STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on August 15, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman, recused
Patricia L. Acampora
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 ON PETITIONS FOR REHEARING

(Issued and Effective August 15, 2013)

BY THE COMMISSION:

INTRODUCTION

On April 23, 2013, the Commission issued its Order Adopting the Terms of a Joint Proposal and Granting a Certificate of Environmental Compatibility and Public Need in this proceeding (the Certificate Order) to Rochester Gas and Electric Corporation (RG&E, the Company) pursuant to Article VII of the New York State Public Service Law for the construction, operation, and maintenance of the Rochester Area Reliability Project (RARP, Project). The Project consists of 345 and 115 Kilovolt transmission lines, improvements to three existing substations, and the construction of a new 345kV/115 kV substation (Station 255) in Monroe County.

Three elements of the Project were modified in the course of the review of the initial application. First, the original proposed location for Station 255 was rejected in favor of an alternative site, identified in the application as Alternative Site 7, on farmland owned by Thomas Krenzer. The Certificate Order approved this location on the recommendation of the New York State Department of Agriculture and Markets (Ag & Markets) expressly to reduce the impact of the Project on active agricultural land. Second, the proposed route of portions of Circuits 940 and 941 was modified because the company was unable to obtain permission to cross land subject to a federal conservation easement. Third, the selection of Site 7 for Station 255 required placement of access roads on Mr. Krenzer's farm, although the actual location of those roads was left for the environmental management and construction plan (EM&CP) process.

On May 22, 2013, a petition for rehearing was filed by Thomas Krenzer, Anna Krenzer, David Krenzer, and Marie Krenzer (the Krenzers), farmers and landowners on whose agricultural property substation 255 and appurtenant lines were sited. The Krenzers also filed a request for party status on May 23, 2013. In addition, on May 21, 2013, the Town of Chili (Town, Chili) Supervisor requested that the Commission reopen the proceeding, and on May 23, 2013, requested party status.

In this order, we grant the requests of the Krenzers and the Town of Chili for party status, remand the proceeding for the limited purpose discussed below, and defer final action on the petitions for rehearing pending the remand.

BACKGROUND

On April 17, 2013, the day before the Commission session to consider this matter, the Krenzers (not then parties

to this proceeding) submitted a letter challenging the siting of Station 255 and appurtenant portions of the transmission line. The Krenzers requested we stay our determination on the pending application on the grounds that they had no notice of the final location of the project and that the project would result in permanent injury to the Krenzer family farm. Specifically, the Krenzers challenged the siting of the new Station 255, appurtenant transmission lines, and access roads. The Krenzers claimed this placement will make farming impossible on large portions of their land. They asserted a preference for Alternative Site 3 for construction of the substation and lines, noting also that Alternative Site 3 has direct access from a public road. The Krenzer family also asserted that neither RG&E nor Ag & Markets contacted either them or the Town of Chili, where their property is located, about the selection of Alternative Site 7.

In the Certificate Order, we noted that, in light of the participation of both the New York State Department of Environmental Conservation (DEC) and Ag & Markets in the negotiation and execution of the Joint Proposal, impacts on both agricultural lands and wetlands had been addressed, concluding that the Krenzers' objections were

> untimely for consideration of certification. Until the day before the scheduled Commission consideration of this matter, no opposing comments were received. These landowners may participate and seek relief in the EM&CP [Environmental Management and Construction Plan] phase.[1]

In their Petition for Rehearing, the Krenzers assert that the construction of the RARP on their land will affect

[1] Certificate Order, at 12 n.24.

approximately 675 acres and that the construction of the access road to Station 255 and of Circuits 940 and 941 will take 325 farmland acres -- roughly half of their land -- out of production. They assert the spacing of utility poles will make use of farming equipment impossible and also raise safety and security concerns. They argue that the original route was preferable and could have been certified had RG&E made more aggressive efforts to obtain permission to cross federal conservation easement property. The Krenzers offer an assessment of the preferable locations for the site of the project, based on the relative ease of building access roads and the avoidance of active farmland of other alternatives. Overall, the Krenzers contest the finding in the Certificate Order that Site 7 and the Circuit 940 and 941 routes minimize the project's impact on agricultural land, contending, among other things, that Ag & Markets and the Company have not worked with the Krenzers to minimize such impacts.

Support for the Krenzer family petition came from a letter filed May 20, 2013 from New York State Senator Michael Ranzenhofer and New York State Assembly member Harry Bronson. Letters from the Monroe County Farm Bureau, the New York Farm Bureau, and the Monroe County Cornell Cooperative Extension, as well as local officials, also requested rehearing and supported the Krenzer petition.

A letter filed May 21, 2013 from the Town of Chili (Town, Chili) Supervisor (and a request for party status filed May 23), requested that the Commission reopen the proceeding and also reconsider the Certificate Order with respect to the portion of the line sited in the Town. His letter was accompanied by a unanimous resolution of the Town Board supporting the Project generally, but asserting the siting of the substation, lines, and poles conflicts with the Town 2030

Comprehensive Plan. The Town also asserted it had inadequate notice of Alternative Site 7, and took issue with our waiver of certain Town rules as unreasonably restrictive.

A Notice issued May 29, 2013, in this proceeding stated:

> Both the Krenzer petition and the Town request seek or imply reopening of the record in this proceeding. Commission Rule of Procedure 4.3(c)(2) provides that a party intervening after the start of hearings "shall be bound by the record as developed to that point." Parties filing responses to these petitions should comment as to whether or not the Commission should waive this rule and reopen the record. (citation omitted)

The Notice requested consolidated responses to the petitions for rehearing and reopening the record and requests for party status.

Thereafter responses were filed by RG&E, DEC, Ag & Markets, and Department of Public Service Staff (Staff). The procedural issues raised by these parties are addressed below. On the merits, Staff and RG&E argue that the Krenzers' objections are largely speculative and based on incorrect interpretations of the Certificate conditions. They note that the siting decisions reflected in the Certificate Order represent a balancing of the impacts these facilities will have on active farmland and on protected state wetlands, the problems of land subsidence in some alternative areas, the presence of residential housing, and the inaccessibility of federal conservation lands. These parties also respond that nearly all the Krenzers' claims can be remedied during the EM&CP process, as specifics of the location of poles and access roads have yet to be determined. Staff notes that the Krenzers' general allegation that the value of their property is 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 may challenge the compensation offered in RG&E's highest appraisal; they can file a claim in New York State Supreme Court for further compensation they believe is due.[2]

DISCUSSION

Party Status

The Krenzers requested party status on the grounds that they would contribute to the development of a complete record, alleging the record lacked adequate information concerning alternative sites and was factually incorrect as to their consent to siting the substation and other facilities on their property. The Town also sought party status and rehearing on the grounds that the Town and affected property owners should be heard. No party responded to its request.

RG&E opposes the Krenzer request for party status. The Company notes that, unlike most PSC proceedings, Article VII proceedings have strict requirements for attaining party status, filing for rehearing, and seeking judicial review, all tailored to ensure the proceedings are expeditious and decisions are final. The Company cites PSL §128 which provides, "Any party aggrieved by any order issued on an application for a certificate may apply for a rehearing under section twenty-two within thirty days after issuance of the order ...." This section limits rehearing to parties only. In addition, RG&E contends, the time for the Krenzers to seek party status is governed by PSL § 124(j), which provides that an individual

[2] As noted, we do not reach the merits of these arguments in this order but summarize them here briefly by way of background.

resident in a municipality entitled to receive notice under PSL § 122(2)(a) may become a party "if he has filed with the commission a notice of intent to be party, within thirty days after the date given in the published notice as the date for filing of the application." Although RG&E recognizes that we have the authority to grant party status at any time, the company urges us not to do so under these circumstances.

RG&E suggests the request for party status should be denied on the ground that "granting such permission would be unfairly prejudicial to other parties,"[3] as the Krenzers had two years to participate in the proceeding and raise these issues and that undue delay threatens the timely completion of the RARP, needed to ensure the reliability of the Rochester area electric supply.

Staff supports the Krenzers' request for party status, noting that only parties may petition for rehearing in a PSL Article VII proceeding. Ag & Markets takes no position on this issue. DEC points out that the Krenzer petitioners, as individuals resident in a municipality (the Town of Chili) entitled to receive notice under §§85-2.10 and 85-2.11 of the Commission's regulations[4] were required but failed to file a timely appearance within 30 days after the date given in the published notice as the date for filing of the application.

Our rules generally contain no deadline for seeking party status: "Permission to intervene after a hearing has commenced may be sought and granted at any time ...."[5] As noted by both RG&E and DEC, the Krenzers would have been statutory parties, as individuals resident in a municipality (the Town of

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[3] 16 NYCRR §4.3(c)(2).

[4] 16 NYCRR §§ 85-2.10 & 85-2.11.

[5] 16 NYCRR §4.3(c)(2).

Chili) entitled to receive notice of the Application, had they filed an appearance within the deadline established by the statute and regulations. However, once that deadline is missed, there is no time limitation on their subsequently seeking party status by request, subject to the requirement of Rule 4.3 that an intervenor generally takes the record as found.

Rule 4.3 also provides that permission to intervene will be granted if it is not unfairly prejudicial to other parties to do so. We are not persuaded that allowing the Krenzers' intervention is prejudicial, as the consideration of this petition does not in itself stay the Certificate Order. The EM&CP process and other preparation for construction of this needed project can continue to move ahead.

In the Bluestone Gas proceeding,[6] we granted party status on rehearing to affected landowners over the applicant's objection that they requested party status after their rehearing petitions were filed. Among the reasons cited were that administrative procedures were more informal than judicial ones and that the petitioners in that case were *pro se*. Although petitioners here are represented by counsel, they are the people whose property is the most seriously affected by the siting decision in this matter. The petition for rehearing, for which party status is a prerequisite under Article VII, is the Krenzers' only opportunity to argue that the RARP was not properly sited on their property.[7] Accordingly, their request for party status is granted.

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[6] Cases 11-T-0401 *et al.*, *Application of Bluestone Gas for Certificate of Environmental Compatibility and Public Need,* Order on Rehearing (issued February 15, 2013)(granting party status and denying rehearing), at 2-3.

[7] See Eminent Domain Procedure Law §206(b).

As to the petition of the Town for party status, the Town Supervisor's letter was accompanied by a unanimous resolution of the Town Board supporting the Project generally but asserting the siting of the substation, lines, and poles conflicts with the Town 2030 Comprehensive Plan. The Town asserted it had inadequate notice of Alternative Site 7, and took issue with our waiver of certain Town rules as unreasonably restrictive. No party responded to its request for party status. The Town had ample information about this proceeding, having been served with the statutory notice and given the choice to become a statutory party. The Town expressly chose not to do so. While we might construe this choice to waive its objection to the Certificate Order, it appears best in this case to ensure that all stakeholders come to the table. Consequently, we will grant its request for party status at this time.

Reopening the Record

Both DEC and RG&E urge that, if the Commission allows this late intervention, the petitioners must comply with the Commission rule of procedure 4.3(c)(2) which provides that a party intervening after the commencement of the hearing "shall be bound by the record as developed to that point."[8]

The relevant section of our rules requires that rehearing may be sought on the grounds that the Commission committed an error of law or fact.[9] The Krenzers assert, in essence, that the Certificate Order contains two errors of fact: (1) the assertion that the chosen sites for Station 255, Circuits 940 and 941, and the access roads mitigate impacts on agricultural land, and (2) statements that the final location of

[8] 16 NYCRR §4.3(c)(2).

[9] 16 NYCRR §3.7(b).

Station 255 followed negotiations with the landowner. The Krenzers also aver that they were denied due process of law because they never received notice of the ultimate location of Station 255 and appurtenant facilities. In order to establish their claims, the Krenzers argue, they must be allowed to reopen the record. The Krenzers point out that the relief they seek requires that the Commission reopen the record to allow them to develop their rehearing case.

As described below, we have already considered the materials proffered by the Krenzers, RG&E, and the other parties with respect to the issues of notice and contact between the parties and the Krenzers. At this time, it is not necessary for us to decide whether the record should be reopened to admit additional materials on the merits of the substantive siting decisions made in this case. Rather, we can consider that question when the matter is brought back before us by the Administrative Law Judge as provided below.

The Notice and Consent Issues

The Krenzers assert three claims relating to notice or consent: (1) they never received actual notice of RG&E's application for a Certificate of Environmental Compatibility and Public Need, (2) they were unaware of the selection of the final site for the substation, poles, and other facilities until immediately before the Certificate Order was issued; and (3) they never negotiated, agreed to, or approved Alternative Site 7 for the location of Station 255.[10] As a result, they assert, they were denied due process of law.

RG&E responded in detail to the notice claims. It provided affidavits describing contacts with the Krenzer family

[10] The Krenzers further assert that they never met with any representative of Ag & Markets.

beginning in June 2011, including mailings and personal meetings and conversations. RG&E provided certificates of service of the Application by first class mail to property owners, including the Krenzers. Finally, RG&E provided an Affidavit of Debra Wegman, its Supervisor of Property Management-Real Estate, which states that the move of Station 255 was at the explicit request of Thomas Krenzer. In its response, Ag & Markets states that it had no direct contact with the Krenzers, but rather relied on RG&E's representations regarding the family's position.

Prior to filing the Application, RG&E published the required notice in the Rochester *Democrat & Chronicle* on September 21 and 28, 2011, which indicated that the Project included, among other things, the construction of new substation 255 and Circuits 940 and 940, along with their proposed route. The public notice expressly stated:

> During the course of the Article VII proceedings, alternate routes not included in the application filing or affected by the primary routes may be offered without further notice by publication.

In addition to the notice by publication provided in accord with the statutory requirements, RG&E sent a letter, dated October 2011, to property owners potentially affected by the RARP; its mailing list indicates this letter was sent to Thomas, Anna, David, and Marie Krenzer.[11]

On September 29, 2011 the Application was filed, and it was deemed in compliance with Commission regulations on January 20, 2012, after the filing of supplemental information requested by Staff. Public Statement Hearings were held in the City of Rochester and the Town of Henrietta on April 3, 2012.

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[11] Exhibit A to Ellis Affidavit, appended to RG&E Response to Krenzer Petitions.

Consistent with usual Commission practice, those hearings were promoted via Commission notice and press release and by RG&E's publication of the notice in local newspapers. No member of the public or representative of any municipalities appeared to make a statement for the record. However, many affected localities, included the Town of Chili, filed statements supporting the project.

Following the filing by RG&E of a Notice of Impending Settlement Negotiations and settlement talks, negotiations concluded with the filing of a Joint Proposal on December 11, 2012. Statements in support of the Joint Proposal were filed by Staff, RG&E, DEC, and Ag & Markets. No statements in opposition were filed. The Commission granted RG&E the Certificate in April 2013. All of these filings and notices duly appeared on the Commission website.

It is undisputed that RG&E complied with its legal obligation to provide notice of the Application by publication, and that notice was legally sufficient in this case. The Public Service Law does not require actual notice to landowners in Article VII proceedings and courts have upheld constructive notice as legally and constitutionally sufficient.[12] In this case, other efforts, such as personal letters and public and individual meetings, more than satisfied the basic legal notice requirements.

Even though neither actual notice nor consent of a landowner is required in siting cases such as this one, landowner views are relevant, and we consider them in reaching siting decisions. Consequently, we take great pains to solicit landowner participation and views through efforts such as public statement hearings and solicitation of written comments, and by

[12] *Powerline Coalition Inc. v. Public Serv. Comm'n.*, 244 A.D.2d 98, 102-03 (3d Dept.), *appeal dismissed*, 92 N.Y.2d 919 (1998).

requiring the utility to conduct outreach and to provide written notice to adjacent landowners, as occurred in this case. The landowner's view is particularly relevant when the land is actively farmed, because siting decisions must reflect an ascertainment of impacts to agricultural resources.

We are concerned about the suggestions in the Krenzers' petition and supporting documents that the Joint Proposal and its recommendation of Alternative Site 7 as the final site of Station 255 may not reflect a complete assessment of the impacts of the substation on agricultural land. In the Certificate Order, we accepted assertions by the parties that the affected landowners were consulted with respect to mitigation of impacts on agricultural lands. While the affidavits and letters submitted by RG&E show that there was communication between RG&E and the Krenzers, there is ambiguity regarding the results of that communication. The Certificate Order stated, "Following negotiations with the landowner and the parties, the Joint Proposal suggests moving the location of Station 255 approximately 400 feet east, mitigating the adverse impact on active agricultural land, and reducing the number of lattice and pole structures."[13] This statement, drawn from the Joint Proposal and the parties' supporting statements, is open to more than one construction as to whether the Krenzers were satisfied with the result, giving rise, in turn, to questions as to how any such satisfaction was evaluated by the parties in drafting the Joint Proposal to recommend the final locations.

[13] Certificate Order at 11, citing Ag & Markets' Letter in Support of Joint Proposal; see also Joint Proposal, p.23, ¶42 ("To minimize agricultural impacts, RG&E evaluated shifting the proposed Station 255 site approximately 200 feet and 400 feet to the east at the request of the property owner and the Department of Agriculture and Markets.").

The statements of both Ag & Markets and of the Krenzers indicate that there were no direct communications between the Krenzers and Ag & Markets concerning the potential impacts of Alternative Site 7 on the Krenzers' farming practices. Without such communications, the parties to the Joint Proposal may not have had a full and accurate understanding of the potential impacts to agricultural lands when deciding to enter into the Joint Proposal. Moreover, we cannot be assured that the appropriate balance was struck with respect to one of the objectives of the Article VII process – consideration of effects on agricultural lands in determining that the facility represents the minimum adverse environmental impact.[14]

Therefore, we will remand this matter to the parties for the limited purpose of re-evaluating, on an expedited basis, the potential impacts to agricultural lands posed by Alternative Site 7, in light of the consultation issues raised by the Krenzers and the Town of Chili. We expect the Krenzers to provide information on their agricultural uses of the property and the parties to review the mitigation determination in light of that information. We will provide for the assignment of an Administrative Law Judge to work with the parties and to report back to us within 30 days from the issuance of this Order on the results of this re-evaluation. That report may present the parties' proposal to modify the Joint Proposal or to confirm their original recommendation, and it may reflect consensus or present opposing views. Parties will be advised of specific procedures and deadlines for this remand process by notice or ruling.

[14] PSL § 126(1)(c).

In the interim, the Certificate Order is neither modified nor stayed by this order. RG&E should expeditiously continue to prepare its EM&CP filing in compliance with the Certificate Order, in light of the reliability need for this project. Indeed, to the extent that the detailed EM&CP work with respect to the Krenzer property can be accelerated and incorporated into this remand process, it would be very helpful, given the positions of several parties that the Krenzers' concerns can be addressed through detailed EM&CP provisions, such as those regarding the location of transmission structures or access roads.

The Commission orders:

1. The requests of Thomas, Anna, David and Marie Krenzer and the Town of Chili to intervene as parties in this proceeding are granted.

2. The matter is remanded to the parties for the review of the agricultural impacts of the siting of Station 255, as provided in this order. The Administrative Law Judge will report the results of such review to the Commission within 30 days from the date of this order.

3. This proceeding is continued.

By the Commission,

Kathleen H. Burgess

Digitally Signed by Secretary
New York Public Service Commission

KATHLEEN H. BURGESS
Secretary