To be Argued by:
RICHARD J. LIPPES, ESQ.
(Time Requested: 10 Minutes)

Yates County Clerk's Index No. 2016-0165

New York Supreme Court

Appellate Division—Fourth Department

In the Matter 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.

BRIEF FOR PETITIONERS-APPELLANTS

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QUESTIONS PRESENTED

1. Did the Supreme Court err in ruling on the merits of Petitioners' claims before Respondents served answers or filed the administrative record?

The Supreme Court ruled against Petitioners' claims on the ground that Respondent New York State Department of Environmental Conservation did not in any way act in a manner that was a violation of any law, arbitrary or capricious or an abuse of discretion.

1. Did the Supreme Court err in ruling against Petitioners' motion for temporary injunctive relief?

The Supreme Court ruled that Petitioners failed to meet their burden to show (1) a likelihood of success on the merits; (2) irreparable injury in the absence of injunctive relief or (3) a balance of equities in their favor.

NATURE OF THE CASE

This proceeding seeks to annul the Title IV and Title V air emission permits issued by the New York State Department of Environmental Conservation, Basil Seggos, Commissioner ("DEC") to Respondent Greenidge Generation LLC ("GGLLC") for new operations at its Greenidge Generating Station ("Greenidge Station") on the western shore of Seneca Lake in the Town of Torrey, New York. The permits were issued on September 8, 2016. Greenidge Station was permanently shut down by a previous owner, sold for scrap in a previous owner's bankruptcy proceeding and had not operated for over five and one-half years at the time the air emission permits were issued. Annulment of the permits is sought on the ground that DEC's determination that there would be no significant environmental impacts from GGLLC's project to begin new operations at Greenidge Station violated the State Environmental Quality Review

Act ("SEQRA"), Environmental Conservation Law, Article 8 and the SEQRA regulations, 6 N.Y.C.R.R. Part 617.

This proceeding is the first of two Article 78 proceedings brought by Petitioners against Respondent DEC challenging permits issued to GGLLC for operation of Greenidge Station. Because the air emission permits challenged in this proceeding were issued to GGLLC a year before a water withdrawal permit and a modified State Pollution Discharge Elimination System ("SPDES") permit were issued to GGLLC on September 11, 2017, and because judgment in the first proceeding had been rendered before the second set of permits was issued, Petitioners' have been forced to bring their legal challenges to the issuance of all the permits in two separate Article 78 proceedings. Petitioners' proceeding challenging the water withdrawal permit and the SPDES permit, *Matter of Sierra Club et al v. DEC et al*, Yates County Supreme Court, Index No. 2017-0232 was filed on November 8, 2017. The first hearing in the second proceeding is scheduled for May 22, 2018 before Justice William Kocher of the Yates County Supreme Court, the same judge who presided over the first proceeding.

STATEMENT OF FACTS

Petitioners brought this Article 78 proceeding against Respondents DEC, GGLLC and GGLLC's affiliates Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC by order to show cause, dated October 31, 2016, Record on Appeal ("R.") 48, and verified petition, dated October 28, 2016, R. 21. Petitioners filed an amended verified petition, adding Petitioner Sierra Club as a party on December 6, 2017. R. 54. Notice of the amended petition was served on December 13, 2016. R. 52.

The amended petition seeks to annul the Title IV and Title V air emission permits issued by Respondent DEC to Respondent GGLLC on September 8, 2016, on the ground that DEC's

determination that there would be no significant environmental impacts from GGLLC's project to begin new operations at Greenidge Station violated SEQRA, and that this determination was affected by errors of law, arbitrary and capricious, and an abuse of discretion. R. 54-55. The specific claims identified in the amended petition include:

(1) The modifications to GGLLC's SPDES permit set forth in the negative declaration constitute a conditioned negative declaration, which is impermissible for a Type I action. R. 78 ¶100.

(2) DEC improperly segmented its review of the impacts of restarting Greenidge Station from its review of the impacts of waste disposal at the Lockwood landfill pursuant to DEC's consent order with Lockwood Hills LLC. R. 77 ¶97.

(3) DEC's negative declaration was based on a flawed and incomplete environmental assessment provided by GGLLC. R. 77 ¶91.

(4) DEC failed to identify all relevant areas of environmental concern. R. 77 ¶92.

(5) DEC failed to take a hard look at the impacts identified in Part 2 of the EAF and the negative declaration. R. 77 ¶93.

(6) DEC failed to correctly analyze the areas of environmental concern identified in the negative declaration. R. 77 ¶94.

(7) DEC failed to provide a reasoned elaboration of the basis for its conclusion that the project to restart Greenidge Station will have no significant environmental impacts. R. 77 ¶95.

(8) DEC's negative declaration was based on incorrect assumptions concerning current and future operations at Greenidge Station. R. 76 ¶89.

(9) DEC's negative declaration failed to compare post-repowering impacts to the correct environmental baseline, which is no operation. R. 77 ¶90.

(10) DEC failed to identify and consider reasonably related long-term, short-term, direct, indirect and cumulative impacts of the project including the climate change and greenhouse gas impacts of operating Greenidge Station. R. 77 ¶98.

In order to clarify the scope of the injunctive relief sought in the order to show cause, Petitioners filed a notice of a motion for temporary injunctive relief on December 23, 2016. R. 82.

In response to the amended petition, Respondent DEC filed a motion pursuant to CPLR 3211 on January 6, 2017 seeking dismissal of the amended petition on the grounds of standing and mootness. R. 112. Also on January 6, 2017, the Greenidge Respondents filed a motion pursuant to CPLR 404, 406, 7804(f) and 3211(a) seeking dismissal of the amended petition. R. 117. Specific grounds for dismissal were not stated in the motion of the Greenidge Respondents. The affidavits filed by the Greenidge Respondents in support of their motion to dismiss and in opposition to Petitioners' motion for temporary injunctive relief addressed facts related to mootness, irreparable harm and balancing of the equities. R. 119-231.

A hearing on the motion for temporary injunctive relief and the motions to dismiss was held before Justice William Kocher of the Yates County Supreme Court on January 24, 2017. R. 357-392. At the hearing, Assistant Attorney General Susan Taylor addressed the scope of the hearing: "[J]ust to be clear, the State has not answered. There's no record, neither of the

Respondents has answered. We are not here on the merits. . . The State's position is that we are here only on the motion to dismiss. And for the private Respondents, they are here on this motion for a preliminary injunction; but we are not here to argue the merits." R. 382.

Although claims regarding the construction of a gas pipeline to Greenidge Station by Respondents Greenidge Pipeline, LLC, and Greenidge Pipeline Properties Corporation were included in the amended petition and the notice of motion for temporary injunctive relief, Petitioners acknowledged in their reply memorandum of law that Supreme Court did not have jurisdiction of Petitioners' pipeline claims and this was noted in the hearing on January 24, 2017. R. 364-365.

On April 21, 2017, Justice Kocher issued his decision and order. R. 14-20. The decision determined that Petitioners had standing. R. 19. The decision did not address the issue of mootness. Supreme Court ruled against Petitioners' motion for temporary injunctive relief on the ground that Petitioners failed to meet their burden to show (1) a likelihood of success on the merits; (2) irreparable injury in the absence of injunctive relief or (3) a balance of equities in their favor. R. 19. With regard to Petitioners' request to annul the Title IV and Title V air permits, Supreme Court found that Respondent DEC did not in any way act in a manner that was a violation of any law, arbitrary or capricious or an abuse of discretion. R. 19-20. Consequently, the court dismissed the petition. R. 20.

Judgment was issued on June 13, 2017 denying Petitioners' motion for temporary injunctive relief, granting Respondents' motions to dismiss and dismissing the petition on the merits. R. 9. On June 26, 2017, Respondents DEC and GGLLC issued notice of entry of the judgment. R. 10-13. On July 19, 2017, Petitioners filed a notice of appeal to this court. R. 3.

ARGUMENT

I. Supreme Court Erred in Ruling on the Merits of Petitioners' Claims before Respondents Served Answers or Filed the Administrative Record

The Supreme Court erred in ruling on the merits of Petitioners' claims before Respondents served answers or filed the administrative record. The court's determination that DEC did not act in a manner that was a violation of any law, arbitrary or capricious or an abuse of discretion was a ruling on the merits of Petitioners' claims. The court's ruling failed to treat the allegations set forth in the amended petition as true, as is required in evaluating a motion to dismiss. It is well-established that "[o]n a motion pursuant to CPLR 3211 (a) (7) and 7804 (f), only the petition is considered, all of its allegations are deemed true, and the petitioner is accorded the benefit of every possible inference." *Matter of Munroe v. Ponte*, 148 A.D.3d 1025, 1027 (2nd Dep't 2017); *Matter of Brown v. Foster*, 73 A.D.3d 917, 918 (2nd Dep't 2010). Accord *Matter of Nassau BOCES Central Council of Teachers v. BOCES,* 63 N.Y.2d 100 (1984) ["the motion papers clearly did not establish that there were no triable issues of fact and the procedure dictated by CPLR 7804 (subd [f]) should have been followed"]; *Matter of Kesterson v. City of Buffalo,* 40 A.D.2d 575 (4th Dep't 1972) ["We agree with the conclusion implicit in Special Term's determination that the petition is not legally insufficient and that the motion to dismiss should therefore be denied"]; *Matter of Kunik v. New York City Dep't of Education*, 142 A.D.3d 616, 617 (2nd Dep't 2016); *Matter of Better World Real Estate Group v. New York City Dep't of Finance,* 122 A.D.3d 27, 36 (2nd Dep't 2014); *Matter of Shapiro v. Ramapo*, 98 A.D.3d 675, 677-678 (2nd Dep't 2012), ["it was error for the Supreme Court to reach the merits of the petitioners' SEQRA claims prior to service of the respondents' answers and the filing of the full administrative record"].

Petitioners' claims as stated in the amended petition meet the standard to be applied on a motion to dismiss set forth in *Leon v. Martinez*, 84 N.Y.2d 83 (1994). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id*. at 87-88.

A. Petitioners State a Valid Claim that DEC's Amended Negative Declaration for the Greenidge Project Is an Impermissible Conditioned Negative Declaration of a Type I Action

The verified petition states that DEC's amended negative declaration for the GGLLC's project to begin new operations at Greenidge Station (the "Greenidge Project") is invalid because it is a conditioned negative declaration of a Type I action. R. 44. This is a valid claim. DEC determined that the Greenidge Project was a Type I action. R. 103. The SEQRA regulations state that Type I actions presumptively require an EIS. 6 N.Y.C.R.R. § 617.4(a). Conditioned negative declarations are only authorized by the SEQRA regulations for unlisted actions. 6 N.Y.C.R.R. § 617.7(d). "The SEQRA regulations do not authorize the issuance of a conditioned negative declaration for Type I actions." *Ferrari v. Penfield Planning*, 181 A.D.2d 149, 151 (4th Dep't 1992). The *SEQRA Handbook* explains why: "The ability of a CND to incorporate controls which readily mitigate impacts assumes smaller and less complex actions and impacts. Therefore, it is appropriate to limit CNDs to Unlisted actions." *SEQRA Handbook*, Chapter 4: Determining Significance Section E. Conditioned Negative Declarations (CNDs), Question 15. Why can't CNDs be used for Type I actions? https://www.dec.ny.gov/permits/48068.html.

Myerson v. McNally, 90 N.Y.2d 742 (1997) sets forth certain tests for when modifications to a negative declaration may be permissible for Type I actions, but states that "a lead agency clearly may not issue a negative declaration [for a Type I action] on the basis of conditions contained in the declaration itself." *Id*. at 753. This, however, is exactly what DEC did for the Greenidge Project. The negative declaration at issue in this case describes major modifications to reduce fish entrainment and impingement that will be required in a proposed modified SPDES permit. The amended negative declaration states, "The project will ultimately involve a modification of the cooling water intake structure (CWIS) at the facility. The modification will include the installation of 'Best Technology Available' (BTA) measures in accordance with Commissioner's Policy CP-52 to reduce fish entrainment and impingement. This will involve construction/attachment of intake screens at the end of the intake below the mean high water line of Seneca Lake." R. 30, 64, 103, 141. The amended negative declaration states that conditions are being imposed for the purpose of achieving an 85% reduction in the entrainment of all fish life stages and a 95% reduction in impingement mortality of all fish life stages. *Id*. Inherent in these conditions is the recognition by DEC that significant environmental impacts are posed by the Greenidge Project without the imposition of the conditions.

For these reasons, Petitioners stated a *prima facie* case that DEC's amended negative declaration for the Greenidge Project is invalid because it is a conditioned negative declaration of a Type I action.

B. Petitioners' State a Valid Claim that DEC Segmented Its Review of the Greenidge Project from Its Review of the Operations of the Lockwood Ash Landfill

The verified petition states that DEC's amended negative declaration is invalid because DEC segmented its review of the impacts of new operations at Greenidge Station from its concurrent review of the impacts of operations at the adjoining Lockwood Coal Ash landfill.

R. R. 77 ¶97. The SEQRA regulations state that, "[c]onsidering only a part of segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance and any subsequent EIS the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible." 6 N.Y.C.R.R. § 617.3(g)(1). "[S]egmentation, i.e., the division of environmental review for different sections or stages of a project project (see 6 NYCRR 617.2 [ag]), is generally disfavored." *Matter of Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475, 1478 (4th Dep't 2015).

The amended petition states that DEC's amended negative declaration fails to consider the impacts of depositing new waste in the Lockwood Hills landfill adjoining Greenidge Station. As noted in the amended petition, the Lockwood Hills landfill is operating under a consent order entered into between Lockwood Hills LLC and DEC on February 18, 2015. R. 41. The consent order states that DEC 'has determined that groundwater at the site contains substances in excess of the duly promulgated water quality standards for, inter alia, total dissolved solids, boron, manganese, magnesium, iron, sodium and sulfate,' and that DEC 'believes that the Leachate Pond is a source of the substances and has contributed and continues to contribute to a contravention of duly promulgated water quality standards in violation of ECL § 17-0501 and 6 NYCRR § 360-1.14(b)(2).' *Id*. In these circumstances, DEC's review of possible impacts of the Greenidge Project should have evaluated the impacts of the projected disposal of new wastes from the generating station in the context of the ongoing problems at the landfill. The amended negative declaration did not do this. It states, "No impacts related to solid waste management are expected to result from the re-activation of Greenidge Station. By eliminating the use of coal as a

fuel source, the generation of solid waste from the facility will be significantly reduced compared to prior operations. If Unit 4 were reactivated with coal, approximately 78,000 tons of fly ash and 158 tons of other waste would be generated per year. However, this will be greatly reduced since coal will no longer be used as a fuel source. As a result, there are no significant adverse impacts related to solid waste management associated with this project." R. 106. This statement completely ignores the impacts of depositing significant amounts of additional waste into the existing Lockwood ash landfill, fails to mention the ongoing landfill clean-up operations and incorrectly implies that there are no problems with current operations at the landfill.

For these reasons, Petitioners stated a *prima facie* case that DEC's amended negative declaration is invalid because it segmented review of the operations of Greenidge Station from review of the impacts of new depositions of waste into the adjoining Lockwood coal ash landfill.

C. Petitioners State a Valid Claim that DEC Failed to Take a "Hard Look" at the Impacts of the Greenidge Project

The verified petition states that DEC's amended negative declaration is invalid because DEC failed to identify all relevant issues, failed to take a hard look at the issues identified and failed to make a reasoned elaboration of the basis for its determination of nonsignificance. "A court's authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. The relevant question before the court is 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination,'" *Kahn v. Pasnik,* 90 N.Y.2d 569, 574 (1997), quoting *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996) and *Jackson v. New York State Urban Dev. Corp*., 67 N.Y.2d 400, 417 (1986).

DEC's SEQRA review failed to meet these standards. As stated in the amended petition, DEC arbitrarily and capriciously used an incorrect baseline to evaluate possible impacts of the Greenidge Project when it evaluated impacts by comparing potential impacts of new operations at the plant to the plant's pre-2011 operations when it operated as a coal-fired plant. R. 43, 55, 77, 22. Instead, DEC should have compared the impacts of new operations to no operations. In failing to use the correct baseline, DEC failed to take a hard look at the environmental issues identified in the amended negative declaration and failed to make a reasoned elaboration of the basis for its determination of no significant environmental impacts from the Greenidge Project.

DEC's use of previous operations as its baseline for determining impacts of the Greenidge Project was contrary to the determination of the U.S. Environmental Protection Agency Region 2 Office ("EPA") that the air emission permits required a "new source review" under the Clean Air Act. R. 62. In fact, EPA disapproved the initial draft permits for Greenidge Station prepared by DEC on the ground that DEC failed to complete such a new source review. *Id*. As set forth in the amended petition, EPA's letter to DEC disapproving the initial draft air permits stated that: "The facility has not operated for nearly five years and was permanently shut down, as demonstrated, among other things, by the prior owners' representations to two federal courts and government agencies and their relinquishment of Clean Air Act Title V and Title IV permits. By concluding that the facility will not be a new source upon reactivation, NYSDEC failed to incorporate into the proposed Title V permit applicable requirements under the Clean Air Act's PSD program and implementing regulations as approved into New York's State Implementation Plan ("SIP"). Thus, the proposed Title V permit fails to assure compliance with applicable PSD requirements." Id. 62-63. DEC should have applied the standards required by EPA for issuance of air emission permits in its SEQRA review of the impacts of the air permits,

but DEC did not do that. Instead, DEC compared the impacts of new air emissions by a retooled Greenidge Station to its previous operations. The amended negative declaration stated, "During its prior operation on coal with many of these existing controls in place, the operation of Greenidge Station did not result in any significant adverse impacts to air quality. These controls will remain in place and, in addition, as detailed above, the boiler and emission controls will be optimized, which will result in even lower air emissions. . . . As a result of the above, the Department has determined that resuming operation of this existing facility, and its conversion to natural gas as its primary fuel will not result in any significant adverse impacts to air quality." R. 30, 64, 105, 143.

For these reasons, Petitioners have made a *prima facie* case that DEC's failure to use a baseline of no operations for its review of the air quality impacts of the air emission permits was a violation of SEQRA's "hard look" requirements. Because DEC used an incorrect baseline of pre-2011 operations, it arbitrarily and capriciously failed to identify all relevant issues, failed to take a hard look at the issues identified and failed to make a reasoned elaboration of the basis for its determination of nonsignificance.

II. Supreme Court Erred in Ruling against Petitioners' Motion for Temporary Injunctive Relief

The Supreme Court erred in ruling against Petitioners' motion for temporary injunctive relief. Petitioners met their burden of proof on each prong of the test for obtaining a preliminary injunction. Petitioners demonstrated: (1) a likelihood or probability of success on the merits of their claims that DEC's actions in issuing the revised air permits and amended negative declaration were arbitrary and capricious and violated SEQRA; (2) irreparable harm if the request for injunctive relief is denied; and (3) a balance of the equities tipping in favor of granting injunctive relief. *Felix v. Brand Service Group*, 101 A.D.3d 1724, (4th Dep't 2012),

Destiny USA Holdings v. Citigroup Global Markets Realty Corp., 69 A.D.3d 212 (4th Dep't 2009).

A. Petitioners Made a Prima Facie Showing of Success on the Merits

The Supreme Court erred in finding that Petitioners did not show a likelihood of success on the merits in ruling on Petitioners' motion for temporary injunctive relief. In order to make this showing, Petitioners needed to make a *prima facie* showing of their right to relief. As this court stated in *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976), "the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with the showing of a certainty of success [citations omitted]. It is enough if the moving party makes a *prima facie* showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits." *Id*. at 326. Accord *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270 (4th Dep't 1996). For the reasons discussed in the previous section of this memorandum, Petitioners made this *prima facie* showing for a number of their claims. The court's reasoning in *Tucker* is particularly applicable to the present case in which the merits of Petitioners' claims had not been briefed at the time their motion for temporary injunctive relief was heard. The *Tucker* court stated:

> [Plaintiffs'] argument may not prove to be ultimately successful, but it is based on substantial principles of constitutional law and involves novel issues of first impression. Plaintiffs' argument and the State's counterarguments in favor of upholding the statute's validity involve aspects of constitutional law too weighty to have been briefed adequately in the short time available to the parties before this motion was heard at Special Term and too complex for Special Term to resolve in the even shorter time available to it before its decision was required. This is precisely the situation in which a preliminary injunction should be granted to hold the parties in *status quo* while the legal issues are determined in a deliberate and judicious manner [citations omitted]. In view of the conceded irreparable harm facing plaintiffs as contrasted with the damage the State would face by postponing implementation of the

> statute until this case can be heard on its merits, Special Term properly exercised its discretion by granting plaintiffs' motion for a preliminary injunction.

54 A.D.2d at 326-327.

It is to be noted that in their affidavits in opposition to Petitioners' motion for temporary injunctive relief, GGLLC and the other Greenidge respondents did not argue that Petitioners did not show a likelihood of success on the merits. Instead, they focused on the issues of irreparable harm and balancing of the equities. R. 119-231.

B. Petitioners Will Be Irreparably Harmed if Injunctive Relief Is Not Granted

The Supreme Court erred in finding that Petitioners did not show irreparable harm if injunctive relief is not granted. The central issue complained of in this case is the failure of DEC to conduct an adequate review of the impacts of new operations by Greenidge Station, including the impacts of burning of large quantities of natural gas, discharging large quantities of toxic air emissions, withdrawing large volumes of water and water organisms from Seneca Lake, discharging large volumes of heated and contaminated water into Keuka Outlet at the mouth of Seneca Lake and disposing new wastes in the Lockwood coal ash landfill. As Petitioners' attorney Richard Lippes argued at the hearing on January 24, 2017, without an environmental impact statement, the public will not know all of the potential adverse effects of operating Greenidge Station and how those impacts could be mitigated. R. 378-384. For this reason, the public interest in preventing as many damaging impacts as possible from the plant's operations is irreparably harmed if an EIS of the plant is allowed to operate before an EIS is conducted. The damaging impacts that will occur are not harms that can be mitigated by monetary damages. See *Destiny USA Holdings*, 69 A.D.3d at 220.

Because the plant is projected to continue it new operations for years into the future and the injuries complained of are cumulative over time, temporary injunctive relief remains necessary to avoid continuing environmental damage until Petitioners' claims can be reviewed on the merits.

C. The Balance of Equities Tips in Petitioners' Favor

The third and final prong of the test for evaluating the propriety of issuing a preliminary injunction is a balancing of the equities. *Id.* at 216-217. The balance of the equities in this matter favors issuance of temporary injunctive relief. The public has a strong interest in seeing that an adequate environmental review of the impacts of new operations at the Greenidge Station is conducted. The harms caused to Seneca Lake and surrounding residents by unmitigated operations at the plant cannot be reversed if proper mitigation measures are not put in place at Greenidge Station. This strong public interest needs to be weighed in evaluating Petitioners request for injunctive relief. "In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *Id.* at 223. After reviewing "the enormous public interests involved" in the *Destiny* case, this court concluded that Destiny had established that a balancing of the equities favored granting the preliminary injunction. The balancing of equities in the present case equally favors giving weight to the interests of the general public. Here, as in the *Destiny* and the *Felix v. Brand* cases, the irreparable injury to be sustained by the public interest in protecting the Seneca Lake and its surrounding residents is more burdensome than the harm that might be caused to Respondent GGLLC through imposition of a temporary injunction on the operations of Greenidge Station.

Respondents have not demonstrated a need for the power to be supplied by the project. The NYISO report cited by GGLLC's attorney Yvonne Hennessey in her affirmation in

opposition to Petitioners' motion for temporary injunctive relief, R. 212, does not support her claim that that the diagram attached as Exhibit E shows a need for additional generating capacity in the Finger Lakes region. R. 138-139. The NYISO report addresses transmission issues and identifies a transmission need, not a generation need.

In these circumstances, the environmental harms that will be created from allowing new operations Greenidge Station without significant additional environmental mitigations outweigh the benefits of allowing the plant to operate without a full environmental review of its impacts.

CONCLUSION

For these reasons, Petitioners' respectfully request that this Court reverse the Supreme Court's decision, deny Respondents' motions to dismiss and grant Petitioners' motion for temporary injunctive relief.

DATED: Buffalo, New York
April 17, 2018

Respectfully submitted,

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