

In the Matter of the Application
for a Part 201 Air State Facility
Permit; a State Pollutant
Discharge Elimination System
(SPDES) Permit; a Title IV Acid
Rain Permit; a Water Quality
Certification; a Construction
Stormwater SPDES Permit; and an
Excavation and Fill in Navigable
Waters Permit by:

Ruling on Motion

February 25, 2004

**Besicorp-Empire Development
Company, LLC**

Proceedings:

Following the issuance of our recommended decision on January 9, 2004, Besicorp-Empire Development Company, LLC ("the Applicant") on January 16 elected to conduct an additional traffic analysis. The additional analysis was submitted on January 23, 2004. An all-party conference call was held on February 2 to determine whether parties were satisfied that the submission resolved the traffic issue in question. In the course of that conversation, the Applicant agreed to file supplemental information requested by the Staff of the Department of Public Service ("DPS Staff").

That supplemental filing was provided under cover of a letter from the Applicant, dated February 4. In that letter, the Applicant requested a conference call to discuss the schedule for briefs on exceptions. Before such a conference call was arranged, however, on February 5, 2004, an e-mail message from Michael Moore, attorney for the City of Rensselaer ("the City"), was received and was also sent to DPS Staff and Staff of the Department of Environmental Conservation ("DEC Staff"). In this e-mail message, the City requested suspension of this DEC proceeding and the associated Article X proceeding pending the conclusion of a newly instituted negotiation process sponsored by Senator Bruno and Assemblyman Canestrari and their staffs. This e-mail request was then forward to all active parties. Parties were allowed, ultimately, until Friday, February 20, 2004, to respond to that motion.

On February 20, the Applicant, via e-mail message from Kevin Bernstein, its attorney, responded that it "wishes to proceed to a litigation schedule for briefs on exceptions and replies without further delay." The Applicant asserted that parties will have an adequate opportunity to comment in briefs on its supplemental traffic information. Moreover, the Applicant continued, it will provide revised certificate conditions agreed upon between it and the City in the current negotiations.¹ These too, it averred, can be commented upon by other parties in their briefs. The Applicant proposed March 5, 2004 as the date for filing briefs on exceptions, and March 19, 2004 for replies to exceptions.

Also on February 20, the City provided an e-mail message offering additional support for its motion and seeking an additional delay. The City stated that the negotiation process has been working well, but that "further discussions and meetings will be needed to resolve final details before a final proposed settlement can be achieved..." The City proposed that the parties report by March 5, 2004 on the status of negotiations, at which time a decision could be made on whether a further delay in setting a briefing schedule is warranted.

Also on February 20, DEC's attorney, Mark Sanza, reported that DEC Staff is taking no position on the City's motion.

DPS Staff, in a response dated (and sent by e-mail to a number of parties²) on February 20, and filed by hard-copy under cover of a letter dated February 23, supported the City's motion to stay the proceeding. DPS Staff counsel, Paul Agresta, further argued that any agreement between the Applicant and the City will have been arrived at in contravention of the Siting Board's settlement guidelines approved by the Public Service Commission, and would therefore be "procedurally and substantively tainted."

DPS Staff counter-moved in the Article X case only for "direct judicial intervention to oversee the rehabilitation and completion of the settlement negotiations." DPS Staff stated that a comprehensive joint proposal seems achievable on the few remaining issues, and that such a process would be more efficient

¹ The Applicant asserted that an agreement in principle on traffic issues had been reached between it and the City.

² Additional e-mail correspondence confirmed that Mr. Bernstein did not receive the e-mail on this date, and that DPS Staff explained this was the inadvertent result of readdressing a reply to an e-mail message originally sent by Mr. Bernstein.

and productive than continued litigation. There is "too much polarization" among parties, DPS Staff asserted, for reasonable progress to be made in negotiations if the briefing schedule is set now. This motion is dealt with in the companion Article X ruling issued today.

The discussions held thus far between the City and the Applicant, DPS Staff asserted, must be regarded as exploratory discussions, since "all appropriate persons and parties had not been notified or invited to participate in a manner that would conform to the Settlement Rules and Guidelines."³ DPS Staff requested the immediate appointment of a DPS settlement judge "to fashion a procedural remedy so that this proceeding may be brought to completion."

In a subsequent e-mail opposing the DPS Staff counter-motion, the Applicant responded that: (1) it has not requested a formal settlement conference pursuant to PSC/Siting Board settlement guidelines; (2) about six weeks have transpired since issuance of the recommended decisions, and it now seeks establishment of a briefing schedule; and (3) the February 4 meeting with the legislators was indeed exploratory and, in view of the City's February 20, 2004 e-mail, there does not appear to be an agreement in principle on traffic between the City and the Applicant. Both the Applicant and DPS Staff object to the other's pleadings on various additional procedural grounds.

Discussion

In the recommended decisions, Presiding Examiner Harrison and I identified one traffic issue about which, in our view, additional information was needed. The Applicant has provided that information and, at DPS Staff's request, additional supporting information. Although the City's and DPS Staff's pleadings argue for suspension of the proceeding for purposes of negotiations, neither of these parties asserts that more information is still needed to address the traffic problem of concern, or that the information provided gives rise to any factual dispute that might call for a further evidentiary hearing.

³ Original emphasis. DPS Staff Counsel stated that (having been informed of the pending negotiations) he notified the City and the Applicant that the proposed discussions were in violation of the Settlement Rules and Guidelines, in DPS Staff's view, and that therefore DPS Staff "could not participate" in the negotiations.

To the extent that the City or DPS Staff disagree with our conclusions on other traffic issues, or other issues, they may file exceptions to the recommended decision, and/or negotiate with the Applicant. As a preliminary matter, however, we need to determine whether the supplemental information provided by the Applicant resolves the specific traffic issue we have identified.

In order to complete that process, we will require all parties to file, by close of business Friday, February 27, 2004, proposals for addressing this limited traffic issue in both this DEC proceeding and the Article X proceeding. This must be done expeditiously, and if the parties have no disputes on the discrete issue we have identified, we should be so informed.

If there are any disputes among the parties on this discrete issue, the question becomes whether comments on the dispute are sufficient, or whether there is a need to hold an evidentiary hearing. There will be no need for a hearing unless there is a genuine dispute on a material factual issue. Any such alleged dispute must be clearly identified in the filings due on February 27, 2004. The party should clearly identify the name of the expert witnesses and a summary of his/her expected testimony. Any such additional hearings will be expeditiously conducted, and a supplemental recommended decision (including briefing schedule) would be issued shortly thereafter.

This proceeding has progressed to its current posture substantially on the basis of a broad-based settlement of issues, and further negotiations are to be encouraged. However, continuation of this proceeding through the briefing process is not inconsistent with the continuation of negotiations. There is no need to further delay the completion of this case, and the City's motion is denied.

February 25, 2004

P. Nicholas Garlick
Administrative Law Judge