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

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,

Docket No. CA 18-00648

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

Yates County
Index No. 2016-0165

–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.

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO GREENIDGE RESPONDENTS' MOTION TO DISMISS THE APPEAL AND IN SUPPORT OF PETITIONERS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

The controversy at the heart of this proceeding is not moot and the motion to dismiss this appeal on the ground of mootness made by Respondents-Respondents Greenidge Generation LLC, Greenidge Pipeline LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC (the "Greenidge Respondents") should be denied.

The fundamental issue in this case is whether Respondent-Respondent New York State Department of Environmental Conservation ("Respondent DEC") conducted an adequate environmental review of the impacts of allowing new electric generating operations at Greenidge Generating Station on Seneca Lake before issuing Title IV and Title V air permits for operation of the station. The environmental harms Petitioners-Appellants ("Petitioners") foresee from new operations at the plant have only begun to occur. These harms are cumulative and occur each day the plant operates without proper equipment in place to mitigate the harms.

Petitioners did not delay in filing or prosecuting their claims regarding the deficiencies in Respondent DEC's environmental review of the repowering of Greenidge Station. This case was brought by order to show cause seeking "a preliminary injunction enjoining [the Greenidge Respondents] from taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station until such time as Respondents shall have complied with all applicable federal and state laws." Record on Appeal ("R.") 48. The order to show cause was signed by Justice Bender on October 31, 2016. R. 49. The verified petition seeking the same relief was filed on October 28, 2016, only 42 days after the New York State Public Service Commission ("PSC") issued certificates of convenience and public necessity ("CPCN") on September 16, 2016, to Greenidge Generation LLC ("GGLLC"), Greenidge Pipeline LLC ("GPLLC"), and Greenidge Pipeline Properties Corporation ("GPPC") to repower Greenidge Station and build a

new gas pipeline to the plant, R. 323-356, and only 11 days after PSC issued a letter on October 17, 2016, authorizing GPLLC and GPPC to move forward with the construction of a new gas pipeline to Greenidge Station. R. 111. PSC's issuance of a CPCN to GGLLC was done in reliance on Respondent DEC's "[e]nvironmental review concerning resumption of operation of the Facility" conducted as lead agency pursuant to the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law (ECL)" and DEC's determination that "the proposed project will not have a significant effect on the environment." See PSC Order. R. 339-340.

Before the order to show cause and verified petition were filed, the Greenidge Respondents were well aware of Petitioners' opposition to the environmental review conducted by DEC so Petitioners' request for a preliminary injunction did not come as a surprise. Petitioner Committee to Preserve the Finger Lakes ("CPFL") and other local environmental organizations filed comments on the draft permits on September 11, 2015, pointing out deficiencies in the initial negative declaration issued by DEC and opposing DEC's issuance of the proposed air permits, the modified State Pollution Discharge Elimination System ("SPDES") permit and water withdrawal permit until a sufficient environmental review had been conducted. R. 61. CPFL and others filed additional comments on the amended negative declaration issued in connection with the amended air permits reiterating their concerns on August 5, 2016. R. 66-67. CPFL also sought party status in the proceedings before the PSC and raised its concerns regarding the inadequacies in DEC's environmental review in the PSC proceedings. R. 336-339. After the order to show cause was served, the Greenidge Respondents proceeded with their construction activities in full knowledge of the fact that Petitioners were seeking a preliminary injunction.

For purposes of obtaining injunctive relief, Petitioners' motion for temporary injunctive relief filed December 23, 2016, was superfluous. The wording of the motion was substantively the same as the wording of the order to show cause. Petitioners filed the motion as part of an agreement on a briefing schedule that allowed Petitioners to submit a memorandum of law with the motion. See R. 395.

Respondents asserted and Petitioners conceded in the proceeding below that the siting of the pipeline pursuant to Article 7 of the Public Service Law ("PSL") is exempt from SEQRA review and that under Article 7 the courts do not have jurisdiction to stop or delay the construction or operation of the pipeline. For this reason, Respondents' assertions that construction of the pipeline has been completed are not relevant to the issue of mootness.

In any event, Petitioners are not seeking to have undone any of the work the Greenidge Respondents have completed to date. For this reason, the Greenidge Respondents are not harmed by the relief Petitioners seek in this matter.

Furthermore, Petitioners are not seeking to prevent long-term operation of Greenidge Station, they are merely seeking the installation of proper equipment to prevent environmental harms that will occur and now have begun to occur with the operation of a plant that uses such huge volumes of water by asking that DEC undertake a new environmental review and consider options to reduce the volumes of water used by the plant, including the option of closed-cycle cooling.

It is Petitioners' understanding that GGLLC has not yet begun the installation of equipment to reduce fish impingement and entrainment at the plant, and that this installation is not imminent. The modified SPDES permit DEC issued to GGLLC on September 11, 2017 with an effective date of October 1, 2017, gives GGLLC until October 1, 2019 to install variable

speed drives on the Greenidge Station cooling water pumps and until October 1, 2022 to complete the installation of cylindrical wedge-wire screens. See Exhibit A to the affirmation of Rachel Treichler of even date herewith, ("Tr. Aff."), pp. 13-14.

Although it is Petitioners' understanding that GGLLC has not yet begun installation of this equipment, it is possible that the installation could begin shortly. Unlike the other equipment already installed at Greenidge Station, if this equipment is installed, it may need to be replaced if Petitioners are successful in obtaining a new environmental review of the repowered operations of Greenidge Station.

In order to forestall GGLLC's expenditure of funds on equipment that may need to be replaced if Petitioners are successful in this case, Petitioners today are bringing a motion for an order enjoining the installation of the equipment required by GGLLC's modified SPDES permit during the pendency of this appeal, and, if the Court agrees with Petitioners' reading of the plain text of the SEQRA law and regulations, to continue thereafter until DEC has completed the environmental review required by SEQRA.

The public interest in seeing that an adequate environmental review is conducted of the operations of Greenidge Station is strong. There is strong concern among Petitioners' members and other residents of the Seneca Lake watershed that an adequate review be conducted of the impacts of the plant's operations on the lake. As old shuttered coal plants are revamped across the state, the issues raised in this proceeding regarding the proper standards for environmental review of these repowering projects will continue to come up. If Respondent DEC is allowed to prepare determinations of no significant impact for these repowering projects and continues to deny the public an opportunity to participate in the Environmental Impact Statement process for these projects, significant harm to the environment may be done.

For these reasons, Petitioners' claims regarding the deficiencies of Respondent DEC's environmental review of the impacts of operating Greenidge Station are not moot.

ARGUMENT

I. The Controversy at the Heart of this Proceeding is Not Moot

For the factual reasons stated above, the cases cited by Respondents do not support dismissal of this appeal on the ground of mootness.

A. Petitioners Sought Preliminary Injunctive Relief and Did Not Delay in Filing or Prosecuting their Case

The landmark decision on mootness is *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165 (2002). *Dreikausen* makes clear that "relief remains at least theoretically available even after completion of [a] project. Simply put, structures changing the use of property most often can be destroyed. . . . [A] race to completion cannot be determinative, and cannot frustrate appropriate administrative review." *Id*. at 173. In the circumstances where a project has been substantially completed, *Dreikausen* states that "several factors [are] significant in evaluating claims of mootness. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation." *Id*. at 174. *Dreikausen* relied on the failure of the petitioner in that proceeding "did not try to enjoin construction during this litigation's pendency" in dismissing their appeal as moot. Therefore, the chief factor relied upon by the court in *Dreikausen,* is missing in the instant case, because Petitioners did seek preliminary injunctive relief at the initiation of this proceeding. As noted above, the verified petition accompanying Petitioners' order to show cause was filed on October 28, 2016, only 42 days after the PSC issued certificates of convenience and public necessity ("CPCN") to the

Greenidge Respondents on September 16, 2016 to repower Greenidge Station and build a new gas pipeline to the plant, R. 323-356, and only 11 days after the PSC issued a letter on October 17, 2016, authorizing GPLLC and GPPC to move forward with the construction of the gas pipeline. R. 111. Petitioners show cause order was signed by Justice Bender on October 31, 2016, and ordered the Respondents to show cause "why a judgment should not be made herein granting the relief sought in the Verified Petition and in particular grant a preliminary injunction enjoining Respondents GGLLC, GPLLC and GPPC from taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station until such time as Respondents shall have complied with all applicable federal and state laws, which is referenced in the attached Petition." In these circumstances, it is clear that Petitioners did not delay in filing their case and immediately took steps to preserve the status quo by seeking a preliminary injunction. Respondents focus on Petitioners' subsequent filing of a motion for temporary injunctive relief on December 23, 2017, but this filing was an additional request that was filed as part of a scheduling compromise to give Petitioners an opportunity file a memorandum of law with the motion. The filing of this additional request for injunctive relief does not in any way negate the filing of the order to show cause.

The Greenidge Respondents moved ahead with their construction activities with full knowledge that the Petitioners were seeking preliminary injunctive relief, and therefore, proceeded at their own risk. See *Allison v. New York Landmarks Preservation Commission*, 35 Misc.3d 500 (New York Cty 2011) where the court stated: "Although that period [of limitations] is now close to expiration, Respondents weighed the risk against their business incentive not to wait for that period to expire, but to proceed immediately, at their own risk, to undertake costly work, despite the obvious opposition by members of the public, including Grunewald and

petitioner organization's members, at LPC's hearings and meetings. Respondents continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success. [citations omitted]." *Id.* at 514.

B. The Work Already Done Does Not Need to Be Undone

Another factor to be considered in determining mootness is whether substantially completed work is "readily undone, without undue hardship." *Dreikausen*, 98 N.Y.2d at 173; *Citineighbors*, 2 N.Y.3d at 729. In this case, the work already done by the Greenidge Respondents does not need to be undone in order to grant Petitioners the relief they are seeking in this matter. Should Petitioners' be successful in their efforts to obtain further environmental review of the impacts of the plant's repowered operations, and should that environmental review lead to requirements for the installation of additional equipment to mitigate the impacts of the plant's operations, the installation of the equipment identified in the affidavits filed by the Greenidge Respondents in Supreme Court and in their affidavits in support of their motion to dismiss this appeal will not need to be undone. For this reason, Supreme Court's findings of fact that various components of the project had been completed by the time its decision was rendered, R. 18-19, does not render this case moot. Notwithstanding the claims made by the Greenidge Respondents, Supreme Court did not make any determination of mootness in its decision.

Because Petitioners are not seeking to have undone the work that has already been done, the Greenidge Respondents will not suffer any injury or prejudice in the event relief is accorded to petitioners. See *Matter of Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475 (4th Dep't 2015). In *Painted Post*, this court rejected respondents' contention that the first cause of action should have been dismissed on the grounds of laches or mootness. In reaching this determination, the court pointed out that there was no evidence in the record that respondents

would suffer any injury or prejudice in the event relief is accorded to petitioners. The court noted that "Petitioners, however, are not challenging the construction of the transloading facility but, rather, they are challenging the underlying project for which the facility was constructed [citations omitted]. Thus, the relief requested by petitioners has not been rendered moot, i.e., 'impossible to grant or wholly untenable.' [citations omitted]." *Id*. at 1476.

Furthermore, Petitioners are not seeking to prevent long-term operation of Greenidge Station, they are merely seeking the installation of proper equipment to prevent environmental harms that will occur and now have begun to occur with the operation of a plant that uses such huge volumes of water by asking that DEC undertake a new environmental review and consider options to reduce the volumes of water used by the plant, including the option of closed-cycle cooling.

C. Construction of Fish Impingement and Entrainment Equipment Has Not Yet Begun

None of the allegations related to construction activity contained in the affidavits of the Greenidge Respondents— either in those included in the record, or in the additional affidavits submitted with their motion to dismiss (which were not considered by the court below) — indicate that the Greenidge Respondents have begun the installation of equipment to prevent fish impingement and entrainment or otherwise modify the plant's once-through cooling system.

Nor does it appear from the installation schedule set forth in GGLLC's modified SPDES permit that the installation of this equipment has begun. The SPDES permit conditions require the installation of variable speed drives on the cooling water pumps by October 1, 2019, the preparation of a Cylindrical Wedge-Wire Screen (CWWS) Pilot Study Plan by April 1, 2018, the preparation of a Technology Installation and Operation Plan (TIOP) within three months of the

date DEC approves the CWWS and complete installation of cylindrical wedge-wire screens at Greenidge Station by October 1, 2022. Tr. Aff., Ex. A, pp.13-14.

At the present time, Greenidge Station is operating with no equipment to protect against fish impingement and entrainment in violation of the Clean Water Act. See Biological Fact Sheet for Greenidge Station, Tr. Aff. Ex. B.

Petitioners request that this court take judicial notice of both the modified SPDES permit and the Biological Fact Sheet., Tr. Aff., Ex. A and B. It is generally considered appropriate for an appeals court to take judicial notice of "incontrovertible official documents" and other "reliable documents, the existence and accuracy of which are not disputed." *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666 (2nd Dep't 1989) (taking judicial notice of a certificate issued by Secretary of State). Accord *Crawford v. Merrill, Lynch, Pierce*, 35 N.Y.2d 291 (1974) (taking judicial notice of two rules of the New York Stock Exchange the accuracy of which was not denied by the plaintiff); *Matter of Amalgamated Warbasse Houses v. Tweedy*, 33 A.D.3d 794 (2nd Dep't 2006) (taking judicial notice of a resolution of the New York City Water Board); *Matter of Park Realty v. Hydrania, Inc*., 17 A.D. 3d 898 (3rd Dep't 2005) (taking judicial notice of a Chancery Court order "the existence and accuracy of which are not disputed"); and *People v Madison*, 8 A.D.3d 956 (4th Dep't 2004) (taking judicial notice of the cover sheet of an indictment). Even if the Court would not deem judicial notice to be a appropriate, Petitioners have the right to present additional evidence in response to the Greenidge Respondents' motion.

Because installation of equipment to prevent fish impingement and entrainment has not yet begun, the facts of the present case differ significantly from the facts of *Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3rd Dep't 2008), a case relied heavily on by Respondents. *Riverkeeper* involved a challenge to the SEQRA review conducted when the

Danskammer Generating Station was repowered. In *Riverkeeper*, the court dismissed those aspects of the petition relating to Danskammer's cooling system on the ground of mootness in reliance on the fact that that Dynegy, the owner of Danskammer, had completed the required modification of its existing cooling system by the installation of variable speed pumps at a cost of over $1 million. In the present case, it is Petitioners' understanding that GGLLC has not yet begun any significant modifications to the existing cooling system at Greenidge Station.

D. The Environmental Harms Sought To Be Prevented Have Only Begun to Occur

The environmental harms to Seneca Lake and to those individuals who use the lake waters for household and recreational uses that Petitioners seek to prevent by bringing this proceeding are only beginning to occur. These environmental harms are cumulative and occur each day Greenidge Station operates without adequate equipment to protect against harmful impacts. The extent of these impacts at the present time is difficult to evaluate. There is nothing in the record to show that Greenidge Station has generated any electricity. The generation data attached to the affidavit of GGLLC's president, Dale Irwin, in support of the Greenidge Respondents' motion to dismiss the appeal is relatively meaningless because it does not show the units of the amounts he claims were generated or otherwise explain the source of the data he provides. In any event, this information is not part of the record in this proceeding. *Chimarios v. Duhl*, 152 A.D.2d 508 (1st Dep't 1989). Neither is the table provided by Mr. Irwin an official document of which judicial notice may be taken on appeal. See cases cited above.

E. The Public Interest in this Case Is Strong

Even if the Petitioners had not sought preliminary injunctive relief or had challenged the items of construction that have been completed, *Dreikausen* stated that other circumstances militating against findings of mootness that courts have considered include "instances where

novel issues or public interests such as environmental concerns warrant continuing review." 98 N.Y.2d at 173. The present case presents exactly this circumstance. The public interest in seeing that an adequate environmental review is conducted of the impacts of the operations of Greenidge Station on Seneca Lake is strong. The case also presents novel issues regarding the proper standard of environmental review to be applied in the case of the repowering of an old, out-of-service coal plant. As old shuttered coal plants are revamped across the state, the issues raised in this proceeding will continue to come up. If Respondent DEC is allowed to prepare determinations of no significant impact for these repowering projects and continues to deny the public an opportunity to participate in the Environmental Impact Statement process for these projects, significant harm to the environment may be done.

For all these reasons, Respondents have failed to demonstrate that Petitioners' claims are moot.

II. Petitioners Meet the Test for Temporary Injunctive Relief

The same standards that apply to Petitioners' appeal of Supreme Court's denial of Petitioners' request for a preliminary injunction, apply to the issuance of Petitioners' motion for temporary injunctive relief to this court. These standards are described in Petitioners' initial brief: (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).

F. Petitioners Are Likely to Succeed on the Merits of Their Appeal

The first prong of the test for issuance of a preliminary injunction is whether Petitioners are likely to succeed on their claims on appeal. For the reasons stated in Petitioners' initial brief, Petitioners are likely to succeed in their claim on this appeal that Supreme Court erred in ruling on the merits of Petitioners' claims before respondents served answers or filed the administrative record and on their claim that Supreme Court erred in ruling against petitioners' motion for temporary injunctive relief. Petitioners refer the court to the initial brief for the statement of those arguments.

G. Petitioners Will Be Irreparably Harmed if Injunctive Relief is Not Granted

Petitioners also meet the second prong of the test for granting a preliminary injunction—irreparable harm. *Destiny USA Holdings*, supra, 69 A.D.3d at 216. Petitioners will be irreparably harmed if their request for injunctive relief is denied. GGLLC may begin to install equipment to reduce fish impingement and entrainment at any time. Such construction could raise a colorable claim of mootness of the pending proceeding which could render ineffectual any judgment ultimately obtained by Petitioners thereby causing them irreparable harm. See e.g. *Dreikausen, supra*. Therefore, in order to effectuate the relief requested in this appeal, it is necessary that this Court grant Petitioners' request for temporary injunctive relief.

The public interest in obtaining an adequate environmental review of the proposed project would also be irreparably harmed if Respondents could raise a colorable claim of mootness.

H. The Balance of Equities Tips Strongly in Petitioners' Favor

Petitioners also meet the balancing of the equities test for evaluating the propriety of issuing a preliminary injunction. Balancing the equities in this matter favors issuance of a preliminary injunction during the pendency of this appeal. Here the irreparable injury to be sustained by Petitioners is more burdensome than the harm that might be caused to Respondents GGLLC through imposition of the injunction. In fact, there will be no financial harm to the GGLLC from granting the injunction as Respondent DEC is currently allowing Greenidge Station to operate without any equipment to prevent fish mortality, so the injunction may actually be beneficial to the Greenidge Respondents in allowing them to delay costs they might otherwise be required to expend.

In addition, the public has a strong interest in this case in seeing that an adequate environmental review of the repowering of Greenidge Station is conducted. When this strong public interest is weighed in evaluating Petitioners request for injunctive relief on appeal, the balancing of the equities even more strongly favors granting of a preliminary injunction.

Because GGLLC will not suffer any costs from imposition of the injunction, and because of the strong public interest in the issues raised by this case, Petitioners request that this Court waive the bond requirement or impose a nominal undertaking.

CONCLUSION

For these reasons, Petitioners' respectfully request that this Court deny the Greenidge Respondents' motion to dismiss the appeal on the ground of mootness and grant Petitioners' request for temporary injunctive relief.

DATED: Hammondsport, New York
July 6, 2018

Respectfully submitted,

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