

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 14, 2013

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown, recused
Gregg C. Sayre
Diane X. Burman

CASE 11-T-0534 - Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need for the Construction of the "Rochester Area Reliability Project," Approximately 23.6 Miles of 115 Kilovolt Transmission Lines and 1.9 Miles of 345 Kilovolt Line in the City of Rochester and the Towns of Chili, Gates and Henrietta in Monroe County.

ORDER REOPENING THE RECORD FOR THE
RE-EXAMINATION OF LOCATION OF SUBSTATION 255 AND
THE ROUTE OF CIRCUITS 40, 940 & 941

(Issued and Effective November 15, 2013)

BY THE COMMISSION:

BACKGROUND

Rochester Gas & Electric (RG&E) filed an Article VII Petition with the Commission on September 29, 2011 for a Certificate of Environmental Compatibility and Public Need related to the Rochester Area Reliability Project (RARP), a transmission project designed to enhance the reliability of RG&E's network in the Rochester area. The Project as proposed and subsequently certified by the Commission consists of 345 and 115 Kilovolt transmission lines, improvements to three existing

substations, and construction of one new 345kV/115kV substation (Station 255) in Monroe County.¹

Following more than a year of negotiations, RG&E, Department of Public Service Trial Staff (Staff),² the Department of Environmental Conservation (DEC), and the Department of Agriculture and Markets (Ag & Markets) submitted a Joint Proposal addressing all of the issues raised in the proceeding. Each of the towns adjacent to the route of the project filed general statements in support of the RARP.³ No party opposed the Joint Proposal. The Joint Proposal was subsequently adopted by the Commission in its order granting the certificate on April 23, 2013 (the Certificate Order).⁴

On April 17, 2013, one day before the Commission session at which the Joint Proposal was discussed, Thomas, Anna, David, and Marie Krenzer (collectively hereinafter, the Krenzlers), landowners in the Town of Chili on whose property both Substation 255 and short segments of 115 kV Circuits 940 and 941 and 345 kV Circuit 40 would be built, filed a letter opposing certification of the RARP because of its potential impact on their agricultural operations. In considering this

¹ Further details regarding the technical specifications of the project, the procedural history leading to the initial Certification of the RARP, and a description of the contingencies leading to the need for the project can be found in the Commission's April 23, 2013 Order in this proceeding.

² This order subsequently refers to Advisory Staff, which differs from Trial Staff, any subsequent references to Staff refer to Trial Staff.

³ See, e.g. City of Rochester Comments (submitted April 25, 2012), Town of Gates Comments (submitted December 16, 2011), Town of Henrietta Comments (submitted December 15, 2011), Town of Chili Comments (submitted December 14, 2011).

⁴ Case 11-T-0534, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued April 23, 2013) (hereinafter Certificate Order).

opposition from the Krenzlers, the Commission stated that since Ag & Markets and DEC participated in the Joint Proposal process, "the impacts on agricultural lands and wetlands have been addressed exhaustively," noted that the letter was received "the day before the scheduled Commission consideration of this matter," and suggested that the Krenzlers "participate and seek relief in the EM&CP phase" of the project.⁵

Following the Commission's adoption of the Joint Proposal, on May 21, 2013, the Krenzlers filed a Petition for Rehearing regarding the Certificate Order and filed a request for party status on May 23, 2013. The Commission also received requests for rehearing from the New York Farm Bureau and the Monroe County Farm Bureau, as well as more than 60 public comments supporting the Krenzlers' petition. These comments included letters from United States Senator Charles Schumer, New York State Senator Michael Ranzenhofer, and Assemblymember Harry Bronson urging the Commission to reconsider the siting of the RARP. On May 23, 2013 Town of Chili Supervisor David Dunning requested that the Commission reopen the proceeding and sought party status.

On August 15, 2013, the Commission issued an Order that granted the Krenzlers' and the Town's requests for party status.⁶ In that Order, the Commission remanded the proceeding to an Administrative Law Judge (ALJ) for the limited purpose of facilitating discussions between the parties regarding the agricultural impacts of the siting of Station 255 and the transmission lines on the Krenzlers' property. At that time we declined to decide "whether the record should be reopened to admit additional materials on the merits of the substantive

⁵ Certificate Order p. 12 n.24.

⁶ Case 11-T-0534, Order on Petitions for Rehearing (issued August 15, 2013) (hereinafter Remand Order).

siting decisions made in this case,"⁷ and directed the ALJ to conduct settlement discussions among the parties and to report results of these discussions to the Commission within 30 days. Based on this report and our review of the record developed to date, we now conclude that the record in this case should be reopened.

POSITIONS OF THE PARTIES

The Krenzlers

In their Petition for Rehearing, the Krenzlers assert that the construction of the RARP will affect approximately 675 acres of their land. Specifically, they state that the construction of the access road to Station 255 (as well as the substation itself) and of Circuits 40, 940, and 941 will take 325 farmland acres -- roughly half of their land -- out of production permanently.⁸ In support of this assertion, the Krenzlers state that the spacing of the transmission towers will make use of certain farming equipment, most notably a seeding vehicle, impossible. They argue that the original route for Circuits 940 and 941 proposed by RG&E in its Article VII application was preferable to the route ultimately proposed in the Joint Proposal and adopted by our Certificate Order. They say that the original route could have been certified had RG&E made more aggressive efforts to obtain permission to cross

⁷ Id. p. 10.

⁸ Case 11-T-0534, Petition for Rehearing Regarding the Commission's Order Granting a Certificate of Environmental Compatibility and Public Need for the Rochester Area Reliability Project (filed May 21, 2013), p. 2.

federal conservation easement property.⁹ The Krenzlers also argue that other alternative locations for Substation 255 proposed by RG&E in its original application would have been preferable because of the relative ease of building access roads to those sites and the avoidance of active farmland.

In short, the Krenzlers contest the finding in the Certificate Order that Site 7 for Substation 255 and the certified route of Circuits 940 and 941 minimize the project's impact on agricultural land.¹⁰ They also contend that 1) Ag & Markets and RG&E did not work with the members of the Krenzer family to minimize such impacts, despite assertions to the contrary made in the Joint Proposal, and 2) that the value of their property will be significantly diminished should the project be built as certified.

RG&E, Ag & Markets, DEC & Staff

Staff and RG&E argue that the Krenzlers' objections are largely speculative and based on an incorrect interpretation of the Certificate and its conditions. These parties note that the siting decisions reflected in the Certificate Order represent a balancing of 1) the impacts these facilities will have on active farmland and on protected state wetlands, 2) the problems of land subsidence in some alternative areas, 3) the presence of residential housing in other areas, and 4) the inaccessibility of federal Wetlands Reserve Program easement lands. These parties, as well as AG & Markets, also respond that nearly all the Krenzlers' claims can be remedied during the Environmental Management and Construction Plan (EM&CP) process, as the

⁹ The easement in question is part of the USDA administered Wetlands Reserve Program. The 30-year easement, placed on property immediately adjacent to that of the Krenzlers, was purchased by USDA in 2007 and prohibits development of the land except at the discretion of the USDA.

¹⁰ Certificate Order p. 12.

specific location of poles and access roads have yet to be determined.

Staff notes that the Krenzlers' general allegation that the value of their property will be drastically reduced by the siting decision is unsupported by any evidence, and therefore cannot be weighed by the Commission. RG&E adds that, after the approval of the EM&CP, petitioners have a right to seek compensation for any loss of value; they can file a claim in New York State Supreme Court for any compensation they believe is due.

Other Comments

The Commission received letters of support for the Krenzlers' petition on May 20, 2013 from New York State Senator Michael Ranzenhofer and New York State Assemblymember Harry Bronson, as well as letters from numerous individuals, the Monroe County Farm Bureau, the New York Farm Bureau, and the Monroe County Cornell Cooperative Extension. All of these letters advance the same or substantially similar arguments to those presented by the Krenzlers.

A number of local officials have also requested rehearing and filed comments in support of the Krenzlers' petition. Chief among these is a letter filed May 21, 2013 by Town of Chili (Chili) Supervisor, David Dunning, who requests that the Commission reopen the proceeding and also reconsider the Certificate Order with respect to the portion of the line sited in the Town of Chili. His letter was accompanied by a unanimous resolution of the Chili Town Board that supports the RARP generally, but asserts that the siting of the substation, lines, and poles as certified conflicts with the Town's 2030

Comprehensive Plan, which in part encourages the development of additional agricultural land within the town's borders.¹¹

DISCUSSION

All of the rehearing requests relate to the segment of the RARP that traverses various properties owned by the Krenzer family, roughly bounded by the Rochester & Southern Railroad bed to the west and the Genesee River to the east. No party has challenged the need for the RARP or any other segment of the project, which, as noted above and in the Certificate Order, is necessary to maintain reliability in the Rochester area. We recognized in adopting the Joint Proposal that, without the RARP, RG&E's transmission system would not meet applicable reliability criteria as early as the summer of 2014, according to the Company's then current load forecast.¹²

We are sensitive to the need to maintain reliability in the Rochester area, and we recognize that any effort to reevaluate siting issues must move forward in a manner that ensures continued reliability. Therefore, we take note of certain intervening developments that indicate to us that the short-term risk to reliability has been partially mitigated. Recent load forecast models for RG&E's service territory, which Advisory Staff has brought to our attention, combined with other transmission upgrades soon to be completed by the company, suggest that while the project is still of critical importance, the reliability impact it is designed to correct may manifest somewhat later than the Company previously projected. This forecast indicates that peak demand will increase at a slower

¹¹ The Town also took issue with the Commission's waiver, as unreasonably restrictive, of certain Town rules in connection with the actual construction of the RARP.

¹² Certificate Order p. 17.

rate than previously expected and anticipated when the parties developed the Joint Proposal. Additionally, Advisory Staff has also informed the Commission that RG&E expects to complete upgrading two transformers (T1 and T3) at Station 80 by December 31, 2013, earlier than the June 2014 date assumed in the Joint Proposal. These upgrades, which add significant capacity to Substation 80, combined with the new load forecast for the Rochester area, allow for additional flexibility regarding the RARP's in-service date.

Based on this new information, we need not decide the Krenzlers' Petition on the record in this case as it currently exists, and additional fact finding may be helpful in ultimately deciding the Petition for Rehearing. However, in light of the continuing reliability need for this project, RG&E will be directed to continue development of the certified project, including preparation and filing its EM&CP in compliance with the Certificate Order.

The Krenzlers' petition presents a number of alleged factual errors inherent in the Joint Proposal adopted by the Commission that they claim necessitate rehearing. Those errors include alleged deficiencies in the Joint Proposal regarding the impact of the RARP on agricultural operations engaged in by the Krenzer Family.

In their petition, the Krenzlers state that the RARP as certified would result in the loss of their ability to commercially farm approximately 48% of their land.¹³ The Krenzlers also state that transmission lines, as certified, will be built 60 feet apart. This distance would allegedly be insufficient for use of a planter employed by the Krenzlers, which measures 100 feet in width, with a spreader 120 feet in

¹³ See, Petition for Rehearing.

width. A distance of 60 feet between utility poles would allegedly not allow the Krenzlers to access the land on the opposite sides of Circuits 940 and 941 with their farming equipment, resulting in a loss of 228 acres of productive land according to the petition.

The Krenzlers also allege that Substation 255 and the roads to access it, as sited, would result in a loss of up to 85 additional acres of productive land. Finally, they argue that neither Ag & Markets, nor RG&E worked in concert with them to minimize these impacts.

Pursuant to the Remand Order, ALJ Van Ort held conferences with the parties designed to discuss modifications to the Joint Proposal.¹⁴ According to a report submitted to the Commission by ALJ Van Ort, proposals for new alternative sites for Station 255, including a proposal made by the Krenzlers in their petition for rehearing¹⁵ and a so-called "Straw Proposal" were discussed during these conferences to assist in re-evaluating the impacts on agricultural lands and guide any recommendation. According to this report, the parties also discussed changing the route of Circuits 940 and 941 to that originally proposed by RG&E, across the Wetlands Reserve Program easement.

ALJ Van Ort reported to the Commission on September 30, 2013 that discussions with and among the parties yielded a "vigorous and thorough airing of the issues surrounding the routing of the various lines and the location of Station 255."¹⁶ He stated that, based on responses to his own inquiries as well

¹⁴ Remand Order at 14.

¹⁵ That proposal was to locate Station 255 to a site approximately one mile west of the certified location, immediately west of the Rochester and Southern Railroad.

¹⁶ Report of Administrative Law Judge David Van Ort, Sept. 30, 2013, at 2.

as discussions among the parties, he concluded that the signatories to the Joint Proposal did not have a "complete understanding" of the agricultural impacts at the time they executed the Joint Proposal, but the parties now do have a full understanding of those impacts.¹⁷ Nevertheless, he reported that there remains no agreement regarding the ultimate location of Substation 255 or the route to be followed for Circuits 940 and 941, with the proponents of the Joint Proposal continuing to endorse its recommendations and the Krenzlers continuing to oppose them.

With respect to Circuits 940 and 941, ALJ Van Ort noted that "from an agricultural impact standpoint, routing of Circuits 940 and 941 along the north side of the NYPA ROW through the federal easement would, if available, be a clearly preferable option than the 'zig-zag' routing of these transmission lines in the Krenzlers' active farmland."¹⁸

Regarding the location of Substation 255, the parties to the Joint Proposal continue to believe that Site 7 (the approved location on the Krenzlers' property)¹⁹ best complies with the requirements of PSL Article VII. According to ALJ Van Ort, the site for that Substation proposed by the Krenzlers in their petition for rehearing would "be partially within designated wetlands and 100- and 500-year flood zones, require adding more than 1.5 miles to the planned third 345 kV ROW to the south of the existing NYPA ROWs to run Circuit 40 to the new Station

¹⁷ Id.

¹⁸ Id. at 4.

¹⁹ Alternate 7 as described in the original application is roughly 400 feet to the west of the site that was certified for Station 255. The location for Station 255 as certified was moved to the east in the Joint Proposal. This was done at the request of the Krenzlers according to the parties to the Joint Proposal.

site.”²⁰ This, according to ALJ Van Ort’s report, would result in “larger towers across other portions of the Krenzlers’ and others’ properties, and would likely require routing the extended Circuit 40 through residential properties,”²¹ involving additional landowners in this proceeding and further delaying the ultimate operational date of the RARP.

We note that the ALJ’s report suggests RG&E’s originally preferred route for Circuits 940 and 941, along the north side of the NYPA ROW, would have less agricultural impact than the certified “zig-zag” routing that traverses the Krenzlers’ property. The window available to meet reliability needs appears to allow time for RG&E to exert maximum efforts to obtain access to the parcel under the federal easement. Such access would eliminate the need for the “zig-zag” and at least partly alleviate the burden imposed on the Krenzlers’ agricultural land.²² Therefore, the Commission orders that the record in this case be reopened to examine whether the route of Circuits 940 and 941 may be so modified. We understand that the USDA’s regulations provide mechanisms for the modification or release of a wetland easement.²³ RG&E is directed to pursue the availability of access to the federal easement property.

The Report questions the suitability of the Krenzlers’ proposed alternative to the location of Station 255, but we will require the parties to consider whether there might be other practical alternatives. We note that moving the substation will necessarily entail re-routing of transmission lines and the shifting of the environmental and land use burdens that were balanced in the Certificate Order. Nevertheless, we believe

²⁰ Report at 3.

²¹ Id.

²² This option does not involve relocation of the substation.

²³ See, 7 CFR § 1467.13.

that the parties should reconsider the alternatives contained in the original application, and should develop a record on the possible location advocated by the Krenzlers, as well as the feasibility of any sites east of the Genesee River.

Specifically, the Commission orders that the record be reopened and further developed as follows: RG&E should re-examine the alternatives for the siting of Substation 255 proposed in its original application between Station 80, on the east, and the Rochester & Southern Rail line, on the west (including any sites east of the Genesee River that were not mentioned in the original application); RG&E should also examine the additional sites for the location of Substation 255 advanced by the Krenzlers in their petition for rehearing or otherwise discussed during the negotiations on remand. The record must also assess the impact of any changes to the routes of Circuits 40, 940, and 941 that would be necessary to accommodate the substation location alternatives. The company should report the results of such examination pursuant to a schedule to be determined by the ALJ.

The ALJ shall thereafter conduct a screening process to eliminate alternatives whose environmental impacts exceed those associated with the certificated substation location and transmission route. Under PSL §126, where we have determined that there is a need for an Article VII facility, we must then find that the facility "represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed."²⁴

²⁴ Public Service Law §196.

The Certificate Order represents our determination of the appropriate balancing of need and impacts in the context of the RARP. Consequently, any alternatives that would impose greater environmental impacts must be excluded from further consideration, as the overall balance of impacts must be no less favorable to the public interest than that imposed by the currently certified facility.

Assuming any alternatives pass this screening, the ALJ should design an expedited process to bring the matter back to the Commission for decision, given the reliability need for this project. That process should be designed to develop a record that details the environmental and agricultural impacts of each of these alternatives and evaluates all of the factors (other than need) contemplated by the statute.²⁵ This additional factual information will allow the Commission to make a prompt final decision on the Krenzlers' petition for rehearing and on the ultimate siting of the portion of the RARP between the Rochester & Southern Railroad line and Station 80.

The Town of Chili was made a party to this proceeding in the Remand Order. We will allow the Town to present information regarding its plan insofar as that plan bears upon the alternatives to be considered.

CONCLUSION

Based on the foregoing, the Commission orders that the record in this case be reopened with regard to the segment of the project discussed above. Because of our concern for reliability, we will require RG&E to continue the work of

²⁵ We recognize here that parties are free to engage in settlement negotiations at any point during this process and nothing in this order should be understood to indicate otherwise.

planning for the construction of the certified project without delay, while simultaneously reexamining alternatives as ordered here.

Pursuant to a schedule to be determined by the ALJ, RG&E shall effect notice of the alternatives to be considered upon all parties and persons potentially impacted by the alternatives being examined. The parties and persons given notice should include, but not necessarily be limited to, all landowners affected by any of the alternate Substation 255 sites or the alternate routes of Circuits 40, 940 and 941 necessary to connect to Station 255 at those alternate locations, and the municipalities in which this segment of the project is to be built.

We will also require the company to file a major milestone schedule for the construction and commissioning of the certified project, and to update that schedule on a monthly basis. RG&E should immediately file any updates to its load forecast and notice of any other developments that might affect reliability needs in order to ensure the continued reliability of the power system in the Rochester area.

In the interim, the Certificate Order is neither modified nor stayed by this order, and we continue to reserve judgment on the petitions for rehearing. As noted above, RG&E shall continue to prepare for construction of the project as certified, in light of the continued reliability need for this project.

The Commission orders:

1. That the record in this proceeding be reopened to reexamine the alternatives for the Rochester & Southern Railroad-to-Station 80 segment as specified in this order.

2. RG&E shall report weekly to Staff on its efforts to obtain access to the parcel subject to the USDA easement for the original route of Circuits 940 and 941.

3. Within 30 days of the date of this order, RG&E shall update and file its projection for the project's need date and a major milestone schedule for completion of the certificated project.

4. Consistent with the discussion in this order, the ALJ shall ensure that RG&E provides notice of the alternatives at an appropriate time upon all parties and persons potentially impacted by the alternatives being examined, including limited to, all landowners affected by any of the alternate Substation 255 sites or the alternate routes of Circuits 40, 940 and 941, and the municipalities in which this segment of the project is to be built.

5. RG&E shall file an analysis of all alternatives for the location of Substation 255, including those proposed in the original application, those proposed by the Krenzlers in their petition on rehearing or otherwise discussed in the course of the remand negotiations, and any located east of the Genesee River identified by the company, according to the schedule set by the ALJ.

6. RG&E shall continue with its work in compliance with the Certificate Order and this order. RG&E shall proceed to file its Environmental Management and Construction Plan in compliance with the Certificate Order.

7. The Administrative Law Judge shall establish the schedule for filings, conduct screening to determine whether there are any viable alternative locations for Substation 255, and schedule additional hearings or other procedures as needed to further develop the record and to bring this matter back to the Commission for final resolution. If the ALJ determines that

the analysis required in this order will not be complete in time to meet reliability needs, the ALJ shall promptly report that conclusion to the Commission.

8. The Secretary may extend the deadlines set forth in this order upon good cause shown, provided the request for such extension is in writing and filed on a timely basis, which should be on at least one day's notice.

9. This proceeding is continued.

By the Commission,

KATHLEEN H. BURGESS
Secretary