

In the Matter of the Application of

**ERIE BOULEVARD HYDROPOWER, L.P.**

for Section 401 Water Quality  
Certification for its School Street  
Project.

Ruling on Petition  
for Party Status

(December 27, 2004)

(Albany County)

DEC Project No.  
4-6103-00027/00001-9  
(FERC No. 2539)

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By letter dated November 16, 2004, the Town of Green Island and Village of Green Island ("Petitioners") filed a joint petition for party status in the above captioned School Street (Cohoes, New York) hydroelectric generation project (hereinafter, the "School Street Water Quality Certification (WQC)" project). This project is the last of nine former Niagara Mohawk Power Corporation projects that have been the subject of settlement negotiations. Erie Boulevard Hydropower, L.P., ("Applicant") is the current successor in interest to Niagara Mohawk Power Corporation with respect to the School Street WQC project<sup>1</sup>.

The Department's WQC proceeding commenced on August 5, 1993, with a legislative hearing and issues conference held in Utica, New York. The hearing addressed all nine hydroelectric projects. During the intervening 11 years, the nine cases have been sequentially the subject of lengthy, complex multiparty negotiations. As noted in my prior rulings in the other eight cases, affirmed by the Commissioner of the Department of Environmental Conservation, participation in the settlement negotiations is not dependent upon party status in the

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<sup>1</sup> The DEC Staff filing identifies Brascan Power New York ("Brascan") as the current applicant. Brascan is the parent entity of Erie Boulevard Hydropower, L.P.

As noted in my prior rulings on the nine hydroelectric WQC applications, this proceeding is governed by 6 NYCRR Part 624 in effect from July 14, 1985 through January 8, 1994, the regulation in effect immediately prior to the current Part 624 (the current Part 624 became effective on January 9, 1994). For purposes of this ruling, citations are to the prior Part 624; citations to the current regulation will be designated as such.

Department's proceeding on the related hydroelectric project WQC application. See, for example, *In the Matter of Niagara Mohawk Power Corp.*, Interim Decision of the Commissioner, DEC Case Nos. 5-4136-00016/00001-9 (FERC #2318; E.J. West project) and 5-4100-00019/00001-9 (FERC #2482; Hudson River project), September 25, 1996.

By letters dated November 23, 2004, Applicant and DEC Staff each filed objections to the petition. However, Applicant and DEC Staff have framed their objections under the current Part 624 regulation, whereas this case is governed by the previous regulation (as explained, *supra*; see also footnote 1). Nonetheless, their arguments in opposition are addressed below in the context of the applicable regulatory standards.

Pursuant to 6 NYCRR 624.4(e), the Administrative Law Judge ("ALJ") may allow any person to become a party at any time during the hearing if it is shown that: 1) good cause exists for failure to file on time; 2) no party will be unreasonably disadvantaged or otherwise prejudiced; and 3) the person's participation will materially contribute to a complete record.

1) Good Cause

Petitioners assert that they just recently learned that settlement discussions in this proceeding were expected to be concluded on December 9, 2004. They are interested in water quality issues addressed in this proceeding because Petitioners are party to a contract for purchase of approximately 13 million gallons per year of water from the City of Cohoes (the "City"). This water is drawn from the Applicant's water canal, which, according to the Petitioners, contains "toxic" polychlorinated biphenyls ("PCBs"). This canal is approximately one mile long, located on the south shore of the Mohawk River.

The Petitioners express general health and safety concerns about the effect of the School Street WQC project on the water supply. The City, Petitioners contend, has not taken an active role in the School Street WQC project settlement discussions. However, this concern is properly addressed first, between Petitioners and their contract party, the City of Cohoes. The City filed a timely petition for party status dated August 3, 1993, in the above captioned matter, and the City has been represented by various outside counsel and/or its Corporation Counsel throughout this proceeding. No filing was received from the City in response to Petitioners' November 16, 2004 motion for late party status.

The Applicant and DEC Staff contend that Petitioners have not offered any "good cause" demonstration why their filing is late or why their participation at this late date in the settlement process is imperative. The Applicant asserts that Petitioners failed to show good cause for the late petition. DEC Staff contends that Petitioners have not provided even a threshold rationale for their failure to file a timely petition (or for their failure to enter the settlement negotiations earlier in the process). Nonetheless, in view of the lengthy sequential negotiation process that has occurred in the original nine cases following the August 1993 legislative hearing and issues conference, I am not persuaded that only a timely petition filed in 1993 should be considered with respect to the School Street WQC project. However, as discussed below, it is a separate matter whether the negotiations have proceeded to a point of near conclusion such that it is infeasible to allow the Petitioners to meaningfully enter the settlement process at this time.

2) Unreasonably Disadvantaged or Otherwise Prejudiced

Petitioners have not addressed this component of a late petition for party status. DEC Staff states that the settlement process for this project is nearly completed. Entry of Petitioners into the settlement process now, DEC Staff contends, would result in significant delay in completion of the settlement negotiations of the long-term negotiation participants, including those participants who have timely applied for party status in the above captioned proceeding. Such delay, DEC Staff contends, would not be in the interest of administrative and judicial economy and fairness. That interest supports timely and complete settlement of significant pending issues by the settlement participants who have engaged in lengthy, complex negotiations in this matter.

3) Materially Contribute to a Complete Record

The Applicant and DEC Staff contend that Petitioners have not demonstrated that their participation as a party in this proceeding will materially contribute to a complete record. They correctly point out that Petitioners' late petition only asserts a general concern about the quality of water that they purchase from the City of Cohoes. As noted above, this is first, a contract issue between Petitioners and the City of Cohoes. Moreover, the Applicant states that a separate, ongoing Departmental proceeding is addressing the issue of PCB contamination in the waters of the Mohawk River upstream of the School Street project area, citing an Order on Consent between the Department and Niagara Mohawk Power Corporation, Index No.

A4-0416-003, dated March 31, 2000. According to Applicant, remediation and clean-up programs are in place, and the City of Cohoes is actively involved in that proceeding.

Finally, DEC Staff contends that Petitioners failed to propose any substantive or significant issue that could be considered for adjudication. The petition, according to Staff, does not assert that Applicant will be unable to meet any requirement of any water quality certificate condition or any applicable regulatory or statutory criterion. In part, this is because no draft WQC has yet been promulgated for this project. In addition, Applicant states that the City of Cohoes and Erie Boulevard Hydropower, L.P., are investigating a proposal to relocate the City's raw water intake source so that it will no longer be located within the Applicant's power canal.

The settlement conferences in the previous eight Niagara Mohawk WQC cases have included all interested persons, and have not been limited to those who timely filed for party status in the above referenced administrative proceeding. Petitioners have not provided any explanation why party status would be a necessary pre-requisite to their participation in the School Street project negotiations.

### **Ruling**

Although Petitioners, the Town of Green Island and the Village of Green Island, have demonstrated an environmental interest in the School Street WQC project, Petitioners failed to offer a satisfactory explanation for the lateness of their motion seeking party status. Further, Petitioners failed to propose any issue for adjudication or submit any offer of proof. 6 NYCRR 624.4.

Party status in the administrative proceeding is not a necessary pre-requisite to participation in the School Street project negotiations. In the event that Petitioners can meaningfully participate in the negotiations without engendering significant delay, I would encourage Petitioners to do so and encourage the settlement participants to consider this<sup>2</sup>. Before the Department issues a WQC for the School Street Project, the Town of Green Island and Village of Green Island and other

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<sup>2</sup> I request that DEC Staff distribute a copy of this ruling to any School Street WQC settlement participants that are not identified on the attached Distribution List in this matter.

members of the public will be afforded an opportunity to comment upon, or raise objections to, the terms and conditions of any such certification pursuant to the provisions of Environmental Conservation Law ("ECL") Article 70 and 6 NYCRR Part 621. At a minimum, if, as DEC Staff suggests, the settlement negotiations are near completion, then Petitioners may participate in the public comment period that will follow promulgation of the draft WQC.

Accordingly, the Town and Village of Green Island's joint application for party status is denied without prejudice to renew at a future time following promulgation of a draft WQC for the School Street WQC project. I am including Petitioners on the updated Distribution List for informational purposes (copy attached). The Town of Green Island and Village of Green Island are encouraged to participate in the settlement negotiations, to the extent practicable, in the interests of reaching a comprehensive settlement on all potential issues. In the event negotiations do not result in a complete settlement or a hearing is otherwise necessary, Petitioners may renew their application(s) for party status at that time.

### **Appeals**

This ruling may be appealed to the Commissioner in writing by January 6, 2005. Replies to any such appeals must be filed by January 12, 2005. Any request for an adjustment to the appeal schedule must be made to Chief Administrative Law Judge James T. McClymonds. All appeals and replies must be addressed to the Office of the Commissioner, NYSDEC, 14<sup>th</sup> Floor, 625 Broadway, Albany, New York 12233-1010 and must include an original and one copy. Electronic facsimile filings will not be accepted. All appeals and replies must be *received* by the Office of the Commissioner by the dates indicated herein. Additionally, three copies of all such appeals, replies, briefs, and other related filings also must be sent to me, at the Department's Office of Hearings and Mediation Services, and to all persons indicated on the current Distribution List (copy attached). Transmittal of documents must be made at the same time and in the same manner to all persons.

DATED: December 27, 2004  
Albany, New York



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Kevin J. Casutto  
Administrative Law Judge

TO: James F. Legnard, Esq.  
School Street WQC Project  
Distribution List (Dated 12/21/2004)  
Nicole Y. Silver, Esq.  
James T. McClymonds, Chief ALJ