

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

a Renewal and Modification of a State
Pollutant Discharge Elimination System
("SPDES") Permit Pursuant to Article 17 of
the Environmental Conservation Law and Title
6 of the Official Compilation of Codes, Rules
and Regulations of the State of New York
Parts 704 and 750 et seq.

- by -

**DYNEGY NORTHEAST GENERATION, INC., ON BEHALF OF DYNEGY
DANSKAMMER, LLC (DANSKAMMER GENERATING STATION),**

Permittee.

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

RULING OF THE DEPUTY COMMISSIONER
ON MOTION FOR LEAVE TO FILE AN EXPEDITED APPEAL

November 15, 2005

RULING OF THE DEPUTY COMMISSIONER
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By motion dated September 12, 2005, permittee Dynegy Northeast Generation, Inc., on behalf of Dynegy Danskammer, LLC ("Dynegy") seeks leave to file an expedited appeal pursuant to section 624.8(d)(2)(v) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") from a September 2, 2005 Ruling on Dynegy's Motion for Protective Order issued by Administrative Law Judge ("ALJ") Daniel P. O'Connell ("ALJ Ruling"). For the reasons that follow, Dynegy's motion for leave to file an expedited appeal is denied.

Dynegy seeks leave to file an expedited appeal to challenge that portion of the ALJ's September 2, 2005 ruling that denied Dynegy's motion for a protective order with respect to intervenor Riverkeeper, Inc.'s ("Riverkeeper") discovery requests P-5 and P-31, and reserved until the hearing decision on whether the financial information sought in P-5 and P-31 is relevant to the proceeding (see ALJ's Ruling, at 3-4). If Dynegy's motion is granted, Dynegy would seek a ruling that the financial information Riverkeeper requests is not relevant to the determination whether the cost of installing closed-cycle cooling at the Danskammer facility would be "wholly disproportionate" to the environmental benefits (see Matter of Dynegy Northeast Generation, Inc. [Danskammer Generating Sta.], Interim Decision of the Deputy Commissioner, May 13, 2005, at 31 and footnote 16).

On this motion for leave to file an expedited appeal, Dynegy has the burden of demonstrating that the failure to decide the proposed appeal would be "unduly prejudicial" to one of the parties or would result in "significant inefficiency" (6 NYCRR 624.8[d][3]). Dynegy has failed to carry its burden.

To support its claim of prejudice, Dynegy contends that the ALJ's ruling requires it to produce "confidential business information," and to submit direct or rebuttal pre-filed testimony for a public adjudicatory hearing based upon that information, without regard to whether the information would have any legal relevance to the proceeding. Dynegy's assertion of the confidential business information privilege is raised for the first time, however, on this motion for leave to appeal. Dynegy did not assert this privilege in its motion to the ALJ and, as a result, the ALJ did not make a determination whether any or all of the requested information is protected by the privilege.

Moreover, Dynegy did not invoke before the ALJ the special procedures that are used to protect confidential business information in the discovery process or otherwise seek to limit the general principle of liberal discovery, as would be appropriate when such a privilege has been established (see 6 NYCRR 624.7[d][1] [incorporating by reference CPLR 3103]; see, e.g., Curtis v Complete Foam Insulation Corp., 116 AD2d 907, 908-909 [3d Dept 1986]). Thus, at this stage of the proceeding,

Dynegy's claim that the ALJ's ruling will require disclosure of confidential business information is unpreserved and unsupported by the record.

In any event, even assuming without deciding that Dynegy's response to Riverkeeper's discovery requests P-5 and P-31 would require disclosure of some confidential business information, use of the ordinary protective discovery measures, such as confidentiality agreements among the parties, would avoid any potential prejudice. Of course, to the extent that some or all of the responsive information is not confidential, no prejudice would result from its disclosure.

Dynegy's assertion that significant inefficiency would result if the question of relevance is not decided at this time is also unpersuasive. Because the ALJ reserved decision, the issue is not presented for review on an appeal from the ALJ's ruling. In addition, what information the parties will rely upon and how the parties intend to use the information is also unknown. Thus, the question is not ripe for decision. Moreover, as with the question of prejudice, use of the ordinary hearing mechanisms to protect allegedly confidential information during the hearing process does not, without more, amount to inefficiency.

The question whether "affordability" of certain control technologies is an element of the "wholly disproportionate" test

in the context presented here -- the proposed retrofit of an existing facility -- is a significant issue that is best decided based upon a properly developed factual record. The more efficient course, and one that will avoid any delay in proceedings occasioned by interim appeals, is to address the scope of the "wholly disproportionate" analysis after the close of the evidentiary hearing. At that point, the precise information relied upon by the parties, and the arguments related thereto, will be known with certainty, allowing development of a complete record upon which to resolve questions concerning the scope of the "wholly disproportionate" analysis and whether "affordability" is properly an element of that analysis. Also, the ALJ will have the opportunity to present his own legal analysis and conclusions concerning the issue before presenting the issue to me for final disposition. The parties will have the opportunity to preserve any objections to the ALJ's rulings and raise arguments thereto, either in their closing briefs or by motion where no closing briefs are provided for by the ALJ (see 6 NYCRR 624.8[d][1], [6]).

The need for a complete record to decide the merits of Dynegy's claim concerning the scope of the "wholly disproportionate" analysis, and the need to avoid any further delay in the hearing process, outweighs any alleged inefficiency in the hearing process arising from the failure to address

relevance at this time.

Accordingly, Dynegy's motion for leave to file an expedited appeal is denied.

For the New York State Department
of Environmental Conservation

/s/

By: Carl Johnson
Deputy Commissioner

Dated: Albany, New York
November 15, 2005