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June 11, 2008

The Honorable Carlos M. Gutierrez  
Secretary of Commerce  
Herbert C. Hoover Building  
14th Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

Re: **Broadwater Energy LLC & Broadwater Pipeline LLC**  
New York State's Objection to Broadwater's Motion to Extend Brief  
Page Limits and Reduce the Review Time by the Secretary of  
Commerce

Dear Mr. Gutierrez:

In response to the request by Broadwater Energy LLC and Broadwater Pipeline LLC ("Broadwater") in its Notice of Appeal dated June 6, 2008 for a shortened time frame for development of the record from 160 to 90 days and its motion dated June 6, 2008 to lengthen the page limits of its principal brief and reply brief, New York State Department of State ("NYSDOS") objects to the granting of these requests. In the alternative, and to the extent indicated below, NYSDOS requests that Broadwater be limited in any principal brief page increase and that NYSDOS be granted the same increase in page length to its principal brief and an extended response time.

Broadwater's filing of a Notice of Appeal is to be considered premature as there are outstanding motions for rehearing to the Federal Energy Regulatory Commission ("FERC") and the consolidated record has not closed

On June 6, 2008, Broadwater filed a Notice of Appeal with the Secretary of Commerce and purported to file the consolidated record. However, the consolidated record has not closed because FERC has not issued its final decision on NYSDOS's motion for rehearing of the Broadwater decision.

The National Oceanographic and Atmospheric Administration ("NOAA") has adopted the definition of a consolidated record (71 FR 788, 799) as defined in section 313(d) of the Energy Policy Act (2005)<sup>1</sup>, which provides:

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for (1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of [the Energy Policy] Act [16 U.S.C. 1465]; or (2) judicial review under section 717r (d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(15 U.S.C. §§ 717n (d)(1) and (2)).

On March 20, 2008, FERC issued an order granting authority for Broadwater, under Section 3 of the Natural Gas Act and associated issuing certificates, to proceed with its Project subject to 87 conditions, which included condition number 28 of the Order prohibiting Broadwater from undertaking the project unless and until NYSDOS concludes that the project is consistent with the Long Island Sound Coastal Management Plan (Order Granting Authority Under Section 3 of the Natural Gas Act and Issuing Certificates, March 20, 2008, 122 FERC ¶ 61, 255). The NYSDOS and other state and local governments have filed motions with FERC requesting a reconsideration of its order and a rehearing. It is the position of NYSDOS that FERC prematurely issued its March 20, 2008 order prior to NYSDOS issuing its federal consistency determination. FERC to date has not yet issued a decision on the rehearing motion.

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<sup>1</sup> The Energy Policy Act of 2005, section 313(d) amended the Natural Gas Act (15 U.S.C. § 717 et seq.) by inserting the definition of a consolidated record into section 717n(d)(1) and (2).

The FERC rehearing decision is not supplemental material or clarifying information but instead a finding that could result in a change in FERC'S decision on the Broadwater application. Since the consolidated record does not include a FERC decision on NYSDOS's rehearing request, the consolidated record is incomplete (15 C.F.R. §§ 930.127(i)(1)). NYSDOS requests that Broadwater's Notice of Appeal be considered premature until such time as FERC issues a decision on the rehearing request and the consolidated record is complete.

NYSDOS requests that the Secretary deny Broadwater's request to increase the volume of their principal brief to 100 double-spaced pages and their reply brief to 35 double-spaced pages

In a motion dated June 6, 2008, Broadwater requested that the Secretary of Commerce allow for its principal brief and reply brief page limits to be extended to 100 double-spaced pages and 35 double-spaced pages, respectively. In prior communications with Robert Alessi, of Dewey & LaBoeuf LLP, NYSDOS had generously agreed to extend the page limit of Broadwater's principal brief to 60 double-spaced pages in exchange for an extended period of time to submit its own 60 double-spaced page principal brief. NYSDOS would require 90 days to prepare its principal brief to account for the additional arguments in Broadwater's larger brief. Importantly, NYSDOS did not agree to an extension of pages for the reply brief.

In its new regulations at 15 C.F.R. §§ 930.127 (b) and (c), NOAA, for the first time, established page limits for the principal and reply briefs and the development of a common record for both parties to access. These regulatory changes were effectuated to "encourage the appellant and State agency to help the Secretary meet the deadlines established in the Energy Policy Act" (Coastal Zone Management Act Federal Consistency Regulations, Docket No. 030604145-4038-02, January 5, 2006). Now Broadwater, an energy venture, is seeking an exception to these rules.

The regulations state that the principal brief shall not exceed 30 double-spaced pages (15 C.F.R. § 930.127(b)). The Secretary may extend the length of briefs for good cause; however, Broadwater's request to extend the page limits is without good cause. Broadwater's claim that it would be "extremely difficult" to provide a comprehensive analysis within the 30 double-spaced page limit is not supported with evidence establishing good cause. It is noteworthy that two liquefied natural gas ("LNG") appeals currently pending before the Secretary of Commerce, AES Sparrows Point v. Maryland Department of the Environment and Weaver's Cove Energy, LLC v. Massachusetts Office of Coastal Management, have submitted their the principal briefs at 30 double-spaced pages and 29 double-spaced pages, respectively, despite also having voluminous records containing scientific and technical information.

Additionally, Broadwater's Notice of Appeal is 21 double-spaced pages in length and contains substantive legal arguments and citations. The regulations allow for Broadwater to submit a 30 double-spaced page principal brief and a 15 double-spaced

page reply brief (15 C.F.R. § 930.127(b)). The culmination of the three documents already effectively provides Broadwater with two additional opportunities to present its appeal while NYSDOS is limited to a principal brief. Broadwater's motion to substantially increase the page limits is not within the spirit of the regulations intended to promote cooperation and meet deadlines. It is requested that Broadwater's request to extend the page limits be denied as it far exceeds the prior 60 double-spaced page agreement with NYSDOS and because Broadwater has not met its burden to provide sufficient bases amounting to good cause warranting 70 double-spaced page and 20 double-spaced page increases to their principal brief and reply brief, respectively (15 C.F.R. § 930.127(g)). In all fairness, its reply brief should not be extended beyond 15 double-spaced pages.

In the event that Broadwater's motion to extend the length of its principal brief to 100 double-spaced pages is granted then NYSDOS requests an extension of time to reply from 60 days to 120 days

A State agency is provided with 60 days from the filing of the Notice of Appeal to file its reply brief (15 C.F.R. § 930.127 (a)). However, if Broadwater's principal brief is to be extended to 100 double-spaced pages or more than three times the regulatory standard of 30 double-spaced pages, then NYSDOS requests an extension of its response time from 60 to 120 days in order to have adequate time to review Broadwater's principal brief and submit its own principal brief (15 C.F.R. § 930.127(g)). If the Secretary allows Broadwater to double the size of its principal brief to 60 double-spaced pages, NYSDOS requests it be granted 90 days (an additional 30 days) from the filing of the Notice of Appeal to respond appropriately. Such an extension would be necessary in order to allow NYSDOS adequate time for review and production of a principal brief, as well as necessary to achieve the fundamental fairness required by NOAA's regulations.

Broadwater's request to shorten the Secretary's review of the appeal from 160 to 90 days should be denied

The Energy Policy Act (2005) amended the Coastal Zone Management Act (1972), § 1465(b)(1), to provide for a 160-day time frame starting from the filing of the Notice of Appeal to close the decision record (Energy Policy Act (2005) Subpart G, § 381). In its Notice of Appeal, Broadwater has requested that the Secretary exercise discretion by shortening the review period for the development of a decision record from 160 to 90 days (15 C.F.R. § 930.130(a)(1)). Broadwater attempts to demonstrate good cause by stating in its Notice of Appeal that the parties, the respective state and federal agencies, and the public have already expended considerable resources in creating the record in the time frame both before and after the initiation of the FERC pre-filing process.

The NYSDOS submits that Broadwater has not established good cause to shorten the time allotted to the Secretary of Commerce to develop the decision record. The

Project is unprecedented in size and scope and the countless impacts it would have to the Long Island Sound speaks to the enormous size of the file. As recognized by FERC Chairman Kelliher:

In our review of this project, FERC has held or participated in 35 community and state and federal agency meetings. FERC staff prepared a draft environmental impact statement of 825 pages and a final environmental impact statement that exceeded 2,200 pages. The total record in this proceeding consists of some 7,100 documents and exhibits. In addition, our response to comments appendix issued on CD is over 1,200 pages long. Altogether, FERC review of this project took more than three years (38 months) and 25,000 staff hours.

(Statement of Chairman Joseph T. Kelliher on Broadwater Energy, LLC, March 20, 2008).

The extensive and detailed record warrants careful and considered review by the Secretary of Commerce. The time expended by all parties to create the consolidated record and indeed Broadwater's unwarranted request to more than triple the size of its principal brief, indicates that Commerce should not rush its decision-making or this appeal.

The utmost consideration and a review period of up to 160 days should be allowed to ensure a thorough review of the record. Broadwater's assertion that its ability to further both the national interest and national security, elements which Broadwater has yet to prove, will be hampered if the decision record is not developed within 90 days is without merit. However, Broadwater is not the only applicant vying to establish LNG import facilities to serve the New York market. The perceived urgency submitted as good cause does not outweigh the regulatory and statutory review that is to be considered in the development of the decision. It is requested that Broadwater's request in its Notice of Appeal to reduce the development of the decision from 160 to 90 be denied.

**Wherefore,** in response to Broadwater's Notice of Appeal request for a diminished review period for developing the record and its motion to increase the number of pages permitted in its principal brief and reply brief, NYSDOS requests the following relief: (1) consider Broadwater's filing of the Notice of Appeal as premature as FERC has not closed the consolidated record; (2) deny Broadwater's motion for an increase in length of its principal and reply briefs to 100 and 35 double-spaced pages, respectively; however, in the event the motion is granted NYSDOS requests that its principal brief page limit be extended to 100 double-spaced pages and its response time be extended from 60 to 120 days; (3) limit Broadwater's principal brief to 60 double-spaced pages and its reply brief to 15 double-spaced pages and grant the request by NYSDOS to extend its principal brief to 60 double-spaced pages and its response time to 90 days; and (4) deny Broadwater's request to shorten the Secretary of Commerce's review time for developing the record from 160 to 90 days.

Respectfully Submitted,



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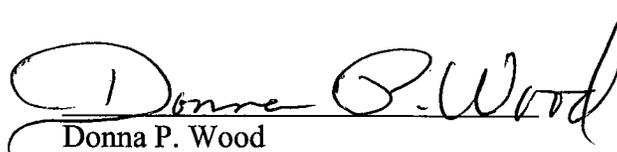
SLW/KG/dw

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Letter of Objection was served this 11th day of June 2008, by first-class mail, unless otherwise indicated, to the following persons at the addresses listed below.

Assistant General Counsel for Ocean Services (by FedEx)  
1305 East West Highway  
Room 6111 SSMC4  
Silver Spring, MD 20910

Robert J. Alessi  
Dewey & Laboeuf LLP  
125 West 55<sup>th</sup> Street  
New York, New York 10019

A handwritten signature in black ink that reads "Donna P. Wood". The signature is written in a cursive style with a large, looped initial "D".

Donna P. Wood  
New York State Department of State  
99 Washington Ave.  
Albany, NY 12231-0001