



Phillips Lytle LLP

VIA Email and Hand Delivery

May 23, 2017

Town of Pendleton
Zoning Board of Appeals
c/o Wolfgang Buechler
Chairman, Zoning Board of Appeals
Pendleton Town Hall
6570 Campbell Blvd.
Lockport, NY 14094

Re: **Supplement to Request for Interpretation/Use Variance** by Empire Pipeline, Inc. Regarding a Proposed Compressor Station and Related Equipment Located at 4281 Killian Road in a Light Industrial District in the Town of Pendleton, New York

Dear Chairman Buechler and Members of the Town of Pendleton Zoning Board of Appeals:

As you know, we represent Empire Pipeline, Inc. ("**Empire**") with respect to the proposed construction and operation of a 22,214 horsepower compressor station and related equipment ("**Facility**" or "**Project**") on a 20-acre parcel located at 4281 Killian Road ("**Site**") in the Town of Pendleton, New York ("**Town**"). The Facility is part of Empire and National Fuel Gas Supply Corporation (collectively, "**National Fuel**")'s Northern Access 2016 project ("**Northern Access**"), which involves improvements to existing interstate pipeline systems in Northern Pennsylvania and Western New York.

On behalf of Empire, and as a follow-up to the April 25, 2017 meeting of the Town of Pendleton Zoning Board of Appeals ("**ZBA**"), we hereby submit an original, and seven (7) copies of this supplement to Empire's Application to the ZBA appealing the Town of Pendleton Building Inspector's denial of a building permit for the Facility, or in the

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alternative, requesting a Use Variance ("**Application**").¹ The Application was filed pursuant to §§ 247-75(A)&(B), respectively, of the Town's Zoning Code ("**Code**").

We hereby submit the following exhibits, which are attached hereto, and made part of the Application:

- Exhibit A:** Transcript of April 25th ZBA meeting
- Exhibit B:** Deed and Recording Documentation for 4281 Killian Road
- Exhibit C:** *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y. 2d 598, 610-611 (1978) (relevant sections highlighted for reference)
- Exhibit D:** *Cellular Tel. Co. v. Rosenberg*, 82 N.Y. 2d 364, 372 (1993) (relevant sections highlighted for reference)
- Exhibit E:** "What if...Pipelines Aren't Built into the Northeast?" Report by U.S. Chamber of Commerce, Institute for 21st Century Energy (relevant sections highlighted for reference)

April 25th ZBA Meeting

As the Board is aware, Empire had a court reporter attend the April 25th ZBA meeting to make a transcript of the discussions on the Application before the Board. A true and correct copy of that transcript is attached hereto as *Exhibit A* for the ZBA's record in this matter. As discussed with the ZBA at the April 25th meeting, Empire has arranged for a court reporter to attend the public hearing on May 25th and will provide the ZBA with a transcript of the hearing.

Acquisition of the Site

On behalf of Empire, we would like to advise the ZBA that on May, 5, 2017, Empire formally acquired the Site from the Tonawandas Sportsmen's Club, Inc. Attached hereto as *Exhibit B* is a copy of the deed and recording information to demonstrate ownership for the Town's reference.

¹ As explained in the Application, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the siting, construction and/or operation of facilities associated with interstate natural pipelines including the Facility. In submitting this supplement to the Application, Empire in no way concedes any authority over the siting of the Facility to the Town, and this submission is made without any admission of fact or concession of law on Empire's part, and with full reservation of all of Empire's rights.



**Additional Information on the
Essential Services that Empire Provides**

As you know, pursuant to Code § 247-75, Empire is currently before the ZBA respectfully requesting that the ZBA: (1) find that Empire is an "essential service" under Code § 247-4; or, in the alternative, (2) grant Empire a use variance to place, construct and/or operate the Facility on the Site.

In the Application dated April 12, 2017, we detailed the Project's status as providing an essential service, and provided further detail on the Project and Empire's status as a public utility for purposes of zoning in New York State. In follow-up to our appearance before the ZBA on April 25, 2017, we are providing additional information on Empire's status as both an essential service and public utility for purposes of zoning in New York State, and to highlight further the deference owed to a public utility such as Empire in the zoning context.

**A. The Facility Constitutes an Essential Service under the
Town Code**

The Site is located in the Town's Industrial District. Permitted uses in the Industrial District include "essential services." Code §247-14(C)(22). The Town's Code defines "Essential Services" as:

The erection, construction, alteration, or maintenance by public utilities or municipal or other governmental agencies of gas, electrical, steam, water, sewage and communication systems and facilities. Railroad trackage and facilities and bus shelters shall also be considered as providing an "essential service."

Code § 247-4.

As detailed in the Application, in the denial of a building permit for the Facility, the Building Inspector has found that the Facility is not an essential service because it does not service end-users within the Town. However, this requirement - that the Facility serve end-users - is nowhere to be found in the plain language of the Code. Under the Code, an essential service has two parts: *first*, it must include the erection, construction, alteration or maintenance of gas, electrical, steam, water sewage and communication



systems and facilities; and *second*, the entity involved must be a public utility, municipality or other governmental agency.

In the Application, we cited two cases decided by the New York Court of Appeals, the State's highest Court, in support of the proposition that under New York law, Empire is considered a public utility for purposes of zoning: *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y. 2d 598, 610-611 (1978) and *Cellular Tel. Co. v. Rosenberg*, 82 N.Y. 2d 364, 372 (1993). We thought it would be helpful to provide the ZBA with a detailed analysis of both of these cases.

1. Consol. Edison Co. of New York v. Hoffman, 43 N.Y. 2d 598 (1978)

In *Hoffman*, (attached hereto as *Exhibit C*), Consolidated Edison Company ("ConEd"), sought a use variance and area variance to modify Indian Point nuclear generating plant by constructing a 565-foot natural draft, wet cooling tower. ConEd was denied the necessary use variance by the Zoning Board of Appeals. 43 N.Y. 2d 598.

The Court noted that the legal issue before it was limited to whether or not the denial of the use variance was an abuse of discretion. The Court explained, "where there are practical difficulties or unnecessary hardships in the way of carrying out an ordinance, a zoning board of appeals has the power to issue a variance." *Id.* at 606. To be granted a use variance, given that such a variance essentially allows a prohibited use, an applicant typically faces a heavy burden and must show an "unnecessary hardship." *Id.* at 606. This requires a showing that there is no permitted use that will obtain a reasonable return on the land; that the circumstances that cause this hardship are unique to the land; and, that the proposed use will not alter the essential character of the community. *Id.* at 607.

However, the Court noted that such hardship showings are not appropriate when a public utility is involved. The Court placed an emphasis on the public necessity involved when considering a variance application by a utility. *Id.* Local concerns, while relevant, are not the only criteria to be used, as utilities are required to "provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." *Id.* at 608. As the needs of the broader public are contemplated by the enabling legislation, when looking to the question of hardship, "the effect on the utility's customers is a significant factor to be considered by local zoning boards." (emphasis added) *Id.* It is important to note here that the Court references the need to



focus on *all customers of the utility*, rather than solely the utility's customers in the municipality in question.

At its Zoning Board of Appeals meeting, ConEd noted that, were its variance to be denied, the utility may have to shut down a unit at the power plant, resulting in excessive capital costs. *Id.* ConEd provided testimony that the plant's operation saved ConEd customers \$78,000,000 in one year, and, if the facility were to shut down, the need for increased production at other plants would translate to significant costs and the use of imported oil. In its decision, the Court specifically pointed to "the potential hardship to Con Edison's approximately three million customers, and millions of others affected, not to mention the harm to the utility's huge investment." *Id.* at 609.

The Court explained that it is well-settled that a zoning board cannot bar a utility from a community where the utility has clearly demonstrated there is a need for its facilities. *Id.* at 610. For a public utility to be granted a use variance, a utility must show that the variance is a public necessity and is required to render safe and adequate service. Further, where the burden on the community is minimal, the showing required by a public utility should be reduced even further. *Id.* at 607.

Hoffman is particularly helpful in its discussion of public utilities for purposes of determining whether the Facility is an essential service. As detailed in the Application, the Project is necessary to provide safe, adequate and reliable service to Empire's customers, which includes NYSEG, which services residents of the Town. The Facility will provide the capacity and infrastructure needed to transport reliable, clean, and cost-efficient natural gas supplies from Pennsylvania to, *inter alia*, Western New York, the Northeastern United States and Canada. The Facility is a compressor station, which is a critical part of the Project because it will maintain pressure necessary to transport natural gas between the Supply and Empire pipeline systems.

The Facility serves the broader public by increasing the supply of natural gas available in the market areas. As explained by the Court of Appeals in *Hoffman*, "in resolving the question of hardship, the effect on the utility customers is a significant factor to be considered by local zoning boards." *Id.* at 608. Thus, it is service to the utility's customers that must be shown for the determination of status as a public utility - and not service to the local residents. In fact, the cooling tower in *Hoffman* was of limited value to residents of the local Village, but was of critical importance to Con Ed's three million customers.



When the Court in *Hoffman* describes the nature of a public utility, the Court points to the utility's need to service its customers, and to the potential harm to the customers should the variance be denied and significant economic impacts follow. Empire's Facility is key to the provision of natural gas to its customers, including those within the Town and throughout the Northeast and United States. Without the Facility, Empire's ability to provide such services will be compromised. As detailed below, the inability to provide such services has significant economic consequences for the Northeast. Accordingly, Empire provides exactly the type of services discussed in *Hoffman*, and its customers will face exactly the types of harm referenced in *Hoffman*, should the Project not be able to proceed.

2. Cellular Tel. Co. v. Rosenberg, 82 N.Y. 2d 364 (1993)

In *Rosenberg* (attached hereto as *Exhibit D*), the Court elaborated on *Hoffman's* discussion of public utilities. A cell phone company, Cellular One, had proposed a cell site in Dobbs Ferry to expand and fill a gap in coverage to its customers in its service area. 82 N.Y. 2d 364, 368. Without the additional cell site, calls from the cell phone company's customers were disrupted due to a lack of antennas. As cell sites were not a permitted use in the zoning district in which the project was proposed, Cellular One applied for a use variance. *Id.*

The Zoning Board denied the use variance, finding that Cellular One did not establish that 1) the land could not achieve a reasonable return with a permitted use; 2) that its circumstances were unique, 3) that there was a public necessity for its service or that it was a public utility, 4) the absence of future hazards and 5) the lack of alternate sites. *Id.* at 370. At issue was whether or not this was the appropriate standard by which to review Cellular One's application. The analysis turned on whether or not Cellular One constituted a public utility for purposes of zoning in New York. This was the first time that the Court found that the related standard applies to entities other than traditional public utilities like ConEd in *Hoffman*.

Rosenberg sets forth a three-part test to determine whether a private business should be considered a public utility for purposes of zoning in New York. *Id.* Under *Rosenberg*, the characteristics of a public utility include: (1) the essential nature of the services offered; (2) operation under a franchise, subject to some measure of public regulation; and (3) logistic problems, such as the fact that the produce of the utility must be piped, wired or otherwise served to each user, the supply must be maintained at a constant level to meet demand, and the user has no alternative source and the supplier



commonly has no alternative means of delivery. *Id.* The Court held that Cellular One met the definition of a public utility.

The Court expanded upon the standard for public utilities established in *Hoffman*, and noted that this standard applies to all utilities, and includes entirely new sitings of facilities as well as modifications of existing facilities. *Id.* at 372. The Court reiterated *Hoffman's* standard that a zoning board cannot exclude a utility from a community if the utility has shown a need for its facilities. *Id.* Cellular One had adequately demonstrated that its proposed cell site would improve its existing service.

As the Town is well aware, and as detailed in the April 12, 2017 supplement to the Application, Empire satisfies the *Rosenberg* test and should therefore be treated as a public utility for zoning purposes under New York law. First, Empire is an interstate pipeline which supplies natural gas, which is the type of essential service for which federal legislation, *i.e.*, the NGA, has been enacted to place limits on local regulations that "prohibit or unreasonably delay the construction or operation of facilities approved by [FERC]." *See, e.g. Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 573-74 (D. Md. 2013).

Additionally, Empire, as a natural gas company regulated by the NGA, operates under authority of FERC and enjoys the power and privilege of eminent domain. Further, as evidenced by the April 12, 2017 supplement to the Application, FERC sets rates for interstate natural gas pipelines such as Empire, and has standard rate setting regulations, which Empire in general, and the Project in particular, are subject to under federal law.

Lastly, the interstate delivery and supply of natural gas tracks closely with the logistical problems articulated by the Court of Appeals in *Rosenberg*. Indeed, the Facility is a compressor station which exists to address one type of logistical problem encountered by natural gas providers, namely the need for gas to be pressurized in order for it to be transported through a pipeline (*i.e.* from a lower pressure pipeline to a higher pressure pipeline). Just as with the wireless service provider regulated by the FCC in *Rosenberg*, Empire fits within the definition of a public utility for purposes of zoning under New York law, including for purposes of the ZBA's interpretation of Code § 247-4.

Importantly, neither case distinguishes between "end-users" and other utilities which serve as intermediaries between pipelines and end users. The focus is on the essential nature of the services being provided in this case, the distribution of natural gas. Both within the plain language of the Code, and as demonstrated through the Courts'



description of public utilities and public necessity found in *Hoffman and Rosenberg*, the Facility clearly constitutes an essential service. The Facility is necessary for the provision of safe and adequate natural gas service to Empire's customers, as determined by FERC in issuing a certificate of public convenience and necessity to Empire for the Project.

B. U.S. Chamber of Commerce Report Regarding Northeast Pipeline Infrastructure Needs

Since the filing of the Application, an extremely relevant report has been released that sheds additional light on the essential nature of the services that the proposed pipeline will provide. Last month, the U.S. Chamber of Commerce ("Chamber") released a report as part of its Energy Accountability Series titled "*What if...Pipelines Aren't Built in the Northeast?*" ("**Chamber Report**"), attached hereto as *Exhibit E*, which outlines the significant challenges facing the Northeast due to the lack of pipeline infrastructure. The Chamber Report attempts to quantify the impacts to the Northeast region from the significant delays and hurdles faced by attempts to improve infrastructure in the region. In addition to the inability to meet ever-increasing demands for natural gas provision, creating capacity concerns, the lack of infrastructure and the delays pipeline projects have been facing in the northeast are creating substantial impacts, including significant reductions in GDP, lost opportunities for sizeable job creation, and noteworthy increases in rates compared to the rest of the nation. These impacts to customers are exactly the type of concerns noted in both *Hoffman and Rosenberg*, which lead to the need for deference to a public utility in the zoning context.

The Chamber Report notes that as natural gas production in the U.S. has increased, the U.S. has seen energy-usage cost savings, the creation of millions of jobs, and lowering of the nation's greenhouse gas emissions. In fact, for the first time, natural gas-fired electricity production has bypassed coal generation for 2016. *Chamber Report* at p. 18. The Northeast, however, has not been able to receive its share in these benefits because of supply limitations. In fact, Northeast residents are paying some of the highest prices in the nation for natural gas delivery. Given the steady increase in demand, it is essential that new pipeline capacity be added to the system to meet current and future needs and to keep costs consistent with those of the rest of the nation. *Id.* at p. 27.

The Chamber Report notes that installing the proper pipeline infrastructure is as essential to the U.S. as "having good roads, safe bridges and world-class airports."



FERC has noted that “with the exception of the Northeast...regional price differences across the country were not large...”. *Chamber Report* at p. 10. FERC stated that “pipeline constraints” throughout the Northeast were to blame for higher gas prices for customers in the Northeast. *Id.* In addition to price increases, the Chamber Report notes that the lack of adequate gas infrastructure in the region has caused “winter reliability challenges” in the Northeast. *Id.* As a result of this lack of infrastructure, Northeast residents pay 29% more for their natural gas than the national average, and 44% more for their electricity, while industrial users in the Northeast pay more than double for their natural gas. *Id.* As demand for natural gas rises, and pipeline projects continue to face delays or denials of local and State approvals, the Northeast will continue to face high energy costs, lower household income and spending power, and economic losses in manufacturing and industry. *Id.* at 19.

The Chamber Report estimates that if the status quo remains with respect to infrastructure, and new infrastructure projects are unable to become permitted, New York alone stands to lose 17,400 jobs and \$1.6 billion in lost state GDP. *Id.* at 11. New York’s losses come from both lost opportunities in the pipeline development job creation and economic impact, and significant lost GDP from higher electricity and natural gas costs passed on to customers in the State. *Id.* at p. 41. The Chamber Report notes that the “primary impediments to these projects advancing in the Northeast” are found at the state and local levels, creating a “unilateral blockade...denying residents access to cheaper, cleaner, more proximal and more reliable sources of natural gas.” *Id.*

The Chamber Report is extremely helpful in highlighting the public necessity of expanding pipeline infrastructure in the Northeast, and the realities of the potential impacts to customers that are noted in *Hoffman* and *Rosenberg*. It is exactly those types of concerns, coupled with the unique needs of public utilities, which have given rise to the relaxed zoning standards for critical infrastructure, such as the Project.

Conclusion

The Facility meets the Code’s definition of “essential service” because it is entitled to the relaxed zoning standard of a public utility under New York law. As demonstrated by the Chamber Report, infrastructure projects such as the Facility are critical to the Northeast economy and to meeting ever-increasing capacity needs and the needs of Empire’s customers.



Town of Pendleton ZBA
Page 10

May 23, 2017

Accordingly, we respectfully request that the ZBA issue an interpretation of the Code confirming the Project's classification as an essential service, or, in the alternative, granting the Project a use variance under the relaxed zoning standard.

If you have any questions concerning the Application or information contained herein, please do not hesitate to contact the undersigned.

Respectfully submitted,

Phillips Lytle LLP

By 

Adam S. Walters

Enclosure

cc: Edward P. Perlman, Esq., ZBA Attorney
Tim Masters, Town of Pendleton Building Inspector
Jack Striegel, Town of Pendleton Building Inspector

EXHIBIT A

PUBLIC HEARING

TOWN OF PENDLETON

PUBLIC HEARING

Public hearing held at the Town of
Pendleton Town Hall, 6570 Campbell Boulevard,
Lockport, on April 25, 2017, commencing at
7:00 p.m., before BONNIE S. WEBER, Notary Public.

PRESENT: ADAMS S. WALTERS,
 Phillips Lytle LLP,
 One Canalside,
 125 Main Street,
 Buffalo, New York 14203-2887,
 (716) 847-8400,
 awalters@phillipslytle.com
 Appearing for National Fuel.

MEMBERS OF THE PUBLIC

20:00:51 1 **BOARD CHAIR:** So next on our agenda are new
20:00:53 2 inquiries to the ZBA. I included the Empire
20:00:53 3 Pipeline as a topic here.

20:00:58 4 My intent of doing this is I wanted to
20:01:00 5 discuss among the Board here some of the technical
20:01:04 6 details that we need to consider for the upcoming
20:01:07 7 hearing that we're going to discuss.

20:01:09 8 You can come up if you want to come closer,
20:01:12 9 Mr. Walters.

20:01:14 10 **MR. WALTERS:** Thank you.

20:01:15 11 **BOARD CHAIR:** This is Mr. Adam Walters from
20:01:20 12 Phillips Lytle; is that correct?

20:01:20 13 **MR. WALTERS:** That's correct.

20:01:20 14 **BOARD CHAIR:** And he is representing Empire
20:01:23 15 Pipeline. It's not our intention to take any input
20:01:26 16 regarding the Empire Pipeline at this point.

20:01:28 17 And the lady to the right of me is just
20:01:30 18 going to take notes on whatever we talk about, so
20:01:34 19 I'm really talking more about just questions.

20:01:58 20 So I've already put in my bid to secure this
20:02:01 21 room, because we usually have a conflict with the
20:02:04 22 Board of Assessment review in May.

20:02:06 23 So I think the Board of Assessment review is

20:02:08 1 getting relegated to -- (inaudible), so that we
20:02:10 2 have this room so we have enough space for the
20:02:13 3 public to attend.

20:02:16 4 One of the topics that I wanted to address
20:02:19 5 was, this is going to overwhelm the secretary in
20:02:22 6 terms of taking minutes or taking notes, so I want
20:02:26 7 to address what we want to accomplish with regard
20:02:29 8 to recording the proceedings.

20:02:31 9 Earlier, before the meeting started,
20:02:34 10 Mr. Walters volunteered the -- the same person is
20:02:37 11 going to be available for taking notes and those
20:02:40 12 notes would be provided to us, if we want?

20:02:42 13 **MR WALTERS:** Absolutely.

20:02:44 14 **BOARD CHAIR:** So that's a question, is that
20:02:45 15 something that we want to avail ourselves of or no?

20:02:48 16 Do you have an opinion on that?

20:02:51 17 **BOARD MEMBER 1:** No. It's up to you.

20:02:53 18 **BOARD CHAIR:** I think it would be convenient
20:02:55 19 to have all the comments written down. I know that
20:02:58 20 when I attended the planning board meetings, when
20:03:02 21 that was done, I think that helped the planning
20:03:02 22 board keep track of what the comments were, because
20:03:06 23 otherwise it's a jumbled mess, quite honestly.

20:03:08 1 You can handle one or two. It's hard --
20:03:11 2 hard if you have 20. So I think we will attempt to
20:03:13 3 do that.

20:03:19 4 I have a question down in my notes as to who
20:03:21 5 is going to represent the Town. I don't think we
20:03:23 6 have an answer to that. You're going to provide us
20:03:25 7 some counsel, but I'm assuming that --

20:03:28 8 **BOARD MEMBER 1:** When you say represent the
20:03:32 9 Town, you're asking to make a determination?

20:03:35 10 **BOARD CHAIR:** I don't think anything --

20:03:36 11 **BOARD MEMBER 1:** You have to make an
20:03:37 12 interpretation. You can request to make an
20:03:38 13 interpretation to review the interpretation of the
20:03:39 14 building department.

20:03:40 15 And there's also a request for a variance,
20:03:43 16 to my understanding.

20:03:44 17 **BOARD CHAIR:** Correct.

20:03:45 18 **BOARD MEMBER 1:** There's two. So when you
20:03:47 19 say who is going to represent the Town, you may
20:03:50 20 have a Town building representative here to explain
20:03:52 21 his reason for his interpretation. That's up to
20:03:56 22 you, if you want that.

20:03:57 23 **BOARD CHAIR:** Okay.

20:03:58 1 **BOARD MEMBER 1:** But I wouldn't say anybody
20:03:59 2 else from the Town. I don't know who else from the
20:04:00 3 Town you would expect.

20:04:01 4 **BOARD CHAIR:** That's a question I didn't
20:04:04 5 think we would be able to answer. We will take
20:04:06 6 whatever we can from that.

20:04:10 7 I have a technical question, only because
20:04:13 8 this needs to be done with some timeliness. There
20:04:17 9 is an assertion in the application to us that --

20:04:20 10 **BOARD MEMBER 1:** There's conflict of
20:04:22 11 interest from -- by two of the members of the
20:04:24 12 Board?

20:04:24 13 **BOARD CHAIR:** Actually, I'm talking about
20:04:26 14 that there is no reason for me to do referrals to
20:04:29 15 the Town planning.

20:04:30 16 Did you notice that when you reviewed it?

20:04:31 17 **BOARD MEMBER 1:** No. No.

20:04:32 18 **BOARD CHAIR:** So I'm just questioning that
20:04:34 19 one. It's something that I'd like you to take a
20:04:36 20 look at before --

20:04:38 21 **BOARD MEMBER 1:** Sure.

20:04:40 22 **BOARD CHAIR:** -- the next meeting.

20:04:40 23 **BOARD MEMBER 1:** Okay.

20:04:42 1 **BOARD CHAIR:** And make a decision on it.
20:04:43 2 And my emphasis is -- I think the reason that it
20:04:45 3 was put on there was not directly related to the
20:04:47 4 use variance requested.

20:04:52 5 We do have an abundance in forward use
20:04:54 6 variance requests to the Niagara County Board. And
20:04:56 7 so I'm not sure that whatever it is that they've
20:04:58 8 reviewed in the past was in the context of the use
20:04:58 9 variance per se. So that's the reason I'm bringing
20:05:01 10 it up as a topic.

20:05:03 11 **BOARD MEMBER 1:** Has there been some review
20:05:05 12 by the County Planning Board.

20:05:06 13 **BOARD CHAIR:** There's an assertion in there.
20:05:06 14 I didn't look to see if there was an attachment
20:05:13 15 that talks about anything, but that they have
20:05:15 16 reviewed something.

20:05:17 17 **BOARD MEMBER 2:** We did not provide any
20:05:17 18 attachments. All previous referrals relative to
20:05:17 19 Access 2016 have been returned unreviewed. And the
20:05:19 20 County's position is, we have no jurisdiction.

20:05:23 21 **BOARD MEMBER 1:** Okay.

20:05:23 22 **MR. WALTERS:** So --

20:05:24 23 **BOARD CHAIR:** But more than likely -- again,

20:05:26 1 this is a sheer guess, more than likely they have
20:05:30 2 to do with the activity that the planning board was
20:05:34 3 taking at the time. They probably referred some
20:05:35 4 things as -- (inaudible), I'm presuming.

20:05:37 5 **MR. WALTERS:** And we would have no
20:05:39 6 objection, if you feel it's useful, to send the
20:05:44 7 referral up and get a letter back from Amy saying
20:05:45 8 it's not necessary or maybe they hear it.

20:05:48 9 I'd be surprised, but whatever you think is
20:05:50 10 best on that, we --

20:05:51 11 **BOARD CHAIR:** Yeah. We'll have to look. We
20:05:54 12 may have a requirement.

20:05:54 13 **MR. WALTERS:** Sure.

20:05:55 14 **BOARD CHAIR:** We may have no choice on that
20:05:56 15 issue of use variance.

20:05:56 16 **MR. WALTERS:** Okay. Our main goal is to
20:05:59 17 make sure you have all the information you need.

20:06:01 18 **BOARD CHAIR:** So we're going to probably
20:06:03 19 have a lot of public input. I was at the public --
20:06:07 20 at the planning board meeting when they had a
20:06:09 21 significant amount of input.

20:06:11 22 They basically instituted a sign up sheet
20:06:14 23 for who -- who wants to end up speaking, which I

20:06:23 1 recommend that we do.

20:06:23 2 They basically alluded to talking to the
20:06:24 3 sign up sheet. It -- actually, I was surprised
20:06:27 4 there were as few people who actually came and
20:06:30 5 talked or spoke, as it did.

20:06:31 6 So it was a manageable amount of time,
20:06:34 7 during that period. I think they limited the --
20:06:37 8 the comment period of each person to about three
20:06:40 9 minutes, which is nominal.

20:06:43 10 Some people had a tough time staying three
20:06:47 11 minutes, but they limited it to three minutes. I'm
20:06:51 12 proposing that we start this with all of those same
20:06:53 13 rules, sign-up sheet.

20:06:55 14 We have to decide if we're doing that in
20:06:58 15 advance or just on the day of the hearing. Right
20:07:00 16 now, in my mind on the day of the hearing is fine,
20:07:03 17 too.

20:07:03 18 We will just go down the sheet. We will
20:07:06 19 attempt to set a time limit of three, is a nominal
20:07:06 20 time limit.

20:07:11 21 And then probably, depending on how many
20:07:12 22 people will have some time left over and if
20:07:16 23 somebody had a need to continue a little bit

20:07:18 1 further, I think we should grant all opportunity
20:07:22 2 for people to make input.

20:07:24 3 As long as it's manageable and as long as
20:07:26 4 we're not at 11 o'clock or midnight, because we're
20:07:31 5 going to lose patience at that point. Those are
20:07:34 6 some of the topics that I had.

20:07:36 7 The other big topic is the one that you
20:07:38 8 started talking about is there is a request in here
20:07:40 9 for recusal of two of the Board members.

20:07:43 10 So first of all, it strikes me that we need
20:07:46 11 to address that first on the day of the hearing, as
20:07:49 12 opposed to last.

20:07:50 13 Right now, it's one of the last topics of
20:07:52 14 the meeting submitted to us. Clearly, it has to be
20:07:57 15 handled first, I think, because it doesn't make
20:07:59 16 sense to proceed with the other parts of it, if a
20:08:01 17 recusal occurs.

20:08:04 18 So one of the questions I have is, do you
20:08:06 19 have input as to -- is recusal as self-determined
20:08:12 20 decision on the part of the Board member or is it
20:08:15 21 something --

20:08:15 22 **BOARD MEMBER 1:** In this case, it is.

20:08:17 23 **BOARD CHAIR:** So each board member who has

20:08:19 1 been requested to recuse himself would be make the
20:08:22 2 determination himself --

20:08:22 3 **BOARD MEMBER 1:** Yes.

20:08:22 4 **BOARD CHAIR:** -- as to whether he believes
20:08:25 5 he can fairly.

20:08:25 6 **BOARD MEMBER 1:** And that board member can,
20:08:27 7 of course, discuss it with the other board members
20:08:29 8 here.

20:08:29 9 The other board members may have questions
20:08:30 10 for that board member about what was said, whether
20:08:33 11 that board member is going to remain objective
20:08:36 12 through the process.

20:08:37 13 Listen to the presentations. Listen to the
20:08:39 14 comments. Evaluate the request for a variance and
20:08:43 15 the request for an interpretation pursuant to the
20:08:48 16 requirements of criteria, established in the Town
20:08:48 17 law.

20:08:53 18 In other words, if the Board member is not
20:08:55 19 going to be fair or is going to be bias or has his
20:08:59 20 mind made up before he starts which way he's going
20:09:02 21 to go, without listening to any of the comments or
20:09:05 22 reviewing appropriate documents, then that board
20:09:10 23 member should recuse himself. He should

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20:09:14 1 acknowledge that bias and recuse himself.

20:09:16 2 However, if the Board member is going to be
20:09:18 3 objective and base his decision on that which is
20:09:20 4 present, the comments he hears and the criteria set
20:09:23 5 forth in the Town law, without letting any personal
20:09:29 6 feelings influence the decision otherwise, then the
20:09:33 7 Board member wouldn't have to recuse himself.

20:09:35 8 **BOARD CHAIR:** Okay. Is that clear with
20:09:40 9 everybody?

20:09:40 10 All right. So we're going to approach that
20:09:43 11 at the actual hearing. We'll approach that first
20:09:46 12 to get that out of the way, I think.

20:09:48 13 **BOARD MEMBER 1:** Well, unless somebody right
20:09:50 14 now says, they want to recuse himself, you might as
20:09:56 15 well do it now so that you can get somebody in for
20:09:57 16 the next meeting.

20:09:57 17 I mean, if any of you five, even though the
20:09:59 18 comments are directed to you and Dennis, if any of
20:10:03 19 you five feel you will not be objective for some
20:10:07 20 reason, then you should let the other board members
20:10:09 21 know and perhaps recuse yourself.

20:10:11 22 **BOARD CHAIR:** Well, does anybody want to
20:10:13 23 make a point about that at this time or no?

20:10:16 1 **BOARD MEMBER 2:** No.

20:10:16 2 **BOARD MEMBER 1:** Well, the comments seem to
20:10:18 3 be directed at you and Dennis.

20:10:20 4 **BOARD CHAIR:** Well, they are.

20:10:21 5 **BOARD MEMBER 1:** So --

20:10:22 6 **BOARD CHAIR:** You suddenly broadened it,
20:10:24 7 though.

20:10:24 8 **BOARD MEMBER 1:** No. Understand, because it
20:10:24 9 should be. If somebody had some animosities
20:10:24 10 because they didn't say anything one way or the
20:10:27 11 other, then they should let -- in all fairness,
20:10:31 12 they should let the other board members know.

20:10:33 13 But, you know, if you feel as though you
20:10:35 14 have to respond, respond. If you don't feel you
20:10:37 15 have to respond, there is no obligation to respond.

20:10:38 16 **MR. WALTERS:** I will say it's nothing
20:10:40 17 personal. We had folks who had made comments in
20:10:43 18 clear opposition to the project and we felt we
20:10:46 19 should bring that your attention.

20:10:48 20 Obviously, that's your decision.

20:10:48 21 **BOARD MEMBER 3:** Did they make comments or
20:10:50 22 just state a fact?

20:10:51 23 **MR. WALTERS:** Well, that's a good question.

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20:10:52 1 I think each of those person -- folks that made
20:10:54 2 comments need to reflect upon that.

20:10:59 3 **BOARD MEMBER 3:** I mean, a comment and a
20:11:01 4 fact, to me, is two different things.

20:11:04 5 **MR. WALTERS:** Well, I think one was clearly
20:11:06 6 strong opinion, right?

20:11:07 7 And we did put in the quotes. Again, I'm
20:11:11 8 not casting dispersions on everyone. I appear
20:11:16 9 before ZBAs and planning boards every day.

20:11:19 10 I know what a tough job it is. It is
20:11:19 11 thankless. You come out here, people mostly yell
20:11:19 12 at you.

20:11:22 13 You do a great and tremendous job. I'm
20:11:25 14 simply pointing out that comments were made and
20:11:28 15 that that is a precursor to having a conflict of
20:11:28 16 interest.

20:11:32 17 What you do with it is up to you.

20:11:36 18 **BOARD CHAIR:** Okay.

20:11:37 19 **BOARD MEMBER 1:** If there is nothing you
20:11:37 20 guys want to discuss here, you can run for the
20:11:38 21 next --

20:11:38 22 **BOARD CHAIR:** I don't think Dennis and I
20:11:40 23 want to discuss it at this point. We will reflect

20:11:42 1 over the next time period and we will proceed one
20:11:46 2 way or the other at the next meeting.

20:11:48 3 **MR. WALTERS:** That makes sense.

20:11:50 4 **BOARD CHAIR:** That was all of my notes.

20:11:51 5 Does anybody else have any logistical topics or
20:11:55 6 what we want to do or how we want to conduct the
20:11:58 7 next meeting or anything we want to think about in
20:12:00 8 advance?

20:12:00 9 **BOARD MEMBER 1:** I think going over the time
20:12:00 10 limits is a guide, the three minutes for comments.

20:12:00 11 **BOARD CHAIR:** Right.

20:12:04 12 **BOARD MEMBER 1:** I think you also have to
20:12:06 13 avoid people going back and forth, because somebody
20:12:06 14 is going to make a comment and somebody who just
20:12:09 15 spoke for three minutes wants to stand up there and
20:12:11 16 reply to that, then you have people going back and
20:12:14 17 forth.

20:12:14 18 **BOARD CHAIR:** Yeah.

20:12:15 19 **BOARD MEMBER 1:** So I think you have to --
20:12:16 20 in anticipation of that, you have to keep order of
20:12:18 21 the proceeding.

20:12:20 22 **BOARD MEMBER 2:** You're not going to limit
20:12:23 23 it to how many people speak?

20:12:24 1 **BOARD MEMBER 1:** I think that's unfair to
20:12:27 2 limit the time that people speak.

20:12:27 3 **BOARD CHAIR:** Honestly, I don't think so.
20:12:28 4 You know, I think it's a public hearing and we have
20:12:29 5 an obligation to hear anybody that wants to talk.
20:12:33 6 The thing that has to give at that point is
20:12:35 7 if it's too long, then we have to continue the
20:12:38 8 public hearing at that another time.

20:12:40 9 **BOARD MEMBER 2:** Are we going to limit it to
20:12:43 10 a certain time or do we go until somebody makes a
20:12:46 11 motion to table it?

20:12:48 12 **BOARD MEMBER 1:** I think you could play that
20:12:50 13 one by ear and see how it's going.

20:12:51 14 **BOARD CHAIR:** Yeah. I wasn't going to say
20:12:54 15 something in terms of time at this point.

20:12:56 16 **BOARD MEMBER 2:** Okay.

20:12:56 17 **BOARD CHAIR:** I've been -- years ago, I was
20:12:58 18 at a planning board meeting where it ran to
20:13:01 19 11 o'clock at night.

20:13:02 20 I was really impressed that they held out
20:13:06 21 that long and managed to be -- I would have called
20:13:08 22 the meeting, you know, but I think we will play it
20:13:12 23 by ear at the time if that happens.

20:13:14 1 That's a possibility. If a lot of people
20:13:17 2 speak, we will have to continue.

20:13:17 3 **BOARD MEMBER 2:** If they allege bias, if
20:13:20 4 everybody is a part of the deliberation, does that
20:13:23 5 affect the decision that's made in the end?

20:13:25 6 Does it ruin a decision either way, if one
20:13:29 7 in -- if they go to court and say that somebody on
20:13:33 8 the Board is biased?

20:13:34 9 **BOARD CHAIR:** They being, anybody, right?

20:13:36 10 **BOARD MEMBER 2:** Anybody.

20:13:36 11 **BOARD MEMBER 1:** And the Court finds that --

20:13:38 12 **BOARD MEMBER 2:** Yeah.

20:13:38 13 **BOARD MEMBER 1:** -- to be so? If the Court
20:13:40 14 finds --

20:13:41 15 **BOARD MEMBER 2:** Because the decision --

20:13:42 16 **BOARD MEMBER 1:** I'm sure -- I'm sure that
20:13:44 17 the Court would vacate the decision of the Board
20:13:47 18 and send it back for reconsideration and probably
20:13:51 19 with another -- with that board member now
20:13:55 20 abstaining from any deliberations or vote on it.

20:13:59 21 **BOARD MEMBER 2:** Okay.

20:14:06 22 **BOARD CHAIR:** I think I -- the next one I
20:14:08 23 probably will review for the audio, because we will

20:14:11 1 have a big audience, what's really being asked for.

20:14:15 2 **BOARD MEMBER 1:** Yeah. I think that's fair.

20:14:15 3 **BOARD CHAIR:** This is a more complicated

20:14:17 4 case than most of the other ones we reflect on.

20:14:20 5 And most people don't really understand -- quite

20:14:24 6 honestly, very few people come to the zone --

20:14:25 7 Zoning Board of Appeals -- knows what the Zoning

20:14:26 8 Board of Appeals is supposed to do and they expect

20:14:29 9 more of us than what we do.

20:14:31 10 **BOARD MEMBER 1:** You can make a comment, of

20:14:33 11 course, a prepared comment to the people in the

20:14:36 12 attendance as to what the purpose of the meeting is

20:14:39 13 and how the procedures are going to be conducted.

20:14:43 14 **BOARD CHAIR:** Sure. I mean, last month we

20:14:46 15 had someone complain about a light shining in his

20:14:49 16 house from his neighbor and that's nothing we can

20:14:51 17 do anything about.

20:14:53 18 We can at least put everybody into

20:14:56 19 perspective on what the Board can do and can't do

20:14:58 20 in this case, so --

20:14:58 21 **MR. WALTERS:** And we'd be happy, obviously,

20:14:59 22 to do a presentation. I'll bring all the teams and

20:15:02 23 if anybody has any questions or members of the

20:15:02 1 public would be able to answer those.

20:15:03 2 **BOARD MEMBER 1:** You want to allow a --
20:15:05 3 well, since it's a public hearing, you are going to
20:15:08 4 be making a presentation, the applicant is.

20:15:12 5 So, you know, just something brief, without
20:15:14 6 getting into the facts --

20:15:15 7 **BOARD CHAIR:** Right.

20:15:16 8 **BOARD MEMBER 1:** -- or substantive portion
20:15:18 9 of the application, and you could leave that up to
20:15:21 10 the presentation of the applicant.

20:15:25 11 **BOARD CHAIR:** Okay.

20:15:26 12 **MR. WALTERS:** Okay.

20:15:26 13 **BOARD CHAIR:** Any other questions?
20:15:28 14 Comments? Thoughts?

20:15:30 15 **BOARD MEMBER 2:** No.

20:15:31 16 **BOARD CHAIR:** All right. I think this
20:15:33 17 concludes that part of our agenda.

20:15:36 18 **MR. WALTERS:** Great.

20:15:38 19 **BOARD CHAIR:** Nothing else to add,
20:15:40 20 Mr. Walters?

20:15:40 21 **MR. WALTERS:** Just scheduling the hearing or
20:15:42 22 do that later?

20:15:43 23 **BOARD MEMBER 1:** An application has been

20:15:45 1 submitted at this point.

20:15:46 2 **BOARD CHAIR:** They have submitted a request
20:15:48 3 and the building inspector is taking the position
20:15:49 4 that he has to fill out an application in order to
20:15:52 5 schedule it. So right now, I'm going with the flow
20:15:56 6 on that.

20:15:57 7 **BOARD MEMBER 1:** It doesn't sound like it
20:15:59 8 will take a long time to do that.

20:16:00 9 **BOARD CHAIR:** I have no reason to doubt why
20:16:03 10 it shouldn't be --

20:16:04 11 **MR. WALTERS:** You wouldn't think so.

20:16:06 12 **BOARD CHAIR:** -- a meeting in May.

20:16:09 13 **BOARD MEMBER 3:** But the ball is in Tim's
20:16:11 14 court right now?

20:16:12 15 **BOARD CHAIR:** Right.

20:16:13 16 **MR. WALTERS:** Okay.

20:16:14 17 **BOARD CHAIR:** I am personally going to push
20:16:15 18 the -- that's the agenda that we're planning on and
20:16:16 19 I would like it to proceed because we have planning
20:16:16 20 to do and we need to have it settled that way,
20:16:18 21 so --

20:16:18 22 **BOARD MEMBER 1:** It's May 22, it looks like?

20:16:20 23 **BOARD CHAIR:** The next meeting is May 23rd.

20:16:23 1 **BOARD MEMBER 1:** 23rd. Okay. Yeah.

20:16:24 2 **BOARD CHAIR:** So I have all expectation that
20:16:26 3 it will occur then --

20:16:27 4 **BOARD MEMBER 1:** Okay.

20:16:27 5 **BOARD CHAIR:** -- without a promise that it
20:16:29 6 will occur.

20:16:30 7 **MR. WALTERS:** Fair enough.

20:16:31 8 **BOARD CHAIR:** That's as good as I can do.

20:16:31 9 **BOARD MEMBER 1:** Is there an extra
20:16:33 10 submission? Is somebody making an extra copy for
20:16:36 11 me?

20:16:36 12 **MR. WALTERS:** If you give me a card, I will
20:16:39 13 have them dropped off to you.

20:16:39 14 **BOARD MEMBER 1:** They said they had another
20:16:40 15 one for me.

20:16:40 16 **BOARD CHAIR:** They have extras.

20:16:41 17 **MR. WALTERS:** We did send some extras.

20:16:41 18 **BOARD MEMBER 1:** Yeah. I will leave you my
20:16:44 19 card.

20:16:44 20 **MR. WALTERS:** Please.

20:16:44 21 **BOARD CHAIR:** I have five or six total. I
20:16:47 22 have one copy. One copy I've asked to be kept with
20:16:50 23 the building department or the Town Clerk, so the

20:16:53 1 public can access it, if they want.

20:16:55 2 And then really the other copy -- one should
20:16:58 3 probably stay with the building department. And
20:17:01 4 then I would say we have three more that are fair
20:17:04 5 game, if somebody wants that to review, it's great
20:17:07 6 reading in case your tired at night.

20:17:10 7 It's -- there's a lot of data in there.
20:17:12 8 There's an awful lot of attachments that backup
20:17:14 9 some of the things that we talked about and give
20:17:17 10 you some background that you can look at.

20:17:19 11 And it's well worth your time to look at
20:17:22 12 that in advance, so that you don't just have it at
20:17:25 13 the hearing.

20:17:25 14 **MR. WALTERS:** We're happy to get extra
20:17:29 15 copies, if that's helpful. Whatever you need.

20:17:32 16 **BOARD CHAIR:** I'm not taking comments, but
20:17:35 17 I'll let you say something, but it's got to be on
20:17:37 18 the topic of just planning for the meeting.

20:17:42 19 **AUDIENCE MEMBER:** Okay. Could a digital
20:17:44 20 copy be made available?

20:17:46 21 **BOARD CHAIR:** As I said, there's copies that
20:17:47 22 will be available in the Town Hall here, so I
20:17:51 23 assume you can make a request for the application

20:17:54 1 to be copied from that.

20:17:55 2 I didn't take mine apart, because I didn't
20:17:58 3 want to break the binding, but there is 29 pages in
20:18:02 4 the application and you can get most of what you
20:18:05 5 want to know out of the 29 pages, I'm sure.

20:18:08 6 Okay. We are staying on the topic that I
20:18:14 7 suggested, right?

20:18:15 8 **AUDIENCE MEMBER 2:** Yes. I'm sorry that I
20:18:18 9 missed pieces of it. I just wanted to say that I
20:18:20 10 have already attempted to have the clerk copy for
20:18:20 11 me.

20:18:20 12 She's having a terrible time. It doesn't --
20:18:24 13 the book does not open and she too doesn't want to
20:18:24 14 break her binding, so I don't know if there is --

20:18:28 15 **BOARD CHAIR:** Frankly, I suggest --

20:18:31 16 **AUDIENCE MEMBER 2:** There is another extra
20:18:34 17 copy that we can break the binding in?

20:18:34 18 **MR. WALTERS:** Sure. For the planning board,
20:18:36 19 whenever they wanted something we actually provided
20:18:40 20 electronic copies for --

20:18:40 21 **BOARD MEMBER 1:** That would be great.

20:18:41 22 **BOARD CHAIR:** I would like an electronic
20:18:43 23 copy.

20:18:43 1 **BOARD MEMBER 1:** Then you could put it on
20:18:45 2 the website and then people could just access it on
20:18:49 3 the website.

20:18:49 4 **MR. WALTERS:** Yeah. We will -- it's
20:18:50 5 actually a link and you downloaded the PDF, because
20:18:54 6 it's a large document.

20:18:56 7 **BOARD CHAIR:** How soon could you get me an
20:19:00 8 electronic copy?

20:19:02 9 **BOARD MEMBER 1:** It's not on the agenda yet.

20:19:04 10 **BOARD CHAIR:** Okay.

20:19:05 11 **BOARD MEMBER 1:** It's not on the agenda yet.

20:19:05 12 **MR. WALTERS:** Give me your e-mail address.

20:19:07 13 **BOARD CHAIR:** I'm -- I am considering his
20:19:10 14 application, so I think he can send me a copy and I
20:19:21 15 will make sure that the Town clerk gets this.

20:19:22 16 **MR. WALTERS:** Great. Appreciate that.

20:19:24 17 **BOARD MEMBER 1:** Mine, too.

20:19:26 18 **MR. WALTERS:** Thank you.

20:19:33 19 **BOARD CHAIR:** I too scanned it, but the --
20:19:36 20 it left the edges kind of light. It's very
20:19:38 21 difficult to open it up.

20:19:38 22 **MR. WALTERS:** It is a big book and the
20:19:41 23 binder is not particularly conducive to copying,

20:19:46 1 but it holds it together. That's why I didn't
20:19:49 2 break it.

20:19:50 3 **BOARD CHAIR:** Any more questions like that?

20:19:52 4 Okay.

20:19:53 5 Thank you, Mr. Walters.

20:19:54 6 **MR. WALTERS:** Thank you. Appreciate
20:19:56 7 everybody's time. We'll see you next month.

20:20:03 8 (Proceeding concluded at 8:20 p.m.)

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1	<p>access [2] - 21:1, 23:2 Access [1] - 6:19 accomplish [1] - 3:7 acknowledge [1] - 11:1 activity [1] - 7:2 actual [1] - 11:11 Adam [1] - 2:11 ADAMS [1] - 1:17 add [1] - 18:19 address [4] - 3:4, 3:7, 9:11, 23:12 advance [3] - 8:15, 14:8, 21:12 affect [1] - 16:5 agenda [5] - 2:1, 18:17, 19:18, 23:9, 23:11 ago [1] - 15:17 allege [1] - 16:3 allow [1] - 18:2 alluded [1] - 8:2 amount [2] - 7:21, 8:6 Amy [1] - 7:7 animosities [1] - 12:9 answer [3] - 4:6, 5:5, 18:1 anticipation [1] - 14:20 apart [1] - 22:2 Appeals [2] - 17:7, 17:8 appear [1] - 13:8 Appearing [1] - 1:20 applicant [2] - 18:4, 18:10 application [7] - 5:9, 18:9, 18:23, 19:4, 21:23, 22:4, 23:14 appreciate [2] - 23:16, 24:6 approach [2] - 11:10, 11:11 appropriate [1] - 10:22 April [1] - 1:15 assertion [2] - 5:9, 6:13 Assessment [2] - 2:22, 2:23 assume [1] - 21:23 assuming [1] - 4:7 attachment [1] - 6:14 attachments [2] - 6:18, 21:8 attempt [2] - 4:2, 8:19 attempted [1] - 22:10 attend [1] - 3:3 attendance [1] - 17:12</p>	<p>attended [1] - 3:20 attention [1] - 12:19 AUDIENCE [3] - 21:19, 22:8, 22:16 audience [1] - 17:1 audio [1] - 16:23 avail [1] - 3:15 available [3] - 3:11, 21:20, 21:22 avoid [1] - 14:13 awalters@phillipslytle.com [1] - 1:20 awful [1] - 21:8</p>	<p>18:8, 18:11, 18:13, 18:15, 18:16, 18:19, 18:23, 19:2, 19:7, 19:9, 19:12, 19:13, 19:15, 19:17, 19:22, 19:23, 20:1, 20:2, 20:4, 20:5, 20:8, 20:9, 20:14, 20:16, 20:18, 20:21, 21:16, 21:21, 22:15, 22:21, 22:22, 23:1, 23:7, 23:9, 23:10, 23:11, 23:13, 23:19, 23:19, 24:3 board [16] - 3:20, 3:22, 7:2, 7:20, 9:23, 10:6, 10:7, 10:9, 10:10, 10:11, 10:22, 11:20, 12:12, 15:18, 16:19, 22:18 Board [16] - 2:5, 2:22, 2:23, 5:12, 6:6, 6:12, 9:9, 9:20, 10:18, 11:2, 11:7, 16:8, 16:17, 17:7, 17:8, 17:19 boards [1] - 13:9 BONNIE [1] - 1:16 book [2] - 22:13, 23:22 Boulevard [1] - 1:14 break [4] - 22:3, 22:14, 22:17, 24:2 brief [1] - 18:5 bring [2] - 12:19, 17:22 bringing [1] - 6:9 broadened [1] - 12:6 Buffalo [1] - 1:19 building [5] - 4:14, 4:20, 19:3, 20:23, 21:3</p>	<p>13:22, 14:4, 14:11, 14:18, 15:3, 15:14, 15:17, 16:9, 16:22, 17:3, 17:14, 18:7, 18:11, 18:13, 18:16, 18:19, 19:2, 19:9, 19:12, 19:15, 19:17, 19:23, 20:2, 20:5, 20:8, 20:16, 20:21, 21:16, 21:21, 22:15, 22:22, 23:7, 23:10, 23:13, 23:19, 24:3 choice [1] - 7:14 clear [2] - 11:8, 12:18 clearly [2] - 9:14, 13:5 Clerk [1] - 20:23 clerk [2] - 22:10, 23:15 closer [1] - 2:8 commencing [1] - 1:15 comment [5] - 8:8, 13:3, 14:14, 17:10, 17:11 comments [14] - 3:19, 3:22, 10:14, 10:21, 11:4, 11:18, 12:2, 12:17, 12:21, 13:2, 13:14, 14:10, 18:14, 21:16 complain [1] - 17:15 complicated [1] - 17:3 concluded [1] - 24:8 concludes [1] - 18:17 conductive [1] - 23:23 conduct [1] - 14:6 conducted [1] - 17:13 conflict [3] - 2:21, 5:10, 13:15 consider [1] - 2:6 considering [1] - 23:13 context [1] - 6:8 continue [3] - 8:23, 15:7, 16:2 convenient [1] - 3:18 copied [1] - 22:1 copies [3] - 21:15, 21:21, 22:20 copy [10] - 20:10, 20:22, 21:2, 21:20, 22:10, 22:17, 22:23, 23:8, 23:14 copying [1] - 23:23 correct [3] - 2:12, 2:13, 4:17 counsel [1] - 4:7 County [2] - 6:6, 6:12 County's [1] - 6:20 course [2] - 10:7, 17:11</p>
2	<p>2 [13] - 6:17, 12:1, 14:22, 15:9, 15:16, 16:3, 16:10, 16:12, 16:15, 16:21, 18:15, 22:8, 22:16 20 [1] - 4:2 2016 [1] - 6:19 2017 [1] - 1:15 22 [1] - 19:22 23rd [2] - 19:23, 20:1 25 [1] - 1:15 29 [2] - 22:3, 22:5</p>	B		
3	<p>3 [3] - 12:21, 13:3, 19:13</p>	<p>background [1] - 21:10 backup [1] - 21:8 ball [1] - 19:13 base [1] - 11:3 believes [1] - 10:4 best [1] - 7:10 bias [3] - 10:19, 11:1, 16:3 biased [1] - 16:8 bid [1] - 2:20 big [3] - 9:7, 17:1, 23:22 binder [1] - 23:23 binding [3] - 22:3, 22:14, 22:17 bit [1] - 8:23 BOARD [119] - 2:1, 2:11, 2:14, 3:14, 3:17, 3:18, 4:8, 4:10, 4:11, 4:17, 4:18, 4:23, 5:1, 5:4, 5:10, 5:13, 5:17, 5:18, 5:21, 5:22, 5:23, 6:1, 6:11, 6:13, 6:17, 6:21, 6:23, 7:11, 7:14, 7:18, 9:22, 9:23, 10:3, 10:4, 10:6, 11:8, 11:13, 11:22, 12:1, 12:2, 12:4, 12:5, 12:6, 12:8, 12:21, 13:3, 13:18, 13:19, 13:22, 14:4, 14:9, 14:11, 14:12, 14:18, 14:19, 14:22, 15:1, 15:3, 15:9, 15:12, 15:14, 15:16, 15:17, 16:3, 16:9, 16:10, 16:11, 16:12, 16:13, 16:15, 16:16, 16:21, 16:22, 17:2, 17:3, 17:10, 17:14, 18:2, 18:7,</p>	<p>boards [1] - 13:9 BONNIE [1] - 1:16 book [2] - 22:13, 23:22 Boulevard [1] - 1:14 break [4] - 22:3, 22:14, 22:17, 24:2 brief [1] - 18:5 bring [2] - 12:19, 17:22 bringing [1] - 6:9 broadened [1] - 12:6 Buffalo [1] - 1:19 building [5] - 4:14, 4:20, 19:3, 20:23, 21:3</p>	
6	<p>6570 [1] - 1:14</p>			
7	<p>716 [1] - 1:19 7:00 [1] - 1:16</p>			
8	<p>847-8400 [1] - 1:19 8:20 [1] - 24:8</p>			
A	<p>able [2] - 5:5, 18:1 absolutely [1] - 3:13 abstaining [1] - 16:20 abundance [1] - 6:5</p>		C	
			<p>Campbell [1] - 1:14 Canalside [1] - 1:18 card [2] - 20:12, 20:19 case [4] - 9:22, 17:4, 17:20, 21:6 casting [1] - 13:8 certain [1] - 15:10 CHAIR [61] - 2:1, 2:11, 2:14, 3:14, 3:18, 4:10, 4:17, 4:23, 5:4, 5:13, 5:18, 5:22, 6:1, 6:13, 6:23, 7:11, 7:14, 7:18, 9:23, 10:4, 11:8, 11:22, 12:4, 12:6, 13:18,</p>	

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1120 Liberty Building

Buffalo, New York 14202 - (716) 853-5600

<p>court [2] - 16:7, 19:14 Court [3] - 16:11, 16:13, 16:17 criteria [2] - 10:16, 11:4</p>	<p>expectation [1] - 20:2 explain [1] - 4:20 extra [4] - 20:9, 20:10, 21:14, 22:16 extras [2] - 20:16, 20:17</p>	<p>helped [1] - 3:21 helpful [1] - 21:15 himself [6] - 10:1, 10:2, 10:23, 11:1, 11:7, 11:14 holds [1] - 24:1 honestly [3] - 3:23, 15:3, 17:6 house [1] - 17:16</p>	<p>limited [2] - 8:7, 8:11 limits [1] - 14:10 link [1] - 23:5 listen [2] - 10:13 listening [1] - 10:21 LLP [1] - 1:17 Lockport [1] - 1:15 logistical [1] - 14:5 look [5] - 5:20, 6:14, 7:11, 21:10, 21:11 looks [1] - 19:22 lose [1] - 9:5 Lytle [2] - 1:17, 2:12</p>	<p>midnight [1] - 9:4 might [1] - 11:14 mind [2] - 8:16, 10:20 mine [2] - 22:2, 23:17 minutes [6] - 3:6, 8:9, 8:11, 14:10, 14:15 missed [1] - 22:9 month [2] - 17:14, 24:7 most [3] - 17:4, 17:5, 22:4 mostly [1] - 13:11 motion [1] - 15:11 MR [29] - 2:10, 2:13, 3:13, 6:22, 7:5, 7:13, 7:16, 12:16, 12:23, 13:5, 14:3, 17:21, 18:12, 18:18, 18:21, 19:11, 19:16, 20:7, 20:12, 20:17, 20:20, 21:14, 22:18, 23:4, 23:12, 23:16, 23:18, 23:22, 24:6</p>
D	F	I	M	N
<p>data [1] - 21:7 decide [1] - 8:14 decision [9] - 6:1, 9:20, 11:3, 11:6, 12:20, 16:5, 16:6, 16:15, 16:17 deliberation [1] - 16:4 deliberations [1] - 16:20 Dennis [3] - 11:18, 12:3, 13:22 department [3] - 4:14, 20:23, 21:3 details [1] - 2:6 determination [2] - 4:9, 10:2 determined [1] - 9:19 different [1] - 13:4 difficult [1] - 23:21 digital [1] - 21:19 directed [2] - 11:18, 12:3 directly [1] - 6:3 discuss [5] - 2:5, 2:7, 10:7, 13:20, 13:23 dispersions [1] - 13:8 document [1] - 23:6 documents [1] - 10:22 done [2] - 3:21, 5:8 doubt [1] - 19:9 down [3] - 3:19, 4:4, 8:18 downloaded [1] - 23:5 dropped [1] - 20:13 during [1] - 8:7</p>	<p>fact [2] - 12:22, 13:4 facts [1] - 18:6 fair [4] - 10:19, 17:2, 20:7, 21:4 fairly [1] - 10:5 fairness [1] - 12:11 feelings [1] - 11:6 felt [1] - 12:18 few [2] - 8:4, 17:6 fill [1] - 19:4 fine [1] - 8:16 first [4] - 9:10, 9:11, 9:15, 11:11 five [3] - 11:17, 11:19, 20:21 flow [1] - 19:5 folks [2] - 12:17, 13:1 forth [3] - 11:5, 14:13, 14:17 forward [1] - 6:5 frankly [1] - 22:15 Fuel [1] - 1:20</p>	<p>impressed [1] - 15:20 inaudible [2] - 3:1, 7:4 included [1] - 2:2 influence [1] - 11:6 information [1] - 7:17 input [5] - 2:15, 7:19, 7:21, 9:2, 9:19 inquiries [1] - 2:2 inspector [1] - 19:3 intituted [1] - 7:22 intent [1] - 2:4 intention [1] - 2:15 interest [2] - 5:11, 13:16 Interpretation [5] - 4:12, 4:13, 4:21, 10:15 issue [1] - 7:15</p>	<p>mail [1] - 23:12 Main [1] - 1:18 main [1] - 7:16 manageable [2] - 8:6, 9:3 managed [1] - 15:21 mean [3] - 11:17, 13:3, 17:14 meeting [13] - 3:9, 5:22, 7:20, 9:14, 11:16, 14:2, 14:7, 15:18, 15:22, 17:12, 19:12, 19:23, 21:18 meetings [1] - 3:20 member [10] - 9:20, 9:23, 10:6, 10:10, 10:11, 10:18, 10:23, 11:2, 11:7, 16:19 MEMBER [6] - 3:17, 4:8, 4:11, 4:18, 5:1, 5:10, 5:17, 5:21, 5:23, 6:11, 6:17, 6:21, 9:22, 10:3, 10:6, 11:13, 12:1, 12:2, 12:5, 12:8, 12:21, 13:3, 13:19, 14:9, 14:12, 14:19, 14:22, 15:1, 15:9, 15:12, 15:16, 16:3, 16:10, 16:11, 16:12, 16:13, 16:15, 16:16, 16:21, 17:2, 17:10, 18:2, 18:8, 18:15, 18:23, 19:7, 19:13, 19:22, 20:1, 20:4, 20:9, 20:14, 20:18, 21:19, 22:8, 22:16, 22:21, 23:1, 23:9, 23:11, 23:17 MEMBERS [1] - 1:21 members [7] - 5:11, 9:9, 10:7, 10:9, 11:20, 12:12, 17:23 mess [1] - 3:23</p>	<p>National [1] - 1:20 necessary [1] - 7:8 need [7] - 2:6, 7:17, 8:23, 9:10, 13:2, 19:20, 21:15 needs [1] - 5:8 neighbor [1] - 17:16 New [1] - 1:19 new [1] - 2:1 next [10] - 2:1, 5:22, 11:16, 13:21, 14:1, 14:2, 14:7, 16:22, 19:23, 24:7 Niagara [1] - 6:6 night [2] - 15:19, 21:6 nominal [2] - 8:9, 8:19 Notary [1] - 1:16 notes [6] - 2:18, 3:6, 3:11, 3:12, 4:4, 14:4 nothing [4] - 12:16, 13:19, 17:16, 18:19 notice [1] - 5:16</p>
E	G	J	K	O
<p>e-mail [1] - 23:12 ear [2] - 15:13, 15:23 edges [1] - 23:20 either [1] - 16:6 electronic [3] - 22:20, 22:22, 23:8 emphasis [1] - 6:2 Empire [3] - 2:2, 2:14, 2:16 end [2] - 7:23, 16:5 established [1] - 10:16 evaluate [1] - 10:14 expect [2] - 5:3, 17:8</p>	<p>game [1] - 21:5 goal [1] - 7:16 grant [1] - 9:1 great [5] - 13:13, 18:18, 21:5, 22:21, 23:16 guess [1] - 7:1 guide [1] - 14:10 guys [1] - 13:20</p>	<p>job [2] - 13:10, 13:13 jumbled [1] - 3:23 jurisdiction [1] - 6:20</p>	<p>keep [2] - 3:22, 14:20 kept [1] - 20:22 kind [1] - 23:20 knows [1] - 17:7</p>	<p>o'clock [2] - 9:4, 15:19 objection [1] - 7:6 objective [3] - 10:11, 11:3, 11:19 obligation [2] - 12:15, 15:5 obviously [2] - 12:20, 17:21 occur [2] - 20:3, 20:6</p>
H	L	L		
<p>Hall [2] - 1:14, 21:22 handle [1] - 4:1 handled [1] - 9:15 happy [2] - 17:21, 21:14 hard [2] - 4:1, 4:2 hear [2] - 7:8, 15:6 HEARING [2] - 1:1, 1:9 hearing [11] - 1:13, 2:7, 8:15, 8:16, 9:11, 11:11, 15:4, 15:8, 18:3, 18:21, 21:13 hears [1] - 11:4 held [2] - 1:13, 15:20</p>	<p>lady [1] - 2:17 large [1] - 23:6 last [3] - 9:12, 9:13, 17:14 law [2] - 10:17, 11:5 least [1] - 17:18 leave [2] - 18:9, 20:18 left [2] - 8:22, 23:20 letter [1] - 7:7 letting [1] - 11:5 light [2] - 17:15, 23:20 likely [2] - 6:23, 7:1 limit [5] - 8:19, 8:20, 14:22, 15:2, 15:9</p>			

JACK W. HUNT & ASSOCIATES, INC.

1120 Liberty Building

Buffalo, New York 14202 - (716) 853-5600

<p>occurs [1] - 9:17 OF [2] - 1:8, 1:21 one [16] - 3:4, 4:1, 5:19, 9:7, 9:13, 9:18, 12:10, 13:5, 14:1, 15:13, 16:6, 16:22, 20:15, 20:22, 21:2 One [1] - 1:18 ones [1] - 17:4 open [2] - 22:13, 23:21 opinion [2] - 3:16, 13:6 opportunity [1] - 9:1 opposed [1] - 9:12 opposition [1] - 12:18 order [2] - 14:20, 19:4 otherwise [2] - 3:23, 11:6 ourselves [1] - 3:15 overwhelm [1] - 3:5</p>	<p>Planning [1] - 6:12 play [2] - 15:12, 15:22 point [7] - 2:16, 9:5, 11:23, 13:23, 15:6, 15:15, 19:1 pointing [1] - 13:14 portion [1] - 18:8 position [2] - 6:20, 19:3 possibility [1] - 16:1 precursor [1] - 13:15 prepared [1] - 17:11 PRESENT [1] - 1:17 present [1] - 11:4 presentation [3] - 17:22, 18:4, 18:10 presentations [1] - 10:13 presuming [1] - 7:4 previous [3] - 6:18 procedures [1] - 17:13 proceed [3] - 9:16, 14:1, 19:19 Proceeding [1] - 24:8 proceeding [1] - 14:21 proceedings [1] - 3:8 process [1] - 10:12 project [1] - 12:18 promise [1] - 20:5 proposing [1] - 8:12 provide [2] - 4:6, 6:17 provided [2] - 3:12, 22:19 PUBLIC [3] - 1:1, 1:9, 1:21 public [8] - 3:3, 7:19, 15:4, 15:8, 18:1, 18:3, 21:1 Public [2] - 1:13, 1:16 purpose [1] - 17:12 pursuant [1] - 10:15 push [1] - 19:17 put [5] - 2:20, 6:3, 13:7, 17:18, 23:1</p>	<p>17:1, 17:5, 21:2 reason [6] - 4:21, 5:14, 6:2, 6:9, 11:20, 19:9 recommend [1] - 8:1 reconsideration [1] - 16:18 recording [1] - 3:8 recusal [3] - 9:9, 9:17, 9:19 recuse [6] - 10:1, 10:23, 11:1, 11:7, 11:14, 11:21 referral [1] - 7:7 referrals [2] - 5:14, 6:18 referred [1] - 7:3 reflect [3] - 13:2, 13:23, 17:4 regard [1] - 3:7 regarding [1] - 2:16 related [1] - 6:3 relative [1] - 6:18 relegated [1] - 3:1 remain [1] - 10:11 reply [1] - 14:16 represent [3] - 4:5, 4:8, 4:19 representative [1] - 4:20 representing [1] - 2:14 request [7] - 4:12, 4:15, 9:8, 10:14, 10:15, 19:2, 21:23 requested [2] - 6:4, 10:1 requests [1] - 6:6 requirement [1] - 7:12 requirements [1] - 10:16 respond [4] - 12:14, 12:15 returned [1] - 6:19 review [6] - 2:22, 2:23, 4:13, 6:11, 16:23, 21:5 reviewed [3] - 5:16, 6:8, 6:16 reviewing [1] - 10:22 room [2] - 2:21, 3:2 run [1] - 16:6 rules [1] - 8:13 run [1] - 13:20</p>	<p>se [1] - 6:9 secretary [1] - 3:5 secure [1] - 2:20 see [3] - 6:14, 15:13, 24:7 seem [1] - 12:2 self [1] - 9:19 self-determined [1] - 9:19 send [4] - 7:6, 16:18, 20:17, 23:14 sense [2] - 9:16, 14:3 set [2] - 8:19, 11:4 settled [1] - 19:20 sheer [1] - 7:1 sheet [4] - 7:22, 8:3, 8:13, 8:18 shining [1] - 17:15 sign [3] - 7:22, 8:3, 8:13 sign-up [1] - 8:13 significant [1] - 7:21 simply [1] - 13:14 six [1] - 20:21 someone [1] - 17:15 soon [1] - 23:7 sorry [1] - 22:8 sound [1] - 19:7 space [1] - 3:2 speaking [1] - 7:23 stand [1] - 14:15 start [1] - 8:12 started [2] - 3:9, 9:8 starts [1] - 10:20 state [1] - 12:22 stay [1] - 21:3 staying [2] - 8:10, 22:6 Street [1] - 1:18 strikes [1] - 9:10 strong [1] - 13:6 submission [1] - 20:10 submitted [3] - 9:14, 19:1, 19:2 substantive [1] - 18:8 suddenly [1] - 12:6 suggest [1] - 22:15 suggested [1] - 22:7 supposed [1] - 17:8 surprised [2] - 7:9, 8:3</p>	<p>terrible [1] - 22:12 thankless [1] - 13:11 THE [1] - 1:21 they've [1] - 6:7 thoughts [1] - 18:14 three [7] - 8:8, 8:10, 8:11, 8:19, 14:10, 14:15, 21:4 Tim's [1] - 19:13 timeliness [1] - 5:8 tired [1] - 21:6 together [1] - 24:1 topic [5] - 2:3, 6:10, 9:7, 21:18, 22:6 topics [4] - 3:4, 9:6, 9:13, 14:5 total [1] - 20:21 tough [2] - 8:10, 13:10 TOWN [1] - 1:8 Town [14] - 1:13, 1:14, 4:5, 4:9, 4:19, 4:20, 5:2, 5:3, 5:15, 10:16, 11:5, 20:23, 21:22, 23:15 track [1] - 3:22 tremendous [1] - 13:13 two [5] - 4:1, 4:18, 5:11, 9:9, 13:4</p>
P				
<p>p.m [2] - 1:16, 24:8 pages [2] - 22:3, 22:5 part [3] - 9:20, 16:4, 18:17 particularly [1] - 23:23 parts [1] - 9:16 past [1] - 6:8 patience [1] - 9:5 PDF [1] - 23:5 PENDLETON [1] - 1:8 Pendleton [1] - 1:14 people [14] - 8:4, 8:10, 8:22, 9:2, 13:11, 14:13, 14:16, 14:23, 15:2, 16:1, 17:5, 17:6, 17:11, 23:2 per [1] - 6:9 perhaps [1] - 11:21 period [3] - 8:7, 8:8, 14:1 person [3] - 3:10, 8:8, 13:1 personal [2] - 11:5, 12:17 personally [1] - 19:17 perspective [1] - 17:19 Phillips [2] - 1:17, 2:12 pieces [1] - 22:9 Pipeline [3] - 2:3, 2:15, 2:16 planning [1] - 3:20, 3:21, 5:15, 7:2, 7:20, 13:9, 15:18, 19:18, 19:19, 21:18, 22:18</p>	<p>questioning [1] - 5:18 questions [6] - 2:19, 9:18, 10:9, 17:23, 18:13, 24:3 quite [2] - 3:23, 17:5 quotes [1] - 13:7</p>	<p>Q</p>	<p>T</p>	<p>U</p>
<p>per [1] - 6:9 perhaps [1] - 11:21 period [3] - 8:7, 8:8, 14:1 person [3] - 3:10, 8:8, 13:1 personal [2] - 11:5, 12:17 personally [1] - 19:17 perspective [1] - 17:19 Phillips [2] - 1:17, 2:12 pieces [1] - 22:9 Pipeline [3] - 2:3, 2:15, 2:16 planning [1] - 3:20, 3:21, 5:15, 7:2, 7:20, 13:9, 15:18, 19:18, 19:19, 21:18, 22:18</p>	<p>R</p>	<p>S</p>	<p>T</p>	<p>V</p>
<p>ran [1] - 15:18 reading [1] - 21:6 really [5] - 2:19, 15:20,</p>	<p>questioning [1] - 5:18 questions [6] - 2:19, 9:18, 10:9, 17:23, 18:13, 24:3 quite [2] - 3:23, 17:5 quotes [1] - 13:7</p>	<p>scanned [1] - 23:19 schedule [1] - 19:5 scheduling [1] - 18:21</p>	<p>table [1] - 15:11 talks [1] - 6:15 teams [1] - 17:22 technical [2] - 2:5, 5:7 terms [2] - 3:6, 15:15</p>	<p>W</p>
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Buffalo, New York 14202 - (716) 853-5600				

<p>19:16, 20:7, 20:12, 20:17, 20:20, 21:14, 22:18, 23:4, 23:12, 23:16, 23:18, 23:22, 24:6 Walters [5] - 2:9, 2:11, 3:10, 18:20, 24:5 wants [4] - 7:23, 14:15, 15:5, 21:5 WEBER [1] - 1:16 website [2] - 23:2, 23:3 words [1] - 10:18 worth [1] - 21:11 written [1] - 3:19</p>
Y
<p>years [1] - 15:17 yell [1] - 13:11 York [1] - 1:19 yourself [1] - 11:21</p>
Z
<p>ZBA [1] - 2:2 ZBAs [1] - 13:9 zone [1] - 17:6 Zoning [2] - 17:7</p>

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Buffalo, New York 14202 - (716) 853-5600

EXHIBIT B

NIAGARA COUNTY CLERK

JOSEPH A. JASTRZEMSKI

Receipt

** Reprint **

Receipt Date: 05/05/2017 11:17:22 AM
RECEIPT # 2017322048

Recording Clerk: TH
Cash Drawer: CASH2
Rec'd Frm: DARCY - CHICAGO
Rec'd In Person

Instr#: 2017-09138
DOC: DEED
DEED STAMP: 4905
OR Party: BELLING DONNA F -I&EXRX
EE Party: EMPIRE PIPELINE INC

Recording Fees	
Cover Page	\$8.00
Recording Fee	\$8.00
Cultural Ed	\$14.25
Records Management - County	\$1.00
Records Management - State	\$4.75
TP584	\$5.00
RP5217 Residential/Agricultural - State	\$116.00
RP5217 - County	\$9.00
Transfer Tax	
Transfer Tax	\$4.00
DOCUMENT TOTAL: ----->	\$170.00

Instr#: 2017-09139
DOC: AFFIDAVIT
OR Party: TONAWANDAS SPORTSMENS CLUB INC
EE Party: TONAWANDAS SPORTSMENS CLUB INC

Recording Fees	
Cover Page	\$8.00
Recording Fee	\$44.00
Cultural Ed	\$14.25
Records Management - County	\$1.00
Records Management - State	\$4.75
DOCUMENT TOTAL: ----->	\$72.00

Instr#: 2017-09140

DOC: DEED
DEED STAMP: 4906
OR Party: TONAWANDAS SPORTSMENS CLUB INC
EE Party: EMPIRE PIPELINE INC

Recording Fees	
Cover Page	\$8.00
Recording Fee	\$14.00
Cultural Ed	\$14.25
Records Management - County	\$1.00
Records Management - State	\$4.75
TP584	\$5.00
RP5217 Residential/Agricultural - State	\$116.00
RP5217 - County	\$9.00

Transfer Tax	
Transfer Tax	\$3700.00
DOCUMENT TOTAL: ----->	\$3872.00

Receipt Summary	
TOTAL RECEIPT: ----->	\$4114.00
TOTAL RECEIVED: ----->	\$4114.00
CASH BACK: ----->	\$0.00

PAYMENTS	
Check # 7664 ->	\$4042.00
JONES HOGAN & BROOKS	
Check # 7678 ->	\$72.00
JONES HOGAN & BROOKS	

WARRANTY DEED WITH LIEN COVENANT

THIS INDENTURE, made as of this 2nd day of May, 2017.

BETWEEN THE TONAWANDAS SPORTSMEN'S CLUB, INC., a New York not-for-profit with an office at 5657 Killian Road, North Tonawanda, New York 14120, Grantor, and **EMPIRE PIPELINE, INC.**, a New York corporation, with an office at 6363 Main Street, Williamsville, New York 14221, Grantee.

WITNESSETH, that the said Grantor, in consideration of One and More Dollars (\$1.00 & More) lawful money of the United States, paid by the Grantee, does hereby grant and release unto the Grantee, their heirs and assigns forever,

ALL THAT TRACT OR PARCEL OF LAND AS SHOWN ON THE ATTACHED EXHIBIT A.

TOGETHER with the appurtenances and all the estate and rights of the Grantor in and to the said premises.

TO HAVE AND TO HOLD, the above granted premises unto the said Grantee.

AND the said Grantor does covenant with said Grantee as follows:

FIRST. - That the Grantee shall quietly enjoy the said premises.

SECOND. - That the Grantor will forever **WARRANT** the title to said premises.

THIRD. - Subject to the trust of fund provisions of section thirteen of the lien law.

IN WITNESS WHEREOF, The said Grantor has hereunto set its hand and seal the day and year first above written.

ORIGINAL FILED

MAY 05 2017

**JOSEPH A. JASTRZEMSKI
NIAGARA COUNTY CLERK**

THE TOMAWANDAS SPORTSMEN'S CLUB, INC.

By: David Notaro
David Notaro, President

STATE OF NEW YORK)
)SS:
COUNTY OF ERIE)

On the 2nd day of May in the year 2017, before me, the undersigned, a notary public in and for said state, personally appeared David Notaro, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

MP
Notary Public

MATTHEW PALMIERI
Notary Public, State of New York
No. 02PA6257969
Qualified in Erie County
Commission Expires March 19, 2020

EXHIBIT A

ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Pendleton, County of Niagara and State of New York, being part of Lot 88, Township 13, Range 7 of the Holland Land Company's Survey, bounded and described as follows:

Beginning at the point of intersection of the west line of Lot 88 with the centerline of Killian Road; thence northerly along the west line of Lot 88 a distance of 1568.41 feet to the southwest corner of lands conveyed to Silas Hall by deed recorded in liber 19 of Deeds at page 346; thence easterly along the south line of Hall's lands a distance of 550.3 feet to a point; thence southerly parallel with the west line of Lot 88 a distance of 1568.41 feet to the centerline of Killian Road; thence westerly along the centerline of Killian Road a distance of 550.83 feet to the point or place of beginning.

EXHIBIT C

43 N.Y.2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193, 11
ERC 1346, 8 Env'tl. L. Rep. 20,250

In the Matter of Consolidated Edison Company of
New York, Inc., Respondent,

v.

Walter Hoffman et al., Constituting the Zoning
Board of Appeals of the Village of Buchanan,
Appellants. Hudson River Fishermen's
Association, Intervenor-Respondent.

Court of Appeals of New York

24

Argued January 5, 1978;
decided February 14, 1978

CITE TITLE AS: Matter of Consolidated Edison
Co. of N.Y. v Hoffman

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 25, 1976, which unanimously modified, on the law, and, as modified, affirmed a judgment of the Supreme Court at Special Term (John C. Marbach, J.), entered in Westchester County, which, in a proceeding pursuant to CPLR article 78 to annul a determination of the Zoning Board of Appeals of the Village of Buchanan denying an application by petitioner Consolidated Edison Company of New York for a variance for the construction of a natural draft, wet cooling tower for its nuclear generating plant, (1) adjudged that the board's actions in requiring petitioner to seek a building permit and in attempting to regulate or prohibit the proposed construction contravened the supremacy clause of the United States Constitution and were thus illegal and void, and (2) enjoined the board from enforcing or attempting to enforce the provisions of the Buchanan Zoning Code as against the proposed construction. The modification consisted of deleting the above provisions and directing that the board issue the variance to petitioner and that the board might regulate local and incidental conditions relative to the construction of the proposed facility.

Special Term found that pervasive Federal regulation of petitioner's facility necessitated a finding of implied pre-emption. The Appellate Division agreed that denial of

the variance contravened Federal law, and, in addition, concluded that it also contravened State law.

The Court of Appeals affirmed the order of the Appellate Division, holding, in an opinion by Judge Cooke, that the issues of Federal pre-emption need not and should not be reached, since the legal issue before the court was whether, based on the evidence presented, the board abused its discretion, as a matter of law, in denying petitioner's application for a variance, and this question was capable of resolution under State law; that where, as here, a public utility sought a use *599 variance, in addition to an area variance, to modify an existing facility, it was required to show that denial of such a use variance would cause unnecessary hardship, but not in the sense required of other applicants; that, instead, it had to show that modification was a public necessity in that it was required to render safe and adequate service and that there were compelling reasons, economic or otherwise, which made it more feasible to modify the plant than to use alternative sources of power such as might be provided by other facilities; that, in the present matter, petitioner had made a striking and more than ample demonstration of hardship and need, and that the zoning board's reasons for denying petitioner's application were arbitrary and capricious, and, hence, its decision to prohibit the variance was an abuse of discretion.

Matter of Consolidated Edison Co. of N. Y. v Hoffman,
54 AD2d 761, affirmed.

HEADNOTES

Municipal Corporations
Zoning

Variations

(11) A question of whether a zoning board of appeals abused its discretion, as a matter of law, in denying an application by a public utility for a variance is capable of resolution under New York State law, and, therefore, issues raised as to Federal pre-emption need not and should not be reached.

Municipal Corporations
Zoning

Variations

(¹²) A zoning board of appeals has the power to issue a variance where there are practical difficulties or unnecessary hardships in the way of carrying out an ordinance (Village Law, § 7-712, subd 2, par [c]).

Municipal Corporations
Zoning

Variations

(¹³) To be granted an area variance, an applicant must show that strict compliance with the zoning law will cause practical difficulties, but, where a use variance is sought, the applicant has the heavier burden of showing unnecessary hardship, since a prohibited use, if permitted, will result in a use of the land in a manner inconsistent with the basic character of the zone; even in the case of an area variance, a significant factor is the magnitude of the variance sought, since the greater the deviation the more likely it is that the impact on the community will be severe.

Municipal Corporations
Zoning

Variations

(¹⁴) An area variance is one which does not involve a use which is prohibited by the zoning ordinance, while a use variance is one which permits the use of land which is proscribed.

Municipal Corporations
Zoning

Variations

(¹⁵) To establish unnecessary hardship, as required to obtain a use variance, the traditional approach has been to require the applicant to show that the land cannot yield a reasonable return if used only for a purpose allowed in the zone, that the circumstances which cause the hardship are unique to the land and not to general neighborhood conditions, and that the requested use *600 will not alter the essential character of the locality, but where a public utility seeks a variance, the public necessity and the effect on the utility's customers must be considered.

Municipal Corporations

Zoning

Variations

(¹⁶) A determination by a zoning board of appeals on an application for a variance may not be set aside in the absence of illegality, arbitrariness or abuse of discretion; it will be sustained if it has a rational basis and is supported by substantial evidence.

Municipal Corporations
Zoning

Variations

(¹⁷) A village zoning board of appeals abused its discretion when it denied a variance sought by a public utility to permit the construction of a natural draft, wet cooling tower in the conversion of the cooling system for its nuclear generating plant, where there was evidence that a Federal regulatory agency would require the utility to terminate operation of the plant if it failed to convert its cooling system, and that, **if the plant were ultimately forced to close down, there would be tremendous ensuing hardship to the utility, its approximately three million customers, and millions of others.**

Municipal Corporations
Zoning

Variations

(¹⁸) Where a public utility was directed by a Federal regulatory agency to evaluate the economic and environmental impacts of various types of cooling systems for its nuclear generating plant, and the zoning board of appeals of the village in which the plant was located had the opportunity to voice its environmental concerns to that agency, the board cannot now complain that the utility's application for a variance to construct the type of system selected was defective because it did not present alternative types of systems.

Municipal Corporations
Zoning

Public Utilities

(¹⁹) A zoning board may not exclude a utility from a

community where the utility has shown a need for its facilities, but this does not mean that a utility may place a facility wherever it chooses within a community.

Public Utilities

Modification of Existing Power Plant

Use Variance

(10) A public utility seeking a use variance to modify an existing power plant must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

67 NY Jur, Zoning and Planning Laws §§ 283, 284, 434

Village Law §7-712

82 Am Jur 2d, Zoning and Planning §§ 266-277, 334-338
Am Jur Pl & Pr Forms (Rev ed), Zoning and Planning,
Forms 103 et seq. *601

POINTS OF COUNSEL

Carl R. D'Alvia, Village Attorney (Henry J. Smith and Gerald Nolan of counsel), for appellants.

I. The determination by the court below is in direct conflict with the law, as settled by numerous decisions of the courts of this State. (*Matter of Otto v Steinhilber*, 282 NY 71; *Williams v Town of Oyster Bay*, 32 NY2d 78; *Dauernheim v Town Bd. of Town of Hempstead*, 33 NY2d 468; *Ministers, Elders & Deacons of Ref. Prot. Dutch Church of Greenville v Schultz*, 37 AD2d 611; *Steele v Shultz*, 40 AD2d 1027; *Matter of Niagara Mohawk Power Co. v City of Fulton*, 8 AD2d 523; *Matter of Consolidated Edison Co. of N. Y. v Village of Briarcliff Manor*, 208 Misc 295; *Matter of Clark v Board of Zoning Appeals of Town of Hempstead*, 301 NY 86; *Matter of Levy v Board of Stds. & Appeals of City of N. Y.*, 267 NY 347; *Van Deusen v Jackson*, 35 AD2d 58, 28 NY2d 608.) II. Neither the zoning ordinance nor the decision of the zoning board contravened State law, or conflicted in any way with Con Edison's duty to furnish electric service.

(*Matter of Consolidated Edison Co. of N. Y. v Village of Briarcliff Manor*, 208 Misc 295.) III. Neither the Buchanan Zoning Ordinance nor the decision of the zoning board pursuant thereto contravenes the supremacy clause or the interstate commerce clause of the United States Constitution. (*Northern States Power Co. v State of Minnesota*, 447 F2d 1143, 405 US 1035; *State of New Hampshire v Atomic Energy Comm.*, 406 F2d 170; *Teeval Co. v Stern*, 301 NY 346; *Bradley v Public Utilities Comm.*, 289 US 92; *Head v New Mexico Bd.*, 374 US 424; *New York Cent. R. R. Co. v Lefkowitz*, 46 Misc 2d 68, 28 AD2d 735, 23 NY2d 1.)

Edward J. Sack for Consolidated Edison Company of New York, Inc., respondent.

I. The court below correctly held that the zoning board is prohibited from preventing Con Edison from building a natural draft, cooling tower for its Indian Point No. 2 nuclear power plant because of Con Edison's duty to furnish utility service under State law. (*City of Albany v Anthony*, 262 App Div 401; *People v Blue Ribbon Ice Cream Co.*, 1 Misc 2d 453; *Incorporated Vil. of Lloyd Harbor v Town of Huntington*, 4 NY2d 182; *Jewish Consumptives' Relief Soc. v Town of Woodbury*, 230 App Div 228, 256 NY 619; *Union Free School Dist. No. 14 of Town of Hempstead, Nassau County v Village of Hewlett Bay Park*, 198 Misc 932, 278 App Div 706; *Matter of Board of Co-op. Educational Servs. of Nassau County v Gaynor*, 60 Misc 2d 316, 33 AD2d 701; *602 *Matter of Long Is. Water Corp. v Michaelis*, 28 AD2d 887; *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551, 297 NY 897; *Matter of Consolidated Edison Co. of N. Y. v Village of Briarcliff Manor*, 208 Misc 295; *Matter of Niagara Mohawk Power Corp. v City of Fulton*, 8 AD2d 523.) II. The courts below correctly found that Federal pre-emption prohibits appellants from preventing Con Edison from building a natural draft, cooling tower for its Indian Point No. 2 nuclear power plant. (*Rice v Santa Fe Elevator Corp.*, 331 US 218; *City of Burbank v Lockheed Air Term.*, 411 US 624; *Hill Packing Co. v City of New York*, 295 NY 527, 331 US 787; *Hackensack Meadowlands Dev. Comm. v Transcontinental Gas Pipe Line Corp.*, 464 F2d 1358, 409 US 1118; *Corporation Comm. of Okla. v Federal Power Comm.*, 362 F Supp 522, 415 US 961; *South Term. Corp. v Environmental Protection Agency*, 504 F2d 646; *New York State Natural Gas Corp. v Town of Elma*, 182 F Supp 1; *Calvert Cliffs' Coordinating Committee v United States Atomic Energy Comm.*, 449 F2d 1109.) III. The record in this proceeding supports the granting of the variance applied for by Con Edison. (*Boomer v Atlantic Cement Co.*, 26 NY2d 219; *Matter of North Amer. Holding Corp. v Murdock*, 9 Misc 2d 632, 6 NY2d 902; *Matter of Jayne Estates v Raynor*, 22 NY2d 417; *Matter of Ullian v Town Bd. of Town of Hempstead*, 68 Misc 2d 393, 38 AD2d 850.) IV.

Appellants' procedural issues are without merit. (*Carruthers v Waite Min. Co.*, 306 NY 136; *Matter of Board of Trustees of Common School Dist. No. 2 of Town of Dickinson v Commissioner of Educ. of State of N. Y.*, 37 AD2d 743; *Matter of Thompson Water Works Co. v Diamond*, 44 AD2d 487; *Matter of Leventhal v Michaelis*, 29 Misc 2d 831; *Matter of Fulling v Palumbo*, 21 NY2d 30; *Matter of Overhill Bldg. Co. v Delany*, 28 NY2d 449; *Matter of Comparato v Knauf*, 61 Misc 2d 245; *Matter of Diocese of Rochester v Planning Bd. of Town of Brighton*, 1 NY2d 508; *Matter of Lakeland Water Dist. v Onondaga County Water Auth.*, 24 NY2d 400; *Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371.)

Ross Sandler for Hudson River Fishermen's Association, intervenor-respondent.

I. The Nuclear Regulatory Commission, in the exercise of its powers under the National Environmental Policy Act, has concluded that the Indian Point Unit No. 2 must be upgraded to more fully protect the environment. That decision effectively sets a minimum requirement for protection of the environment which the Village of Buchanan may not *603 circumvent. (*State of New Hampshire v Atomic Energy Comm.*, 406 F2d 170; *Calvert Cliffs' Coordinating Committee v United States Atomic Energy Comm.*, 449 F2d 1109; *Environmental Defense Fund v Corps of Engrs. of U. S. Army*, 470 F2d 289; *Matter of Consolidated Edison Co. of N. Y. v Village of Briarcliff Manor*, 208 Misc 295; *Matter of Long Is. Water Corp. v Michaelis*, 28 AD2d 887; *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551; *Matter of Niagara Mohawk Power Corp. v City of Fulton*, 8 App Div 523; *Matter of New York State Elec. & Gas Corp. v McCabe*, 32 Misc 2d 898; *Florida Avocado Growers v Paul*, 373 US 132; *City of Burbank v Lockheed Air Term.*, 411 US 624.) II. This case is properly before this court. (*Matter of Thompson Water Works Co. v Diamond*, 44 AD2d 487; *Matter of Board of Trustees of Common School Dist. No. 2 of Town of Dickinson v Commissioner of Educ. of State of N. Y.*, 37 AD2d 743; *Matter of Niagara Mohawk Power Co. v City of Fulton*, 8 AD2d 523.)

Lewis R. Bennett, Scott B. Lilly, Vito J. Cassan, John R. Davison and Amelia C. Anzalone for the Power Authority of the State of New York, *amicus curiae*.

Courts will decline to reach a Federal constitutional question when a decision based on State law can be substituted. (*Minnesota v Northern States Power Co.*, 447 F2d 1143, 405 US 1035; *Maun v United States*, 347 F2d 970; *Utah v United States*, 403 US 9; *Chemehuevi Tribe of Indians v FPC*, 420 US 395.)

Peter H. Schiff for the Public Service Commission of the State of New York, *amicus curiae*.

The only proper basis for overturning the challenged

action of the Village of Buchanan Zoning Board is a determination predicated on State law. (*Rice v Santa Fe Elevator Corp.*, 331 US 218; *City of Burbank v Lockheed Air Term.*, 411 US 624; *De Canas v Bica*, 424 US 351; *Northern States Power Co. v State of Minnesota*, 447 F2d 1143; *Maun v United States*, 347 F2d 970; *State of New Hampshire v Atomic Energy Comm.*, 406 F2d 170.)

OPINION OF THE COURT

Cooke, J.

Consolidated Edison Company of New York, Inc., operates a nuclear generating plant, known as Indian Point Unit No. 2, in the Village of Buchanan, in Westchester County. The facility's cooling system, up to now, has been a "once-through" system by which water is taken from the Hudson River to cool *604 the condensers and then returned to the river. This method of cooling uses high quantities of water and, according to concerned citizens and organizations, is extremely destructive of fish and plant life in the river.

An alternative to the once-through cooling system is a "closed-cycle" system which recirculates the water used to cool the condenser, requiring replenishment at times from the river in a limited amount to replace that which is lost by evaporation. This closed-cycle system is considered desirable by the intervenor in this matter, the Hudson River Fishermen's Association, which, with others, has urged the discontinuance of the present cooling system before a Federal agency, the Atomic Energy Commission (now succeeded by the Nuclear Regulatory Commission) which licenses Indian Point Unit No. 2.

After hearings concerning the cooling system used at Unit No. 2, on May 6, 1974, the AEC amended the plant's license to read, *inter alia*, that "the once-through cooling system will be permitted during an interim period, the reasonable termination date for which now appears to be May 1, 1979." (Recently, and after the commencement of the instant proceeding, this termination date was extended to May 1, 1982.) The amendment also required evaluation of the economic and environmental impacts of an alternative closed-cycle system to be made by Con Edison in order to determine a preferred system for installation. Further, it was contemplated that the termination date might be advanced or postponed depending on whether all governmental approvals were obtained by December 1, 1975.

In accordance with the decision of the Atomic Safety and Licensing Appeal Board and the license as amended, Con Edison had prepared a report which concluded that, in a

closed-cycle system, based on economic and environmental data, the preferred means of cooling is a natural draft, wet cooling tower. This would require the construction of a 565-foot tower in the Village of Buchanan. However, when Con Edison applied for a building permit, the application was denied by the village's building inspector on the grounds that the size of the proposed tower exceeds the 40-foot height limitation in the zoning district, that a visible vapor plume emanating from the tower would extend beyond the boundary of the immediate site in contravention of section 54-22 of the Buchanan Zoning Ordinance, and that a saline draft would be *605 deposited, also in violation of that section. Thereafter, Con Edison sought a variance from Buchanan's Zoning Board of Appeals.

In a lengthy decision, dated June 19, 1975, the zoning board of appeals, after reviewing the underlying controversy before the Federal Atomic Energy Commission (and now the Nuclear Regulatory Commission) concerning the cooling system used by Indian Point Unit No. 2, denied the application for a variance. Since Con Edison was continuing to study the ecological effect of the once-through cooling system, and was under no present direction by a regulatory agency to begin construction, the board took the view that no practical difficulties requiring a variance had been shown, concluding that the application was "contingent" and "pro forma". The board also stated that if it were not denying the variances for the reasons stated, it would deny them on the ground that Con Edison had not shown that it was requesting the minimal variance which must be granted to preserve the spirit of the ordinance while protecting the public interest under section 7-712 (subd 2, par [c]) of the Village Law and thus that practical difficulties calling for a variance had not been established. In this respect, the board commented that the application precluded any consideration of alternatives, including any variations of the mechanical systems, which might be only 68 feet high, or any modification of the towers and adaptability of the technology of one system to the other to eliminate objectionable features, and merely called for acceptance of a natural draft system and a 565-foot tower as indispensable consequences of any closed-cycle system.

This article 78 proceeding followed on July 17, 1975, with Con Edison seeking a judgment annulling the decision of the zoning board of appeals and directing it to issue the variance. Special Term, reasoning that pervasive Federal regulation of Con Edison's facility necessitates a finding of implied preemption, granted the petition to the extent of enjoining the board from enforcing or attempting to enforce the provisions of the Buchanan Zoning Ordinance as against construction of a

closed-cycle cooling system at Indian Point Unit No. 2. The Appellate Division not only agreed with Special Term that denial of the variance contravened Federal law, but also concluded that State law was violated (see Public Service Law, § 65, subd 1; Transportation Corporations Law, § 11), and then modified by directing the board to issue the variance for *606 construction of the tower, stating that the respondents may regulate local and incidental conditions relative to the construction of the proposed facility. We granted leave to appeal to this court and affirm on more limited State-law grounds.

(¹¹)At the outset, we note that issues of Federal pre-emption are raised with differing emphases by the original parties, the intervenor, and *amici*. These issues need not and should not be reached. Con Edison asserts that the decision of the zoning board of appeals was erroneous, arbitrary and capricious. Hence, reducing the case to its simplest terms, the legal issue before this court is whether, based on the evidence presented, the board abused its discretion, as a matter of law, in denying Con Edison's application for a variance. Since this question is capable of resolution under our own State law, we should not decide broad questions not necessary to the resolution of the present dispute but, rather, approach this case with a narrower focus.

(², ¹³)Starting with basics, where there are practical difficulties or unnecessary hardships in the way of carrying out an ordinance, a zoning board of appeals has the power to issue a variance (Village Law, § 7-712, subd 2, par [c]). Depending on the type of variance sought, a distinction in the burden placed on the applicant has developed (see 2 Anderson, *New York Zoning Law and Practice* [2d ed], § 18.07). To be granted an area variance, the applicant must satisfy the less demanding standard of showing that strict compliance with the zoning law will cause "practical difficulties" (see, e.g., *Matter of Wilcox v Zoning Bd. of Appeals of City of Yonkers*, 17 NY2d 249, 255; *Matter of Village of Bronxville v Francis*, 1 AD2d 236, aff'd 1 NY2d 839). On the other hand, since a prohibited use, if permitted, will result in a use of the land in a manner inconsistent with the basic character of the zone, a heavier burden is placed on the applicant (see *Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309, 313-314) and the enabling act has been construed to require a showing of "unnecessary hardship" (see, generally, 2 Anderson, *New York Zoning Law and Practice* [2d ed], § 18.32). However, even in the case of an area variance, a significant factor is the magnitude of the variance sought, since the greater the deviation the more likely it is that the impact on the community will be severe (see *Matter of National Merritt v Weist*, 41 NY2d 438, 441).

(¹⁴)An "area" variance is one which does not involve a use *607 which is prohibited by the zoning ordinance, while a "use" variance is one which permits the use of land which is proscribed (*Matter of Overhill Bldg. Co. v Delany*, 28 NY2d 449, 453; 3 Anderson, *American Law of Zoning* [2d ed], §§ 18.06-18.07). In the instant matter, in addition to an area variance to accommodate the height of the tower, the village asserts that operation of the tower will result in prohibited uses for which variances are necessary. The proscribed uses are that the cooling tower will produce a vapor plume from which, depending on the salt content of the river at any given time, a saline drift may be deposited on the locale and be harmful to some types of trees.¹ Hence, as noted, where a use variance is sought, the applicant must show unnecessary hardship.

(¹⁵)To establish unnecessary hardship, the traditional approach has been to require the applicant to show that the land cannot yield a reasonable return if used only for a purpose allowed in the zone, that the circumstances which cause the hardship are unique to the land and not to general neighborhood conditions, and that the requested use will not alter the essential character of the locality (see *Matter of Otto v Steinhilber*, 282 NY 71, 76). It has been observed, however, that these requirements are not appropriate where a public utility such as Con Edison seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely (2 Anderson, *American Law of Zoning* [2d ed], § 12.31, pp 474-475; see, generally, 3 Rathkopf, *Law of Zoning and Planning*, ch 72, [3d ed]).

This analysis is borne out by the fact that the courts have placed emphasis on the public necessity when considering a utility's application for a variance (see *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551, esp 553, affd 297 NY 897; see, also, Note, *Zoning and the Expanding Public Utility*, 13 Syracuse L Rev, 581, 583-584; see, generally, 67 NY Jur, *608 *Zoning and Planning Laws*, § 191). Local concerns, though important, are not the sole criteria, since utilities such as Con Edison, a gas, electric and steam corporation, are required to "provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable" (Public Service Law, § 65, subd 1). Indeed, consideration of the needs of a broader public are reasonably within the contemplation of the enabling legislation, which authorizes a zoning board to grant a variance "so that the spirit of the local law or ordinance shall be observed, public safety and welfare secured and substantial justice done" (Village Law, § 7-712, subd 2, par [c]). Thus, in

resolving the question of hardship, the effect on the utility's customers is a significant factor to be considered by local zoning boards.

(¹⁶)Having reviewed what must be presented to and considered by the local zoning board, the issue is whether the zoning board erred in its decision to deny the variance. Since the zoning board is given discretion in these matters, the court's function is limited, and a board determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion (*Matter of Cowan v Kern*, 41 NY2d 591, 598; *Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309, 314, supra.). The board's determination will be sustained if it has a rational basis and is supported by substantial evidence (*id*; see, also, *Matter of National Merritt v Weist*, 41 NY2d 438, 443, supra.). Even where a utility is involved, the courts function under the same limited standard of review (see *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551, affd 297 NY 897, supra.; cf. *Matter of Long Is. Light. Co. v City of Long Beach*, 280 App Div 823).

At the hearing before the Buchanan Zoning Board of Appeals, Con Edison expressed its concern that, if the Nuclear Regulatory Commission adhered to its requirement that Indian Point Unit No. 2 terminate operation of a once-through cooling system and the village stuck to its position of not allowing construction of the cooling tower, the utility could be faced with the necessity of shutting down Unit No. 2, which has a capital cost in excess of \$204,000,000. The board was presented with testimony that the operation of the plant saved Con Edison customers \$78,000,000 in fuel expense in 1974, and that if the facility were closed down additional fuel costs to make up the lack of generation by increasing production at its other plants, all of which burn imported oil, would *609 translate to \$567,000 per day. In terms of oil use, in 1974 alone, the operation of Indian Point Unit No. 2 saved approximately 7,300,000 barrels of oil or equivalently 306,600,000 gallons.

(¹⁷)In view of the potential hardship to Con Edison's approximately three million customers, and millions of others affected, not to mention the harm to the utility's huge investment and the taxes paid, the board's decision to treat the application as contingent or pro forma was unwarranted. Although the license amendment from the agency which regulates the plant contemplated that the termination date might be changed, a reading of the relevant documents and decisions manifests that the right to operate would be terminated upon failure to convert to a closed-cycle system. Since it was estimated that excavation and construction might take years, there was

no justification for delaying commencement of the project. Moreover, the board recognized that Con Edison itself had objected to the increased expense resulting from a contemplated \$84,000,000 construction cost and a \$35,000,000 annual operating budget, and thus there was no need to fear that Con Edison would begin the project prematurely or before it was absolutely necessary. Considering the enormous social and economic significance of this application for a variance and the tremendous ensuing loss if the plant ultimately were forced to close down, it is difficult to imagine a more arbitrary and capricious manner of resolving the dispute. Based on the evidence presented of hardship to Con Edison and its customers, there is more than an ample basis for concluding that the Buchanan Zoning Board of Appeals abused its discretion in denying the variance sought.

⁽⁸⁾Comment should also be made concerning the zoning board's suggestion that the application was defective because it did not present alternatives to a natural draft, wet cooling tower. Con Edison was directed to evaluate the economic and environmental impacts of a closed-cycle system in order to determine a preferred system for installation. Based on its studies, the utility concluded that mechanical draft wet towers were unacceptable environmentally because that type of system would double the fog and icing conditions prevalent in the area, and would violate the noise prohibitions of the Buchanan code. Alternatively, mechanical draft wet/dry towers were also considered more harmful to the environment than *610 the natural draft, wet cooling tower for which a variance was sought.²

While ordinarily a village may properly decide for itself which of several evils it should bear, this is not such an instance. The zoning board had the opportunity to present its position before the regulatory agency which directed the evaluation by Con Edison. It thus had an appropriate forum to voice its environmental concerns and should not have used the local proceedings to express its dissatisfaction. There is no indication of any lack of good faith by Con Edison in its conclusion as to the most acceptable system from an environmental standpoint. Indeed, considering that the area is zoned for industrial use and that other industrial facilities are located nearby, concern over the environmental effect of a vapor plume from the proposed tower appears greatly exaggerated.

As for aesthetics, the zoning board also expressed concern that the 565-foot tower would be an eyesore. The zone, however, includes the two domed containment buildings of Indian Point Units Nos. 2 and 3, which are 219-foot high, and a stack for the Unit No. 1 superheater building

which is 375-foot high. Although these structures are pre-existing uses, construction of which was commenced prior to adoption of the present zoning code, since these facilities also greatly exceed the height limitations, the specter of the tower is substantially dissipated.

⁽⁹⁾In conclusion, it has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities (see *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551, supra.; *Matter of Long Is. Water Corp. v Michaelis*, 28 AD2d 887). However, this has never meant that a utility may place a facility wherever it chooses within the community (see *Matter of Niagara Mohawk Power Corp. v City of Fulton*, 8 AD2d 523; *Matter of Long Is. Light. Co. v Incorporated Vil. of East Rockaway*, 279 App Div 926; see, also, Public Service Law, art 8, § 140 et. seq.).

⁽⁷⁾, ⁽¹⁰⁾The question here is not one of siting a plant, but simply the need to modify the existing facility (see *Matter of *611 Long Is. Light. Co. v City of Long Beach*, 280 App Div 823, supra.; *Northport Water Works Co. v Carll*, 133 NYS2d 859). To be granted such a use variance, the utility should be required to show that denial of the variance would cause unnecessary hardship, but not in the sense required of other applicants (see *Matter of Otto v Steinhilber*, 282 NY 71, 76, supra.). Instead, the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities. However, where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced (cf. *Matter of Long Is. Light. Co. v Griffin*, 272 App Div 551, esp 554, affd 297 NY 897, supra.; *Matter of Long Is. Light. Co. v City of Long Beach*, 280 App Div 823, supra.). In this matter, Con Edison has made a striking and more than ample demonstration of hardship and need, the reasons for denying its application were arbitrary and capricious, and hence the zoning board's decision to prohibit the variance was an abuse of discretion.

Accordingly, for the reasons stated, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.
Order affirmed. *612

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Footnotes

- ¹ In the zone where Con Edison's facility is located there is a prohibition against: "Dissemination of noise, vibration, odor, dust, smoke, observable gas or fumes, or other atmospheric pollutants beyond the boundaries of the immediate site of the building in which such use is conducted" (Code of Village of Buchanan, § 54-22, subd A [1]). In addition, the ordinance prohibits any use which will cause or result in "[h]azard of fire or explosion or other physical hazard to any person, building or vegetation" (subd A [2]), or "[a] harmful discharge of waste materials" (subd A [4]).
- ² Subsequently, the facility's license was again amended and is now consistent with Con Edison's study. The license, as amended, reads: "The Nuclear Regulatory Commission has determined *** that a closed- cycle natural draft, wet cooling tower system is the preferred alternative closed-cycle cooling system for installation at Indian Point Unit No. 2."

EXHIBIT D

82 N.Y.2d 364, 624 N.E.2d 990, 604 N.Y.S.2d 895

In the Matter of Cellular Telephone Company,
Doing Business as Cellular One, Respondent,
v.
Armand Rosenberg et al., Constituting the Zoning
Board of Appeals of the Village of Dobbs Ferry,
Appellants.

Court of Appeals of New York

203

Argued October 5, 1993;

Decided November 18, 1993

CITE TITLE AS: Matter of Cellular Tel. Co. v
Rosenberg

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 28, 1992, which affirmed a judgment of the Supreme Court (Donald Silverman, J.; opn 153 Misc 2d 302), entered in Westchester County in a proceeding pursuant to CPLR article 78, granting the petition, annulling a determination of respondent Zoning Board of Appeals of the Village of Dobbs Ferry that denied an application by petitioner for a use variance, and directing that the use variance be issued to petitioner.

Matter of Cellular Tel. Co. v Rosenberg, 188 AD2d 648, affirmed.

HEADNOTES

Municipal Corporations
Zoning

Variance--Use Variance for Public Utility--Cellular Telephone Facility

(¹) A cellular telephone company is a "public utility", and the construction of an antenna tower in a residential district to facilitate the supply of cellular telephone service is a "public utility building" within the meaning of a zoning ordinance. Accordingly, the siting of a cellular telephone facility qualifies as a "public utility" use

variance exception under *Matter of Consolidated Edison Co. v Hoffman* (43 NY2d 598), which established a test of public necessity, rather than unnecessary hardship, where an entity requesting a use variance is a public utility. *Matter of Consolidated Edison* applies to all public utilities, and to entirely new sitings of facilities as well as the modification of existing facilities.

Municipal Corporations

Zoning

Variance--Public Necessity Test for Use Variance for Public Utility Not Overruled by Village Law § 7-712-b (2)

(²) Village Law § 7-712-b (2), as amended, was not intended to overrule *Matter of Consolidated Edison Co. v Hoffman* (43 NY2d 598), which established a test of public necessity, rather than unnecessary hardship, where an entity requesting a use variance is a public utility.

Municipal Corporations

Zoning

Variance--Use Variance for Public Utility--Lack of Rational Basis for Denial of Variance for Cellular Telephone Facility

(³) Appellant Zoning Board's determination denying an application by *365 respondent, a provider of cellular telephone service, for a use variance to construct a cellular telephone cell site at a location in an educational district zone lacks a rational basis, and the Board abused its discretion, as a matter of law, in denying the application. The record supports the conclusion that the proposed installation would have a negligible impact on the surrounding neighborhood. Moreover, the record supports the conclusion that respondent, as a public utility, sustained its burden of proving the requisite public necessity, since it established that the erection of the cell site would enable it to remedy gaps in its service area that currently prevent it from providing adequate service to its customers in that area.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Zoning and Planning, §§ 315, 318, 321.

Village Law §7-712-b (2).

NY Jur 2d, Buildings, Zoning, and Land Controls, §§184, 186, 268, 345.

ANNOTATION REFERENCES

See ALR Index under Utilities; Variances; Zoning.

POINTS OF COUNSEL

Richard M. Gardella, White Plains, for appellants.

I. The Court below's acceptance of Supreme Court's expansion of the public utility use variance exception is not supported by case law, legislation or public policy. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Otto v Steinhilber*, 282 NY 71.)

II. The Court below's acceptance of the expansion of the use variance test to cover Cellular Phone Company facilities is not backed by a reading of *Consolidated Edison* or by prior and subsequent case law. (*Matter of Consolidated Edison Co. v Hoffman*, 48 NY2d 598; *Matter of Cellular Tel. Co. v Rosenberg*, 153 Misc 2d 302; *Matter of Long Is. Light Co. v City of Long Beach*, 280 App Div 823; *Matter of Long Is. Water Corp. v Michaelis*, 28 AD2d 887; *Matter of Long Is. Light Co. v Incorporated Vil. of E. Rockaway*, 279 App Div 926; *Matter of Long Is. Light Co. v Horn*, 23 AD2d 583; *Video Microwave v Zoning Bd. of Appeals*, 77 Misc 2d 798; *Matter of Mammina v Zoning Bd. of Appeals*, 110 Misc 2d 534; *Stamanski v Romeo*, 62 Misc 2d 1051; *Matter of Payne v Taylor*, 178 AD2d 979.)

III. The expanded *Otto* exception approved by the Court below was not recognized by the Legislature when it amended use variance enabling statutes in 1991. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of *366 Otto v Steinhilber*, 282 NY 71.)

IV. The Court below's affirmance of the lower court's necessity and the lack of alternative findings was not supported by substantial evidence in the record. (*Matter of Zagoreos v Conklin*, 109 AD2d 281; *Matter of United States Transmission Sys. v Schoepflin*, 63 AD2d 970; *Gottlieb v Board of Appeals*, 139 AD2d 617; *Matter of Niagara Mohawk Power v City of Fulton*, 8 AD2d 523.)

V. Precedential and jurisdictional concerns expressed by the Board were justified. (*Knight v Amelkin*, 68 NY2d 975; *Matter of Long Is. Water Corp. v Michaelis*, 28 AD2d 887.)

VI. Appellant's determination was rational and supported by the record; it should not have been disturbed. (*People ex rel. Fordham Manor Refm. Church v Walsh*, 244 NY 280; *Matter of Faham v Bockman*, 151 AD2d 665; *Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Petruzzelli v Zoning Bd. of Appeals*, 181 AD2d

825; *Burger King Corp. v Amelkin*, 70 AD2d 627; *Matter of Agoglia v Glass*, 35 AD2d 954, 29 NY2d 535; *Matter of Baker v Zoning Bd. of Appeals*, 67 AD2d 1071.)

Keane & Beane, P. C., White Plains (*Edward F. Beane and Judson K. Siebert* of counsel), for respondent.

I. The lower courts properly applied the *Consolidated Edison v Hoffman* standard. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Otto v Steinhilber*, 282 NY 71; *Matter of Zagoreos v Conklin*, 109 AD2d 281.)

II. The lower courts properly held that Cellular Telephone Co. is a public utility thereby warranting an application of the *Consolidated Edison v Hoffman* standard. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Consolidated Edison Co. v Village of Briarcliff Manor*, 208 Misc 295; *Matter of Long Is. Light Co. v Horn*, 23 AD2d 583; *Matter of Niagara Mohawk Power Corp. v City of Fulton*, 8 AD2d 523; *Matter of Payne v Taylor*, 178 AD2d 979; *Video Microwave v Zoning Bd. of Appeals*, 77 Misc 2d 798.)

III. The amendment to the Village Law does not alter or affect the applicability of the *Consolidated Edison v Hoffman* standard. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598.)

IV. The record establishes that Cellular Telephone Company satisfied the *Consolidated Edison v Hoffman* standard. (*Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598; *Matter of Pilato v Zoning Bd. of Appeals*, 155 AD2d 864; *Matter of Market Sq. Props. v Town of Guilderland Zoning Bd. of Appeals*, 66 NY2d 893; *American Nassau Bldg. Sys. v Press*, 143 AD2d 789; *Reed v *367 Planning Bd.*, 120 AD2d 510; *Matter of Pine Hill Concrete Mix Corp. v Town of Newstead Zoning Bd. of Appeals*, 161 AD2d 1187.)

Rice & Amon, Suffern (*Terry Rice* of counsel), for New York Planning Federation, *amicus curiae*.

The history, rationale and necessity for providing limited immunity from local zoning laws for public utilities dictates that such preferred treatment not be expanded to cellular telephone companies. (*People v De Jesus*, 54 NY2d 465; *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91; *New York Club Assn. v City of New York*, 69 NY2d 211, 487 US 1; *Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500; *McMinn v Town of Oyster Bay*, 66 NY2d 544; *Matter of Wulfsohn v Burden*, 241 NY 288; *Village of Euclid v Ambler Realty Co.*, 272 US 365; *Marcus Assocs. v Town of Huntington*, 45 NY2d 501; *Village of Belle Terre v Boraas*, 416 US 1; *Udell v Haas*, 21 NY2d 463.)

Donovan Leisure Newton & Irvine, New York City (*Louis C. Lustenberger, Jr., Susan Hart-White and Christoph C. Heisenberg* of counsel), for The Children's Village, *amicus curiae*.

The Board's determination that the cell site posed a

potential health hazard was arbitrary and capricious. (*Matter of Dodson v Planning Bd.*, 163 AD2d 804; *Matter of Pilato v Zoning Bd. of Appeals*, 155 AD2d 864; *Matter of C & B Realty Co. v Town Bd. of Oyster Bay*, 139 AD2d 510; *Reed v Planning Bd.*, 120 AD2d 510; *Matter of North Shore Equities v Fritts*, 81 AD2d 985; *People ex rel. Fordham Manor Refm. Church v Walsh*, 244 NY 280; *American Nassau Bldg. Sys. v Press*, 143 AD2d 789; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176; *Matter of High Point Enters. v Board of Estimate*, 67 AD2d 914, 47 NY2d 935.)

OPINION OF THE COURT

Smith, J.

The primary issue on this appeal is whether the siting of a cellular telephone facility qualifies as a "public utility" use variance exception under *Matter of Consolidated Edison Co. v Hoffman* (43 NY2d 598).

Respondent Cellular Telephone Company (Cellular One), formerly known as Metro One, is a telephone corporation (Public Service Law § 2 [17]; Transportation Corporations Law § 25) and a public utility company (*368 Public Service Law § 2 [23]; see also, Village Law § 5-524 [6] [defining public utility services to include telephone services]). Cellular One is licensed by the Federal Communications Commission (FCC) and the New York Public Service Commission (PSC) to provide cellular telephone service to subscribers throughout the New York-New Jersey metropolitan area. The FCC has authorized respondent "to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service" to serve the New York metropolitan area. The PSC has issued respondent a certificate of public convenience and necessity, as is required for every telephone corporation (Public Service Law § 99). In addition, the PSC is authorized to prescribe respondent's service and rate standards (see, Public Service Law § 91). Cellular One operates more than 100 cell sites with over 3,500 transmitters in the New York-New Jersey area.

On July 20, 1990, Cellular One informed the Dobbs Ferry Planning Board of its proposal to establish a cellular telephone cell site on the 209-acre grounds of Children's Village, a not-for-profit corporation licensed to provide treatment and a home for neglected children. Erection of the cell site would enable respondent to expand and fill gaps in its service area. Presently, due to the large intervals between its existing antennas, respondent cannot adequately transmit or receive calls in the area of the proposed site. Calls of respondent's customers in that area are often interrupted or disconnected due to the scarcity of

antennas, and interference from static. In addition, cross talk and intermodulation render inaudible calls that are connected. On September 26, 1990, pursuant to a lease agreement, Cellular One leased approximately 800 square feet of land from Children's Village. The lease agreement allowed respondent to establish and operate the cell site on the grounds.

The proposed cell site involves the installation of nine cellular antennas, measuring 4 feet 1 inch by approximately 10 inches, which would be attached to an existing 70-foot water tower. The antennas would not increase the height of the water tower. A one-story 14-foot by 28-foot modular building would house computer equipment adjacent to the water *369 tower. Located at approximately 400 to 500 feet from the nearest private residential dwelling, the water tower would also be at a higher elevation than residential dwellings in the area. In addition, the proposed site requires the enhancement of an existing dirt road to facilitate access to the site, and the installation of fencing.

The Children's Village site is located in the E (Educational District) Zone under the Dobbs Ferry Zoning Code. The proposed cell site is not a permitted use in this zone. Thus, in October 1990, Cellular One applied for a permit to begin the installation. By letter dated October 9, 1990, the Dobbs Ferry Building Inspector informed respondent that its cell site proposal had to be denied because such business was not a permitted use in the zone.

On October 18, 1990, Cellular One applied for a use variance to construct the cell site on the Children's Village property. A series of public hearings regarding respondent's application commenced on November 14, 1990 and continued on January 9, 1991 and February 13, 1991. During the hearings, the Chairman of the Zoning Board questioned the authority of the Board to grant the variance, in light of this Court's holding in *Matter of Otto v Steinhilber* (282 NY 71). He also inquired about alternate sites and required the submission of the lease between Children's Village and Cellular One. Several people who owned homes near the Children's Village site raised concerns about noise, reception interference and health risks. Cellular One objected to the submission of the lease and its viewing by the public, but subsequently surrendered it to the chairman. In addition, respondent argued that other alternative sites were not suitable, and that the holding in *Matter of Otto* did not apply to its variance request since it is a "public utility." Cellular One also offered expert testimony to show that the granting of the application will have no negative impact on the neighborhood and that any concerns in that respect were

unwarranted. The experts stated that the proposed cell site would have no effect on washing machines, telephones, radios or televisions, that there would be no disruption of any other frequencies, and that there would be no effect of any of the transmissions on humans or animals or any other organisms. In addition, the experts explained that the additional traffic flowing from the installation of the cell site would be limited to one vehicle accessing the site once or twice a month for routine maintenance. Respondent asserted that it selected the Children's *370 Village site because of its natural elevation, its location in a heavily wooded area and proximity to highways, and the existing water structure, which would mean that Cellular One would not have to create a tower elsewhere.

Appellant Zoning Board denied the use variance, finding that Cellular One offered insufficient evidence to establish (1) "that the land at issue cannot yield a reasonable return if used only for the purpose allowed by the applicable zoning statute," (2) "that its circumstance (or that of the Children's Village) is due to a unique situation and not to the general condition of the neighborhood," (3) "that there exists a public necessity for its service, or what the need of the broader public is relating to such service, or that it is a public utility relating to the zoning ordinance," (4) "the absence of possible future hazards to the health and welfare of the community," and (5) "the lack of alternate sites (i.e. on other than Children's Village land) which would accommodate [Cellular One's] needs for its business."

This CPLR article 78 proceeding challenging the Board's determination followed. Cellular One alleged that the Board's actions in denying the use variance were arbitrary and capricious, unsupported by the record, not supported by substantial evidence, and contrary to law. Cellular One asserted that the Board failed to apply the appropriate standard of public necessity set forth in *Matter of Consolidated Edison Co. v Hoffman (supra)*, and, instead, erroneously applied the test of unnecessary hardship applicable to nonutility applications for use variances. Supreme Court granted the petition and directed appellants to issue the use variance, finding, as a matter of law, that Cellular One is a public utility and that the Board's finding and conclusions to the contrary were incorrect, and that the Board's decision was "significantly flawed in its analysis and conclusions" and "arbitrary and capricious." (153 Misc 2d 302, 309.) The Appellate Division affirmed, stating that Supreme Court properly determined that Cellular One is a public utility, that the test for a use variance set forth in *Matter of Consolidated Edison Co. v Hoffman* is applicable, that Cellular One made a sufficient showing to warrant the issuance of the use variance, and that the Board's determination to the

contrary was arbitrary and capricious (188 AD2d 648). This Court granted leave to appeal.

On this appeal, appellants contend that the determinations *371 of Supreme Court and the Appellate Division unnecessarily expand the test for entitlement to a use variance in *Matter of Consolidated Edison (supra)* to include the facilities of all public utilities, regardless of whether they provide essential services to the community. Appellants urge that the exception should be used to protect only public utilities, such as electric, gas, steam and water corporations, that supply essential services which are commonly recognized by the grant of "governmental type" powers, including the power of eminent domain, monopoly status, and partial zoning exemption for their major facilities. Respondent argues that the test in *Matter of Consolidated Edison (supra)* applies to all public utilities, and that it is a public utility within the meaning of the Court's decision in that case, and, thus, it is entitled to the application of the "public necessity" use variance test.

A "public utility" has been defined to mean " 'a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service' " (2 Anderson, *American Law of Zoning* § 12.32, at 568-569 [3d ed]). Characteristics of the public utility include (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services, (2) "operat[ion] under a franchise, subject to some measure of public regulation," and (3) logistic problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user ...[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery" (*id.*, at 569).

(¹¹) We conclude that a cellular telephone company is a "public utility" as defined here and sufficiently possesses the characteristics outlined above. In addition, the construction of an antenna tower in a residential district to facilitate the supply of cellular telephone service is a "public utility building" within the meaning of a zoning ordinance (*see, Matter of Payne v Taylor*, 178 AD2d 979).

In *Matter of Consolidated Edison (supra)*, this Court created a "public utility" exception to the test for unnecessary hardship, warranting the grant of a use variance, outlined in *372 *Matter of Otto v Steinhilber*

(*supra*).³ In *Matter of Consolidated Edison*, the Zoning Board of Appeals of the Village of Buchanan denied an application by Consolidated Edison Company for a variance for the construction of a wet cooling tower for its nuclear generating plant. The Board determined that no practical difficulties requiring a variance had been shown. Consolidated Edison Company commenced an article 78 proceeding, seeking to annul the Board's determination. The Court held the factors outlined in *Matter of Otto v Steinhilber (supra)* are not appropriate where the entity requesting the variance is a public utility. Thus, the Court stated:

"Instead, the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities" (*Matter of Consolidated Edison*, 43 NY2d 598, 611, *supra*).

The Court stated further that "where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced" (*id.*, at 611).

Matter of Consolidated Edison (supra), applies to all public utilities. It also applies to entirely new sitings of facilities, as well as the modification of existing facilities. As we stated in that case, "[I]t has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities" (*id.*, at 610). There can be no question of Cellular One's need to erect the cell site to eliminate service gaps in its cellular telephone service area. The proposed cell site will also improve the transmission and reception of existing service. Application of our holding in *Matter of Consolidated Edison (supra)* to sitings of cellular telephone companies, such as Cellular One, permits those companies to construct structures necessary for their operation *373 which are prohibited because of existing zoning laws and to provide the desired services to the surrounding community. Furthermore, the test we announced in that case, as well as the regulations of the FCC and the PSC, serve to guard against appellants' concerns about the potential proliferation of similar applications and the inability of local land use officials to exercise control to protect their communities.

Footnotes

¹ Public Service Law § 2 (23) states that the term "public utility company" applies to "one or more persons or corporations operating an agency or agencies for public service, and who or which is or are subject to the jurisdiction, supervision and regulations prescribed by or pursuant to this chapter."

(²) Nothing in the plain language of the amendment to section 7-712-b (2)' of the Village Law supports the conclusion that the Legislature intended to overrule *Matter of Consolidated Edison*. Section 7-712-b (2) makes no reference to a "public utility," and, in essence, codifies the requirements for demonstrating unnecessary hardship established in *Matter of Otto (supra)*. Furthermore, the effective date of the amendment to section 7-712-b was July 1, 1992, long after the Zoning Board denied petitioner's variance application and after petitioner commenced this article 78 proceeding.

(³) We are not persuaded by appellants' argument that the record supports their conclusion that Cellular One did not establish its entitlement to a use variance. A board's determination denying a variance will be sustained only if it has a rational basis and is supported by the record (*Matter of Consolidated Edison*, 43 NY2d, at 608, *supra*). The record supports the conclusion that the proposed installation would have a negligible impact on the surrounding neighborhood. It would not affect washing machines, telephones, radios or televisions, and there would be no disruption of any other frequencies. Furthermore, the transmissions from the cell site would not affect humans, animals or any other organisms. Moreover, the record supports the conclusion that Cellular One sustained its burden of proving the requisite public necessity. Cellular One established that the erection of the cell site would enable it to remedy gaps in its service area that *374 currently prevent it from providing adequate service to its customers in the Dobbs Ferry area. No rational basis exists for the Board's determination, and the Board abused its discretion, as a matter of law, in denying petitioner's application for a use variance.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Simons, Titone, Hancock, Jr., Bellacosa and Levine concur.
Order affirmed, with costs.*375

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- ² In *Matter of Otto v Steinhilber*, the Court articulated the factors that a zoning board must consider before finding unnecessary hardship warranting the grant of a use variance. The Court stated that "the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality" (*id.*, at 76).
- 3 Section 7-712-b (2) (b) provides: "No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that (1) under applicable zoning regulations the applicant is deprived of all economic use or benefit from the property in question, which deprivation must be established by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created."

EXHIBIT E

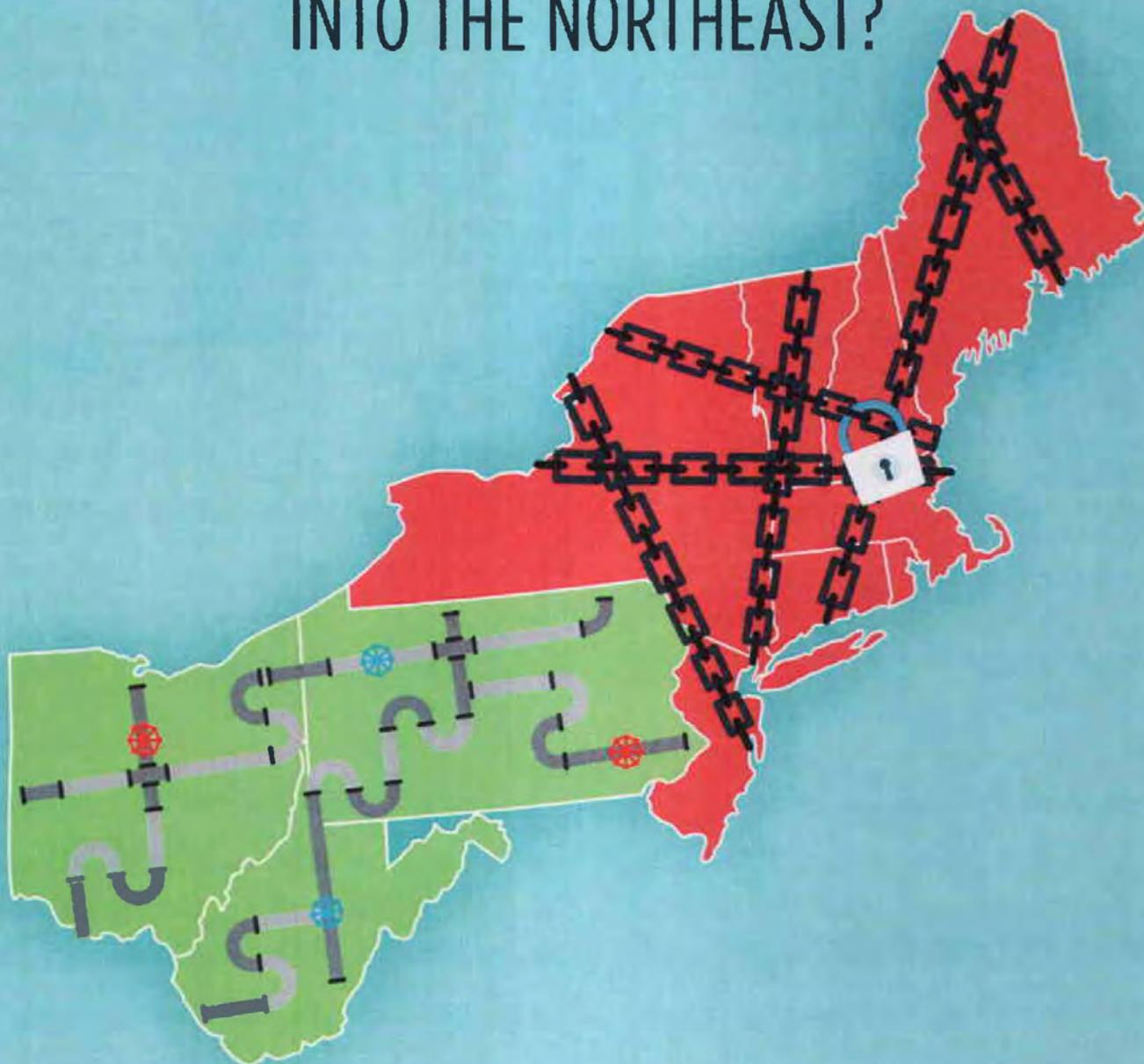
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ENERGY ACCOUNTABILITY SERIES

This paper represents the fifth entry in our **Energy Accountability Series** – a project that for the first time quantifies what the U.S. economy might look like in the future if certain energy-related policy proposals put forth by prominent politicians and their supporters were actually implemented today.

The Institute's first report, released in August 2016, modeled a scenario in which the development of oil, natural gas and coal on federal lands was phased out and eventually banned by political decree – a policy goal that was included in 2016 Democratic Party platform. Our second report, which came out in September 2016, imagined a world in which the historic renaissance in domestic energy production that has taken place in our country in recent years had never come to pass. The upshot, based on our analysis: 4.3 million jobs that exist today would have never been created.

For our third report, we examined what the impact might be on our economy if U.S. businesses and consumers were forced to pay as much for their energy as our friends in the European Union do for theirs – a self-imposed disadvantage that owes its existence to the bloc's overly restrictive energy policies. U.S. politicians (including former President Barack Obama) have cited Europe over the years as an exemplar on energy. Our report showed that those policies applied here could result in the destruction of more than seven million U.S. jobs and \$670 billion in annual GDP.

Our fourth report, released prior to the November election, sought to better understand the impacts to the economic landscape if activists aligned with the so-called Keep It In the Ground campaign got their wish, and the deployment of hydraulic fracturing technology was banned nationwide. Our models found that such a scenario could result in the loss of nearly 15 million American jobs over the next five years, and force the United States to surrender its recently earned status as a global energy superpower – and all the geopolitical and security benefits that come with that status.

Our country's emergence as an energy superpower, and now even a net-exporter of natural gas, has generated broad-based economic benefits for all Americans, not just those who live in high-energy production states. But there's one part of our country that continues to be deprived of the full measure of benefits and cost-savings that would otherwise be available if it was properly linked up in our nation's vast and expansive natural gas pipeline network: the Northeast. Quantifying the ongoing costs of that isolation is the focus of our final report.

Not dissimilar to high energy prices in Europe, the Northeast's relative lack of access to clean-burning, low-cost natural gas is largely self-imposed – a function of some state and local political figures prioritizing the wishes of environmental groups ahead of the needs and interests of their constituents.

Even with the election now behind us, and support for nationwide infrastructure build-out at record levels, these impediments will remain intact absent a coordinated effort by those affected in the region to stand up and demand change. We're hopeful this report can be used to help further that cause, and that the broader **Energy Accountability Series** can play an important role in helping to inform the course the Trump administration takes on these and other critical issues.



OUR MISSION

The mission of the U.S. Chamber of Commerce's Institute for 21st Century Energy is to unify policymakers, regulators, business leaders, and the American public behind a common sense energy strategy to help keep America secure, prosperous, and clean. Through policy development, education, and advocacy, the Institute is building support for meaningful action at the local, state, national, and international levels.



The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

What If Pipelines Aren't Built Into the Northeast?

Previous Energy Institute reports have provided both quantitative and qualitative detail with respect to how the dramatic increase in natural gas (and oil) production in the United States over the past half-decade has benefited businesses, consumers and communities across the nation.

These benefits have come in many different forms, from energy-usage cost-savings for consumers exceeding several thousand dollars per household per month, to the creation of millions of jobs and the lowering of the country's greenhouse-gas emissions profile to levels not seen since the mid-1990s.

But despite myriad economic and environmental advantages that have been created and broadly distributed to citizens all throughout the country, Northeast states haven't received their share of this bounty. Consequently, Northeast residents continue to pay some of the highest prices for delivered natural gas anywhere in the nation, despite living close to some of the most prolific natural-gas producing basins anywhere in the world.

The Trump administration has signaled that infrastructure development will be a major focus during its term in office, with the goal of creating tens of millions of new jobs and an unprecedented coalition of business, labor and community organizations coming together to support these initiatives. The continued build-out of our nation's energy transportation network should be part of this strategy. Having the proper pipeline infrastructure in place is just as important to the country and its residents as having good roads, safe bridges and world-class airports.

Unfortunately, even if a significant portion of these surface infrastructure investments are directed to high-population density states in the Northeast, the fate of much-needed energy infrastructure build-out activities in the region is far less certain. The good news is that a number of pipeline development projects have been proposed over the past several years, with several developers currently in various stages of the process for securing permits from state, federal and at times even local regulatory agencies.

The bad news is that if past is prologue, we should expect that many of these projects will never be able to acquire the approvals they need to get off the ground. A recent example is the decision in April 2016 by regulators in New York to deny a crucial water-quality permit (one already approved by federal regulators) to the builders of the Constitution Pipeline, which would transport more than 600 million cubic feet of natural gas per day from the Marcellus region in Pennsylvania to consumers in New England.

The fifth report in our **Energy Accountability Series** imagines and subsequently models a scenario in which the status quo continues to win the day, in which politicians in the Northeast continue to complain about the high prices their constituents pay for natural gas, while in the next breath railing against any developer with the audacity to put the pipes in the ground necessary to correct that very situation.

Of course, it's no secret by now that Northeast residents pay more for natural gas than other parts of the country. But how does that price premium impact the broader Northeast economy? How many jobs are these higher-than-they-should-be natural gas prices

destroying – or preventing from being created in the first place? And how much household income is being needlessly frittered away owing to these anachronistic policies? These are the questions we ask and answer in this report.

Before we answer those questions, allow us to highlight just a few recent quotes from some politicians and the interest groups that support them underscoring their opposition to commonsense and desperately needed energy infrastructure projects in the region:

“The growing rallying cry of the climate movement, to keep fossil fuels in the ground, is taking hold, and not just in the form of chants and headlines, but in the form of cancelled gas pipelines...”

Sierra Club, May 2, 2016

“Each of these new infrastructure projects should be stopped because it extends the fossil fuel era a few more disastrous decades.”

Bill McKibben, founder of 350.org, DNC platform committee member, Jan. 19, 2016

“The Pipeline Opposition Action Group is dedicated to stopping the high-pressure fracked gas pipelines ... plus all related fossil fuel infrastructure.”

350 Massachusetts

“The industry’s pipeline projects must be stopped.”

Food & Water Watch

“I believe the Northeast Energy Direct pipeline that would carry fracked natural gas for 400 miles through 17 communities is a bad idea and should be opposed.”

U.S. Sen. Bernie Sanders (I-Vt.), Nov. 29, 2015

“I have opposed Kinder Morgan’s proposed pipeline through Massachusetts and New England because of concerns that it could have led to the export of American natural gas to foreign countries, the impact it would have had on local communities in Massachusetts, and its potential to worsen climate change.”

U.S. Sen. Ed Markey (D-Mass.), April 20, 2016

“[W]hile building the Northeast Direct Gas Pipeline would provide the economic benefit of providing good jobs with good wages for local labor, the project as a whole is not in the public interest.”

Former Massachusetts State Sen. Benjamin B. Downing (D), July 25, 2014

“Governor Cuomo ... stood up to the oil and gas industry and effectively shut down the Constitution Pipeline project ... And the fact that this historic decision comes on Earth Day ... makes it all the more significant.”

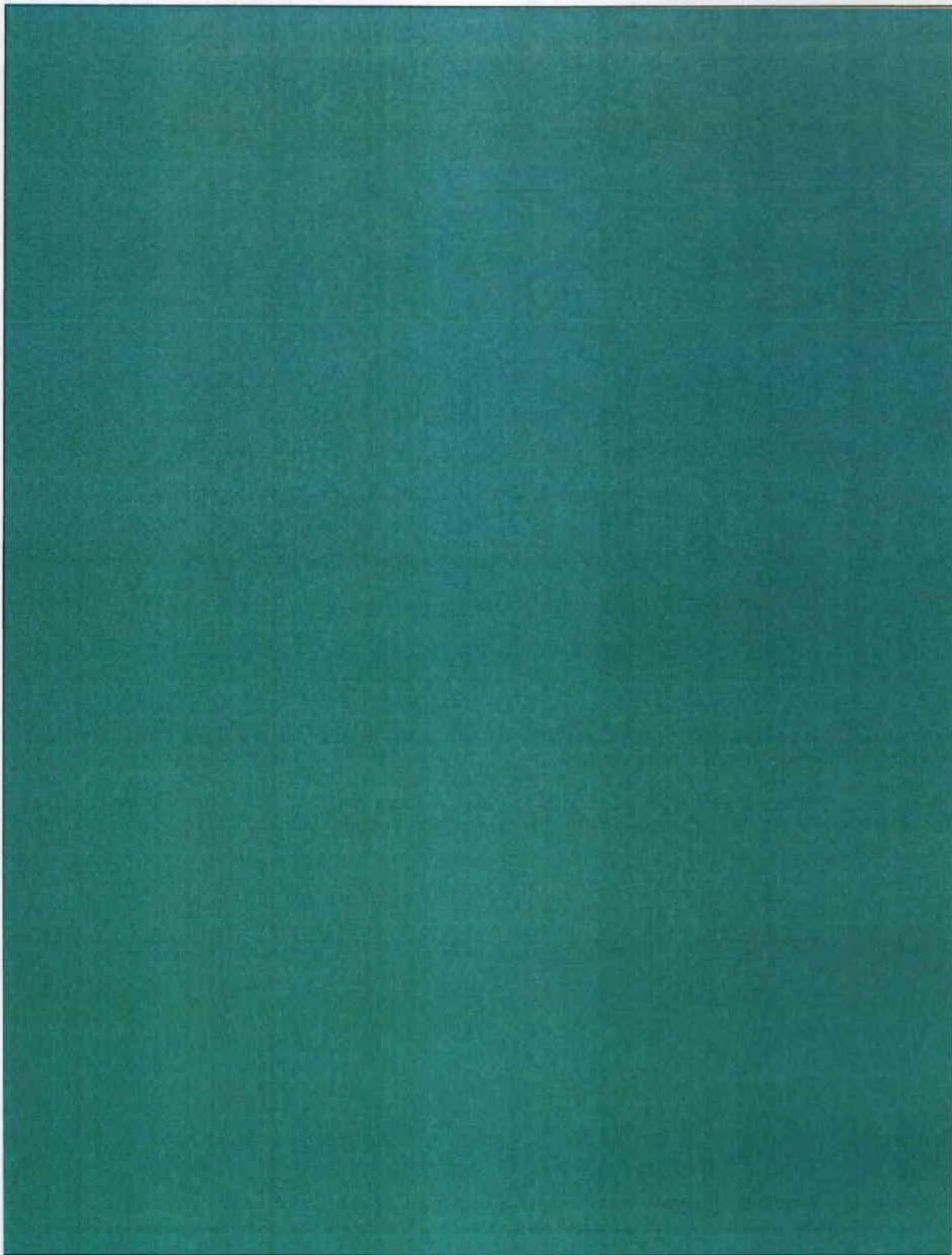
Catskill Mountainkeeper, April 22, 2016

“We want an end to New York’s ruinous dependency on fracked gas, along with all of the hateful, harmful infrastructure that comes with it ... An end to fossil fuels is our united goal.”

Sandra Steingraber, co-founder, New Yorkers Against Fracking, Jan. 15, 2016

Contents

9	Executive Summary	31	Economic Impact Methodology
13	Current State of Play	35	National Economic Impacts
17	Northeast Natural Gas & Electricity Prices	39	State-Level and Regional Economic Impacts
23	Natural Gas Infrastructure and Market Needs		



1

EXECUTIVE SUMMARY

The United States has experienced a dramatic increase in natural gas production and consumption in recent years thanks in large part to the development of natural-gas rich reservoirs in basins such as the Marcellus and Utica.

This addition to the market of literally billions of cubic feet (Bcf) of natural gas per day has had the effect of creating millions of new jobs, generating billions in new revenues and royalties, and bringing about a fundamental change to our nation's energy systems – particularly as it relates to electricity generation and distribution.

Despite the historic increase in natural gas production, as well as the economic and environmental advantages that have come with it, infrastructure development has not proceeded at a similar and corresponding pace, particularly in the high-density Northeastern United States, which in this report is defined as the six New England states, plus New York, New Jersey and Pennsylvania.

The upshot? Whereas the broad-based benefits of increased domestic resource production have been distributed widely and broadly across most of the United States – and even to regions hosting very little upstream activity – **millions of citizens in Northeast states have been denied the opportunity to take full advantage** of both the direct and indirect benefits that the energy renaissance has made possible for fellow Americans living elsewhere.

The Federal Energy Regulatory Commission (FERC) routinely issues updates that report and comment on this trend, noting in a recent submission that “with the exception of the Northeast ... regional price differences across the country were not large, a sign that midstream investments over the past 10 years have largely relieved natural gas transportation constraints.”¹

According to federal regulators, there is nothing mysterious about the fact that Northeast residents pay so much more for their natural gas than everyone else. In that same report, FERC declares that “pipeline constraints” in and near several distribution points throughout the Northeast region were responsible for “higher [natural gas] prices for consumers.”² A more recent report, issued in late December by the non-profit North American Electric Reliability Corporation, cited a “lack of adequate gas infrastructure” as the primary driver for “winter reliability challenges” in the Northeast.³

An examination of historical natural gas and electricity prices shows how much more the Northeast states pay for their natural gas relative to the rest of the country. Based on federal data, we know that:

- Northeast residents pay **29 percent more for their natural gas** than the U.S. average, and **44 percent more for their electricity.**
- Six of the 10 states where residents pay the highest prices for electricity in the country are New England states, with Connecticut, Rhode Island, Massachusetts and New Hampshire all **above 16 cents per kilowatt hour** (national average: 10.42)⁴
- Industrial users in the Northeast **pay more than double for their natural gas** than the U.S. average, and **62 percent more for electricity.**

Given its lack of indigenous resource availability, lack of available fuel storage capacity, and aforementioned lack of pipelines, the Northeast relies mainly on pipeline imports from Canada and liquefied natural gas (LNG) imports from overseas to meet demand, particularly during peak periods in the winter.

Currently, natural gas demand in New England averages nine to 10 Bcf/day, with demand peaks in the winter reaching 20.8 Bcf/day. **The existing natural gas delivery network is simply not robust enough to facilitate these spikes.**

Natural gas pipeline capacity into the region will reach 21.6 Bcf/day only if one includes in that calculation the pipeline expansion projects currently under evaluation and the continued influx of new LNG imports. In other words, even in the best possible case, which is far from the most plausible one, almost no margin will exist between the consumers' peak demand number and the installed supply number.

As part of this project, we modeled the economic impact of continuing with the status quo, which is best defined as a severely constrained ability to build new energy development infrastructure into the region. Among our findings:

- The loss of nearly **78,400 jobs by 2020**
- The displacement of more than **\$4.4 billion in labor income**
- The destruction of nearly **\$7.6 billion in GDP**

We also took a closer look at how the inability to get new energy infrastructure projects permitted in the regions could impact individual Northeast and New England states:

- New England: **22,900 jobs lost | \$2.0 billion in lost state GDP**
- Massachusetts: **8,700 jobs lost | \$792 million in lost state GDP**

CITATIONS

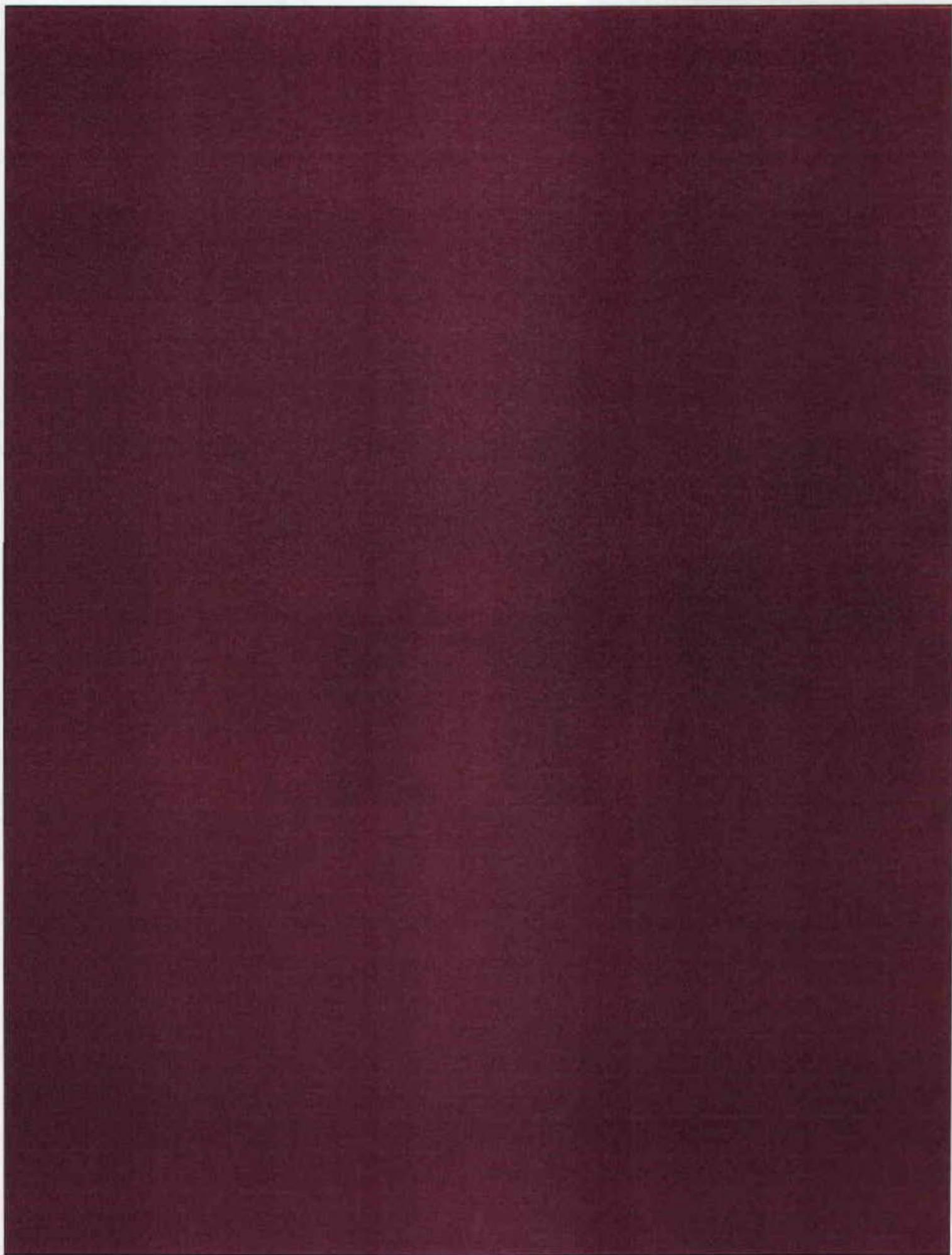
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- Pennsylvania: **21,900 jobs lost | \$2.4 billion in lost state GDP**
- New York: **17,400 jobs lost | \$1.6 billion in lost state GDP**
- New Jersey: **11,600 jobs lost | \$1.2 billion in lost state GDP**

We also ran an impact analysis on two states that reside outside the Northeast, but which would also stand to be adversely impacted in economic terms if prohibitions were placed on pipeline development in the Northeast.

- Ohio: **2,100 jobs lost | \$295 million in lost state GDP**
- West Virginia: **2,500 jobs lost | \$159 million in lost state GDP**

Notwithstanding the new administration's stated support for investments in key energy infrastructure, it's important to note again that the primary impediments to these projects advancing in the Northeast do not originate in Washington. A coordinated effort by those affected in the region will be required to influence local and state policy-makers to finally end what is in effect a unilateral blockade, one denying residents access to cheaper, cleaner, more proximal and more reliable sources of natural gas.



CHAPTER **2**
CURRENT STATE
OF PLAY

While much of the country has benefited from the massive influx of new natural gas supplies entering the marketplace over the past decade, the Northeast has not been able to reap quite as much of the benefit of that trend notwithstanding its proximity to major producing formations like the Marcellus and Utica. One reason why: the work of activist groups allied with the so-called Keep It In the Ground campaign to oppose and in some cases prevent desperately needed pipeline infrastructure projects from moving forward.

But a closer analysis of the Northeast's future supply capabilities shows that the current infrastructure as it presently exists will not be able to keep pace with forecasted growth rates in demand.

The polar vortex that took place in the winter of 2014 was an indicator of what happens when insufficient supply comes face-to-face with peak demand, leading to extraordinary price spikes that in this case put the public's safety and well-being at risk. With forecasts pointing to colder winters in the near-term for the Northeast, the region can ill afford to ignore its critical infrastructure needs.

The economic consequences associated with continuing to deny developers' requests to extend and improve pipeline capacity in the region are significant, with our analysis forecasting the loss of more than \$7.6 billion in GDP owing to the effect of higher natural gas and electricity prices on the broader economy, plus the loss of investments tied to the development activities themselves.

Even with all of its obvious economic and environmental benefits, natural gas infrastructure development continues to encounter outsized political resistance.

Notably, most of this push-back continues to be registered in states that do not have a long history when it comes to pipeline development. Polling data consistently shows that most Northeast residents aren't fully aware of how much more they pay for their energy than everyone else in the country. Common sense suggests they'd be angry if they were.

According to federal data, Northeast states have some of the highest delivered natural gas prices in the entire country, with residential and commercial consumers paying about 30 percent more overall than the average American household.

The Northeast region has been studied closely over the years and many reports have sought to sound the alarm on the significant supply curtailments that may occur if infrastructure build-out is not prioritized to meet growing demand.

One recently released independent study, produced on behalf of the Eastern Interconnection Planning Collaborative,¹ reviewed the adequacy of the natural gas pipeline delivery system in the region to meet the needs of the gas-fired electric generation under various conditions over a 10-year horizon. Among its other core conclusions was that there are significant constraints on the ability to deliver natural gas to residences and businesses as well as to gas-fired power plants to the point where even advanced planning does not provide sufficient relief.²

There were two headline events in the past year that point to the difficult environment that prospective pipeline developers should expect to face as they seek to secure the approvals they need to commence their projects:

- The **Constitution Pipeline** was placed on hold because regulators in New York denied at the last minute a critical water-quality permit to Williams. Interestingly, the company had acquired precisely this same permit from federal regulators earlier in the year.
- The **Access Northeast** pipeline has been placed on hold after a court in Massachusetts ruled that none of the costs associated with the build-out of the line could be redirected back to ratepayers, notwithstanding the project partners having received previous assurances to that effect. The project's sponsor, Spectra Energy, announced in a Dec. 2016 state filing that it now does not expect work to begin before 2019.³ In January 2017, Evercore, the largest utility in New Hampshire, filed a formal motion asking the court to reconsider its ruling, citing continuing high natural gas prices for its customers.

The natural gas system in New Jersey, New York, and New England is expected to become more constrained as federal, state, and local regulatory actions promoting the use of natural gas move forward in the coming years. In addition, the planned and targeted closures of up to 6,075 MW of nuclear plants in the Northeast will increase the demand for natural gas to fill the power supply gap. For example, New York Gov. Andrew Cuomo has successfully pressured the owners of the Indian Point nuclear power plant to shutter its operations.

“ Because of the benefits of the Marcellus here in the Northeast, we’re bringing [natural] gas out of the wellhead at a \$1.96 MMBtu. In fact, Pennsylvania gas is almost a dollar cheaper than [benchmark-priced] natural gas.”

Robert Powelson, Pa. PUC commissioner; as quoted by POLITICO, Dec. 28, 2016

Incongruously, the effort to stop the expansion of the nation's natural gas transportation network is moving forward at precisely the same time as other efforts take shape aimed at allowing residential and commercial consumers to switch over to natural gas as a replacement for fuel oil.

In 2011, the New York City Department of Environmental Protection issued regulations mandating the phase-out of No. 6 residual fuel oil for heating by 2015 and No. 4 residual fuel oil for heating by 2030. The city also requires that all new boiler or burner installations must utilize cleaner fuels, which according to the city's definition includes natural gas.

The Northeast currently finds itself on a conflicted path when it comes to natural gas. The demand for natural gas is projected to increase significantly in the near-term, and for the first time ever, that phenomenon has become wholly independent of the weather. Decisions made years ago related to fuel-switching and electricity generation have essentially “locked in” the future demand expansion – even while the demand side has failed to keep up.

Based on the current supply and demand picture, no rational analyst would consider to the current situation in the Northeast to be either sustainable or tenable. Something, as they say, has got to give.

CITATIONS

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3

NORTHEAST NATURAL GAS & ELECTRICITY PRICES

Since 2008, natural gas prices in the U.S. (Henry Hub) have been declining from a high of \$13.31/MMBtu in June 2008 to a low of just \$1.49/MMBtu in March of this year.¹ The shale revolution has played an obvious role in facilitating this steady price decline, which itself has had the effect of disrupting major segments of the country's energy system.

For the first time, natural gas-fired electricity generation has surpassed coal generation on an annual basis in 2016.² Additionally, in the future as more traditional sources of electric generation find themselves under pressure owing to carbon constraints, natural gas is projected to claim an even greater share of the nation's electricity generation.

But as we continue to see in the Northeast, a low natural gas price at the wellhead does not always equate to a low price at the delivery point for that same molecule of natural gas. The extent to which it is depends almost entirely on the costs associated with bringing those supplies to the marketplace.

HIGHER ENERGY PRICES IN THE NORTHEAST

Across the board, Northeast natural gas and electricity prices are significantly higher than the rest of the country across all sectors. While several factors play into this trend, the availability of natural gas supply into the region is one of the primary drivers.

For example, the Federal Energy Regulatory Commission's (FERC) 2015 State of the Markets Report notes that "with the exception of the Northeast, including New England, regional price differences [in natural gas] across the country were not large," a clear sign, FERC said, that "midstream investments [made] over the past 10 years have largely relieved natural gas transportation constraints."³ FERC goes on in that same report to note that "pipeline constraints near Algonquin Citygates in Boston, Transco Zone 5 in the Mid Atlantic, and Transco Zone 6 New York, resulting in higher prices for consumers in 2015."⁴

Using EIA's historical price data, we can see just how high prices actually are compared to the U.S. average. As Table 1 shows, the price premium that consumers in the Northeast are forced to pay for natural gas is between 29 and 106 percent above the U.S. average price.

On the electricity side, the story is similar. Without greater access to low cost fuel supply, the Northeast is forced to rely on relatively more expensive imports, which has a direct impact on the delivered price for electricity (Table 2).

Consumers in the Northeast pay anywhere from 40 to 62 percent more per MWh for their electricity relative to residents in the rest of the country. Coupled with high natural gas prices, Northeast consumers are at a serious disadvantage. In fact, recent press has shown

Table 1: 2015 Delivered Natural Gas Prices by Sector

Sector	U.S. Average Delivered Price (\$/Mcf)	Northeast Average Delivered Price (\$/Mcf)	Northeast Price Premium
Residential	10.38	13.35	29%
Commercial	7.91	10.30	30%
Industrial	3.91	8.04	106%
Electric Power	3.37	4.26	26%

Table 2: 2015 Delivered Electricity Prices by Sector

Sector	U.S. Average Delivered Price (\$/MWh)	Northeast Average Delivered Price (\$/MWh)	Northeast Price Premium
Residential	126.7	182.3	44%
Commercial	105.9	147.9	40%
Industrial	68.9	111.7	62%

increased concern over high energy prices affecting the local economy.

In New Hampshire, business leaders organized a letter in support of Northeast Energy Direct, a \$3.3 billion project that would have brought natural gas from New York into New England. The letter expressed concern that the state's economy "could be short-circuited by the high cost of energy" if the pipeline was blocked.⁵ A month later, the company announced it would no longer be proceeding with the project.

"The population up there [in New England] has to pay exorbitant power bills, and the number one reason for that is that local gas, indigenous to the U.S., 300 miles away, the cheapest in the world, can't get up there. It's sinful."

Robert Christensen, Drexel Hamilton LLC; as quoted by Bloomberg, July 12, 2016

A study by La Capra Associates for the New England Coalition for Affordable Energy found that the lack of new energy infrastructure "will cost New England households and businesses **\$5.4 billion in higher energy costs** (in 2014 dollars) between 2016 and 2020."⁶ The study estimates that the "lack of energy infrastructure will **reduce household spending by \$12.5 billion.**"⁷

Concerns about natural gas price and availability have been vocalized by several U.S. senators representing New England states. In March 2014, soon after the polar vortex sent natural gas prices soaring, six U.S. senators sent a letter to the FERC, stating that "severe price increases like those we have seen in New England can hurt families and cripple businesses, especially manufacturers that rely on natural gas for power generation."⁸

The lead signatory of the letter was Sen. Ed Markey (D-Mass.), who earlier this year led a campaign to pressure Kinder Morgan to drop plans to build a 420-mile natural gas pipeline into the western part of his state.⁹ In April, the company announced it would no longer be moving forward with the effort.

Higher levels of demand, coupled with the lack of new pipeline capacity, could keep the Northeast locked into the same high-cost energy situation it has been in over the past decade. And as the system becomes more constrained over time, this problem will be exacerbated even further.

Not only are consumers faced with higher energy bills, lower household income and spending, but there also is a potential for even greater damage on the Northeast's manufacturing and industrial economy, leading to even more significant economic losses for the region. And despite activists' claims to the contrary, renewable energy, while an important segment of the overall market, will not by itself be able to "cover"

for natural gas as a significant, dispatchable provider of baseload generation.

MACROECONOMIC INDICATORS IN THE NORTHEAST

High energy costs tend to negatively impact local, regional and national economies – especially when that cost burden is so far out of alignment with what's in place in neighboring jurisdictions. As part of our analysis, we pulled the lens back a bit to examine how some of the other major macroeconomic indicators in place in the Northeast region may have been impacted overtime by these higher costs – and vice-versa.

In 2015, the Northeast accounted for just over 16 percent of U.S. GDP.¹⁰ Its growth over the past five years, however, has been below average. As shown in Table 3, the U.S. economy has been growing at a faster rate on average than the Northeast. Between 2010 and 2015, Northeast GDP grew by 1.0 percent, whereas U.S. GDP as a whole grew at 1.8 percent over the same period.

Table 3: Northeast vs. U.S. GDP Growth

Region	2010-15 Growth	Annual Average Growth
Northeast	5.3%	1.0%
U.S.	9.5%	1.8%

The Northeast's underperformance relative to the rest of the country when it comes to GDP growth isn't the only macroeconomic indicator worth highlighting. Job growth also has been weak compared to the U.S. as a whole, as shown in Table 4. A recent report by the Federal Reserve office in Boston confirms that "the New England economy continues to improve, but lags the nation in most measures."¹¹

// The existing pipelines carrying natural gas into New England are now running at or near maximum capacity ... Addressing natural gas infrastructure constraints is currently the region's highest-priority challenge."

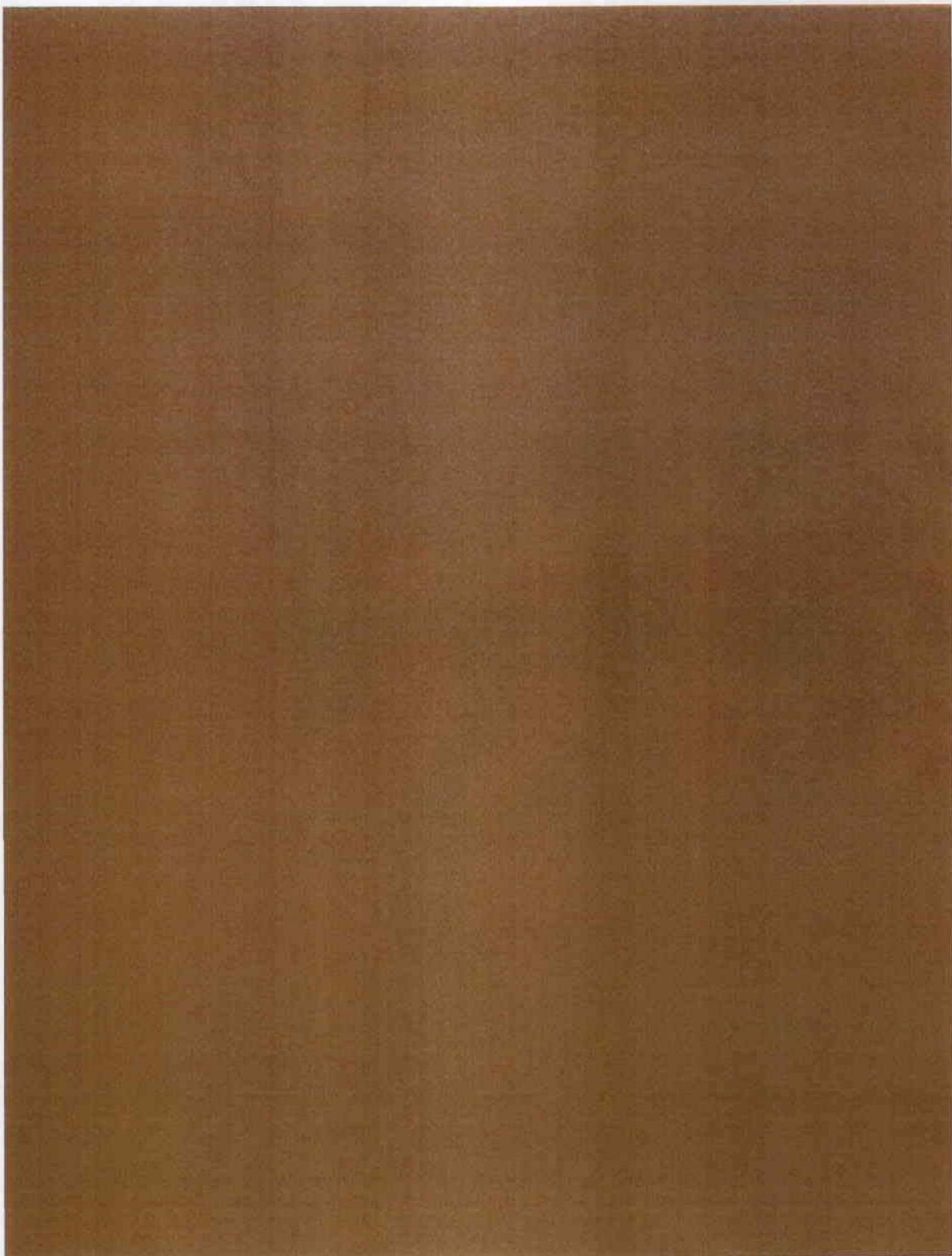
ISO New England, "Natural Gas Infrastructure Constraints"; accessed Dec. 27, 2016

Table 4: Northeast vs. U.S. Jobs Growth¹²

Region	2010-2015 Growth	Annual Average Job Growth
Northeast	2.4%	0.5%
U.S.	5.8%	1.1%

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4

CHAPTER

NATURAL GAS INFRASTRUCTURE AND MARKET NEEDS

Despite its proximity to abundant, cheap natural gas supply out of the Marcellus, the Northeast has seen pipeline constraints and prices increase over the past few years. These concerning trends can be blamed on several phenomena:

Upstream (natural gas production)

- Very little indigenous natural gas is produced in New England, and the same is true in New Jersey.
- While having tremendous natural gas resource potential, New York has placed a ban on what it calls "high-volume hydraulic fracturing," effectively preventing the commercial development of the Marcellus Shale.

Midstream (pipelines and storage)

- State governments and public-utility commissions have increasingly denied requests to have ratepayers contribute to the financing of natural gas infrastructure development
- Opposition from activist groups has slowed the permitting process, and spurred litigation
- New England has very few underground energy storage options owing to its unique subsurface geology

Given its lack of a resource base, lack of storage capacity, and constrained access to pipeline capacity, the Northeast relies mainly on pipeline imports from other parts of the United States and Canada and LNG imports from overseas to meet demand, particularly during peak periods in the winter.

Currently, natural gas demand in New England averages between nine and 10 Bcf/day, with demand peaking in the winter to around 20.8

Bcf/day. Natural gas pipeline capacity into the region is around 21.6 Bcf/day, including planned pipeline expansions and LNG imports. That leaves little room for demand spikes and future growth.

PROJECTING FUTURE SUPPLY NEEDS

Future projections related to the balance between supply and demand – making sure there's enough supply to maintain system reliability and stability -- is the key question in determining whether to expand energy infrastructure capacity. In the industry, we refer to these as "market needs" analyses.

In the electricity system, system operators often use a 15 percent minimum capacity reserve margin (calculated as excess capacity divided by peak demand) when determining the market needs for expanding supply capacity. The reserve margin serves as a buffer in case of unplanned circumstances, such as unexpected transmission line or substation outages that could reduce supply and thus impact the reliability of the grid.

When it comes to the Northeast's natural gas infrastructure, accurately defining the market need, inclusive of the reserve margin, has become especially important over the past few years. The three primary factors in determining market needs are as follows:

- **Economic growth.** This factor helps to establish a region's average demand growth going forward, as higher growth will place more burdens on existing infrastructure and require capacity expansions to meet baseline demand.
- **Structural changes to the economy.** Market forces and policy changes can affect baseline demand as well. For example,

declining costs for renewable energy “drop-ins” can partially offset the need for future natural gas demand in the power sector. Gas demand, though, could also increase under new policies. EPA’s Clean Power Plan, whose prospects for implementation are admittedly weaker now than they were before the recent election, would have had a major impact in facilitating the transition away from coal generation toward renewables and natural gas.

- **Weather projections.** Weather plays an important role in these analyses owing largely to its variability. If expectations are that colder than normal winters will continue, for example, then more capacity will be needed to ensure supply availability, reliability, and system stability.

In the following section, we provide our forecast for the Northeast’s market needs given these factors.

NORTHEAST DEMAND FORECAST

As part of this project, we ran a simulation of what the Northeast market need for additional pipeline capacity will be through 2022. To run the analysis, we first developed a demand forecast for the Northeast.

We started with the natural gas demand projections from EIA’s 2016 Annual Energy Outlook (AEO). We chose to use an average of the AEO 2016 Reference case and the High Economic Growth case because planning for expansions should be based upon a reasonable “high” case in order to ensure adequate system availability, reliability, and stability.^{1,2} Pipeline capacity, as with other large infrastructure investments such as bridges, ports, highways, the internet, and other networks, cannot be instantly added to the system. As such, one cannot plan for simply the average outcome and must consider a reasonable high case instead.

In addition to the Northeast’s economic growth potential and structural changes in power sector demand (specifically, the ongoing structural shift from coal to natural gas), we included the potential and expected nuclear power plant closures in the Northeast in our demand forecast. We assume that these plant closures would be replaced with natural gas-fired, baseload power generation. Table 5 lists the power plant name, capacity, equivalent natural gas demand necessary for replacement, and potential retirement year.

The “Potential Retirement Year” column in Table 5 represents a likely scenario. The Fitzpatrick, Ginna, and Nine Mile Point plants in New York were slated to be retired in the next few years unless they received incentives.

In August 2016, the New York’s Public Service Commission announced the Clean Energy Standard, which will incent further operation by allowing these plants to obtain “zero emissions credits” through 2029.³ The provision is being challenged in court by a group of energy companies and trade groups.⁴ For the purposes of our modeling, we assume these incentives do not ultimately materialize and that financially struggling nuclear plants will close by 2018.

Gov. Cuomo announced in early Jan. 2017 that the Indian Point Energy Center will be shut down, with the first reactor retired by April 2020 and the second by April 2021.⁵ Our analysis reflects this latest news and factors in how this closure will impact peak natural gas demand.

Table 5: Potential and Expected Nuclear Power Plant Closures and Equivalent Natural Gas Demand Necessary for Replacement

Nuclear Plant Name	Location	Capacity (MW)	Equivalent Natural Gas Demand at Peak (Bcf/d)	Potential or Announced Retirement Year
Fitzpatrick	NY	838	0.14	2018
Ginna	NY	580	0.10	2018
Indian Point	NY	2,069	0.35	2020-2021
Nine Mile Point	NY	1,900	0.32	2020
Pilgrim	MA	688	0.12	2019
Total Demand			1.02	

Finally, we adjusted the average annual demand to determine the peak gas demand for the Northeast. Because AEO data is provided on an annual basis, it averages out the peaks that occur throughout the year. To get a more accurate picture of peak demand levels (i.e., the level in which the pipeline system would be most constrained), we adjusted the forecasted average annual demand by a ratio of maximum to average daily demand. This ratio was determined and applied for each sector (i.e., Residential, Commercial, Industrial, and Electric Power) in the Northeast.⁶

Applying the ratio of maximum to average daily demand is necessary when accounting for weather variability. In 2014, inadequate pipeline capacity, high demand, and extreme weather conditions created by the polar vortex contributed to the dramatic increase in natural gas and electricity prices during the winter. In New York City, natural gas prices hit a record high of \$120/MMBtu⁷; in Boston, prices rose to more than \$75/MMBtu and averaged over \$22/MMBtu (or 50 percent higher than the previous winter).⁸ During this same period, day-ahead electricity prices spiked to over \$500/MWh.⁹

“ We’ve been hearing loud and clear from business and residential customers about the need to lower and stabilize [natural gas] prices. Expanding the supply of [natural] gas into New England is one of the necessary actions that must occur as part of the effort to reduce energy costs and ensure reliability.”

Bill Quinlan, president of N.H. operations for Evercore; as quoted by Associated Press, Jan. 7, 2017

After adjusting for power plant closures, we find that peak demand in 2017 is expected to reach 20.8 Bcf/d, increasing to 23.2 Bcf/d by 2020. The annual peak demand forecast is shown in Figure 1.

SUPPLY REQUIREMENTS

As shown, natural gas demand is projected to steadily increase in the Northeast region over the next four years. Given this level of demand,

the question becomes: does the current and projected pipeline infrastructure hold enough capacity to maintain reliability? The following analysis shows the Northeast's current gas supply capacity, future additions, and the supply gaps that exist for meeting future demand.

CURRENT PIPELINE CAPACITY STATUS

Using the EIA's State to State Region Inflow Capacity data,¹⁰ we are able to determine the current pipeline capacity coming into the Northeast. This serves as an indicator of the actual natural gas deliveries that can flow into the region. As of 2016, the available inflow capacity into the Northeast equaled nearly 20.0 Bcf/d. New England's LNG import terminals offer another 2.6 Bcf/d of additional capacity onto the system (Table 6).¹¹

PLANNED PIPELINE PROJECTS

Three projects currently in the planning stages would bring 1.58 Bcf/d of new capacity into the Northeast, and at least 15 other projects within the boundaries of the Northeast are also being planned – all of which would enhance system capacity and reliability if allowed to move forward. Table 7 summarizes these projects.

FUTURE SUPPLY GAPS IN THE NORTHEAST

With a few new pipeline additions and expansions coming online in 2017, the overall pipeline capacity into Northeast will reach just over 21.58 Bcf/d. However, by 2018 this may not be enough capacity, especially given the possibility that supply reserve margins (excess capacity divided by demand) turn negative (Figure 2).

Based on the reserve margin forecast depicted above, it will be critical that new pipeline capacity be added to the system. If, for example, one of the region's LNG import terminals unexpectedly shut down during peak season, demand could move beyond the available supply almost instantaneously. This could have a major and deleterious impact on the broader system, bringing into play extremely high price spikes, power outages, reduced availability of household heating supply, and consumer cost increases measuring collectively in the billions of dollars.

Figure 1: Peak Demand Forecast for the Northeast

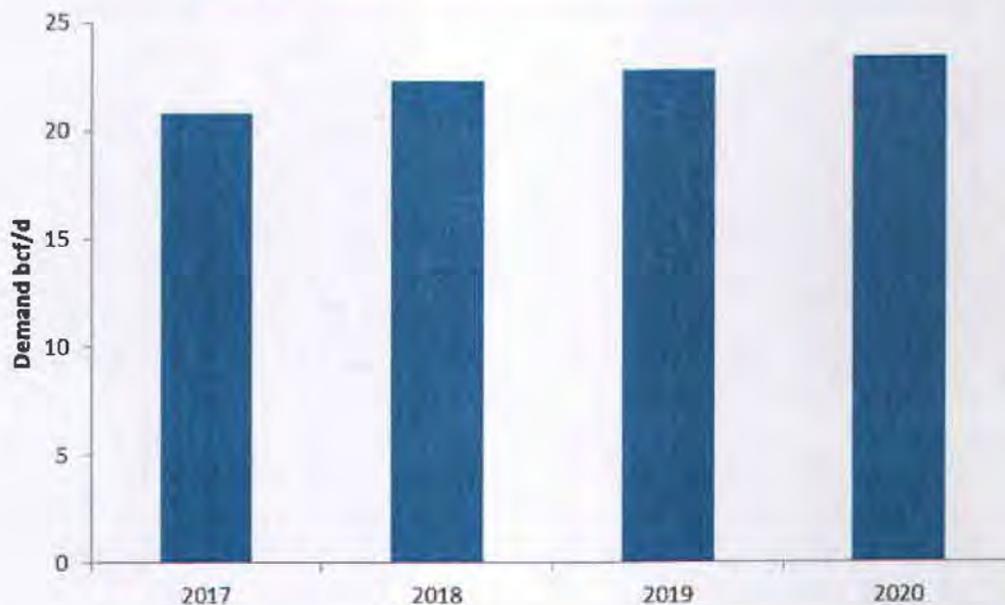


Table 6: Total Existing Inflow Capacity into the Northeast (Bcf/d)

Pipeline Capacity into the Northeast by Route	Capacity (Bcf/d)
Pennsylvania/ Delaware to New Jersey	8.4
Pennsylvania to New York	4.7
Canada to New York	3.2
Canada to New England	1.1
LNG Imports Capacity	2.6
Total	20.0

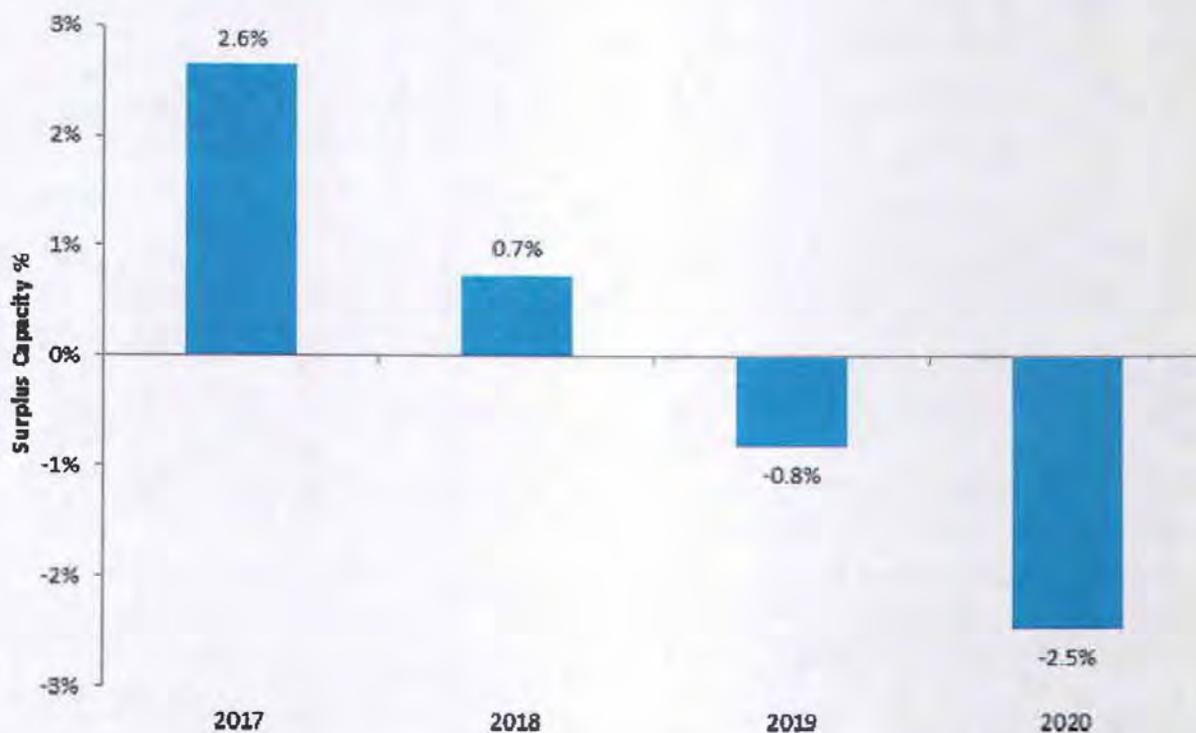
Table 7: Planned Pipeline Capacity Additions in the Northeast

Pipeline	State/Region to State/Region	Status	Capacity (Bcf/d)
Interstate into the Northeast			
PennEast	PA to NJ	Under FERC Review	1.00
Northern Access	PA to NY	Approved	0.48
Continent to Coast	Canada to NY	Approved	0.10
Total			1.58
Interstate within the Northeast			
Constitution Pipeline	NY to New England	FERC approved, but on hold due to NY state environmental review	0.63
Algonquin Incremental Market (AIM) Project	NY to New England	Under Construction	0.33
New York Bay Expansion	NY to New England	Under Construction	0.11
Access Northeast	NY to New England	On Hold	0.90
Atlantic Bridge Project	NY, CT, MA, and ME	Approved	0.13
South to North Project	NY to CT	Under Company Consideration	0.63
Total			2.73
Intrastate within the Northeast			
Connecticut Expansion Project	CT	Approved	0.07
Garden State Expansion Project	NJ	Approved	0.18
Wright Interconnector Project*	NY	FERC approved, but awaiting a NY state air permit	--
New Market Project	NY	Approved	0.08
Salem Lateral Project	MA	Under Construction	0.11
Valley Lateral	NY	Approved	0.13
Eastern System Upgrade	NY	Under FERC Review	0.23
Total			0.80

* Capacity increase is part of Constitution Pipeline;

Note: As of March 2017, FERC does not have a full quorum of commissioners to issue pipeline certifications. This analysis does not attempt to quantify the impacts of the lack of a quorum at FERC

Figure 2: Northeast Surplus Natural Gas Delivery Capacity



THE JONES ACT IMPACT

Originally passed by Congress nearly a century ago to support the country's Merchant Marine fleet after World War I, the Jones Act requires that maritime transport of cargo between points within the United States be carried by vessels that are owned by U.S. citizens, registered under the U.S. flag, and physically built in the United States.

But according to a 2015 report issued by the Government Accountability Office (GAO), "currently operating LNG carriers are nearly all foreign built and operated. LNG carriers have not been built in the United States since before 1980, and no LNG carriers are currently registered under the U.S. flag."¹²

In effect, this means that LNG regasification facilities based in New England have no practical ability to access LNG supplies that originate in or are sent out of the United States. In Boston, a terminal located on the Mystic River receives shipments of LNG primarily during the winter months almost exclusively from suppliers in Trinidad and Tobago. Recent reports indicate that shipments have only increased over the past several years, with import volumes reaching a three-year high in 2015.¹³

Of course, whether the Mystic River terminal receives its natural gas from Cove Point, Md. or Trinidad, the CH₄ molecules are the same. But the price consumers are forced to pay for those molecules is not. In that same GAO report cited above, the agency estimates that establishing a fleet of Jones-Act compliant LNG cargo ships

would add an additional \$0.73 per MMBtu onto the price of the delivered product, representing a 24 percent increase in shipping rates that would be passed along to the consumer.¹⁴

Without the Jones Act, these costs would not apply, and consumers in the Northeast would be in line to access LNG supplies that are cheaper both in their origination (as natural gas at the wellhead) and in their delivery (as LNG shipments traveling 450 miles from Maryland, as opposed to 2,400 miles from Trinidad).

CITATIONS

- 1 Note that the AEO does not break out forecasted demand by specific states, but rather by region. To calculate New York and New Jersey forecasted demand, the Institute used the forecast for the appropriate region and multiplied by these states' historical share of natural gas consumption in the region between 2010 and 2015.
- 2 Total natural gas demand includes demand in the following sectors: Residential, Commercial, Industrial, Transportation, Electric Power Generation, and Other.
- 3 <https://www.technologyreview.com/s/602079/new-york-state-has-a-plan-to-rescue-nuclear-power/>
- 4 <https://www.rtoinsider.com/federal-suit-new-york-nuclear-power-subsidies/>
- 5 https://www.nytimes.com/2017/01/09/nyregion/cuomo-indian-point-nuclear-plant.html?_r=1
- 6 Note that data for Vermont was not available. However, it is assumed that Vermont follows the same demand curve shape as the rest of New England and New York.
- 7 Record winter withdrawals create summer storage challenges, EIA., June 12, 2014. Available at: <http://www.eia.gov/naturalgas/review/winterlookback/2013/>
- 8 Taming the polar vortex. (2014). Washington Post. Available at: <http://www.washingtonpost.com/sf/brand-connect/wp/enterprise/taming-the-polar-vortex/>
- 9 <http://energyresearchcouncil.com/Polar-vortex-effect-on-electricity-prices.html>
- 10 Data is available for download here: <https://www.eia.gov/naturalgas/pipelines/EIA-StatetoStateCapacity.xls>
- 11 These import terminals include: Distrigas, Northeast Gateway Project, and Neptune LNG. These terminals have a max sendout capacity of 1.0 Bcf/d, 0.8 Bcf/d, and 0.75 Bcf/d, respectively.
- 12 <http://www.gao.gov/assets/680/673976.pdf>
- 13 <https://www.bloomberg.com/news/articles/2016-07-12/pipeline-phobia-keeps-new-england-s-unlikely-trade-route-open>
- 14 <http://www.gao.gov/assets/680/673976.pdf>

5

CHAPTER

ECONOMIC IMPACT METHODOLOGY

The previous sections summarize the current state and capacity of the Northeast's natural gas infrastructure, as well as projecting out the region's future market needs. In this section, we quantify the economic impact of preventing pipeline development from moving forward in this region, and also take a look at the cascading impacts it could create for economic sectors across the entire value chain.

METHODOLOGY

The analysis presented here estimates the potential impacts over the next four years: 2017 to 2020. This time frame includes all recently announced pipeline projects while still capturing the increase in production to utilize the capacity, as well as the benefits of lower energy prices to end-consumers. Our economic impact analysis is divided into three natural gas value chain segments:

- **Upstream:** Natural gas extraction
- **Midstream:** Gas pipeline investments
- **Downstream:** End-consumers of natural gas and electricity

To estimate the economic impacts across these three segments, we used publicly available economic data from announced pipeline projects, energy demand forecasts, and announced retirements of nuclear generators.

We then ran these economic inputs through the IMPLAN model to estimate the overall macroeconomic effects of preserving the status quo, which effectively prevents new pipeline infrastructure from being developed in and into the region.

IMPLAN is a commonly used and highly regarded input-output modeling software and data system that tracks the movement of money and resources through an economy,

looking at linkages between industries along the supply chain to measure the cumulative effect of spending in terms of job creation, income, production, and taxes. These aspects of the IMPLAN model help us understand and quantify the economic "ripple" (or multiplier) effect that tracks how each dollar of input, or direct spending, cycles through the economy to suppliers and ultimately to households.

UPSTREAM: ECONOMIC IMPACTS OF PIPELINE DEVELOPMENT

As previously mentioned, the outflow of new supply coming out of the Marcellus and Utica regions will not benefit Northeast residents as much as it could if much-needed infrastructure projects are not allowed to move forward. The key states poised to be supplying the Northeast with incremental natural gas supplies would be Pennsylvania, Ohio, and West Virginia.

These upstream states would lose out on sales and corresponding private sector capital expenditures (capex) without the planned pipelines being built. Using publicly available data on well decline rates and capex per well, we translated incremental demand into wells not drilled and then capex not spent within each state. The capex necessary for the additional production serves as the main input into the IMPLAN model across four expenditure categories:

- Extraction of oil and natural gas
- Drilling of oil and gas wells
- Construction of new non-residential structures
- Household income impacts (from land lease deals as well as royalty payments)

Our capex input into IMPLAN was proportionately distributed across Pennsylvania, Ohio and West Virginia based on historical production levels.

MIDSTREAM: ECONOMIC IMPACT OF PIPELINE DEVELOPMENT

The midstream economic impact data is derived from pipelines that specifically serve the Northeast region. We used FERC filings and also examined announcements from organizations such as the Northeast Gas Association to capture the full breadth of projects planned for the New England states, as well as New Jersey, New York and Pennsylvania.¹ Where detailed breakouts of project costs were not available, we apply a cost structure breakdown from projects where data were available.² The pipeline costs were distributed across the following expenditure sub-categories:

- Employee compensation
- Architectural, engineering and related services
- Iron, steel pipe and tube manufacturing
- Construction of other new nonresidential structures
- Insurance carriers (for contingency)
- Legal services
- Advertising, marketing and related services

The costs are then further refined to capture only the spending that would occur in the specific state of interest, filtering out any outlays that were or could have been made in other states.

We assume as part of this analysis that project costs are spread equally across the years in which the projects are active. For example, if a project was scheduled to start construction in 2016 and end it in 2018, and cost \$300 million in total, we assume project expenditures of \$100 million each in 2016, 2017 and 2018.

In situations where pipelines traverse several states, project costs were attributed according to the length of pipeline that was laid in each respective state. The economic impacts of more than \$7.8 billion of announced pipeline capital expenditure were considered in this analysis.

DOWNSTREAM: IMPACTS OF LOWER COSTS TO END-USERS

According to two recent studies by Concentric Energy Advisor, increasing pipeline capacity and incentivizing supply will translate into reduce natural gas and electricity costs to end-consumers.³ The studies focused on four primary areas of potential savings that could be achieved from additional pipeline infrastructure and lower market area natural gas prices:

- Electric consumers when natural gas-fired generation resources set the electric energy price based on lower market area natural gas prices ("Gas-Fired Generation Savings")
- Electric consumers when natural gas-fired generation resources could displace less efficient and more costly oil-fired generating resources, and set the electric energy price based on lower market area natural gas prices ("Oil-Fired Generation Displacement Savings")
- Industrial natural gas consumers that are purchasing natural gas supplies at lower market area natural gas prices ("Industrial Transport Customer Savings")
- Natural gas local distribution company (LDC) customers when LDCs have the opportunity to purchase more natural gas supplies from lower-cost, local Marcellus Shale production ("LDC Gas Supply Savings")

These cost savings were then divided up across every single economic sector (536 in total) and input into IMPLAN to fully capture the economic consequences if the costs savings were not realized. Cost savings were assessed for Pennsylvania, New Jersey, New York, ⁴ Massachusetts⁵ and all of New England. The cost savings per year was directly proportional to the capacity expected to be online in each respective state.

CITATIONS

- 1 Pipeline projects that were considered expansions or upgrades in addition to new builds were included in this analysis
- 2 We used the Atlantic Bridge Project's filing to the FERC to serve as a representative distribution of project costs across spending categories.
- 3 "New England Cost Savings Associated with New Natural Gas Supply and Infrastructure"; Concentric Energy Advisors, May 2012 & "Estimated Energy Market savings from Additional Pipeline Infrastructure Serving Eastern Pennsylvania and New Jersey"; Concentric Energy Advisors, March 2015.
- 4 New York was extrapolated using New England results and respective natural gas capacities. This is a conservative assumption since New York has a higher population than New England.
- 5 Massachusetts was prorated using State Energy Data System (SEDS) from the EIA.

6

NATIONAL ECONOMIC IMPACTS

The results show not just those directly associated with the pipeline or production industries, but also indirect impacts from suppliers to the operators as well as induced impacts from the earnings spent by the employees, contractors and suppliers. All results (unless otherwise noted) are presented in 2016 dollars.

Table 8 captures the total economic impact of a future in which planned pipeline development is prevented from moving forward in Northeast, combining all those impacts that would be realized across the upstream, midstream and downstream sectors in the states we studied. **Based on this analysis, we find that nearly \$7.6 billion in total lost GDP opportunity would be the upshot of a no-pipeline policy, with an additional \$3.8 billion in lost employee compensation over the next four years.** We also find that 78,400 job-years would not be created during the same span.

UPSTREAM

Pennsylvania, Ohio and West Virginia have established themselves as leaders of the energy renaissance movement, owing primarily to their development of the Marcellus and Utica basins. Under a scenario in which pipeline development in the Northeast is halted in the future, these

states would also stand to be negatively impacted, especially insofar as the policy results in them losing access to otherwise viable markets for their products.

Table 9 shows that the three non-Northeast states we analyzed would stand to **lose more than \$1.4 billion in state GDP and \$522 million in employee compensation over the next four years if the development of pipeline projects into the Northeast is halted.** The thousands of potential jobs that will be lost also happen to be high-wage jobs compared to the national average. Production already has slowed recently due to falling prices, and the lack of access to a new market with significant and demonstrable demand for natural gas may further exacerbate the problem in these states.

MIDSTREAM

If all of the announced pipeline projects outlined earlier in this report were prevented from moving forward, nearly **14,900 jobs and \$1.2 billion in state GDP impacts would disappear** or not be created in 2017 alone. As Table 10 shows, many of the pipeline projects that are currently still in need of additional permits to move forward are actually scheduled to be completed in 2017 and 2018. The lone exception is PennEast, which is

Table 8: Total Annual Economic Lost Opportunity if NE Pipeline Development is Prevented – Impacts to New England, New York, New Jersey, Pennsylvania, Ohio, and West Virginia

	2017	2018	2019	2020	Total
Employment (jobs)	16,188	21,925	20,136	20,106	78,355
Labor Income (millions)	\$948.9	\$1,252.3	\$1,124.5	\$1,119.2	\$4,444.8
Employee Compensation (millions)	\$790.9	\$1,056.8	\$956.3	\$951.0	\$3,755.2
GDP (millions)	\$1,496.9	\$2,071.7	\$2,008.6	\$2,027.4	\$7,604.6

Table 9: Total Annual Upstream Economic Lost Opportunity Impacts to Pennsylvania, Ohio and West Virginia

	2017	2018	2019	2020	Total
Employment (jobs)	1,800	2,424	3,052	3,755	11,032
Labor Income (millions)	\$109.9	\$146.7	\$183.8	\$224.2	\$664.6
Employee Compensation (millions)	\$86.0	\$115.2	\$144.5	\$176.7	\$522.3
GDP (millions)	\$237.5	\$315.4	\$393.6	\$477.7	\$1,424.2

scheduled to come online in 2019.

DOWNSTREAM

Among all the sectors we studied, the downstream sector stands to take the biggest hit under a no-new-pipeline scenario in the Northeast.

Economic losses in this case are based on the savings that could have been enjoyed year after year if these pipelines were permitted to move forward. The economic impacts shown in Table are proportional to the additional capacity that

would come online from 2017 to 2020.

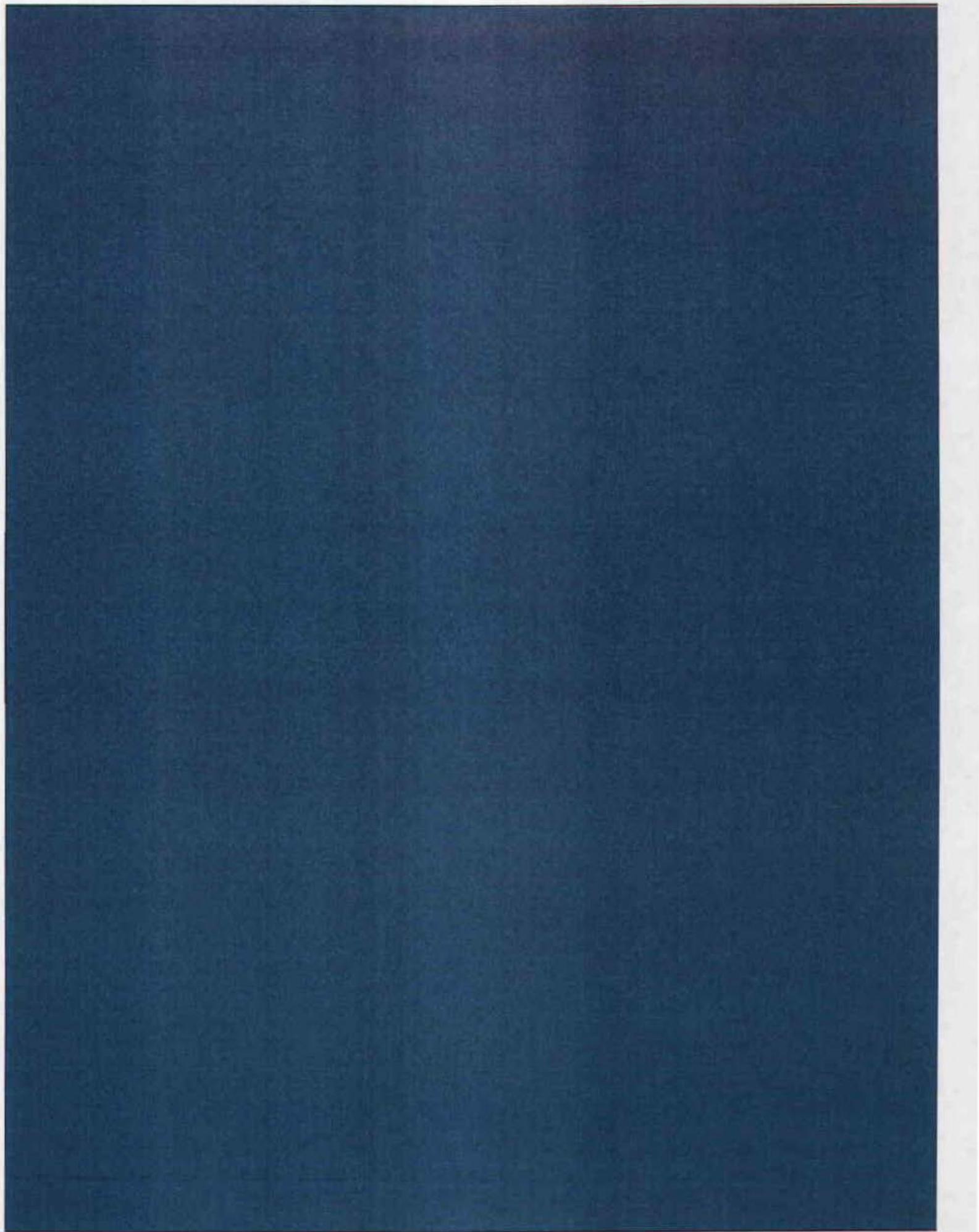
We find that depriving the region of the lower natural gas prices that would have been available owing to proper pipeline build-out would result in nearly **\$5 billion in lost GDP, \$2.5 billion in lost employee compensation, \$2.9 billion in lost labor income and 52,400 unrealized jobs** during the four year span. Higher energy prices would continue to be a burden on both residential and business consumers alike.

Table 10: Total Annual Midstream Economic Lost Opportunity Impacts to Pennsylvania, New England, New York and New Jersey

	2017	2018	2019	2020	Total
Employment (jobs)	7,886	6,277	734	-	14,897
Labor Income (millions)	\$474.6	\$377.7	\$45.7	-	\$898.0
Employee Compensation (millions)	\$388.0	\$310.6	\$37.5	-	\$736.1
GDP (millions)	\$637.1	\$504.8	\$65.4	-	\$1,207.2

Table 11: Total Annual Downstream Economic Lost Opportunity Impacts to Pennsylvania, New England, New York and New Jersey

	2017	2018	2019	2020	Total
Employment (jobs)	6,502	13,224	16,350	16,350	52,426
Labor Income (millions)	\$364.3	\$727.7	\$895.0	\$895.0	\$2,882.1
Employee Compensation (millions)	\$316.9	\$631.1	\$774.3	\$774.3	\$2,496.7
GDP (millions)	\$622.3	\$1,251.6	\$1,549.7	\$1,549.7	\$4,973.3



7

STATE-LEVEL AND REGIONAL ECONOMIC IMPACTS

We also captured the economic impacts on a state by state basis. Certain states affect different sectors of the pipeline infrastructure more than others. Pennsylvania, New England, New York and New Jersey will be hardest hit from the scenarios we studied, whereas Ohio and West Virginia would lose out on a number of upstream opportunities.

NEW ENGLAND

Without much of an indigenous upstream segment to speak of, New England will see the greatest impacts primarily to its midstream and downstream sectors. We project the total midstream and downstream GDP losses to be \$2.0 billion, as shown in Table 12 – with **\$1.4 billion in GDP lost** due to shouldering higher than necessary energy prices.

The loss of planned pipeline upgrades within the region would also deprive the region of **\$600 million in potential GDP impacts**. The midstream and downstream impacts translate

to **22,900 potential job-years vanishing** – which itself results in over **\$1.3 billion in labor income lost** over a four-year period.

MASSACHUSETTS

As the most populous of the six New England states, Massachusetts would absorb the greatest economic losses of any state in that region. Over a four-year span, our analysis indicates that Massachusetts could see GDP losses of nearly **\$792 million, or roughly 40 percent of the total GDP lost** across New England. The 8,700 job-years that would vanish are also **roughly 40 percent of New England's job-loss total**.

Of the 8,700 job-years lost, roughly 62 percent of those come from downstream electricity price impacts to residential, industrial and commercial consumers, as depicted in Table 13. In other words: most people end up losing their jobs because their employers can't afford to pay their energy bills.

Table 12: Total Annual Economic Lost Opportunity - New England

	2017	2018	2019	2020	Total
Employment (jobs)	6,388	8,073	4,237	4,237	22,936
Labor Income (millions)	\$374.5	\$464.5	\$231.6	\$231.6	\$1,302.3
Employee Compensation (millions)	\$315.7	\$395.3	\$202.4	\$202.4	\$1,115.7
GDP (millions)	\$530.3	\$689.8	\$388.9	\$388.9	\$1,998.0

Table 13: Total Annual Economic Lost Opportunity - Massachusetts

	2017	2018	2019	2020	Total
Employment (jobs)	1,629	3,429	1,800	1,800	8,658
Labor Income (millions)	\$109.3	\$212.4	\$103.1	\$103.1	\$528.0
Employee Compensation (millions)	\$93.7	\$185.7	\$92.0	\$92.0	\$463.4
GDP (millions)	\$141.9	\$311.4	\$169.6	\$169.6	\$792.4

PENNSYLVANIA

Pennsylvania stands to be the biggest loser under a no-new-pipelines scenario, as shown in Table 14. Significantly, the commonwealth is projected to lose out on nearly **\$2.4 billion in total GDP over a four year period**, with those impacts fairly evenly distributed among the streams. Pennsylvania could see thousands of potential jobs disappear across the upstream, midstream and downstream sectors and with them almost **\$1.3 billion in labor income**.

NEW YORK

New York's total economic losses closely mirror those of New England, but would be felt almost entirely due to the projected downstream effects. New York would **lose about \$200 million in GDP** due to lost opportunities in the midstream space, while the remaining \$1.4 billion in GDP losses come from higher electricity and natural gas costs.

New York highlights how critical pipeline infrastructure is to the state economy as the

higher prices alone would extinguish more than 87 percent of both the **\$971 million in employee compensation** and **17,400 total job-years** losses, as shown in Table 15.

NEW JERSEY

Much like its neighbor, New Jersey also will be hard hit mostly due to downstream impacts from the lack of pipeline infrastructure being green-lighted in the future. More than 95 percent of the **\$1.2 billion in GDP losses** between 2017 and 2020 come from downstream effects, as New Jersey essentially isolates itself from abundant natural gas supplies in nearby Pennsylvania, Ohio and West Virginia. Table 16 shows that over a four year span, **\$673 million in labor income** and **11,600 job years would disappear** under a no-pipeline scenario.

OHIO

Ohio will lose out on nearly **\$295 million in GDP over the next four years** based on our analysis, which is captured in Table 17. The state is poised to see significant increases in natural

Table 14: Total Annual Economic Lost Opportunity - Pennsylvania

	2017	2018	2019	2020	Total
Employment (jobs)	3,526	5,401	6,387	6,548	21,861
Labor Income (millions)	\$210.9	\$311.4	\$362.4	\$374.1	\$1,258.9
Employee Compensation (millions)	\$169.7	\$255.8	\$301.7	\$311.3	\$1,038.5
GDP (millions)	\$357.1	\$571.3	\$711.3	\$748.4	\$2,388.1

Table 15: Total Annual Economic Lost Opportunity - New York

	2017	2018	2019	2020	Total
Employment (jobs)	2,281	4,662	5,462	4,981	17,385
Labor Income (millions)	\$132.6	\$262.8	\$303.7	\$272.2	\$971.2
Employee Compensation (millions)	\$113.6	\$227.4	\$263.9	\$237.8	\$842.7
GDP (millions)	\$211.4	\$430.0	\$502.7	\$457.1	\$1,601.2

gas production as commodity prices continue to emerge from their recent lows, and Ohio is well positioned to service new markets in the Northeast assuming additional infrastructure is permitted to move forward.

While these results capture only the losses we would expect to occur owing to a drop in future production (thanks to an important market being blocked off), the analysis does not capture the deleterious impact that lower commodity

price might deliver, which itself could be exacerbated by an over-supply situation wrought by the closing-off of Northeast markets.

WEST VIRGINIA

Finally, the state of West Virginia stands to lose out on more than **\$124 million in labor income over the next four years**, and **\$159 million in GDP impacts** thanks to policies in place in the Northeast that prevent new energy infrastructure from being permitted and approved (Table 18).

Table 16: Total Annual Economic Lost Opportunity – New Jersey

	2017	2018	2019	2020	Total
Employment (jobs)	3,241	2,777	2,777	2,777	11,572
Labor Income (millions)	\$191.2	\$160.7	\$160.7	\$160.7	\$673.4
Employee Compensation (millions)	\$162.5	\$139.0	\$139.0	\$139.0	\$579.6
GDP (millions)	\$322.8	\$280.4	\$280.4	\$280.4	\$1,164.0

Table 17: Total Annual Economic Lost Opportunity – Ohio

	2017	2018	2019	2020	Total
Employment (jobs)	334	455	577	717	2,083
Labor Income (millions)	\$18.7	\$25.2	\$31.8	\$39.1	\$114.9
Employee Compensation (millions)	\$12.6	\$17.1	\$21.7	\$27.0	\$78.4
GDP (millions)	\$48.8	\$65.1	\$81.4	\$99.1	\$294.5

Table 18: Total Annual Economic Lost Opportunity – West Virginia

	2017	2018	2019	2020	Total
Employment (jobs)	419	557	696	846	2,518
Labor Income (millions)	\$20.9	\$27.6	\$34.3	\$41.4	\$124.1
Employee Compensation (millions)	\$16.8	\$22.2	\$27.7	\$33.5	\$100.2
GDP (millions)	\$26.4	\$35.1	\$43.9	\$53.4	\$158.9



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