UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Premium Energy Holdings, LLC) Project No. 15056-000

COMMENTS OF THE CITY OF NEW YORK

Pursuant to Rule 211 of the Rules of Practice and Procedure promulgated by the Federal Energy Regulatory Commission ("Commission")[1] and the Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Competing Applications issued by the Commission on February 11, 2021 ("Notice"),[2] the City of New York ("City") respectfully submits these comments on Premium Energy Holdings, LLC's ("Premium Energy") Application for a Preliminary Permit for the Ashokan Pumped Storage Project ("Project").[3] Premium Energy proposes to construct a pumped storage hydropower facility within the Catskill Mountains, including the Catskill Forest Preserve,[4] that would use the Ashokan Reservoir – a critical part of the New York City Water Supply System (the "Water Supply System") which provides high-quality, unfiltered drinking water to more than nine million people

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1 18 C.F.R. §§ 385.211.

2 The Notice appears to contain a typographical error regarding the issuance date. It indicates the Commission issued the Notice on February 11, 2020 when it actually issued it on February 11, 2021.

3 *Premium Energy Holdings, LLC*, Docket No. P-15056, Application for Preliminary Permit for the Ashokan Pumped Storage Project (November 19, 2020). Premium Energy submitted an Amended Application on February 1, 2021 to respond to a deficiency letter issued by Commission Staff on December 29, 2020. The two filings are collected referred to herein as the "Application."

4 The Catskill Forest Preserve comprises the State-owned lands that are designated as undevelopable under Article XIV of the New York State Constitution.

every day – as its lower reservoir.[5] Based on the limited information provided to the Commission, the City has multiple concerns with the Project, submits that it is not in the public interest and could not be developed, and respectfully requests that the Commission deny the request for a preliminary permit.

SUMMARY OF POSITION

To be clear, the City is a strong proponent of the decarbonization of the electric system in New York. However, in achieving concurrent federal, State, and City decarbonization goals, care is needed to avoid causing deleterious impacts, such as endangering the water supply for more than nine million people in New York. The potential impacts of the Project are substantial, and it is highly doubtful that Premium Energy could ever obtain the property rights needed to construct and operate the Project. Accordingly, the City submits that this Project is not consistent with achievement of federal, State, or City public policies on safe drinking water, is not in the best interests of the public, and Premium Energy likely will never be able to complete the steps required for a license application. Since the Commission disfavors issuing a preliminary permit where doing so would not serve any purpose, the City respectfully requests that the Application be denied.[6]

The City recognizes that in considering a request for a preliminary permit, the Commission does not make any determinations or findings regarding the merits of a proposed project. In this case, however, there is a threshold question as to whether Premium Energy could ever develop the Project, or even undertake the studies and analyses required to support a licensing application.

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[5] A geographic depiction of the Water Supply System and its associated watersheds can be found at https://www1.nyc.gov/assets/dep/downloads/pdf/water/drinking-water/water-supply/nyc-water-supply-system.pdf.

[6] *See, e.g.*, *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012); *Rivertec Partners, LLC*, 156 FERC ¶ 62,161 (2016); *FreedomWorks, LLC*, 167 FERC ¶ 62,026 (2019).

Premium Energy has no legal right or ability to use the Ashokan Reservoir or adjacent City-owned lands, and it similarly has no legal ability to use State-owned lands for its proposed upper reservoir or tunnel. Its inability to acquire the lands and property rights needed for the Project should be considered by the Commission and form a proper basis to deny the request for a preliminary permit.

In the event the Commission decides to grant Premium Energy a preliminary permit for the Project, the City respectfully requests that the Commission emphasize that such action does not include any authorization to enter or conduct tests on City-owned property, including the Ashokan Reservoir or surrounding lands. Given the importance of the Ashokan Reservoir and the need to protect the integrity of the Water Supply System, the Commission should require Premium Energy to obtain the City's prior consent before conducting any tests of any type that could impact the Ashokan Reservoir or its surrounding watershed even if such tests would take place outside of City-owned lands.

BACKGROUND

On November 18, 2020, Premium Energy submitted its Application to the Commission. That Application provided limited information regarding a proposal to construct an 800 MW pumped storage hydropower facility between the Ashokan Reservoir and a new reservoir, not yet determined, to be created within the Catskill Mountains. The Ashokan Reservoir would serve as the lower pool and Premium Energy proposes three alternative impoundments to serve as the upper pool.[7] To construct the Project, Premium Energy advises that it will need to construct an upper

[7] *Id.* at 11. All three alternatives would involve the creation of an entirely new impoundment. Under New York's Clean Energy Standard, projects involving new impoundments are not eligible to provide renewable energy credits and are not counted towards meeting the State's renewable energy goals due to their significant impacts. NYPSC Case 15-E-0302, Proceeding

reservoir, a dam for that reservoir, tunnels, shafts, and penstocks to connect the upper and lower reservoirs, an underground powerhouse with approximately five turbine-generator units, new transmission lines, and appurtenant facilities.[8]

A. The Water Supply System and Ashokan Reservoir

The Water Supply System is comprised of three systems – Croton, Catskill, and Delaware – which together provide approximately 1.1 billion of gallons of high quality drinking water to more than nine million people in and around New York City every day.[9] It comprises the largest municipal water supply in the United States, and the Catskill and Delaware systems together comprise the largest unfiltered water supply in the nation.

The Catskill System was established by the Water Supply Act of 1905. The Ashokan Reservoir and the Catskill Aqueduct were completed in 1915. An additional reservoir and aqueduct were added in 1927, and the system has an operational capacity of approximately 600 million gallons per day. The lands comprising the reservoirs and immediately surrounding the reservoirs are owned by the City of New York.

The Ashokan Reservoir consists of two basins which, at full capacity, impound 125 billion gallons of water. Water from the Ashokan Reservoir flows through the Catskill Aqueduct to the Kensico Reservoir and then to the Hillview Reservoir.[10] As a terminal reservoir in the City's unfiltered water supply system, the Ashokan Reservoir is subject to higher levels of protection and

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on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016) at 105-106; Order on Petitions for Rehearing (issued December 15, 2016) at 4-8.

8 Notice at 1.

9 In addition to New York City, the Water Supply System serves parts of Westchester, Putnam, Orange, and Ulster Counties.

10 New York City Department of Environmental Protection ("DEP"), *Ashokan Reservoir*, available at https://www1.nyc.gov/si`te/dep/water/ashokan-reservoir.page.

regulation than most reservoirs in the region, the State, and the country. On a daily basis, the Ashokan Reservoir supplies approximately 40% of the City's drinking water needs and up to 100% of some of the surrounding communities' drinking water needs.[11]

B. The Catskill Park and Catskill Forest Preserve

The Catskill Park is a conglomeration of approximately 700,000 acres of public and private lands that was designated in the late 1800s by the New York State Legislature.[12] The Ashokan Reservoir and other portions of the Catskill Water Supply System are located within the Catskill Park.

The largest property owner within the Catskill Park is the State of New York, which owns the Catskill Forest Preserve. Established in 1885, it cannot be developed. Pursuant to Article XIV, Section 1 of the New York State Constitution, "[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. ***They shall not be leased, sold or exchanged, or be taken by any corporation***, public or private…." [emphasis added].

Based on the general description in the Application, it appears that the proposed upper reservoir would be located within the Catskill Forest Preserve. Given Article XIV of the New York State Constitution and the exceptions to the federal right of eminent domain under Section 21 of the Federal Power Act ("FPA"),[13] the City is unaware of any legal ability of Premium Energy to secure the property rights to any of the potential locations for its proposed upper reservoir or for the tunnel between the upper and lower reservoirs. Moreover, for the reasons set forth in Point II,

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[11] *Id.*

[12] The designation is currently found in Section 9-0101(2) of the New York Environmental Conservation Law.

[13] 16 U.S.C. § 814.

below, Premium Energy cannot acquire any property rights to access or use the Ashokan Reservoir or the surrounding lands owned by the City to construct the Project should a license be granted.

C. The Filtration Avoidance Determination

The Water Supply System is subject to the federal Safe Drinking Water Act ("SDWA"),[14] enacted in 1974 to protect public health by protecting the public sources of drinking water against naturally-occurring and man-made contaminants. In 1989, in accordance with 1986 amendments to the SDWA, the U.S. Environmental Protection Agency ("EPA") promulgated the Surface Water Treatment Rules ("SWTR")[15] to require filtration and disinfection of surface water sources of drinking water to protect against adverse health impacts from pathogens in the water sources. The SWTR allowed for filtration avoidance provided certain specified criteria were satisfied, and the Interim Enhanced SWTR imposed additional requirements on unfiltered water systems.

In July 1992, the City sought approval from the EPA to avoid filtration of waters from its Catskill and Delaware Water Supply Systems as permitted by the SDWA and SWTR. In January 1993, the EPA issued the first Filtration Avoidance Determination ("FAD"). Subsequent FADs were issued by the EPA in December 1993, January 1997, May 1997, November 2002, and July 2007. In September 2007, the EPA delegated its SWTR responsibility for the Catskill and Delaware Water Supply Systems to the New York State Department of Health ("DOH"). DOH issued a Revised 2007 FAD in May 2014, and a new FAD in 2017.[16] All of the FADs include

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[14] 42 U.S.C. § 300f *et seq.*

[15] 40 C.F.R. Part 141 – National Primary Drinking Water Regulations, Subpart H. The regulations were modified in 1998 in accordance with 1996 amendments to the SWDA to add Subpart P – the Interim Enhanced SWTR. The regulations were further modified in 2006 to add Subpart W – the Long Term 2 Enhanced SWTR.

[16] The 2017 FAD can be found at https://health.ny.gov/environmental/water/drinking/nycfad/docs/fad_final_december_2017.pdf.

provisions requiring the City to protect the watersheds surrounding the Water Supply Systems and require compliance with stringent standards for water quality.

Failure to meet those standards could result in the City being required to construct filtration facilities. Current estimates place the capital cost of adding such facilities in the billions of dollars, with annual operations and maintenance costs in the hundreds of millions of dollars. Accordingly, the City places tremendous emphasis and expends significant resources on protecting the entire Water Supply System and maintaining water quality within its reservoirs. In addition to its FAD obligations, the City is required by a January 1997 New York City Watershed Memorandum of Agreement with the EPA, State of New York, towns and counties within the watersheds, environmental parties, and other stakeholders to implement watershed protection programs. In accordance with the FAD and Memorandum of Agreement, the City has acquired fee title or conservation easements to well over 100,000 acres of land within the watersheds to help protect against pollution and the introduction of contaminants into the water supply.

Since 1993, the FAD has required the City to fund hundreds of projects each year to protect the watersheds and sources of the drinking water collected in the Ashokan and other reservoirs. In accordance with the FAD, lands around the Ashokan Reservoir are subject to regulations that limit ground disturbances and the use of new impervious surfaces, and projects in the Ashokan Reservoir watershed are required to meet higher standards for wastewater and stormwater collection and treatment, and other considerations that are meant to protect the health of water consumers and avoid the need to install filtration on the Water Supply System.

The City has spent or committed $2.7 billion over the past 25 years on efforts to protect the Water Supply System, including programs specifically to reduce turbidity in the Ashokan

Reservoir.[17] Further, the City intensively monitors water quality. DEP scientists and robotic monitoring equipment provide more than two million water quality data points each year, including analyses for more than 250 different parameters.[18]

D. The Importance of Controlling Turbidity

Turbidity generally refers to the suspension of particulate matter, including clay, silt, and other inorganic matter and living and dead organic matter, within a body of water. Turbidity can be caused by erosion, wave action, storms, snow melt, and natural water flows. Higher levels of turbidity affect water quality. From a water supply perspective, turbidity in unfiltered systems can negatively affect the disinfection process. Particles responsible for turbidity have been shown to physically shield pathogens from disinfectants.

Turbidity in the Catskills is a function of geology and hydrology. The valleys in the eastern Catskills – where the Project would be located – are lined with glacial deposits of fine clay and silt that are easily mobilized during runoff events, when high flows cause mountainside streams to scour their banks and beds. This natural process causes streams to turn brown for days as they move tons of glacial sediment toward the West Basin of the Ashokan Reservoir. The streams on which Premium Energy proposes to build an upper reservoir include several that have historically contributed the largest quantities of sediment into the Ashokan Reservoir.

The City has been aware of these conditions since the inception of the system and designed the Ashokan Reservoir with two basins to allow suspended particles to settle before the water is

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[17] *See, e.g.*, Hu, W., *A Billion-Dollar Investment in New York's Water*, N.Y. TIMES (January 18, 2018), available at https://www.nytimes.com/2018/01/18/nyregion/new-york-city-water-filtration.html.

[18] DEP, *New York City Drinking Water Supply and Quality Report – 2020* at 4, 10-15, available at https://www1.nyc.gov/assets/dep/downloads/pdf/water/drinking-water/drinking-water-supply-quality-report/2020-drinking-water-supply-quality-report.pdf.

conveyed into the Catskill Aqueduct. Over the past 40 years, the City has conducted extensive studies of turbidity in the Ashokan Reservoir watershed. These studies, including ones that have been subject to rigorous peer review, have found that no turbidity control mechanism will be effective at the watershed scale to reduce turbidity during high flow events. The City has invested billions of dollars in projects to optimize the operational flexibility of its Water Supply System and develop sophisticated modeling tools that forecast water quantity and quality across the System, all to mitigate the challenges caused by turbidity while satisfying daily water demands.

The Project proposes to use approximately four billion gallons of water from the Ashokan Reservoir each time it operates. The Application indicates that water would be drawn from the Ashokan Reservoir, pumped to the upper reservoir, and discharged back into the Ashokan Reservoir. Based on its long experience operating the Ashokan Reservoir, the City is very confident in stating that the Project would exacerbate turbidity problems and reduce water quality within the Reservoir.

COMMENTS

To be clear, the City is committed to decarbonization of the electric system and supports the development of renewable resources. As discussed in Point III, below, the City supports the prudent development of renewable resources within the Water Supply System. However, the City's support is not without limits.

While there is a dearth of information regarding the Project in the Application, the information that is provided causes the City to have significant concerns with the Project. Of greatest concern is the potential for the Project to severely complicate the City's compliance with the turbidity filtration avoidance criterion, including risks of the imposition of filtration requirements. Whether it does or not, the Project certainly would disrupt the City's water supply

operations and impose substantial additional costs and burdens on the City. The Project would degrade water quality within the Ashokan Reservoir and undermine the City's massive efforts and investments to improve water quality. In sum, the Project is ill-conceived, and its detriments significantly outweigh its potential benefits.

The Commission is not required in all cases to grant an application for a preliminary permit.[19] In *Rivertec Partners*, the Commission noted that it "has denied preliminary permits for projects at federal facilities after the federal entities indicated that no purpose would be served in issuing a permit because the federal entity would not approve modifications to its federal facilities."[20] In *Wyco*, the Commission denied a request for a preliminary permit because the applicant failed to demonstrate any likelihood of receiving the authorizations necessary for it to prepare a license application during the term of the preliminary permit.[21]

The City respectfully submits that similar circumstances exist here, and the Commission should reject the Application for similar reasons. Premium Energy proposes a Project to be located on State- and City-owned lands, and these Comments demonstrate that it will be unable to obtain the property rights needed for the Project.[22] That the property at issue is owned by State and City governments rather than the federal government is inapposite in this matter. Just as the Commission found no purpose would be served by granting preliminary permits in the cited case, the Commission should find that no purpose would be served in granting Premium Energy a preliminary permit.

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19 *See, e.g.*, *Rivertec Partners, LLC*, *supra*, at P 7; *Wyco, supra*, at P 8.

20 *Rivertec Partners, supra*, at P 8; *FreedomWorks, supra*, at P 11.

21 *Wyco, supra*, at P 16.

22 Prior to submitting the Application, Premium Energy met with City officials and was advised of the City's significant concerns with the Project and strong likelihood that the City would not permit such use of its property.

POINT I

THERE ARE SUBSTANTIAL CONCERNS WITH THIS PROJECT THAT JUSTIFY DENIAL OF THE APPLICATION

There are several fatal flaws with the Project, each of which should be sufficient to justify denial of a preliminary permit. When weighed collectively, they make a decision to grant a preliminary permit irrational.

The predominant overarching concern pertains to the turbidity problems that would unavoidably be created by the Project. As explained above, turbidity has been a long-standing problem within the Ashokan Reservoir, and the City has spent hundreds of millions of dollars to try to minimize the problem.

The Project's design is to draw a very substantial amount of water out of the Ashokan Reservoir – enough to lower the approximately 13 square mile Reservoir by about two feet[23] – then return the water to the Reservoir. The Project would negatively affect water quality within the Ashokan Reservoir by re-suspending sediments and frequently exposing more of the shoreline to wave action and erosion. Due to the similar geology comprising and surrounding the proposed upper reservoir, it, too, would capture significant quantities of sediment and then discharge them into the Ashokan Reservoir at irregular intervals, disrupting the predictive modeling that the City uses to operate the Water Supply System. In other words, the pumped storage operations could degrade the use of the Ashokan Reservoir whenever the hydropower facility is running and for an extended period of time thereafter, and it would severely complicate the City's compliance with the turbidity filtration avoidance criterion in the SWTR.

[23] Application at 13.

A second overarching concern relates to the fact that Premium Energy will never be able to proceed with the Project regardless of the results of any technical or environmental studies. Premium Energy acknowledges the proposed upper reservoir and at least part of the tunnel would be located on State-owned lands.[24] As explained above, such lands are part of the Catskill Forest Preserve, for which sale, lease, and development are prohibited under the New York Constitution. Under Section 21 of the FPA, the federal right of eminent domain would be unavailable to Premium Energy even in the remote possibility that the Commission ever grants it a license. Accordingly, Premium Energy will never be able to gain control of those lands. As discussed in Point II, below, the same exception in Section 21 applies equally to the City-owned lands comprising and surrounding the Ashokan Reservoir. Given the detrimental impact the Project will have on the Water Supply System, the City would not enter into an agreement with Premium Energy for the Project. Therefore, Premium Energy could never construct or operate the Project, rendering issuance of a preliminary permit by the Commission an academic exercise that is contrary to the public interest.

Third, as demonstrated by the incident at the City's Cannonsville Reservoir during the City's analysis of a potential hydropower project at that location, it is imperative that every precaution be taken at every stage of the development process, including the preparation of studies. Given the types of analyses and site testing that will be required for the Project, the developer must be highly experienced and have the technical competence and financial capability to properly design and undertake the work. Based on publicly-available information, it does not appear that Premium Energy has ever developed or operated any hydropower projects, and it is unclear whether it has the financial resources to address any problems it creates.

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[24] *Id.* at 15.

The City is aware that the Commission typically does not consider substantive concerns in deciding whether to grant a preliminary permit.[25] However, this is not an ordinary project. The Commission's responsibility is to the public, and it should not allow any developer to proceed with a project that could place the water supply for over nine million people at risk, especially a project, such as here, that never could be viable.

POINT II

PREMIUM ENERGY WOULD BE UNABLE TO OBTAIN PROPERTY RIGHTS FOR OR DEVELOP ITS PROJECT IF GRANTED A LICENSE

Premium Energy has no authority or permission to enter City-owned lands for any purpose related to the Project. Moreover, Premium Energy cannot obtain the property rights needed for it to develop or operate the Project. While possessing such rights is ordinarily not a requirement for an applicant to receive a preliminary permit, the City respectfully submits that this is not an ordinary project. Premium Energy's inability to acquire State-owned lands is explained in Point I, above. It also is unable to acquire lands owned by the City. Because the Project could not be developed regardless of the outcome of the studies listed in the Application, neither the intent of Subchapter I of the FPA nor the public interest would be served by granting Premium Energy a preliminary permit, and the Commission's precedent, also discussed in Point I, should apply.[26]

A. The City-Owned Lands Comprising And Surrounding The Ashokan Reservoir Are Exempt From The Right Of Eminent Domain Under The Federal Power Act

The City has not consented and will not consent to granting access or control to City-owned lands to Premium Energy for the Project. Without that consent, the Project cannot be developed

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[25] *See, e.g., Premium Energy Holdings, LLC,* 170 FERC ¶ 61,231 (2020) at P 17.

[26] The City also notes that the public comments submitted to date indicate widespread public opposition to the Project.

as Premium Energy would be unable to exercise the right of eminent domain granted to hydropower license holders because the Ashokan Reservoir and surrounding lands fall under the exclusion set forth in FPA § 21.

Specifically, the statute restricts the right as follows:

> no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law.[27]

The Ashokan Reservoir and the surrounding City-owned land meet these three enumerated statutory requirements.

The first element requires the City to have acquired the Ashokan Reservoir prior to October 24, 1992. The City's ownership of the lands in and around the Ashokan Reservoir were authorized by the New York Water Supply Act of 1905.[28] After the enactment of the Water Supply Act, the City began acquiring real estate in fee simple for what would become the Catskill System.[29] The Ashokan Reservoir was completed and placed into service in 1915.[30] Thus, there can be no question that this element is satisfied.

The second element is that the property is owned by a State or one of its subdivisions. As a matter of law, it is indisputable that the City is a political subdivision of the State of New York.

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[27] FPA § 21, 16 U.S.C. § 814.

[28] Laws of 1905 of the State of New York, Chapters 723-726, 734 (codified within several sections of Title 24, Ch. 3 of the N.Y.C. Admin. Code) and 738 (codified as New York State General Municipal Law § 76).

[29] Real estate is defined in the Water Supply Act as including "all uplands, lands under water, the waters of any lake, pond, or stream, all water rights or privileges, and any and all easements and incorporated hereditaments and every estate, interest and right, legal and equitable, in land or water . . . ." Chapter 724, § 25 of the Laws of 1905 of the State of New York.

[30] DEP, *Ashokan Reservoir*, available at https://www1.nyc.gov/site/dep/water/ashokan-reservoir.page.

All municipalities in New York are corporate municipal instrumentalities created by the State of New York. Historically, each local government was created by a special act of the New York State Legislature. In the 20th century, Article IX of the New York State Constitution was adopted and provides that "[t]he legislature shall provide for the creation and organization of local government…."[31] A municipal corporation is defined under New York law as "a county, town, city and village."[32]

There is ample legal precedent demonstrating that municipal corporations are part of the State, itself. The U.S. Supreme Court held that "[a] municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department."[33] The New York Court of Appeals made the same finding, stating "[c]onstitutionally as well as a matter of historical fact, municipal corporate bodies … are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents."[34] Thus, the second element is satisfied.

The third element requires the lands to be a public park, recreation area, or wildlife refuge. As part of the Water Supply Act, the New York State Legislature required that at each reservoir constructed for the Water Supply System, the City allow access by the public for certain recreational uses.[35] Since the time the City acquired the lands comprising the Ashokan Reservoir,

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31 New York State Constitution, Article IX, § 2(a).

32 New York General Municipal Law § 2; New York General Construction Law § 66(2).

33 *City of Worcester v. Worcester Consol. Street Ry. Co.*, 196 U.S. 539, 548 (1905).

34 *City of New York v. State of New York*, 86 N.Y.2d 286, 289-290 (1995).

35 *See* Ch. 724, § 38 and Ch. 725, § 7 of the Laws of 1905 of the State of New York. These provisions have since been codified in the Administrative Code of the City of New York and continue to govern the City's operation of the water supply system to this day. *See* Title 24, Ch. 3 §§ 24-359 and 24-326(a) of the N.Y.C. Admin. Code.

it has continually allowed the public to use those lands and waters for certain recreational activities, including fishing and rowboating for the purposes of fishing, picnicking, walking, bicycling, and other activities. Indeed, at the base of the dam is a five-acre area that has been open to the public for recreational uses for decades – well before 1992.[36] The requirements of the Water Supply Act and these uses eliminate any question that the Reservoir and surrounding lands are a recreational area as contemplated by FPA § 21.

The recreational uses have always been regulated so that such uses are consistent with the City's duty to protect the drinking water supply.[37] However, the existence of reasonable rules regulating recreational use should in no way affect the Commission's determination that the Ashokan Reservoir is part of a recreation area established by State law. The State of New York has required that these lands be available to the public for the certain recreational purposes, and the City fully complies with these statutory requirements.

The City's position is reinforced by the 1992 amendments to FPA § 21. As initially drafted by the House of Representatives, the language of the amendment provided that the exercise of the right of eminent domain under the statute "shall not include any site or area that was acquired by a State or local government or agency thereof solely for the purposes of a public park, recreation, or wildlife refuge . . . [emphasis added].[38] In the version of the bill that was enacted into law, the

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[36] *See, e.g.*, DEP Press Release, *DEP Re-Activates Fountain at Ashokan Reservoir* (May 6, 2011), available at https://www1.nyc.gov/html/dep/html/press_releases/11-35pr.shtml#.YGulLOhKhPY. Over time, the City has expanded the recreational uses at and around Ashokan, including adding a paved walkway and an unpaved hiking and biking trail. People have continuously fished on the Ashokan Reservoir since it was constructed, and over 2,000 boats are registered for use on it.

[37] The City's regulations governing recreational uses within water supply lands can be found at Chapter 16 of Title 15 of the Rules of the City of New York.

[38] 138 Cong. Rec. H. 3747, *Comprehensive National Energy Policy* (May 27, 1992) at 108.

word "solely" was removed, which clearly evidences Congress' intent that the protection from a licensee's exercise of eminent domain would extend to lands that had multiple uses, so long as one such use was as a public park, recreation area, or wildlife refuge. Thus, the fact that the City also uses the Ashokan Reservoir for water supply purposes is inapposite, and the third element is satisfied.

Because Premium Energy cannot obtain the lands it ultimately needs for its Project via eminent domain, and the City will not grant it access to or control of the Ashokan Reservoir and surrounding lands, no public interest or public policy would be served or advanced by granting a preliminary permit to Premium Energy.

B. In The Event The Commission Grants A Preliminary Permit, It Should Expressly Require Premium Energy To Obtain The City's Permission To Enter City-Owned Lands And Engage In Land-Disturbing Activities

The issuance of a preliminary permit by the Commission grants a developer priority over competing projects and time to gather the information necessary for the applicant to subsequently prepare and submit a license application.[39] The D.C. Circuit has confirmed that "the purpose of the preliminary permit system is solely to allow a potential applicant to develop sufficient information to prepare a complete license application."[40] Importantly, a preliminary permit does not authorize the permittee to enter any private property absent the landowner's consent, even if for the purpose of conducting studies to support a subsequent hydropower licensing application.[41]

If the Commission rejects the many reasons why the Application should be denied and instead grants a preliminary permit, it should make clear that Premium Energy must obtain the

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[39] *Nevada PSH Energy Storage, LLC*, 173 FERC ¶ 62,147 (2020) at P 4 (citing *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 (2003) at P 6).

[40] *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034, 1039 (D.C. Cir. 1986).

[41] *Nevada PSH Energy Storage, LLC*, *supra*, at P 4.

City's permission prior to entering the Ashokan Reservoir or surrounding City-owned lands. The Commission also should make clear that its issuance of a preliminary permit does not authorize Premium Energy to conduct any form of land-disturbing activities related to the Project.

The City recognizes that the Commission typically makes some reference to the need to obtain landowner approval in its Orders granting preliminary permits. The City respectfully requests that the Commission emphasize this point in this matter given (i) Premium Energy's disregard of the City's concerns to date; (ii) the lack of clarity as to whether Premium Energy understands or appreciates the implications of its proposal and the need for the City's consent to proceed; and (iii) the FAD, DEP's watershed regulations,[42] and the special need to protect the unfiltered water flowing from the Ashokan Reservoir – a need that makes the Ashokan Reservoir unique from most, if not all, other reservoirs that host or are being considered for hydropower development.

Additionally, the City respectfully requests that the Commission condition any preliminary permit on Premium Energy obtaining DEP's prior consent before undertaking any activities within the Ashokan Reservoir watershed that could cause contamination of the Ashokan Reservoir or otherwise adversely impact the Water Supply System. This extraordinary requirement would help avoid adverse impacts on the Reservoir and Water Supply System.

[42] Chapter 18 of Title 15 of the Rules of the City of New York.

POINT III

IF A PRELIMINARY PERMIT IS GRANTED, THE COMMISSION SHOULD REQUIRE STUDIES THAT EVALUATE ALL POTENTIAL IMPACTS OF THE PROJECT

The City is aware that the Commission does not typically place study requirements in preliminary permits. However, the Commission is not legally prohibited from doing so. As noted above, this is not an ordinary hydropower licensing proceeding. In the event the Commission decides to grant Premium Energy a preliminary permit, the Commission should require Premium Energy to study the potential impacts of the Project in context of the use of the Ashokan Reservoir for water supply purposes and in context of the requirements imposed by the FAD. In other words, the studies must consider the heightened, more stringent requirements related to maintenance of the unfiltered water supply.

The City recognizes that the next step in the process would be scoping of the issues to be studied. However, because of the vagueness of the description of the studies in the Application, and the omission from that list of any assessment of the FAD, water quality, or turbidity impacts, and Premium Energy's disregard for the position of the City to date, the City offers the following information on studies and analyses that should be performed to support any licensing application. The following list is not intended to be all-inclusive. Rather, it is offered to provide a more complete picture of the scope of studies that will be needed to support this Project.

The City's provision of this information should not be misconstrued to mean that if the Commission issues a preliminary permit for the Project, the City would provide access to its lands to Premium Energy. Some studies can be performed based on publicly-available information, and others involve lands owned by the State or other entities, for which Premium Energy may be able to obtain access. The City seeks only to inform Premium Energy of the breadth of studies that

would be needed in this matter to ascertain the extent to which the Project could impact the Ashokan Reservoir and Catskill Water Supply System and to ensure that the Commission has before it a proper record on which to base any decision if a license application is submitted.

The City's concerns with the Project fall within four general categories: (i) impacts on water quality; (ii) impacts on the City's water supply operations; (iii) impacts on the environment including fish and wildlife habitat; and (iv) incremental impacts on dam safety. From an operational perspective, Premium Energy must consider the effects the Project could have on the City's ongoing and daily use of the Ashokan Reservoir. For example, the Project will influence the elevations of the Reservoir, diversion of water into the Reservoir, the timing of intake and withdrawal of waters, and management of flows between water supply reservoirs.

In July 2020, DEP announced it would commence field work for the Ashokan Century Program, a multi-year capital program devoted to upgrading the dams, dikes, chambers, bridges, and infrastructure at the Ashokan Reservoir.[43] The City has already devoted substantial administrative and financial resources towards this Program, but the Application makes no mention of it. Premium Energy will need to study all implications of its Project on the Program, including technical, operational, environmental, and financial considerations.

The Application broadly references an environmental impact study and environmental surveys. Premium Energy would need to study the impacts on both the environment, generally, and on the Reservoir, specifically. For example, construction of the Project – including a new impoundment, transmission lines, a powerhouse, and a miles-long underground tunnel – may

[43] DEP Press Release, *NYC DEP Announces Upcoming Field Work for Ashokan Century Program Temporary Closure of Some Recreational Areas* (July 27, 2020), available at https://www1.nyc.gov/site/dep/news/20-024/nyc-dep-upcoming-field-work-ashokan-century-program-temporary-closure-some#/0.

necessitate substantial land clearing, land disturbance, and commercial traffic. Such activities could lead to erosion, sedimentation, and incremental turbidity. Additionally, both construction and operations could have a substantial impact on habitats and the species that live within the Ashokan Reservoir and its surrounding lands.

With respect to existing operations, there is no mention in the Application of conducting any Probable Maximum Flood or inundation studies. The Project could materially change peak storm flows into the Ashokan Reservoir, which is a key metric in evaluating dam safety. The Commission has been committed to ensuring dam safety and it should make clear to Premium Energy the need to carefully and comprehensively study the impact of the Project on the safety of the Ashokan Reservoir and its dams.

Further, to ensure the Water Supply System continues to comply with the stringent standards set forth in the FAD, Premium Energy will be required to conduct very frequent, if not continuous, water quality testing while it is performing any ground disturbing activities. Premium Energy would need to take immediate action if it is causing a degradation in water quality. For purposes of absolute clarity, Premium Energy should understand that the City will hold it liable for any contamination of the water supply or degradation in water quality, and such liability could be substantial. It is not clear whether Premium Energy has properly considered the costs and risks associated with its Project. However, the City respectfully urges that the Commission do so notwithstanding that this is only the first step in the licensing process.

POINT IV

THE CITY SUPPORTS THE APPROPRIATE USE OF HYDROPOWER WITHIN ITS WATER SUPPLY SYSTEM

The State of New York's energy policy goals, and the statutory goals set forth in the Climate Leadership and Community Protection Act,[44] can only be achieved through multi-faceted efforts. That work involves expansion and diversification of the carbon-free electricity supply portfolio in New York. The City supports the State's goals.

Indeed, the City is a strong supporter of reducing and eventually eliminating reliance on fossil fuels and converting the electric system to be entirely carbon-free. In 2015, New York City Mayor Bill de Blasio launched an ambitious plan to prepare New York City to withstand the existential threats associated with climate change.[45] OneNYC initially called for, among other things, an 80% reduction in greenhouse gas emissions by 2050 and expanding the development of renewable resources. As awareness of the impacts of climate change increased, OneNYC was revised to call for 100% clean electricity by 2040 and carbon neutrality by 2050.[46] In his 2021 State of the City address, Mayor de Blasio discussed a new City of New York Recovery For All Plan to take additional steps to protect New York City against the pervasive and increasing threat

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[44] Chapter 106 of the Laws of 2019 of New York. Provisions of that Act require 70% of the State's electricity in 2030 to come from renewable resources, and 100% of the electricity in 2040 to come from carbon-free resources.

[45] *One New York: The Plan for a Strong and Just City* (issued April 2015) at 160-168, available at http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf ("OneNYC").

[46] *OneNYC 2050: Building a Strong and Fair City A Livable Climate* (issued April 2019) at 5, available at http://onenyc.cityofnewyork.us/strategies/a-livableclimate/.

of climate change through greater investment in green infrastructure and reduced dependence on fossil fuels.[47]

Within the transition to a carbon-free electricity supply portfolio, the City understands and appreciates the need for dispatchable generation. The City also is aware that hydropower can serve this role and has long supported hydropower development that is compatible with the operation of its Water Supply System. At present, there are four hydropower facilities which produce electricity via water flowing through City aqueducts.

The City's Water Supply System was designed to convey water from reservoir to reservoir, and ultimately to New York City, by gravity alone. The four existing facilities are located within the waterworks that convey water between locations in the Water Supply System, and only produce energy with water that the City is moving through the system as part of its regular water supply operations. The City works closely with the facilities' operators to ensure that hydropower operations do not introduce contamination into the Water Supply System. Because those facilities use water that already is flowing between reservoirs, they do not create or exacerbate turbidity within the water supply reservoirs or negatively impact DEP's water supply operations. This method of operation makes the existing facilities distinctly different from the Project, which would draw water from the Ashokan Reservoir outside the scope of its normal operations. Moreover, water supply operations govern when water flows through the aqueducts and the facilities are able

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[47] *State of the City 2021: Mayor DeBlasio Announces a Recovery for All of Us* (issued January 28, 2021), available at https://www1.nyc.gov/office-of-the-mayor/news/062-21/state-the-city-2021-mayor-de-blasio-recovery-all-us#:~:text=In%202021%2C%20New%20York%20City,19%20and%20supercharge%20our%20recovery.&text=New%20York%20City's%20Vaccine%20for,New%20Yorker%20every%20three%20seconds; *see also* NYC Office of the Mayor, *Recovery for All*, available at https://recoveryforall.nyc.gov/.

to generate electricity.[48] In contrast, Premium Energy apparently would flow water based solely on energy market prices and electricity demand, irrespective of the impacts on water supply operations. Such flows also have the potential to create incremental turbidity and reduce water quality.

While the City is not wholly opposed to the concept of adding hydropower to its Water Supply System, each hydropower facility and its operations much be carefully analyzed to ensure they do not adversely impact the core purpose for which the Water Supply System was established – to supply a reliable quantity of high quality water to nearly half the population of New York State. Most importantly, for any new facility, water supply operations must always take priority over hydropower operations.

CONCLUSION

The City shares the same public policy goals as the federal government and State of New York in decarbonizing the electricity supply. The City also has a long history of supporting hydropower development that is compatible with the operation of its Water Supply System. The pumped storage project proposed by Premium Energy, however, is not compatible with the operation of the Water Supply System or the Filtration Avoidance Determination. Moreover, because Premium Energy could not secure the property rights it needs for the Project, granting its request for a preliminary permit would not serve any useful or meritorious purpose.

Put simply, this is a poorly-conceived, inappropriate project that should be stopped before it can cause any damage to the Water Supply System or the environment, or the imposition of billions of dollars of incremental costs on New York consumers for an otherwise unneeded

[48] To the extent DEP has flexibility in flowing water between reservoirs, it works with the facilities' operators to match releases with electricity demand. However, at all times, the water supply needs take precedence over electricity generation needs.

filtration system. The Commission has the power to prevent these harms, and the City respectfully urges it to exercise that power in this matter. For the reasons set forth herein, Premium Energy's request for a preliminary permit should be denied.

Respectfully submitted,

Dated: April 8, 2021
Albany, New York

/s/ Kevin M. Lang

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the City of New York have been served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Albany, New York, this 8th day of April, 2021.

/s/ Kevin M. Lang

Kevin M. Lang, Esq.