issues are raised.

10. Ash Disposal. Special Condition No. 7 of the draft permit to construct requires that commitments be provided for total ash disposal six months prior to facility operation. In numerous decisions, this agency has held that in order to satisfy the SEQR mandates for comprehensive project review, such commitments must be demonstrated prior to the issuance of construction permits. (see Matter of Multi-Town Solid Waste Management Authority, Interim Decision, November 19, 1982; Matter of Ogden Martin Systems of Babylon, Inc., Interim Decision, December 6, 1985; Matter of Orange and Rockland Utilities, Decision, April 13, 1982; Matter of Consolidated Edison Company of New York, Inc., Decision, September 14, 1983).

The Applicant is therefore directed to supply evidence of such commitments as soon as possible. The record of this proceeding will remain open until such evidence is received. Depending upon the site or sites identified, there may be adjudicable issues relating to their acceptability. If the sites are out of state, this hearing would, however, be an inappropriate forum to adjudicate the acceptability of the sites. In such a case, responsible government would still require that Applicant provide written assurances from the appropriate regulatory agency of the involved state.

There also remains a question of the appropriate length of time of the commitment for ash disposal. In the context of cogeneration facilities, there is no regulation that specifies the length of time for which an applicant must demonstrate available disposal capacity. However, there are regulations relating to ash disposal for incinerator facilities, which require a showing of ten years disposal capacity, 6 NYCRR 360.3(d)(2)(v). Though the incinerator regulations are not directly applicable to this

facility, they apply to projects that are sufficiently similar to raise an issue concerning the appropriateness of the five year commitment proposed in the draft permit. Accordingly I find that an issue is raised at least as to the length of commitment need for ash disposal. As stated above, depending upon the Applicant's submissions there may also be issues related to acceptability of the site that will need to be adjudicated.

11. Alternatives. Intervenor's have argued that a number of alternatives not considered in the DEIS should be issues for adjudication in this hearing. The standard for determining issues enunciated at the outset of this Interim Decision is still applicable. In order to satisfy this standard, Intervenor's need show that there is a reasonable basis to believe that there is another alternative which is practical and can better minimize the adverse impacts of the project as proposed. In this case, the Intervenor's have failed to provide sufficient evidence to form a reasonable basis that any of the proposed additional alternatives would meet either of the above criteria.

Intervenor's also argue that the Applicant should be required to supplement the DEIS with an analysis of one or more of the suggested alternatives. Whether this should be required will be dealt with elsewhere in this Interim Decision.

12. Need for SPDES Permit Parameters for Phosphates and Sulfates. Intervenor's argue that limits are needed, at least in part, because of a possible upgrading of the classification of Onondaga Lake. If such a reclassification were likely in the reasonably foreseeable future, there might be a basis to adjourn the proceeding pending the outcome of such action. However, this is not the case, and any change is at this time speculative and should not be considered. Nor have Intervenor's supported their claim that there is a basis to believe that the discharge of phosphates or sulfates will in any way contribute to a contravention of existing water quality standards or contribute to any identifiable environmental problem. No issue is raised.

13. Lack of Effluent Limits for Cadmium, Mercury, Selenium and Silver. Effluent limits are proposed for point source 001 which is the only point source with an identified discharge of these heavy metals. Hence no issue is raised.

14. Thermal Discharges and Mixing Zone. Intervenor's have failed to show how the proposal would fail to comply with existing regulations or why any more stringent limit would be appropriate. No issue is raised.

15. Use of BACT for Copper, Iron, Oil and Grease. Intervenor's have not cited any authority that would reasonably lead to the conclusion that BACT should be required. No issue is raised.

16. Air Dispersion Modelling. The assertions by Intervenors are too general to formulate an issue. As an example of the defect, Intervenors asks that the issue of whether 1964 or 1965 wind data should be used in the modeling be adjudicated without even alluding to why the 1965 data is inappropriate or the significance of using 1964 data in its stead. The remaining assertions by Intervenors have similar deficiencies. If Intervenors has an expert ready to testify on air dispersion modeling, it was incumbent upon them to provide more detail in their submission as to the nature of the proposed issue. If there was any doubt as to the level of detail needed, two adverse rulings by ALJ Serbent should have suggested the need.

17. Visible NO<sub>x</sub> Plume. In its January 14, 1988 letter Staff identified a potential adverse visual effect from a NO<sub>x</sub> plume which could occur if and when two additional cogeneration projects, currently under review, become operational. Staff indicated, however, that there is no accurate way of predicting whether such an effect will occur. Although Intervenors argue that the potential cumulative impact should be addressed in the hearing, there is no showing that any factual issues are in dispute. Intervenors have not alleged that there is any way to predict the effect nor have they alleged that there are any mitigating measures which could be incorporated into the project design or operation. No issue is raised.

#### Requirement for an SEIS

Intervenors have appealed a ruling of ALJ Serbent which denied their motion to remand the DEIS back to staff for supplementation. Such an appeal is apart from the appeal of the issues ruling and is therefore not appealable as of right. I have determined, however, that it is the public interest to address this appeal.

Intervenor's original basis for its motion were alleged deficiencies or omissions in the DEIS. More recently, they also cite the revisions to Applicant's Acidic Deposition Study (the "Study") as a further basis to require an SEIS. Since the two arguments raise different issues, they will be discussed separately.

The deficiencies alleged by Intervenors related to the discussion of alternatives, cumulative impacts of acidic deposition, ash disposal, proximity of the proposal to an inactive hazardous waste site, effects to Onondaga Lake and project need. With the exception of the issue of alternatives the adequacy of the Applicant's treatment of these issues in the DEIS has been addressed in the earlier portion of this Interim Decision.

I note that a discussion of project alternatives is required as part of any DEIS (ECL §8-0109(2)(d)). Consideration of alternatives is part of the SEQR process as a component of a larger effort to examine ways in which adverse project impacts can

be mitigated or avoided. The requirement for examining alternatives in a DEIS does not however, require that every conceivable alternative be considered; rather the rule is one of reasonableness and balance (Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dept., 1983), aff'd 60 N.Y.2d 805, 469 N.Y.S.2d 689 (1983)).

In this case, it is clear that there are alternatives that Applicant has not analyzed. However, I find nothing to suggest that the subset of alternatives analyzed was unreasonable. The SEQR regulations state that the DEIS should contain such detail "as is appropriate for the nature of magnitude of the proposed action and the significance of its potential impacts" (6 NYCRR 617.14(c)). If the record suggested that the proposed project would have far reaching adverse impacts, it would be incumbent on the lead agency to more exhaustively review alternatives. Although the project as proposed would have some adverse impacts, the nature and magnitude of these impacts do not warrant an expansion of the discussion of alternatives.

Regarding the submission of the updated Study, 6 NYCRR 617.8(g) criteria are directly relevant. In each instance where the regulations provide authority for the lead agency to require an SEIS, the decision is tied to whether the new component may result in significant adverse effects. In this instance, the Study does not suggest any such impacts and hence supplementation of the EIS would be inappropriate.

Accordingly ALJ Serbent is instructed to promptly proceed with the adjudicatory phase of the hearing consistent with this Interim Decision. The commencement adjudicatory phase of the hearing should not be postponed pending the Applicant's submittals concerning ash disposal sites.

IN WITNESS WHEREOF, the Department of Environmental Conservation has caused this Interim Decision to be signed and issued and has filed the same with all maps, plans, reports, and other papers relating thereto in its office in the County of Albany, New York this *1st* day of April, 1988

DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
THOMAS C. JORLING, COMMISSIONER



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