

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

In the Matter

-of-

The Application for a State Pollutant Discharge Elimination System Permit ("SPDES") 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 750 et seq., and Air Pollution Control Permits Consisting of a Preconstruction permit and a Certificate to Operate, Pursuant to ECL Article 19 and 6 NYCRR Parts 200 et seq.,

by

TransGas Energy Systems, LLC,

Applicant.

DEC Case No. 2-6106-00149/00014
SPDES No. NY0006301
(PSC Case No. 01-F-1276)

INTERIM DECISION OF THE COMMISSIONER

March 12, 2004

INTERIM DECISION OF THE COMMISSIONER

This New York State Department of Environmental Conservation ("Department") permit hearing proceeding, conducted pursuant to 6 NYCRR part 624, concerns applications by TransGas Energy Systems, LLC ("TransGas"), for air pollution control permits and a State Pollutant Discharge Elimination System ("SPDES") permit for its proposed electric power generation project. The environmental permits are sought as part of an application for a certificate of environmental compatibility and public need pursuant to Public Service Law article X.

Several proposed intervenors appeal from a Part 624 issues ruling of Administrative Law Judge ("ALJ") Kevin J. Casutto dated September 4, 2003. On their appeals, intervenors challenge the ALJ's determination that issues concerning TransGas's air modeling and its analysis of alternative project sites pursuant to 6 NYCRR 231-2.4(a)(2)(ii) are not adjudicable. Several intervenors also challenge the ALJ's denial of party status to them. For the reasons that follow, the ALJ's issues ruling is affirmed.

Facts and Procedural Background

Project Description

TransGas proposes to construct and operate a combined-

cycle and cogeneration plant that can generate up to 1,100 megawatts ("MW") of electric power and up to 2 million pounds per hour of steam. The facility would be located on an approximately eight-acre site at the existing Bayside Oil Terminal at North 12th Street and Kent Avenue, in the Greenpoint/Williamsburg area of Brooklyn, New York. The site is bounded on the north by the Bushwick Inlet, on the east by Kent Avenue, on the south by North 12th Street and on the west by the East River. The entire project area is presently zoned M3, a heavy industrial district.

The facility would be configured with two power blocks, each consisting of two Siemens Westinghouse W501-F gas combustion turbine generators ("CTG"), two heat recovery steam generators ("HRSGs"), one steam turbine generator ("STG") and associated balance-of-plant systems and facilities. The primary fuel for the gas turbines would be natural gas, with very low sulfur fuel oil used for backup. Each gas turbine would be coupled to its HRSGs which, in turn, would produce steam to operate the steam turbine and for steam export. Additional facility features include two auxiliary boilers, heat recovery and delivery infrastructure for potential steam sales, and dry cooling technology.

Exhaust gases produced within the CTGs would be routed into the HRSGs. Exhaust gases generated within the HRSGs would pass through a variety of pollution controls, including an

oxidation catalyst and Selective Catalytic Reduction ("SCR") with an accompanying ammonia injection grid. Thereafter, the exhaust gases would be vented to the atmosphere through a 325-foot tall exhaust tower.

Air Permit Application Background

The proposed facility is considered a major new source and, as such, is subject to the Prevention of Significant Deterioration ("PSD") regulations. The proposed project site is located in Kings County, NYSDEC Region 2, Metropolitan Air Quality Control Region ("AQCR"). Kings County is "attainment" or "unclassified" for all criteria pollutants except for ozone. For the "attainment" pollutants, the facility is required to demonstrate compliance with the National Ambient Air Quality Standards ("NAAQS"). Although the proposed facility is not located in a non-attainment area for the criteria pollutant PM₁₀, adjacent New York County is designated as non-attainment for PM₁₀. Accordingly, TransGas is required to establish that the emissions from the proposed facility will not cause exceedances of the significant impact levels for PM₁₀ in New York County.

Ozone is designated as "severe non-attainment" throughout the Metropolitan AQCR. Accordingly, because the proposed facility's potential emissions exceed threshold levels for the ozone precursors nitrogen oxides ("NO_x") and volatile organic compounds ("VOC"), 6 NYCRR part 231 Non-attainment New

Source Review ("NSR") applies. The NSR regulations require, among other things, an analysis of the lowest achievable emission rate ("LAER") for ozone precursor pollutants, and an alternatives analysis pursuant to 6 NYCRR 231-2.4(a)(2)(ii) ("Part 231 analysis"), as part of the air permit application.

In January 2002, TransGas pre-filed its air quality modeling protocol with the Department and the United States Environmental Protection Agency ("USEPA"). Consistent with federal and State requirements, TransGas proposed a two-staged modeling procedure. First, an air impact analysis would be conducted to determine whether emissions from the facility would exceed applicable significant impact levels. If so, a multiple major source modeling study, including a cumulative air quality assessment, would be conducted to assess the impacts of the proposed facility and existing major sources on NAAQS and other standards.

The Department approved the protocol in April 2002. In June 2002, TransGas pre-filed its air quality permit application, together with its air quality modeling analysis, with the Department for comments. TransGas's air quality modeling indicated that the proposed facility would result in maximum modeled concentrations that are less than USEPA's significant impact levels.

TransGas also performed a cumulative air quality

assessment at the request of the New York City Department of Environmental Protection ("NYCDEP"). The study, dated November 2002, was based, in part, upon the air modeling protocol approved by the Department in April. It was also based upon input from NYCDEP, including approved inventories, and emission sources suggested by the Office of the President of the Borough of Brooklyn and the Greenpoint/Williamsburg Waterfront Task Force. The analysis indicated that at both ground-level and elevated (flagpole) receptors, total impacts, including the maximum model concentrations and background air quality concentrations, would be less than their respective NAAQS for all pollutants modeled and averaging periods.

In December 2002, TransGas formally filed its air quality permit application as part of its application to the New York State Board on Electric Generation Siting and the Environment ("Siting Board") for a certificate of environmental compatibility and public need pursuant to article X of the Public Service Law.¹ Also included in the Article X application was the cumulative air quality assessment requested by NYCDEP. The air quality modeling analyses were later revised in March 2003.

In various sections of its Article X application,

¹ See Department of Public Service Case No. 01-F-1276, Application by TransGas Energy Systems, LLC, for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,100 Megawatt Combined Cycle Cogeneration Facility in the Borough of Brooklyn, New York City.

TransGas discussed the project's potential impact on area land use and development, and concluded that the project was consistent with current development plans. Specifically, the application referenced two plans adopted in December 1991 by the New York City Planning Commission pursuant to section 197-a of the New York City Charter. Those plans, known as the Williamsburg Waterfront 197-a Plan and the Greenpoint 197-a Plan, respectively, were the result of a public process that began in 1989. The plans included objectives and broad strategies for improving public access to the Williamsburg and Greenpoint waterfronts and for promoting residential and mixed land uses where appropriate. The plans specifically directed examination of potential re-zoning to accomplish the stated objectives, but noted that such re-zoning would have to undergo regular review procedures. The New York City Council subsequently approved the plans (see, e.g., Council of City of New York Resolution No. 29 [1-30-02] [Greenpoint 197-a Plan]).

TransGas's Part 231 alternatives analysis was provided in Attachment Y-4 to its Article X application. The analysis included a discussion of the air quality impacts, as established by the approved air quality modeling studies, and concluded that the project avoids potential and adverse environmental effects relative to air quality. The Part 231 analysis also discussed a variety of alternative project sites, and concluded that no

alternative sites would offer more protection to the environment than the proposed site, while all of the alternative sites examined offered fewer environmental and non-environmental benefits than the proposed project site. In addition to the project site, the alternative sites examined included one site owned by TransGas (in Syracuse, New York), and four other sites along the Greenpoint and Williamsburg waterfront that TransGas considered during site selection, but none of which are owned or controlled by TransGas. The Part 231 analysis also examined a variety of alternative environmental control techniques, technologies, production processes, and project sizes, and concluded that the alternatives failed to offer more protection to air quality than the proposed project.

In June 2003, the Department issued draft air and SPDES permits, and a notice of complete application, public hearing and issues conference, for the project. Shortly thereafter, the City of New York announced its re-zoning proposal for the Greenpoint-Williamsburg area, including the proposed project site and surrounding areas. The proposal, known as the Greenpoint-Williamsburg Land Use and Waterfront Plan ("June 2003 Plan"), recommended, among other things, that the waterfront areas north of the Bushwick Inlet and the project site, and waterfront areas south of the project site be rezoned for residential use. The June 2003 Plan also specified a 350-foot maximum building height

for some of the rezoned residential areas. The plan projected that the necessary rezoning review and approvals would be completed in 2004.

Permit Hearing Proceedings

Joint DEC and Article X legislative hearings and issues conferences were conducted in July 2003. Thereafter, on August 22, 2003, Administrative Law Judge ("ALJ") Kevin J. Casutto issued his issues ruling addressing the application for Department permits ("DEC Part 624 Issues Ruling"). In his ruling, the ALJ advanced for adjudication one issue regarding SPDES discharge levels for tetrachloroethene.² The ALJ held that all other proposed issues were non-adjudicable. The ALJ granted full party status to the combined party of the Office of the Brooklyn Borough President, the Greenpoint Williamsburg Waterfront Task Force and the New York Public Interest Research Group ("NYPIRG") (collectively, "Joint Petitioners"), and denied party status to six other petitioners, including the City of New York ("City").

Joint Petitioners and the City timely filed separate appeals from the DEC Part 624 Issues Ruling on September 4, 2003. Identically worded appeals in the form of letter briefs,

² This issue was settled on November 17, 2003 at the Article X-DEC joint adjudicatory hearing (Department of Public Service Case No. 01-F-1276), by stipulation of the parties amending the applicable permit condition. Accordingly, this issue will not be adjudicated.

essentially supporting the appeals of Joint Petitioners and the City, were timely filed by M&H Realty, LLC, Ramlu Trading Co., and Part Tower Greenpoint Associates, LLC. These parties, together with Joint Petitioners, are collectively referred to as "Intervenors." Separate replies to these appeals were filed by TransGas and Department staff ("Staff") on September 12, 2003.

Discussion

In addition to challenges to the ALJ's denial of party status to several of the Intervenors, only two substantive issues are raised on appeal by the parties. Those issues concern the adequacy of TransGas's air modeling analysis and its alternatives analysis under 6 NYCRR 231-2.4(a)(2)(ii).

Air Modeling Analysis

At the issues conference, Intervenors objected to Applicant's air modeling analysis, claiming that it failed to consider the construction of as many as 7,000 residential units along the Greenpoint and Williamsburg waterfront immediately north and south of the project site. While both the project site and the potential location for residential construction are each presently zoned for heavy industry and would prohibit residential usage, Intervenors maintained that the rezoning effort by the City was well underway and would allow for residential

development in those areas. In particular, Intervenors relied on the detailed June 2003 Plan which, if adopted, would permit the construction of residential buildings on the waterfront with heights of up to 350 feet. Intervenors predicted that the necessary amendments to the zoning law proposed by the plan will be completed in 2004.

The ALJ ruled that Intervenors' challenges to the air modeling were insufficient to raise an adjudicable issue. The ALJ held that the re-zoning that would permit residential development in the area was "indefinite and speculative at this time" (Issues Ruling, at 8). The ALJ also held that Intervenors failed to identify any statute, regulation, or guidance that would require TransGas to revise the air modeling (see id.). The ALJ pointed out that TransGas's air modeling protocol was submitted to the Department and the USEPA on January 8, 2002 and approved by the Department on April 11, 2002, well before the City announced its June 2003 re-zoning proposal.

Intervenors argue in their appeals that, based on the June 2003 Plan, the requisite re-zoning is likely and, given New York City market conditions, a maximum build out of allowable residential units is inevitable. They maintain that the locations of potential 350-foot tall receptors for use in the air modeling analysis are predictable and may be used to determine whether air impacts on such potential receptors will violate

NAAQS.

TransGas and Staff each argue that the change anticipated by Intervenors in the zoning law needed for residential development in the relevant waterfront areas is speculative and the construction of several thousand residential units is hypothetical. They contend that Intervenors offer unrealistic assertions concerning the completion date for buildings that have not yet been designed or permitted. In particular, Staff maintains accurate air modeling is not possible where, as here, no information concerning specific ambient air receptors associated with the housing units is available.

I conclude that the ALJ correctly ruled that Intervenors failed to raise an adjudicable issue concerning TransGas's air modeling analysis (see 6 NYCRR 624.4[c][1][iii]), but for reasons different from those relied upon by the ALJ. The relevant federal and State air modeling guidances fail to expressly indicate whether only existing elevated receptors need to be included in an air impacts analysis (see, e.g., USEPA, Guideline on Air Quality Models [Revised], 40 CFR part 51, app W; Air Guide 26, NYSDEC Guidelines on Modeling Procedures for Source Impact Analyses [revised Dec. 9, 1996]). Nevertheless, at the very least, only those elevated receptors known or reasonably foreseeable at the time an applicant's modeling protocol is approved need be considered for inclusion in an air quality

impact analysis (see Matter of St. Lawrence Cement Co., LLC, First Interim Decision of the Commissioner, at 8-9 [Dec. 6, 2002]). As noted in St. Lawrence, "modeling represents a significant expenditure in both applicant and Department resources and makes up a significant part of an application for a major facility" (id. at 9). To require an applicant to re-model impacts from a facility based upon information that comes to light after the modeling protocol is approved by the Department would impose a significant burden upon applicants and inject undue uncertainty into the permit application process (see id.).

In this case, the specific information Intervenors ask to have incorporated into TransGas's modeling -- 350-foot-tall residential units located along the waterfront north and south of the project site -- was not contemplated at the time the modeling protocol was approved by the Department. Those detailed specifications appear for the first time in the June 2003 Plan, which was issued over a year after TransGas's air modeling protocol was approved in April 2002. Although the 197-a plans for Greenpoint and the Williamsburg waterfront were available at the time of protocol approval and, indeed, were considered in TransGas's Article X application, those plans did not contain the specific re-zoning proposals or the 350-foot-high receptors detailed in the June 2003 Plan.

Accordingly, the specific residential building

receptors Intervenor propose to have included in TransGas's air modeling were not reasonably foreseeable when the modeling protocol was approved. This conclusion is confirmed by the actions of the City and several Intervenor during the application review process that occurred in this case. As noted above, as part of its Article X application, TransGas conducted in November 2002 a cumulative air impacts analysis at the request of the City. That analysis was subject, in part, to the City's approval, and was designed with inputs from intervenors the City, the Brooklyn Borough President, and the Greenpoint/Williamsburg Waterfront Task Force. If the construction of 350-foot tall residential buildings were sufficiently certain or predictable at that time, those Intervenor, at a minimum, would have requested that they be included in the cumulative air impacts analysis. Their failure to do so indicates how uncertain the development of such residences was at that time.

Because the specific information Intervenor seek to have considered in TransGas's air modeling was not available at the time the modeling protocol was approved, it is not necessary to determine whether and how such information might be incorporated into an air impacts analysis. Nonetheless, it should be noted that, subsequent to the Part 624 issues conference, TransGas conducted a cumulative air impacts analysis incorporating the potential 350-foot residential buildings

contemplated by the June 2003 Plan.³ The re-modeling was conducted using an additional 1,660 elevated (flagpole) receptors simulating the locations and heights of the buildings provided for in the rezoning plan (see Art X Hearing Transcript, at 836-837 [Nov. 14, 2003]). The re-modeled air impacts analysis revealed that the cumulative impact of the TransGas facility and existing and proposed major and minor sources will not exceed ambient air quality standards at any of the possible residential buildings proposed by the June 2003 Plan (see id. at 837). Thus, much, if not all, of the re-modeling Intervenor's appeal on their appeals in this DEC Part 624 permit application proceeding has already been provided through the Article X proceeding.

Therefore, the ruling of the ALJ that Intervenor's failed to raise an adjudicable issue with respect to TransGas's air modeling analysis is affirmed.

Alternatives Analysis

As noted above, because the project site is located in an area that is designated non-attainment for one or more

³ Although TransGas maintained that it was not required to conduct the re-modeling incorporating the potential residential buildings that may result if the June 2003 Plan is approved and implemented, it performed the re-modeling "in order to provide the [Article X Hearing] Examiners and the [Siting] Board with as complete a record as possible" (Art X Hearing Transcript, at 836 [Nov. 14, 2003]). The re-modeling was entered into the Article X record and subjected to cross examination by the parties to the Article X hearings.

criteria pollutants, TransGas is required to perform a Part 231 alternatives analysis. Part 231 provides:

"[a]s part of a permit application for a proposed source project or proposed major facility subject to this Subpart, the applicant shall: . . . (ii) submit an analysis of alternative sites, sizes, production processes, and environmental control techniques which demonstrates that the benefits of the proposed source project or proposed major facility significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification within New York State"

(6 NYCRR 231-2.4[a][2][ii]).

TransGas's Part 231 analysis is structured pursuant to the three-prong analysis described in the Commissioner's Interim Decision in Matter of Keyspan Energy Dev. Corp. (Spagnoli Road Project) (Nov. 15, 2002):

"First, the applicant must show whether the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible. Second, the applicant must show whether a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweigh the former. Lastly, the applicant must show whether there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable"

(id. at 7).

At the issues conference, Intervenors sought to raise

issues under each of the three prongs. The ALJ held, however, that Intervenors failed to raise an adjudicable issue concerning TransGas's Part 231 alternative's analysis. Citing the ALJ Hearing Report in Matter of Keyspan (Spagnoli Rd.) (Feb. 3, 2003), the ALJ in this case stated that an applicant bears a low burden to demonstrate compliance with the Part 231 alternatives analysis requirement, and that petitioners challenging a Part 231 alternatives analysis bear a "heavy burden of persuasion" (see DEC Part 624 Issues Ruling, at 13). The ALJ concluded that Intervenors failed to raise a substantive and significant issue concerning the first or second prong of the Part 231 analysis. The ALJ also concluded that Intervenors failed to raise an adjudicable issue concerning the third prong, because "[t]hey made no offer of proof of availability of any alternative site or that any other site is preferable to the proposed site" (id. at 14).

On their appeals, Intervenors argue that the ALJ erred in characterizing TransGas's burden in demonstrating compliance with the Part 231 alternatives analysis requirement at the issues conference stage as "very low," and in stating that Intervenors, in raising an adjudicable issue concerning a Part 231 alternatives analysis, bear a "heavy burden of persuasion." Intervenors contend that the ALJ should have applied, instead, the standards for adjudicable issues provided for in 6 NYCRR

624.4(c). They maintain that the "heavy/low" burden standard, which originated in In re Campo Landfill Project (NSR Appeals No. 95-1, USEPA Env'tl Appeals Bd [June 19, 1996] [1996 WL 344522]), is a post-hearing standard, and not appropriate at the issues conference stage.

To the extent the ALJ applied the "heavy/low" burden standard in the issues ruling in this case, Intervenors are correct. Without passing on whether the In re Campo standard applies to a Part 231 analysis, that standard is a post-hearing standard appropriate for analyzing an evidentiary record. Such a standard is not appropriately used in reviewing a DEC Part 624 issues conference record. Offers of proof submitted during an issues conference are not evidentiary (see 6 NYCRR 624.4[b][2][ii] [purpose of issues conference is to narrow or resolve disputed issues of fact without resort to taking testimony (emphasis added)]). Accordingly, it is inappropriate at this stage of the proceedings to apply the In re Campo weight-of-evidence standard to determine whether a "heavy" or "low burden" of proof has been met.

The appropriate standards to be applied at the issues conference are those specified in 6 NYCRR 624.4(c). Where, as here, Department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable

requirements of statute and regulation, the applicant is deemed to have made a prima facie showing that statutory and regulatory requirements have been met (see Matter of Sithe/Independence Power Partners, L.P., Interim Decision of the Commissioner, Nov. 9, 1992, at 2). Accordingly, the burden of persuasion shifts to the potential party proposing an issue relating to that component to demonstrate that the issue is both substantive and significant (see 6 NYCRR 624.4[c][4]). No further burden is imposed upon such a proposed party at the issues conference stage.

To the extent the ALJ applied the "substantive and significant" test to Intervenors' offers of proof and concluded that they failed to raise an adjudicable issue under Part 231, that conclusion is affirmed for the following reasons.

1. Alternative Site Analysis

On their appeals, Intervenors raise three challenges on the merits to TransGas's Part 231 alternatives analysis. First, Intervenors challenge TransGas's analysis of alternative sites. In the context of Part 231, a party seeking to challenge a Part 231 alternative site analysis approved by Department staff may carry its burden of persuasion at the issues conference stage by making an offer of proof that the sites analyzed by an applicant do not meet the requirements of Part 231, or that other sites, available to the applicant, would fulfill both Part 231 and project requirements (see Matter of Keyspan (Spagnoli Rd.)),

Commissioner's Interim Decision, Nov. 15, 2002, at 8). A challenger proposing to adjudicate a defect or omission in the analysis must demonstrate not only that the defect or omission exists, but that such defect or omission is likely to affect permit issuance in a substantial way (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). If the challenger's offer of proof is competent and sufficient, the issue will be joined for adjudication (see id.). In that event, any balancing of the evidence to determine whether the sites proposed by the challenger are preferable to the applicant's sites would have to wait until after the close of the evidentiary record.

Intervenors' offers of proof in this case fail to raise an adjudicable issue under the Part 624 "substantive and significant" test. At the issues conference, Joint Petitioners did not challenge TransGas's analysis of the four waterfront sites it reviewed in its alternative site discussion. Instead, Joint Petitioners offered to identify at least 20 other locations in New York City that Con Edison has determined are suitable for new natural gas-fired combined cycle generating facilities, and at least 53 potential sites that the New York Power Authority has identified. They also offered to provide expert testimony that the alternative sites would offer more protection to the environment than the proposed project site without unduly

curtailing non-environmental benefits.

Joint Petitioners' offer of proof, however, failed to specify the locations they proposed. Moreover, and more fundamentally, Joint Petitioners failed to allege that any of the alternative sites they propose are available to TransGas. Where, as here, the applicant is a private entity, the alternative sites proposed by an intervenor must be sites owned or controlled by the applicant (see Matter of Keyspan [Spagnoli Rd.], Commissioner's Interim Decision, at 8).⁴

Intervenors implicitly concede that the alternative sites they would offer are not owned or controlled by TransGas. Nevertheless, they urge that alternative sites offered by them for inclusion in the Part 231 analysis should not be so limited. Specifically, they argue that sites considered for purposes of Article X review should also be considered pursuant to Part 231. Moreover, Joint Petitioners contend that sites considered in an environmental impact statement ("EIS"), if one exists for a project, should also be considered in a Part 231 review.

The requirement under Part 231 that alternative sites

⁴ In its submissions on appeal, the City states that, due to an oversight, it neglected to include in its petition for party status and offer of proof demonstrating that an alternative site is available and preferable, and offers such proof for the first time on appeal. Putting aside the question whether such offer of proof is timely, the City's submission suffers the same defects as the ones suffered by the Joint Petitioners' offer of proof.

proposed by an intervenor be sites owned or controlled by a private applicant is consistent with similar requirements under SEQRA (see 6 NYCRR 617.9[b][v] [consideration of alternative sites may be limited to parcels owned by, or under option to, a private project sponsor]; see also Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack, 148 AD2d 130, 135, lv denied 75 NY2d 701; Horn v International Bus. Machs. Corp., 110 AD2d 87, 95, lv denied 67 NY2d 602). Article X regulations contain a similar provision (see 16 NYCRR 1001.2[d][2] [for a private applicant, site alternatives may be limited to parcels owned by, or under option to, such applicant]; see also Matter of Citizens for Hudson Valley v New York State Bd. on Elec. Generation Siting and Eenvt., 281 AD2d 89, 97-98). Although an Article X hearing examiner has the discretion to allow the submission of evidence on alternative sites not owned or controlled by a private project sponsor, that discretion is authorized by statute (see Application by Athens Generating Co., L.P., New York Public Service Commission, Case 97-F-1563, 1999 WL 357819 [citing Public Service Law § 167(4)]). Part 231 contains no such explicit grant of discretion.

2. Analysis of Social and Economic Costs

Second, Intervenors argue that TransGas's Part 231 analysis fails to demonstrate that the social and economic benefits of the project outweigh its costs. Specifically, Joint

Petitioners contend that TransGas's application is incomplete because its Part 231 analysis fails to quantify the costs associated with the project and contains no analysis comparing those costs with the project benefits as required by the second prong of the test. Joint Petitioners' assertion, however, is rebutted by reference to the Part 231 analysis itself (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2 [offers of proof may be rebutted by reference to the application materials]). A review of TransGas's Part 231 alternatives analysis, especially sections 2.1 through 2.6, and other application materials, reveals that TransGas acknowledged and quantified potential adverse environmental impacts arising from the project, and provided an analysis of those impacts. The existence of the costs analysis is not diminished by its placement in its discussion of the first prong of the test, or by TransGas's conclusion that those costs are minimized.

The City contends that TransGas failed to analyze all social and economic costs associated with the project because it failed to consider the impact the facility will have on future residential development as contemplated by the City's re-zoning initiative. The City asserts that the project will have "devastating social and economic impacts" on the City's plans for the area, especially the construction of residential buildings in the vicinity of the plant, the character of the Brooklyn

waterfront, and the City's plans to turn the project site into a park. At the issues conference, the City indicated that it would present testimony of officials from the New York City Department of City Planning and NYCDEP concerning the project's impact on development under the zoning plan in general. Joint Petitioners similarly offered to present testimony by experts from the Pratt Institute Center for Community and Environmental Development, who would testify that the project could potentially limit the height of residential buildings in the area and, thus, negatively impact future residential development.

To determine whether Intervenors have raised an adjudicable issue concerning the adequacy of TransGas's analysis of social and economic costs, Intervenors' offer of proof must be evaluated in the context of the goals and purposes of Part 231 non-attainment new source review. Review of the adequacy of an alternatives analysis prepared pursuant to 6 NYCRR 231-2.4(a)(2)(ii) must recognize its relation to the NSR review program and its goal of furthering attainment of NAAQS (see Matter of Keyspan [Spagnoli Road], Commissioner Decision). The Part 231 alternatives analysis requirement should not be read as necessitating a comprehensive SEQRA-type analysis for every air permit subject to NSR review. The project's potential impacts on the broad range of environmental concerns are addressed, in the Article X context, through the environmental review process

provided for under Article X (see Public Service Law § 164) and, in non-Article X cases, by the lead agency pursuant to SEQRA.

In contrast, the purpose of the Part 231 alternatives analysis is to aid in determining whether the application as proposed furthers the goal of minimizing emissions of any nonattainment contaminants or whether available alternatives exist that better serve that goal. In turn, to aid in the evaluation of available alternatives, Part 231 requires that social and economic costs of a project be assessed. Thus, under Part 231, social and economic costs are not to be assessed in the abstract but, rather, as part of an analysis of alternatives.

Given this context, to demonstrate that a defect or omission in the Part 231 evaluation of social and economic costs is likely to impact permit issuance in a substantial way, the party proposing the issue must show either that consideration of the proposed social and economic costs effect, in some way, the conclusions reached concerning the alternatives included in an applicant's analysis, or that alternatives not considered in the application are available that avoid or minimize the social and economic costs proposed. Absent such a showing, challengers fail to demonstrate that the adjudication of social and economic costs under Part 231 would result in permit modification or denial.

Applying these standards, Intervenors fail to raise a substantive or significant issue concerning the second prong of

the test. Intervenors' offers of proof concern the project's potential impact on future land use, an issue that is subject to review, in this case, pursuant to Article X. For purposes of Part 231 review, however, Intervenors' offers of proof fail to indicate how the project's impacts on land use effect the analysis of alternative sites, sizes, production processes and environmental control techniques in TransGas's application and the conclusions reached concerning whether those alternatives advance or hinder the attainment of NAAQS for the ozone precursors NO_x or VOC. As noted above, Intervenors fail to raise an adjudicable issue concerning the availability of alternative sites. Intervenors also fail to challenge the alternatives analyzed or suggest alternatives not considered by TransGas. Without a demonstration by Intervenors that alternatives exist that avoid or minimize the social and economic costs proposed, or that the failure to include the proposed social and economic costs render inadequate the alternatives analyzed by TransGas, adjudication of the issue would "dissolve into an academic debate" that lacks the potential to result in the denial of a Part 231 air permit, a major modification to the proposed project, or the imposition of significant air permit conditions in addition to those proposed in the draft air permit (see 6 NYCRR 624.4[c][3] [standard for significance]; see also Matter of Superintendent of Fish Culture [Adirondack Fish Culture Sta.],

Interim Decision of the Commissioner, Aug. 19, 1999, at 8 [citing Matter of AKZO Nobel Salt, Inc., Interim Decision of the Commissioner, Jan. 31, 1996, at 12]). Moreover, Intervenor's offers of proof fail to raise sufficient doubt about TransGas's Part 231 alternatives analysis such that a reasonable person would require further inquiry (see 6 NYCRR 624.4[c][2] [standard for substantive issue]).

3. Avoidance of Adverse Impacts

Finally, the City argues that TransGas failed to demonstrate, under the first prong of the test, that potential and real adverse impacts of the project have been avoided to the maximum extent possible because the Part 231 analysis fails to account for air pollution impacts to residential buildings that will be constructed under the June 2003 re-zoning initiative. This argument fails for the same reasons that the challenges to TransGas's air modeling based upon the June 2003 Plan fail. TransGas's Part 231 alternatives analysis contains an assessment of the air impacts revealed by the air modeling conducted pursuant to the protocol approved by the Department in April 2002. That analysis revealed that the project will comply with all NAAQS. Accordingly, because the City has failed to identify a significant defect or omission in the Part 231 analysis of air impacts (see Matter of Jointa-Galusha, LLC, Interim Decision of the Commissioner, May 7, 2002, at 12), the City fails to raise an

adjudicable issue.

The City's argument also fails for reasons similar to those that apply to its social and economic costs argument. Just as the assessment of social and economic costs in a Part 231 analysis must be undertaken in the context of alternative sites, sizes, production processes, and environmental control techniques, so must the assessment of air impacts for non-attainment pollutants. Intervenors failed to demonstrate the existence of alternative sites, sizes, production processes or environmental control technology that avoid or minimize the non-attainment pollutant impacts associated with the project as proposed. Thus, adjudication under Part 231 of the air impacts issue proposed would be an academic exercise that lacks the potential for permit modification or denial.

In sum, Intervenors fail to raise a substantive and significant issue concerning TransGas's 6 NYCRR 231-2.4(a)(2)(ii) alternatives analysis. Accordingly, the ALJ ruling that Intervenors failed to raise an adjudicable issue concerning that analysis is affirmed.

Party Status

Given the failure of the parties to raise on this appeal an issue for adjudication, the ALJ's ruling that the City, Part Tower Greenpoint Associates, LLC, M & H Realty, LLC, and

Ramlu Trading Co. should be denied party status is affirmed (see
6 NYCRR 624.5[d][1]).

Conclusion

Because the parties to these appeals fail to raise a substantive and significant issue for adjudication, I remand this matter to Department staff for issuance of the DEC permits applied for by applicant TransGas Energy Systems, LLC.

For the New York State Department
of Environmental Conservation

/s/

By: Erin M. Crotty, Commissioner

Albany, New York
March 12, 2004