

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FOURTH DEPARTMENT

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In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE  
FINGER LAKES by and in the name of PETER  
GAMBA, its President, and COALITION TO PROTECT  
NEW YORK by and in the name of KATHRYN  
BARTHOLOMEW, its Treasurer,

*Petitioners-Appellants,*

For a Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, BASIL  
SEGGOS, COMMISSIONER, GREENIDGE  
GENERATION, LLC, GREENIDGE PIPELINE, LLC,  
GREENIDGE PIPELINE PROPERTIES  
CORPORATION and LOCKWOOD HILLS, LLC,

*Respondents-Respondents.*

**AFFIRMATION IN SUPPORT  
OF GREENIDGE  
RESPONDENTS' MOTION TO  
DISMISS APPEAL**

Docket No. CA 18-00648

Yates County Supreme Court  
Index No. 2016-0165

FILED  
JUN 22 PM 3:14  
CLERK OF THE SUPREME COURT  
YATES COUNTY

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STATE OF NEW YORK    )  
  ) SS.:  
COUNTY OF ALBANY    )

**Yvonne E. Hennessey, Esq.** affirms, under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules ("CPLR"):

1. I am an attorney at law duly licensed to practice in the courts of the State of New York and a member of the firm of Barclay Damon LLP, attorneys for Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC (collectively, the "Greenidge Respondents").

2. I am fully familiar with the circumstances and proceedings in this action.

3. I make this Affirmation in support of the Greenidge Respondents' motion to dismiss this appeal, perfected by Petitioners-Appellants on April 17, 2018.

4. This Affirmation is based upon my representation of the Greenidge Respondents before the lower court, and my review of relevant documents, including the New York State Department of Environmental Conservation's ("NYSDEC") and New York State Public Service Commission's ("NYSPSC") proceedings and approvals, respectively for the resumption of operations at the Greenidge Generating Station located in Torrey, New York ("Greenidge Station") on natural gas (with up to 19% biomass co-firing) as well as the associated in-plant construction and the construction and operation of a 4.6 mile natural gas pipeline to the Greenidge Station (the "Greenidge Pipeline") (collectively, the "Greenidge Project").

5. The appeal is taken from the June 13, 2017 Order and Judgment of Supreme Court, Yates County (Hon. William F. Kocher, J.) that upheld several determinations of NYSDEC relating to the Greenidge Respondents' operation of the Greenidge Generating Station in Dresden, Town of Torrey, New York, including the State Respondents' issuance of Title IV and V air emission permits for the operation of the Greenidge Generating Station and its environmental review of the Greenidge Project under the State Environmental Quality Review Act ("SEQRA"). (Record on Appeal ["R."], 7-9).

6. The lower court's Order and Judgment denied Petitioners-Appellants' motion for a preliminary injunction, granted the Respondents-Respondents' motions to dismiss and dismissed the Amended Verified Petition as lacking merit. *Id.* at 9.

7. As established below, and further demonstrated by the lower court's findings of fact, Petitioners-Appellants' claims were moot before the lower court. Now, following Petitioners-Appellants' irrefutable failure to move for an injunction pending appeal and their lengthy delay in perfecting their appeal of the lower court's decision, Petitioners-Appellants' appeal itself is moot and subject to dismissal.

## **NYSDEC's Review and Approval of the Greenidge Station**

8. In furtherance of the Greenidge Project, in 2014, Respondent Greenidge Generation, LLC submitted applications to NYSDEC for Title IV and V air permits.

9. In 2014, Respondent Greenidge Generation, LLC also submitted applications for renewal of the Greenidge Station's existing State Pollution Discharge Elimination System ("SPDES") permit and an initial water withdrawal permit for the Greenidge Station.

10. NYSDEC initially issued a Notice of Complete Application ("NOCA") and Negative Declaration on July 30, 2015, which provided the basis for NYSDEC's SEQRA determination that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment.

11. NYSDEC published notice its NOCA and Negative Declaration in the Environmental Notice Bulletin ("ENB") on August 12, 2015.

12. On August 12, 2015, NYSDEC also issued the following draft permits for public notice and comment: Title IV and Title V air permits, a SPDES renewal permit, and an initial water withdrawal permit.

13. On October 26, 2015, NYSDEC submitted the proposed Title V air permit and a public comment responsiveness summary ("Responsiveness Summary") to the United States Environmental Protection Agency ("USEPA") for review, as required by Section 505(a) of the Clean Air Act. NYSDEC also provided a copy of the Responsiveness Summary and the proposed Title V permit to Petitioners Committee to Preserve the Finger Lakes ("CPFL") and Sierra Club.

14. On December 7, 2015, USEPA issued a letter to NYSDEC that requested revisions to the draft Greenidge Station Title V air permit.

15. From January 2016 through June 2016, Respondent Greenidge Generation, LLC worked with NYSDEC and USEPA to modify the draft Title V air permit as requested by the USEPA.

16. On June 28, 2016, NYSDEC issued an Amended Negative Declaration, based on revisions to the draft Title V air permit, which concluded once again that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment. A true and accurate copy of the June 28, 2016 Negative Declaration is part of the Record on Appeal at 89-106.

17. NYSDEC published notice of this SEQRA determination in the June 29, 2016 ENB. A true and accurate copy of the June 29, 2016 ENB Notice is part of the Record on Appeal at 145-48.

18. Also on June 29, 2016, NYSDEC published notice in the ENB of the availability of revised draft Title IV and Title V air permits for the Greenidge Station for public review and comment.

19. On September 8, 2016, NYSDEC issued the final Title IV and Title V air permits which authorized the in-plant construction work necessary to convert the Greenidge Station to natural gas (with up to 19 percent biomass co-firing) and the subsequent operation of the Greenidge Station.

#### **NYSPSC Review and Approval of the Greenidge Pipeline**

20. On October 2, 2015, Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation (collectively, the "Pipeline Entities") submitted an application to the NYSPSC seeking issuance of a Certificate of Environmental Compatibility and Public Need under Article VII of the Public Service Law (the "Article VII Certificate") for construction of a 4.6 mile natural gas pipeline to supply natural gas to the Greenidge Station (the "Greenidge Pipeline"),

which application was docketed by the Commission as Case 15-T-0586 (the “Article VII Proceeding”).

21. On September 16, 2016, NYSPSC issued, among other things, the Article VII Certificate for the Greenidge Project. See NYSPSC, *Order Granting Certificate of Environmental Compatibility and Public Need* (“Certificate Order”), a true and accurate copy of which is part of Record on Appeal at 149-210.

22. In the Certificate Order, the NYSPSC found that the Greenidge Pipeline was needed and that the adverse environmental impacts of that facility would be largely temporary in nature due to construction and would be minimized by the requirements of the Article VII Certificate approved by the NYSPSC. [R. 178].

23. The Certificate Order further provided that construction of the Greenidge Pipeline could not commence until the NYSPSC issued a Notice to Proceed with Construction for the Greenidge Pipeline and related facilities. [R. 208].

24. On October 17, 2016, the NYSPSC issued the requisite Notice to Proceed with Construction. A true and accurate copy of the NYSPSC’s Notice to Proceed is part of the Record on Appeal at 211.

25. As provided by NYSPSC in the Certificate Order, it was the intention of the Pipeline Entities to commence construction soon after the NYSPSC approval and permissions were obtained. [R. 153] (“It is the Pipeline Companies intent to commence construction soon after the Certificate is granted and all the appropriate permits and permission have been obtained.”).

### **Petitioners’ Challenge to the Greenidge Project**

26. By Verified Petition, Petitioners-Appellants CPFL and Coalition to Protect New York (“CPNY”) filed the instant challenge on October 28, 2016, exactly four (4) months after

NYSDEC issued the Amended Negative Declaration at the heart of Petitioners-Appellants' claims. [R. 21-46].

27. The lower court signed an Order to Show Cause on October 31, 2016. [R.48-49]. The Order to Show Cause did not seek a temporary restraining order or preliminary injunction. *See id.*

28. Petitioners-Appellants then waited until November 3, 2016 to serve the Greenidge Respondents.

29. On December 6, 2016, Petitioners-Appellants filed and served an Amended Verified Petition that added Sierra Club as a petitioner, followed by a Notice of Petition which was served and filed on December 13, 2016. [R. 54-80]. Again, Petitioners-Appellants did not seek a temporary restraining order to preliminary injunction. *See id.*

30. Thereafter, by notice of motion dated December 23, 2017, Petitioners-Appellants' finally elected to seek a preliminary injunction from the lower court to enjoin the Greenidge Respondents from taking steps to repower the Greenidge Facility or construct a natural gas line to connect to the Facility; their motion did not seek to enjoin operations. A true and accurate copy of Petitioners-Appellants' notice of motion for preliminary injunction is part of the Record on Appeal at 82-84.

31. On January 6, 2017, the Greenidge Respondents moved to dismiss the Amended Verified Petition on the grounds that Petitioners-Appellants' claims were moot and also that Petitioners-Appellants lacked standing. A true and accurate copy of the Greenidge Respondents' notice of motion to dismiss and supporting papers are part of the Record on Appeal at 117-118 and 213-237.

32. On that same date, the Greenidge Respondents opposed Petitioners-Appellants' motion for a preliminary injunction. A true and accurate copy of the Greenidge Respondents'

opposition to Petitioners-Appellants' motion for preliminary injunction is part of the Record on Appeal at 119-212.

33. Oral argument on Petitioners-Appellants' motion for preliminary injunction and Respondents-Respondents' motions to dismiss was held before New York Supreme Court Judge William Kocher, Yates County, on January 24, 2017. (R. 357-92).

34. By letter dated March 31, 2017, the Greenidge Respondents advised the lower court and counsel for Petitioners-Appellants that "construction of the Greenidge Pipeline and all in-plant construction to repower the Greenidge Station has been completed and, following extensive and costly testing, the Greenidge Station resumed operations this week." [R. 393].

35. Shortly thereafter, by Decision dated April 21, 2017, the lower court found that Petitioners-Appellants failed to meet their burden to prevail on their request for a preliminary injunction and that the NYSDEC "did not in any way act in a manner that was a violation of any law, arbitrary or capricious or an abuse of discretion." Petitioners' Amended Petition was dismissed. A true and accurate copy of the lower court's April 21, 2017 Decision is part of the Record on Appeal at 14-20.

36. In reaching this holding, the lower court made, among others, the following findings of fact:

On October 17, 2016, the NYSPSC issued the requisite Notice to Proceed with Construction. As provided by NYSPSC in the Certificate Order, it was the intention of the Pipeline Entities to commence construction soon after the NYSPSC approval and permissions were obtained.

In-plant construction work on the Greenidge Station and construction on the Greenidge Pipeline commenced on October 17, 2016. As for November 3, 2016, when the Greenidge Respondents were served in the underlying action, the following construction activities had already been completed: all materials for the in-plant work had been purchased; over 30 percent of the in-plant construction work had been completed; all necessary materials for the construction of the Greenidge Project had been purchased; 50 percent of site clearing activities (including tree removal) had been completed, and 20% of the Greenidge Pipeline construction had been completed (trenched, welded, piping laid into the trench,

and soil backfilled over the piping). The cost associated with the work that had been completed by November 3, 2016 was \$3,020,866. As of December 23, 2016, when Petitioners filed their motion, approximately 80% of the Greenidge Project had been completed at a cost of \$7,688,467. On January 6, 2017, 94% of the Greenidge Project construction had been completed at a cost of \$11,418,24[ ].

(R. 18-19)

37. On June 20, 2017, the Yates County Clerk entered the Order and Judgment. A true and accurate copy of the Order and Judgment is part of the Record on Appeal at 7-9.

38. The Order and Judgment provided in pertinent part:

“ORDERED AND ADJUDGED that Petitioners’ Motion for Temporary Injunctive Relief is denied and Respondents’ Dismissal Motions are granted and the petition is dismissed on the merits according to the decision dated April 21, 2017”

(R. 9).

39. The State Respondents and Greenidge Respondents each served notice of entry on June 27, 2017. A true and accurate copy of the Greenidge Respondents’ notice of entry is part of the Record on Appeal at 12-13.

40. Petitioners-Appellants filed a notice of appeal on July 19, 2017 and served it on the State Respondents and the Greenidge Respondents via e-mail and first class mail on July 19, 2017. A true and accurate copy of Petitioners-Appellants’ notice of appeal is part of the Record on Appeal at 3-4.

41. Petitioners-Appellants then waited almost another full nine (9) months late to serve their brief and perfect this appeal.

#### **Petitioners-Appellants’ Claims Have Been Moot Since Their Inception**

42. Nearly two years have passed from the date NYSDEC issued the Negative Declaration at the heart of Petitioners-Appellants’ claims, on June 28, 2016. During that time, Petitioners-Appellants have delayed at every step of the way and failed to take the necessary steps to preserve the status quo.



43. At the outset, Petitioners-Appellants waited until the eve of the statute of limitations to originally bring their SEQRA claims – almost a full four months despite clear knowledge that the Greenidge Respondents intended to and, indeed did, commence construction as soon as possible. And, when they did, they failed to make any effort to preserve the status quo.

44. They also waited a full eight weeks from the date of the NYSDEC's issuance of the Title IV and V air permits, which authorized the necessary in-plant construction work for the Greenidge Station, before serving the Greenidge Respondents in this action on November 3, 2016, and over twelve weeks had elapsed by the time Sierra Club was added as a party on December 6, 2016. [R. 54].

45. From September 16, 2016, the date of NYSPSC's issuance of the Certificate Order which authorized construction of the Greenidge Pipeline, seven weeks had elapsed by the time the Greenidge Respondents were served in this action. [R.149].

46. Although Petitioners-Appellants brought this action by Order to Show Cause, they did not seek a temporary restraining order or otherwise seek to maintain the status quo during the pendency of the lower court action until:

(a) December 23, 2016 – over 25 weeks after NYSDEC issued the Amended Negative Declaration at issue in the Amended Verified Petition;

(b) several months after NYSDEC and NYSPSC's construction approvals were issued for the Greenidge Project; and

(c) after construction had begun on the Greenidge Project at significant cost to the Greenidge Respondents. [R. 82-84; 119-126].

47. After losing before at the lower court level, Petitioners-Appellants then waited a full three weeks to file their notice of appeal. [R. 3-4]. They then waited nine (9) months to perfect, all the while failing to seek an injunction pending appeal.

48. Accordingly, Petitioners-Appellants' claims were moot and so too is their appeal.

**WHEREFORE**, the Greenidge Respondents respectfully request an order dismissing the appeal as moot, or for such other and further relief as the Court deems just and proper.

Dated: June 22, 2018  
Albany, New York

  
**YVONNE E. HENNESSEY, ESQ.**