The Alarm Clock Didn't Ring: The Failure to Consider the Environmental Impacts of the "Deregulation" of the Electric Industry in New York

By Peter Henner

In 1996, the New York State Public Service Commission (PSC), in Opinion No. 96-12,[1] adopted a far-reaching decision to radically restructure and deregulate New York's investor-owned utilities, with the stated goal of establishing "competition" and "customer choice" for all ratepayers. As part of that determination, the PSC directed the preparation of a Final Generic Environmental Impact Statement (FGEIS) and made environmental findings in accordance with SEQRA. However, that FGEIS deferred consideration of important environmental issues until they could be analyzed in the context of the specific plans that would be filed by each utility, and in the context of other decision-making by the PSC. Unfortunately, these issues were later ignored in subsequent environmental reviews, with the result that the PSC has now implemented what may be the single most important policy initiative of the last 25 years without meeting its legal obligations to analyze the prospective adverse environmental impacts of its determination, and to minimize such impacts to the maximum extent practicable.[2]

The purpose of SEQRA is to ensure that state and local agencies give full consideration to the environmental consequences of their actions before committing to an action. A town planning board must consider all prospective impacts of a new subdivision, including impacts on growth, traffic, municipal services, air quality and water resources. Similarly, a state agency proposing to dramatically change the manner in which a crucial service is delivered to the citizens of the state must also carefully consider the impacts of its proposed determination. The failure of the PSC to do so has serious implications, not just with respect to the future of the electric industry, but also for the issue of SEQRA compliance. The important public policy goal of a thorough environmental review for all public "actions" is threatened if a state agency can avoid SEQRA in its consideration of a controversial decision such as the decision to implement "competition" in the electric industry.

It is the author's belief that deregulation has failed in New York and will continue to fail: 1) electric prices have continued to rise at a higher rate in New York than in the rest of the country; 2) customer "choice" has not been practical; 3) problems associated with the policies for full stranded cost recovery have provided a windfall for utilities at the expense of ratepayers; 4) transmission constraints have resulted in the exercise of market power, especially in the New York metropolitan area; 5) the reliability of electric transmission and distribution systems in New York State has decreased; and (6) utility divestiture of generating assets may exacerbate the problems of meeting the rising demand for electricity in New York State. However, the purpose of this article is not to argue against deregulation; rather, my intention is to provide a case study of how a critical policy decision was made without full consideration of potentially serious adverse environmental impacts. A proper SEQRA review could and should have anticipated the factors and events that have resulted in the failure of deregulation. Had such a review been done, it is possible that different determinations would have been made with respect to the restructuring of the electric industry.

The recent California energy crisis has graphically illustrated the dangers of implementing deregulation without adequately considering prospective impacts. This is not to say that the problems in California can or will happen in New York. It is to say that one of the purposes of SEQRA is to ensure that the possibility of such a crisis is considered by the decision-making agency, in this case, the PSC. It is also to say that the possibility of such a crisis, as well as the possibilities of lesser adverse impacts, was not given adequate consideration in the SEQRA review process.

In 1993, the PSC instituted the "Competitive Opportunities Proceeding."[3] After a collaborative process, and a formal hearing culminating in a Recommended Decision, the PSC issued Opinion No. 96-12 on May 20, 1996. In this Opinion, the PSC: 1) ordered five investor-owned utilities—Central Hudson Gas and Electric Corp. ("Central Hudson"), Consolidated Edison ("Con Ed"), New York State Electric and Gas (NYSEG), Orange and Rockland Utilities ("Orange and Rockland"), and Rochester Gas and Electric (RGE)—to file proposed plans for restructuring;[4] 2) set forth a lengthy vision and goal statement; and 3) made important decisions with respect to the implementation of retail versus wholesale competition and the creation of an Independent System Operator (ISO).

In Opinion 96-12, the PSC also made findings under the State Environmental Quality Review Act (SEQRA)[5] and approved a Final Generic Environmental Impact Statement (FGEIS) that had been issued on May 3, 1996. This FGEIS formed the basis of the environmental conclusions made by the PSC in Opinion 96-12.

As discussed below, the environmental findings in Opinion 96-12 necessarily left a number of issues to be

resolved in the context of specific restructuring proposals which were to be filed by the individual utilities. However, the PSC ultimately determined not to require the preparation of any supplemental environmental impact statements in connection with individual utility restructuring plans. Instead, the PSC determined that all of the environmental impacts associated with these plans were within the thresholds and limits established by the 1996 FGEIS. Consequently, a number of important environmental impacts pertaining to the deregulation of electricity were never considered, mitigation measures were never considered, nor were the environmental impacts of alternative measures analyzed in the context of the individual restructuring efforts.

Issues in the Restructuring of the Electric Industry in New York

The importance of electricity to contemporary society cannot be overstated. Virtually every aspect of daily living, from the use of residential lighting and appliances, and commercial and industrial enterprises, to the services upon which we rely, is dependent upon the existence of a reliable and affordable supply of electricity. The need for electricity is expected to rise dramatically as a result of the use of computers; 13 percent of national electric use is currently used to power computers and the Internet, and this figure is expected to increase to 50 percent.[6] Traditionally, electricity has been supplied by public utilities that have exercised a monopoly subject to price regulation by government. Public utilities have also been vertically integrated, and have generated power, transmitted power and distributed it to customers. However, in the last 20 years, power producers have become established which are not regulated utilities. Furthermore, technological advances in electricity transmission, combined with both legal and regulatory changes, have made it possible to separate the electricity generation function from the transmission and distribution function.[7]

Under traditional regulation, a utility is allowed to earn a rate of return based upon its capital investment in a generating facility. The generation of power has been assumed to be a monopoly, but the utility is restricted from obtaining monopoly profits by the regulatory agency. However, with the rise of non-utility generation, non-regulated power producers can now generate power, in some cases cheaper than the utility. Advocates for deregulation argue that power produced by non-regulated generators, and sold in a competitive market, will ultimately result in lower prices for electricity than can be realized under a regulated monopoly.

In order to establish a competitive market for power generation, it is necessary for utilities to separate the generation and transmission and distribution functions. Under the competition model chosen by the PSC, electric customers will purchase power from generators in a competitive marketplace. The power generators will then "wheel" the power to the customers on power lines owned by the utility. The utility will charge a fee for power delivery, in addition to the fees paid to the generator.

Under this new "deregulated" system, the cost of generating the power will theoretically be lower than the regulated price presently charged by the utility. However, the goals of competition and choice of electric supplier have not been realized. As of November 30, 2001, less than 5 percent of the customers of investor-owned utilities in New York State purchased power from entities other than the utility.[8] Nor has the price of electricity been reduced for New York ratepayers: between 1999 and 2000, the average price paid by all New York ratepayers per kilowatt hour increased from 10.4 cents to 11.19 cents, while the national average price only increased from 6.66 cents to 6.69 cents.[9]

New York State's determination to "deregulate" electric utilities will almost certainly have a tremendous impact upon the state. In particular, this decision will have a number of "environmental impacts," especially considering the broad definition of "environment" under SEQRA.[10] Prospective impacts include the possibility of increased air pollutant emissions, changes in energy use, impacts on renewable energy programs and energy efficiency programs, and conservation programs. In addition, deregulation of the electric industry may have tremendous social and economic impacts, including changes in the cost of power, the availability of electric power for prospective economic development, impact on low-income ratepayers, and impacts upon municipalities that have been the host communities for large power plants.[11]

If deregulation encourages cheaper power, we must ask whether the use of cheaper power will result in increased pollution. For example, should older coal plants not covered by contemporary environmental controls obtain a competitive advantage as a result of deregulation, electric power from these plants could displace power from newer, cleaner plants, and could result in increased air pollution.

Deregulation may also have a significant impact on energy conservation programs. Public service commissions may lose the ability to effectively require utilities to allocate resources for programs that encourage energy conservation and energy efficiency. Furthermore, utilities that have been engaged in research and development activities, particularly with respect to renewable energy, will no longer be able to fund those activities in a competitive deregulated environment.

There are also serious environmental impacts associated with the transition from a regulated environment to a competitive environment. The sale of power plants to

non-regulated entities may affect environmental permits, and result in property tax and other economic consequences to the host communities.

Perhaps the most important consequence of deregulation is the question of "stranded cost recovery." Utilities, having invested large sums of money based upon a regulated environment which was expected to continue, claim that they are entitled to recover those sums of money as a result of the transition to a deregulated environment. In contrast, electric customers, either industrial or residential, that may seek to leave the utility and obtain power from different sources, may be adversely affected if they are required to pay money to the utility, as well as pay for the cost of obtaining power elsewhere.

This is not to say that the implementation of "competition" is necessarily bad or that these issues cannot be satisfactorily resolved. However, if a governmental agency in general, and the New York State Public Service Commission in particular, is to adopt a competition policy, it has an obligation to consider these possible effects, and, in the case of a New York State agency, to take the requisite hard look required by SEQRA before implementing such a policy.

SEQRA Requirements

SEQRA requires that every "agency" consider the prospective environmental impacts of its "actions." A decision maker is required "to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project."[12] An environmental impact statement under SEQRA "is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."[13]

Most of the 25 states that have "deregulated" or "restructured" the electric industry have done so by legislative enactment.[14] Legislative enactments are not "actions" under SEQRA, and if the decision to deregulate electric utilities had been made by the Legislature, it would have been exempt from environmental review.[15] However, in New York, the restructuring of the electric industry was accomplished through a "proceeding" that was conducted by the PSC, and the administrative determination to implement deregulation was therefore an "action" within the meaning of SEQRA. The PSC was therefore required, as part of its SEQRA review, to consider the prospective environmental impacts of deregulation, including prospective mitigation measures and alternatives, as well as the "no-action" alternative. The PSC was also required to consider the "cumulative impact" of its action, together with other planned actions.

Summary of Competitive Opportunities Proceeding, Opinion 96-12

Opinion 96-12 did not implement the actual deregulation of the electric industry in New York State. Instead, the PSC set forth its "vision and goals for the future regulatory regime,"[16] identified the major issues that would need to be resolved, and set forth an implementation plan. The opinion established a goal of establishing competition with respect to the generation of power and in the area of energy service, while maintaining system reliability. The PSC determined that competition was desirable because of the potential consumer benefits, particularly with respect to the lowering of electricity prices. The PSC determined to adopt a "retail model," by which customers would purchase electricity from generators, either directly, or indirectly through energy service companies (ESCOs), rather than a wholesale model, where utilities purchase electricity on the open market, for resale to customers.

The PSC rejected the utilities' argument that they were entitled to recover all stranded costs as a matter of law.[17] Instead, the issue of stranded cost recovery was deferred to the individual restructuring plans which utilities were to file. The PSC determined that only "prudent" strandable costs would be recovered. The PSC determined to delay its reassessment of "the flexible rate guidelines and the need for them [until] after the competitive market has been in effect for a few years."[18]

The PSC also determined to implement a "system benefits charge" to provide a funding source for public policy initiatives that were not expected to be addressed by the competitive markets. These public policy initiatives pertain to programs to encourage energy efficiency, conservation, and renewable resources. However, the PSC also stated that the "use of a system benefits charge should be revisited sometime after retail competition has commenced to determine whether the level of these programs is sufficient and whether the continued use of a system benefits charge is required."[19]

Opinion 96-12 "strongly encourage[d] divestiture, particularly of generation assets, but [did] not require it immediately."[20] Similarly, "while divestiture of energy service company operations is encouraged, for now we will allow utilities to continue to provide energy services to their customers . . . ,"[21] utilities were also directed to continue to be providers of last resort for electric service; i.e., if a customer did not elect a different energy supplier, the customer would continue to purchase electricity from the utility.[22]

As noted above, Opinion 96-12 did not implement deregulation. However, the PSC set forth an implementation plan that was intended to enable "customers to enjoy the benefits of competition as quickly as possible" because "the need to achieve the goals of competition is

urgent and we must proceed without undue delay."[23] In the first phase of the plan, utilities were directed to file rate restructuring plans by October 1, 1996, with the goal of establishing a competitive wholesale power market in early 1997 and introduction of retail access early in 1998. In addition to the rate restructuring plan, the utilities were also directed to file: 1) documents pertaining to the classification of transmission and distribution facilities, 2) a proposal for the creation of an independent system operator, 3) information pertaining to load pockets, and 4) information about the role of energy service corporations and other issues with both the PSC and with the Federal Energy Regulatory Commission (FERC).[24]

The PSC anticipated that "a wholesale competitive market [would] begin in early 1997. The experience gained in the wholesale market prior to the introduction of retail access will allow parties to become more familiar with what can be expected in the way of market prices."[25] Although the experience that was expected to be gained in the wholesale competitive market was expected to be necessary for the transition to retail competition, the utilities' filings in 1996 were expected to address

> the structure of the utility both in the short and long term . . . ; a schedule for the introduction of retail access to all of the utilities' customers, and a set of unbundled tariffs that is consistent with the retail access program, [and] a rate plan to be effective for a significant portion of the transition that incorporates our goal of moving to a competitive market.[26]

As it happened, wholesale competition did not begin until November 18, 1999, when the New York ISO commenced operations.[27] The delay in implementing wholesale competition, if considered by the PSC, might have slowed the PSC's headlong rush toward retail competition. In May 1996, the PSC did not have a clear vision of what was likely to happen with respect to the transition to competition, and was hoping to rely upon the experience that it hoped to gain as result of the transition to wholesale competition in 1997. Nevertheless, the PSC directed the utilities to proceed with the transition to retail competition without the benefit of any experience with wholesale competition.

Environmental Findings in Opinion 96-12

In making SEQRA findings in Opinion 96-12, the PSC characterized its

> proposed action in this proceeding [as] the adoption of a policy supporting increased competition in electric markets, including a preferred method to achieve electric competition; and regulatory and rate-making practices that will assist in the transition to a more competitive and efficient electric industry, while maintaining safety, environmental, affordability, and service quality goals.[28]

The "Findings" section of Opinion 96-12 acknowledged that

> the likely environmental effects of a shift to a more competitive market for electricity are not fully predictable due to: 1) the complexity of the electric industry in New York; 2) the interaction of New York's regulatory activities with those of other states and the federal government; 3) the level and types of market responses; and 4) the lack of relevant examples of such a shift to competition.[29]

In summary, the PSC acknowledged that, as of May 1996, it was not possible to fully ascertain the extent of the environmental impacts of its proposed action.

Nevertheless, the PSC determined that "the FGEIS did not identify reasonably likely significant adverse impacts . . . " with the exception of issues pertaining to loss of research for renewable energy and energy efficiency, impacts on local communities where generating plants were located, and decreased air quality as result of increased emissions related to oxides of nitrogen and sulfur.[30] In order to address these impacts, the PSC proposed mitigation measures in the form of a "systems benefit charge" to fund energy efficiency and research programs, and expressed its intention to "monitor closely" the competitive restructuring to ensure that specific mitigation measures are implemented if needed.[31] The PSC also expressed its intention to "support and assist efforts by New York State and federal agencies with respect to possible increased air contamination as a result of the transition to competition."[32] The PSC expressed its belief that energy efficiency would be increased by its retail competition model and that such a model might provide as much research and development as the "no-action" alternative.[33]

Even though adverse environmental impacts were hard to predict, the PSC determined that any adverse environmental impacts that could not be mitigated were outweighed by the benefits that it assumed would be realized as a result of the transition to competition. It might be argued that the perceived benefits of competition were not properly analyzed in the FGEIS, or in Opinion 96-12. A critical or, at the least, a more balanced discussion of the presumed benefits of competition might have been able to predict the possibility that the transition to competition would not yield the promised rewards. However, while the PSC's environmental analysis could have been challenged on such grounds, a

strong argument could be made that the FGEIS, based upon the knowledge that was available in 1996, represented a reasonable effort to comply with the PSC's obligations under SEQRA, and to provide a thorough environmental review of prospective adverse environmental impacts. The PSC's efforts should be compared with the efforts of the Federal Energy Regulatory Commission, which also prepared an FEIS in connection with its Order 888, establishing an open access rule for electricity transmission lines.[34] Given the lack of knowledge at the time, given the strong theological belief of the PSC in 1996 in the miracle powers of "competition," and the traditional deference given to substantive compliance with SEQRA, the environmental findings of the PSC in Opinion 96-12 would appear to meet statutory muster.

Nevertheless, the major criticism of the PSC's environmental review of the deregulation process is not that it failed to conduct a proper review in the 1996 FGEIS; rather, the crucial failing is the PSC's continuing reliance upon this 1996 FGEIS to address the questions that have arisen in the course of implementing deregulation. This is especially true since, from the perspective of 2002, with the benefit of hindsight into the experiences not only of New York, but also of California, the environmental findings in Opinion 96-12 are, at the very least, suspect.

As specific restructuring plans were developed, and as determinations were made with respect to issues that were left open in Opinion 96-12, further environmental review should have been required. Nevertheless, no Supplemental Environmental Impact Statement was prepared, and the important environmental questions were not addressed. Consequently, the PSC failed to consider the important environmental impacts associated with the deregulation of the electric industry.

Filings of Individual Electric Utilities

On October 1, 1996, Con Ed, RGE, NYSEG, Orange and Rockland, and Central Hudson filed rate/restructuring proposals, in accordance with Opinion 96-12. Con Ed, RGE, and NYSEG filed Environmental Assessment Forms (EAFs) for their plans. On December 19, 1996, a coalition of 16 environmental and consumer groups known as Public Interest Intervenors (PII)[35] filed a motion to require the remaining utilities to file Environmental Assessment Forms, and to require the preparation of Supplemental Environmental Impact Statements for all five rate/restructuring plans.

After the rate/restructuring plans were filed, the utilities engaged in settlement discussions with all interested parties. As a result of these discussions, proposed settlement agreements were submitted to the Public Service Commission that included specific proposals for the utilities: 1) to divest themselves of generating assets, 2) to implement rate changes as a result of the transition to competition, 3) to recover stranded costs, and 4) a proposal regarding systems benefit charges. Environmental Assessment Forms were ultimately submitted with respect to all of these proposed settlements.

PII's motion was ultimately denied in a ruling by Chief Administrative Law Judge Gerald Lynch, on June 19, 1997. Judge Lynch held that

> PII's support for preparing SEISs is based in part on its overly narrow view of the FGEIS. The general nature of the FGEIS does not detract from its comprehensiveness which covers many of potential effects of the introduction of competition into the generation and other segments of the electricity market.[36]

PII had identified a number of specific issues that they believed had not been adequately addressed in the FGEIS, and which required further supplemental environmental analysis. PII raised six issues that were common to all of the restructuring plans, plus an additional two issues with respect to Con Ed's restructuring plan. Specifically, PII questioned: (1) the level of the systems benefit charge, which was intended to pay for the cost of energy efficiency, conservation, and research and development, particularly with respect to renewable energy; (2) whether the reduced commitment to energy efficiency would have any air quality impacts; (3) whether there were environmental impacts associated with the institution of "price cap regulation" for transmission services; (4) whether there were environmental impacts associated with the imposition of a "competitive transition charge" which would permit the utilities to recover their stranded costs, and, according to PII, would protect the utility's fossil generating units from full market risk; (5) the lack of environmental disclosure with respect to the sources of power that customers would be able to purchase under a retail choice program; and (6) impacts on "load pockets" (areas in which access to electric power is limited by transmission and distribution constraints). In addition, PII also argued that an SEIS should have studied the two particular impacts associated with Con Ed's restructuring plan: a requirement that 80 percent of the electric power used in New York City would be generated within the city, and the tax revenue impacts associated with the need to purchase electric power from out-of-state to replace the power from the divested generating facilities.

Although the FGEIS had considered the possible air quality impacts at some length, it could not and did not address the specific questions associated with individual restructuring plans. The FGEIS considered the issue of stranded costs, but Opinion 96-12 specifically deferred consideration of the issue of stranded cost recovery to the individual restructuring plans. Now, in these individ-

ual plans, the PSC approved settlements permitting the recovery of these costs, and, furthermore, established a specific mechanism, the Competitive Transition Charge (CTC), for their recovery. The PSC did not consider the possibility of mitigating the prospective environmental impacts of permitting the full recovery of stranded costs. Nor did the PSC consider the implications of permitting the full recovery of stranded costs and the possible subsidization by ratepayers of uneconomic and environmentally dirty power plants.

Furthermore, by permitting the utilities to recover their full stranded costs, the PSC affected the process by which the utilities' generating assets would be sold. If the utility will recover any losses associated with the forced sale of generating assets, it has no incentive to minimize these losses in the sale process.

The imposition of the CTC will also affect competition, and the ability and willingness of customers to purchase power from sources other than the utility. The CTC may therefore affect whether or not competition, the stated goal of the PSC, will actually be realized. Nevertheless, the PSC did not deem the potential environmental impacts of the CTC on competition as worthy of study in a SEIS.

Similarly, the other impacts identified by PII raised issues that were not addressed in the FGEIS. Although the FGEIS considered the imposition of a systems benefit charge, questions as to the amount of the systems benefit charge were obviously delayed until the individual restructuring plans. However, the environmental impacts of different levels of the systems benefit charge were not considered in the individual restructuring plans. Higher systems benefit charges would mitigate environmental impacts, a crucial question under SEQRA. Nevertheless, this question was not considered worthy of an SEIS.

Issues pertaining to load pockets are obviously specific to each utility's service area. Specific load pockets, even the New York City load pockets, were not discussed in the FGEIS. Once again, there are clear alternatives as to how this issue could have been addressed and prospective environmental impacts associated with each of these alternatives.

Ultimately, the PSC, in approving all five of the utility restructuring plans that were submitted on October 1, 1996, upheld the recommendation of Judge Lynch not to require an SEIS. In all of these decisions, as well as in the decision approving Niagara Mohawk's PowerChoice restructuring plan, the PSC determined that the impacts identified in the Environmental Assessment Form and all of the other information that had been submitted was "within the bounds and thresholds of the FGEIS adopted in 1996," but noted "because of the inherent uncertainty in forecasting future impacts, as a matter of discretion, monitoring of [the utility's] restructuring and environmental impacts will be implemented."[37] Thus, even though the PSC acknowledged the continuing uncertainty, and even though the PSC did not consider the specific impacts associated with each deregulation plan, no further environmental review was considered necessary.

The only issue that the PSC did deem worthy of further environmental review was the question of environmental disclosure of the sources of power. Although any environmental impacts associated with such disclosure were found to be within the scope of the 1996 FGEIS, the PSC ultimately addressed the issue of environmental disclosure in a separate order, Opinion No. 98-19, issued on December 15, 1998.

Niagara Mohawk's PowerChoice Proceeding

Niagara Mohawk had been exempted from the requirement to file a rate and restructuring plan by October 1, 1996, because Niagara Mohawk had filed a rate and restructuring proposal known as PowerChoice. This proposal involved long and comprehensive settlement discussions with all interested parties, that resulted in the filing of a proposed settlement on October 10, 1997.[38]

Niagara Mohawk had unique problems as a result of 29 purchase power agreements with independent power producers. Pursuant to the now repealed provision of section 66-c of the Public Service Law[39] (commonly referred to as the "six cent law"), Niagara Mohawk had been required to purchase power at substantially above market cost. By the mid-1990s, these contracts had contributed to a fiscal crisis for Niagara Mohawk, which, inter alia, was considering filing bankruptcy.

The Niagara Mohawk settlement also included a "Master Restructuring Agreement" (MRA). Under the MRA, Niagara Mohawk would pay approximately 80 percent of the value of the purchase power agreements, in the form of cash and 25 percent of Niagara Mohawk's stock, in order to obtain relief from the requirement to purchase power at above market rates.

Niagara Mohawk submitted a supplemented Environmental Assessment Form on November 4, 1997, with respect to environmental issues. PII did not comment on the Niagara Mohawk EAF, and several of the environmental groups represented by PII, including the Natural Resources Defense Council, Pace Energy Project, and the Adirondack Council, signed the Niagara Mohawk settlement. Nevertheless, the PSC, in an appendix to Opinion 98-8, repeated its discussion of the generic concerns raised by PII.[40]

However, the city of Oswego, the "Steam Host Action Group" and a group of large industrial customers known as "Multiple Intervenors" commented on the EAF. The "Multiple Intervenors" supported the EAF, as they had supported EAFs filed by other utilities. The "Steam Host Action Group" expressed the concerns of

industrial customers that purchased steam from cogeneration plants owned by independent power producers. Oswego, joined by the cities of Fulton and Cohoes, raised a number of concerns with respect to the systems benefit charge, and the potential social and economic impacts of power plant closures. In addition, a variety of other parties commented on the EAF in their briefs to the PSC.

In Opinion 96-12, the PSC had declined to immediately require that utilities divest their generating assets. Nevertheless, all of the utility plans, including Niagara Mohawk's plan, involved some provisions for the sale of generating assets.

In adopting a divestiture plan, there are a number of variables that need to be considered. The PSC had to determine whether the generating assets should be sold at an auction, how the auction would be conducted, and whether the utility itself or any of its subsidiaries would be permitted to participate in the auction. Furthermore, the PSC had to determine how the generating assets would be packaged.

For example, one of the issues involved in Niagara Mohawk's auction was whether all of its hydroelectric facilities should be auctioned in one package, or whether interested bidders could bid on one or more hydroelectric facilities separately. The PSC, by packaging the 38 MW School Street hydroelectric facility together with a group of small hydroelectric facilities, effectively precluded the city of Cohoes from participating in the auction, and limited bidding to entities willing to assume the responsibility for operating a group of hydroelectric facilities. The environmental impacts of decisions pertaining to the conduct of individual auction plans were obviously not considered in the context of the FGEIS associated with Opinion 96-12.

The FGEIS did consider, and specifically acknowledged, the fact that the selling of generating assets could have local economic impacts. However, the FGEIS did not consider the specific localized impacts of specific utility plans on specific communities.

Niagara Mohawk's "Recommended Full Environmental Assessment Form," that it filed on March 6, 1998, in connection with its proposed auction plan, noted that

> the specific physical and operational changes that might result from the divestiture of [particular facilities] *are difficult to predict*. It is safe to say, however, that the changes which may result have already been covered in both the PSC's Competitive Opportunities Environmental Impact Statement, as well as the analysis of the environmental impacts of the PowerChoice restructuring plan [emphasis added].

If these changes were difficult to predict in 1998, it is hard to imagine how they could possibly have been considered in the 1996 FGEIS. In any event, none of these impacts from the divestiture of any specific facility were previously considered, either in the FGEIS, or in the EAF associated with the PowerChoice proceeding itself.

Niagara Mohawk's EAF in the PowerChoice proceeding did not acknowledge any specific impacts. Instead, the EAF stated, in a conclusory manner, that the benefits of alleged lower electricity rates would compensate for any adverse impacts. Niagara Mohawk did not consider the fact that communities such as Oswego, where utility generating assets comprise 71 percent of the local tax base,[41] would be particularly hard-hit by the sale of generating assets.

The Department of Public Service did prepare a Draft Supplemental Environmental Impact Statement (DSEIS) in connection with Niagara Mohawk's auction plan. The DSEIS was issued on April 15, 1998, more than three weeks after the PSC had determined to approve the restructuring plan of Niagara Mohawk, and exactly one week after the PSC approved the revised auction plan for Niagara Mohawk, as well as auction plans for two other utilities on April 8, 1998. The PSC explained its decision to conduct a SEQRA process after making its determination by stating that it would proceed on a "dual track": by proceeding with the auctions while proceeding with the environmental review (the receipt of comments on the Draft Environmental Impact Statement (DEIS) and the preparation of the Final Environmental Impact Statement (FEIS).

Thus, any review of the localized impacts of the auction plan was an ex post facto review, conducted after the relevant determinations had been made, in clear violation of the mandate that SEQRA processes should be completed before the agency determines to act. The FGEIS had specifically acknowledged that there would be need for such a review, that

> it is not possible to predict what communities will experience changes in character due to electric competition, or what will be the magnitude of those impacts . . . it is not possible now to predict what communities will experience losses of tax revenues due to electric competition, or what will be the magnitude of those losses.[42]

Nevertheless, even though the need for consideration of local impacts was acknowledged in 1996, the actual environmental review of these impacts was not conducted until after the final determinations were made with respect to the sale of the generating assets.

Although the PSC finally, in its April 15th DSGEIS, acknowledged that there might be serious consequences

for the city of Oswego, the PSC was no longer in a position to take any meaningful action, nor did the PSC take any meaningful action to mitigate those consequences. Given the decisions to which the PSC had already committed itself, there were no effective alternatives. The restructuring plan had already been approved, and the PSC was committed to the auction plan. The only mitigation measure that could be offered was for the PSC to offer to mediate tax disputes between the prospective new owners of the generating facilities and affected municipalities. The PSC could not offer any mitigation measures that would have affected the auction of the facility, nor could the PSC even consider any provision to require Niagara Mohawk to provide any relief to the affected municipalities.

Furthermore, the DSGEIS did not address crucial questions with respect to the auction plan. Although the DSGEIS did address the question of tax impacts, it did not consider alternative auction plans, different "packaging" of assets to be sold, or mitigating the adverse impacts associated with high stranded costs.

Oswego, joined by Fulton, Cohoes, the New York Conference of Mayors, and Buffalo City Councilman Alfred Coppolla, brought an Article 78 proceeding against the Public Service Commission, alleging violation of both SEQRA procedures and substantive compliance with SEQRA.[43] In its petition, Oswego noted the prospective harsh environmental impacts as a result of loss of tax revenue, but also noted the failure of the restructuring plan to provide any rate relief for residential ratepayers, and specifically alleged that

> the PSC, in its eagerness to move towards competition in the electric industry, has made a determination that the benefits of competition outweigh any possible costs that may be associated with any particular plan to effectuate the transition to competition . . . [The PSC] has not considered the actual benefits that may result from a specific plan to achieve its goals, and the PSC has failed to balance the purported benefits against the actual adverse environmental impacts of the Settlement.[44]

Oswego noted the failure to calculate the impacts of permitting recovery of "stranded costs" and of the determination that ratepayers would be required to pay the full cost of the buyout of the independent power producers' contracts. Oswego also challenged the PSC conclusion that there were alleged public benefits associated with the transition to competition and also noted that the settlement in general, and the CTC in particular, would have the impact of prohibiting industrial customers from developing on-site generation, and would also inhibit the use of alternative energy sources such as solar power. Finally, Oswego described a number of alternatives and prospective mitigation measures that the PSC could have pursued.

Oswego's petition was dismissed by the Albany County Supreme Court.[45] The court determined that the petitioners did not have standing because their interests were solely "economic."[46] The court added, as dicta, that "the extensive records submitted to the court reveals that the PSC took the requisite 'hard look' at the environmental consequences of the proposed action," and also rejected the petitioners' segmentation argument.[47]

Completion of Deregulation

With the approval of the rate and restructuring plans, deregulation of the electric industry was effectively completed. The investor-owned utilities proceeded to sell most of their generating assets, and, at least theoretically, implemented programs for retail choice. However, it is clear that the impacts of many important issues associated with a transition to competition were never considered in the context of an environmental review. Although the FGEIS considered the possibility of stranded cost recovery, the relative impacts of full or partial stranded cost recovery were never considered in the context of plans for individual utilities. Obviously, the amount of stranded cost which will be recovered will affect the viability of the transition to competition and will also have a variety of environmental consequences. These issues could not have been fully addressed in the FGEIS, and were simply ignored in the environmental review associated with the individual restructuring plans.

Furthermore, neither the FGEIS nor the individual restructuring plans considered those factors that we now know have adversely impacted the goal of competition. For example, there is a shortage of generating supply in New York State. With utilities in the process of transitioning to competition and selling their generating assets, the utilities, for the most part, did not engage in any new plant construction in recent years. Although there are a variety of proposals to build new generating plants, it is not clear whether these proposals will result in sufficient capacity in the near future, nor, for that matter, is it even clear whether the electricity that will be generated will be sold in New York State, or will be sold to customers outside of New York.

One of the issues discussed in Opinion 96-12 was whether the New York Power Authority should assume ownership of transmission facilities within New York State. This proposal does not appear to have been discussed at all in the context of the implementation of deregulation, nor were any environmental advantages or disadvantages associated with such a proposal ever considered. Similarly, even though Opinion 96-12 and the associated FGEIS discussed the creation of the Indepen-

dent System Operator, there is nothing to indicate that the environmental implications of the decision to create an ISO were ever considered after the 1996 FGEIS.

As noted above, the PSC never evaluated its experiences with wholesale competition before implementing retail competition. Furthermore, the PSC never considered what, at least with hindsight, appears to be self-evident: neither ESCOs nor non-utility generators are anxious to compete to sell power to residential customers in New York. This is especially true since the CTC makes it difficult for customers, especially residential customers, to obtain any cost savings. A reasonable cost-benefit analysis, conducted as part of a SEQRA review, would have evaluated these prospective events.

Nevertheless, even in 2001, the PSC continues to insist that all of the environmental impacts associated with the transition to deregulation were fully considered in the 1996 FGEIS, and refuses to perform additional environmental review in the context of ongoing decisions pertaining to the deregulation of the electric industry.

Divestiture of Nuclear Generating Assets

As of 1996, there were six nuclear power plants operating in New York State, that generated approximately 18 percent of the total electric power generated within the state.[48] The 1996 FGEIS briefly discussed these facilities and how they would be treated in the transition to deregulation. The FGEIS noted that there would be liability for the ultimate decommissioning of these facilities and that it was

> improbable that the liability would be assumed by a competitive company. It has been suggested that a public entity such as the New York Power Authority might take over the operation of all the State's nuclear plants and thus assume the decommissioning liability (along with monies in the current decommissioning funds). Barring takeover by a public entity, it is probable that responsibility would devolve to the [utilities that owned them].[49]

The FGEIS also proposed that

> the Commission should review specific costs for nuclear power plant decommissioning on a utility by utility basis in rate or other proceedings, and the allowance in rates of reasonable costs for decommissioning consistent with NRC requirements. This would mitigate concerns regarding the provisions of adequate funding the effective and timely cleanup of nuclear plants.[50]

The issue of divestiture of nuclear power plants was not considered in the context of the individual rate and restructuring plans that were filed by any of utilities. However, the Commission did institute a generic nuclear proceeding,[51] Case No. 98-E-0405, to consider the issues involved in the divestiture of nuclear generating assets. In that proceeding, Department of Public Service staff initially asked, and the utilities agreed, to prepare a Supplemental Generic Environmental Impact Statement to address issues not adequately addressed in the 1996 FGEIS.[52] However, no draft SGEIS was ever completed or submitted to the Commission in the generic nuclear proceeding.

In 2001, Con Ed proposed to sell its Indian Point 2 generating facility to Entergy. Although this proposed sale was not contemplated in the context of Con Ed's rate and restructuring proposal, the transfer of an electric generating facility requires approval of the Public Service Commission pursuant to section 70 of the Public Service Law. Accordingly, Con Ed applied for approval of the sale, and submitted a Draft Supplemental Environmental Impact Statement in support of its application.[53]

This DSEIS claimed that there would be no adverse environmental impacts of the proposed transfer because "the change in ownership of Indian Point 2 is not expected to result in any significant changes in the operation of the facility."[54] The DSEIS also characterized "the transfer of the ownership of Indian Point 2 [as] a part of the restructuring process" and stated that "it can be concluded that [potential environmental] impacts will be well within the range of the impacts estimated in the [Competitive Opportunities 1996] FGEIS."[55]

Comments were received with respect to Con Ed's draft SEIS, but it was ultimately accepted by the PSC on April 15, 2001, without any changes.[56] The Commission determined that it was necessary to address the issue of possible loss of local property tax revenues, but, "nearly all of the impacts found and considered had already been adequately addressed in the [1996] FGEIS, and in most cases, the mitigation measures identified in the FGEIS that were adopted by the commission in its finding statement are sufficient."[57]

There are important environmental considerations in the transfer of nuclear power plants from regulated utilities to entities that are not subject to any regulation by the PSC. Although the NRC does require the owners of nuclear power plants to set aside money for the ultimate decommissioning of the plants, the NRC requirements are not necessarily sufficient to adequately fund decommissioning, and, in any event, the NRC does not require restoration of "greenfield status."[58] The Public Service Commission has a considerable amount of control over a regulated entity. The PSC can require the entity to raise additional money to fund any shortfall in decommissioning expenses, and can use its regulatory authority to

ensure that a regulated owner of a nuclear power plant complies with all environmental regulations.

The 1996 FGEIS did not address the question of costs for decommissioning of nuclear facilities. The FGEIS contemplated the possibility that the New York Power Authority might take over nuclear power plants. However, between 1996 and 2001, NYPA sold its two nuclear facilities (Indian Point 3 and Fitzpatrick) and completely got out of the nuclear generating business. Nor did the 1996 FGEIS contemplate that a "competitive" non-regulated facility would be willing to assume decommissioning liability. Thus, it should be clear that the particular issues involved in the sale of a nuclear power plant were not considered by the PSC in the 1996 FGEIS.

The Indian Point 2 facility has been one of the most troubled nuclear power plants in the nation. The plant has suffered a number of environmental problems, both nuclear and non-nuclear. These problems were acknowledged in Con Ed's DSEIS, which also described an environmental site assessment that had been conducted. Indian Point 2 is operating under a SPDES permit that last expired in 1992, and has been the subject of various proceedings before DEC since the mid-1970s. Furthermore, the transfer of the facility may also impact how long the plant continues to operate,[59] whether the new owner of the site will have a greater or lesser ability to handle spent nuclear fuel when Indian Point 2 exhausts its storage capacity in 2004, and the ability of the new owner to remedy the long-standing problems with the operation of the facility.

Furthermore, the PSC's reliance on the 1996 FGEIS ignored the fact that there had been considerable developments with respect to deregulation between 1996 and 2001. By the summer of 2001, the California energy crisis was a matter of national public debate. The concept that electric power generating facilities should be owned by non-regulated utilities should have been subject to reappraisal. Instead, the PSC chose to rely on the findings that it had made in 1996, and not to reevaluate them in the light of intervening years. The August 17 order approving the FSEIS stated

> there is no reason to generically examine the future treatment of New York's nuclear plants in Case 98-E-0405 [the generic nuclear proceedings], given this proceeding and Case 01-E-0011, related to the proposed sale of Nine Mile Point Units 1 and 2. The impacts of the move to a competitive marketplace have been addressed in the FGEIS and need not be repeated herein.[60]

The 2001 reliance on the FGEIS of 1996 is curious, inasmuch as the 1998 generic proceeding was instituted, and a new environmental impact statement proposed, precisely because the issue of nuclear divestiture was not considered in Opinion 96-12 or in the 1996 FGEIS.

Finally, it should be noted that the PSC has continually maintained that there are no environmental impacts associated with the mere transfer of ownership of an electric generating facility pursuant to section 70 of the Public Service Law. The PSC took this position with respect to the sale of non-nuclear generating assets, as well as with respect to generating assets. However, it is not necessarily true that there are no environmental impacts associated with the transfer of ownership. In the one reported case to address this issue,[61] the Third Department found that a negative declaration by the Green Island Power Authority was deficient because it failed to consider the environmental impact of the change in ownership of a hydroelectric plant as a result of an eminent domain proceeding. In the case of the Indian Point 2 transfer, the town of Cortlandt (the host community for the Indian Point facilities) pointed out a number of significant potential adverse impacts, including the possibility of other generating facilities being constructed on site.[62]

Conclusion

As Justice Harris noted six years ago:

> Opinion 96-12 further sets forth the Commission's policy on how a competitive industry should be structured—not by direction, but by vision. Opinion 96-12 in no way restructures the electric industry. It represents an expectation, not a direction of utility action, and calls for the collaboration of the electrical energy industry to join the Commission in an exploration of a future blueprint for the industry.[63]

Nevertheless, the Environmental Impact Statement adopted in association with Opinion 96-12, the 1996 FGEIS, has been used as the basis of a conclusion that all of the environmental impacts of the deregulation of the electrical industry were already fully considered at that early stage. Such a conclusion enabled the PSC to avoid its responsibilities to consider the environmental impacts of numerous details that had to be worked out in the context of individual restructuring plans. Furthermore, uncritical reliance on the 1996 FGEIS enabled the PSC to stick its head in the sand and ignore the issues pertaining to the failure to implement wholesale competition, the California energy crisis in 2001, the failure of energy marketers to enter the market, and the declining amount of energy supplies, while the PSC continued to insist that a goal of retail competition would somehow magically solve the problems of the New York State electric industry.

It is too late to put the genie back in the bottle; we cannot go back to 1996 and restore a regulated environ-

ment. Nevertheless, the failure of deregulation, and, more particularly, the failure of the PSC to adequately consider the environmental impacts before it placed the future of New York ratepayers and consumers at the mercy of a poorly understood competitive market, should stand as an object lesson in the necessity for better enforcement and administration of SEQRA.

Endnotes

1. PSC Op. and Order No. 96-12, Cases 94-E-0952 et.al., "In the Matter of Competitive Opportunities Regarding Electric Service," issued May 20, 1996 (cited as Op. 96-12).
2. Environmental Conservation Law § 8-0109(8) (ECL).
3. Case No. 93-M-0229, "Proceeding on Motion of the Commission to Address Competitive Opportunities Available to Customers of Electric and Gas Service and Develop Criteria for Utility Responses," subsequently renumbered as Case No. 94 -E-0952.
4. Niagara Mohawk Power Corp. ("Niagara Mohawk") was exempted from the requirement to file a restructuring plan because it had already submitted its PowerChoice proposal, discussed below, and Long Island Lighting Co. (LILCO) was exempted because the PSC had already initiated an investigation into its rates.
5. Op. 96-12, 76-81.
6. Stephen P. Sherwin, *Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 Alb. L.J. of Sci. & Tech., 263, 265 (2001) (cited as "Sherwin"), quoting NYISO 2000's Annual Report of the New York Independent System Operator at 15.
7. The enactment of the Public Utility Regulation and Policy Act in 1978 assisted the rise of the independent power-producing industry. The Energy Policy Act of 1992 specifically authorized the creation of "exempt wholesale generators," entities that were engaged solely in the generation of electric power, and which could be owned as separate corporations by utilities. Consequently, there are now a number of entities that are engaged in the generation and sale of electric power besides regulated utilities. In addition, the rise of energy marketing companies, such as the now infamous Enron, have also assisted the separation of the power generation function from the function of transmitting and distributing electricity.
8. November 2001 Electric Retail Access Migration Summary, available on the PSC Web site, http://www.dps.state.ny.us/Electric_RA_Migration.htm, last modified February 14, 2002. The 4.8 percent of customers who no longer purchase power from the utility purchase 17.6 percent of the electric power generated, because of significantly higher "migration" rates for non-residential customers, who represent 6.3 percent of customers and use 24.9 percent of the total non-residential load.
9. Sherwin, at 295, citing U.S. Dep't of Energy Web site.
10. "Environment" is defined as "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character*," ECL § 8-0105(6) (emphasis added). *See also Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359 (1986), holding that social and economic impacts must be considered in SEQRA analysis.
11. For example, in the city of Oswego, the steam station formerly owned by Niagara Mohawk comprised approximately 71 percent of the local tax base. The sale of this plant as a result of the deregulation of Niagara Mohawk had a tremendous impact upon the city's tax base.
12. *Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 222 (4th Dep't 1980).
13. *Id.* at 220.
14. A status report of deregulation/restructuring efforts by state is available on the U.S. Dep't of Energy Web site, www.eia.doe.gov/cneaf/electricity.
15. ECL § 8-0105 (1), which does not include the Legislature in the definition of a "state agency." *Compare* ECL § 8-0105(2), which includes a "governing body" in the definition of a "local agency."
16. Op. 96-12 at 24-28.
17. *Id.* at 47-51.
18. *Id.* at 53.
19. *Id.* at 56–57.
20. *Id.* at 60.
21. *Id.*
22. *Id.* at 67.
23. *Id.* at 73.
24. *Id.* at 73-76.
25. *Id.* at 74.
26. *Id.* at 75-76.
27. The ISO's first year of operations was hardly encouraging, as the system was plagued with software problems, lack of staff, and the ISO, at least in the first year, was unable to adequately monitor and prevent the exercise of market power by electric producers, see Sherwin at 288-293.
28. Op. 96-12 at 76-77.
29. *Id.* at 77.
30. *Id.*
31. *Id.* at 78.
32. *Id.* at 78.
33. *Id.* at 79.
34. Order 888, which was issued approximately one month before the PSC's Op. 96-12, provided an environmental analysis under the federal National Energy Policy Act, which was largely limited to the issue of whether increased air emissions would be the result of open access. This FEIS was criticized at the time by the U.S. Envtl. Protection Agency for failing to adequately consider potential adverse environmental impacts.
35. PII was comprised of the Natural Resources Defense Council, Pace Energy Project, Citizens Advisory Panel, New York Public Interest Research Group, Environmental Advocates, New York Rivers United, American Wind Energy Association, New York Energy Efficiency Council, American Lung Association, Hudson River Clearwater Citizen Action of New York, Association for the Protection of the Adirondacks, Hudson River Keeper, Scenic Hudson, Adirondack Council, and Citizens Campaign for the Environment.
36. Ruling on motion for Supplemental Environmental Impact Statements, Case Nos. 94-E-0952 (issued June 19, 1997), 17.
37. Central Hudson, Case No. 96-E-0909, Op. No. 98-14, 41-42 (June 30, 1998); New York State Electric and Gas, Case No. 96-E-0891, Op. No. 98-6, 40 (Mar. 5, 1998); Rochester Gas and Electric, Case No. 96-E-0898, Op. No. 98-1, 45 (Jan. 14, 1998); Consolidated Edison, Case No. 96-E-0897, Op. No. 97-16, 63 (Nov. 3, 1997); Orange and Rockland, Case No. 96-E-0900, Op. No. 97-20, 29-30 (Dec. 31, 1997); Niagara Mohawk, Case No. 94-E-0098, Op. No. 98-8, 58 (Mar. 20, 1998).

38. Op. and Order No. 98-8, Case 94-E-00098, "Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service," 4-5 (cited as Op. 98-8) (Mar. 20, 1998).

39. The six cent provision was repealed by Ch. 512 of the Laws of 1992.

40. Op. 98-8, app. C, 9–12.

41. The 71 percent figure was cited by Niagara Mohawk in connection with the PowerChoice proceeding.

42. FGEIS Case 94-E-0952, *The Matter of Competitive Opportunities Regarding Electric Service* 9–5, 9–7 (May 3, 1996).

43. Specifically, Oswego alleged the PSC: 1) had failed to comply with its own procedural rules pertaining to SEQRA because of the alleged failure of the recommended decision to make a SEQRA determination, 2) failed to prepare and file an EAF until shortly before the Commission rendered its decision, which violated SEQRA, 3) failed to prepare an Environmental Impact Statement specifically addressing Niagara Mohawk's restructuring, 4) failed to treat the PowerChoice settlement as a Type I action under SEQRA, 5) impermissibly segmented its environmental review, and 6) failed to comply with SEQRA procedures in connection with the auction plan and the adequacy of the Environmental Impact Statement for the auction plan. Oswego also challenged the PSC's substantive compliance with SEQRA because of its alleged failure to take a hard look at the environmental consequences of its action. The author represented petitioners in this proceeding.

44. *Oswego v. Pub. Serv. Comm.*, Index No. 2115-98, Petition ¶ 161 (Sup. Ct., Albany Co. 1998).

45. *Oswego*, Index No. 2115-98 (Sup. Ct., Albany Co., May 21, 1998) (Keegan, J.).

46. For a discussion of how *Society of Plastics v. County of Suffolk*, 77 N.Y.S.2d 761 (1991), has radically reshaped the notion of SEQRA standing, see Peter Henner, *Great Future in* Plastics? *The Judicial Repeal of Standing for Environmental Organizations in SEQRA Cases*, 21-4 N.Y. Envtl. Lawyer (Fall 2001).

47. *Oswego*, slip op. at 5-6.

48. FGEIS, Case No. 94 -E-0952, 5-86. This includes the Indian Point 3 and Fitzpatrick nuclear plants, formerly owned by NYPA, that generated 7.2 percent of the state's electric power.

49. *Id.* at 5-87.

50. *Id.* at 6-45.

51. Case No. 98-E-0405, *In the Matter of Nuclear Generation in a Competitive Market for Electricity*, filed in Case 93-M-0229.

52. Interim Report, Case 98-E-0405, Nuclear Generation and the Competitive Electric Market 11-13 (June 1999), *see also* DSGEIS filed by Niagara Mohawk in support of its proposed transfer of Nine Mile I and II in Case No. 01 -001, 4, which states that the "investor-owned utilities volunteered to prepare a . . . " DSGEIS.

53. Draft Supplemental Environmental Impact Statement, Public Service Law § 70 transfer of Indian Point Units 1 and 2 Facility to Entergy Nuclear Indian Point II, LLC (Jan. 19, 2001).

54. This sentence is repeated 14 times verbatim, and paraphrased in several locations in the course of the 25-page DSEIS, with respect to almost all of the specific sections addressed in the DSEIS.

55. *Id.* at 25

56. Order adopting and approving issuance of Final Supplemental Environmental Impact Statement in Case No. 01-E-0040, one commissioner order (Aug. 17, 2001). In accepting the FEIS, the PSC determined that "the purpose of this final SEIS is to examine the site-specific impacts of the proposed transfer" (p. 4).

57. *Id.* at 52.

58. The NRC decommissioning requirements are set forth in 10 CFR § 50.75. In the case of Indian Point 2, a decommissioning study performed for Con Ed by Scientech NES, Inc. indicated that the decommissioning of Indian Point would cost $20 million more than the NRC minimum. Furthermore, if the site is restored to "greenfield" conditions, the total cost will exceed the NRC minimum by an additional $47 million, for a total of $67 million.

59. The new owner of Indian Point, Entergy, has now applied for a certificate pursuant to Article X to construct a natural gas facility adjacent to the two nuclear facilities, an action that Con Ed would obviously not have pursued. Thus, it is likely that the transfer will result in a an extensive delay, if not cancellation, of any plans to restore the site to greenfield status.

60. This statement should be contrasted with the interim report referenced in note 52 above, which stated that staff have requested that the investor-owned utility companies prepare a DSEIS which would "include, among other issues, the effect of the various operational scenarios on reliability, systemwide environmental and economic impacts, changes in quantities of nuclear materials generated or used, local impacts such as local tax revenues, local employment and economic activity and a discussion of health and safety for nuclear plant workers and the public resulting from possible implementation of the various economic alternatives . . . " June 1999 Interim Report in Case No. 98-E-0405, 12-13.

61. *Niagara Mohawk Power Corp. v. Green Island Power Authority*, 265 A.D. 2d 711 (3rd Dep't 1999)

62. Cortlandt referenced Entergy's intentions with respect to a gas-fired generating facility adjacent to the Indian Point 2 and 3 nuclear facilities, loss of oversight from the PSC, possible extension of the plant life, and a concomitant delay in restoration of "greenfield" status at the site, and with respect to the ultimate resolution of Indian Point 2's long-standing environmental problems, including problems with its SPDES permit. Cortlandt pointed out that mitigation measures could be ordered by the PSC in the context of approving the transfer, but the PSC refused to do so.

63. *Energy Ass'n v. Pub. Serv. Comm.*, 169 Misc.2d 924, 941 (Sup. Ct., Albany Co. 1996).

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