

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

BROOKFIELD POWER NEW YORK CORP. :

for Redetermination of a Deficiency or for Refund of
Corporation Franchise Tax under Article 9-A of the Tax
Law for the Years 2004 and 2005. :

DETERMINATION
DTA NOS. 822205 and 822206

In the Matter of the Petition :

of :

BROOKFIELD POWER NEW YORK GP CORP. :

for Redetermination of a Deficiency or for Refund of
Corporation Franchise Tax under Article 9-A of the Tax
Law for the Years 2004 and 2005. :

Petitioners, Brookfield Power New York Corp. and Brookfield Power New York GP Corp., filed petitions for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2004 and 2005.

On December 8, 2008 and December 16, 2008, respectively, petitioners, by their representative, Hiscock & Barclay, LLP (Robert A. Barrer, Esq., David G. Burch, Esq., and Amanda K. Davis, Esq., of counsel) and the Division of Taxation, by its representative, Daniel Smirlock (Clifford M. Peterson, Esq., of counsel) waived a hearing and agreed to submit these matters for determination based on documents and briefs to be submitted by May 4, 2009, which date began the six-month period for the issuance of this determination. After review of the

evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for Empire Zone wage tax credits for the period ended December 31, 2005 on the basis of its determination that the periods ended September 28, 2004 and December 31, 2004 each constituted a full benefit year, thereby exhausting petitioners' final two years of wage tax credits.

FINDINGS OF FACT

On November 13, 2008 and November 14, 2008, respectively, petitioners and the Division of Taxation (Division) entered into a written stipulation of facts, the relevant portions of which have been incorporated into the following Findings of Fact. In addition, included with its brief, the Division submitted 39 proposed findings of fact, each of which has been incorporated into the following Findings of Fact except: the last sentence of proposed finding of fact 24, which contains the names of the auditors assigned to these matters, has been omitted as not relevant herein; the references to "Brookfield Power GP" in proposed finding of fact 25 have been changed to Brascan Power New York GP Corp. to more accurately reflect the record; the references to "Brookfield Power Corp." in proposed finding of fact 26 have been changed to Brascan Power New York Corp. to more accurately reflect the record; and proposed findings of fact 37, 38 and 39 have been rejected as being irrelevant in this proceeding.

1. Erie Boulevard Hydropower, LP (Erie) was created in August 1999 to acquire and operate various hydroelectric generating plants throughout New York State.

2. At the time of its creation, Erie was owned by Orion Power New York, LP (with 99% ownership) and Orion Power New York GP, LP (with 1% ownership). Orion Power New York,

LP and Orion Power New York GP, LP, are subsidiaries which were indirectly owned by Orion Power Holdings, Inc., the taxpayer to which Erie's income, losses and credits were passed through during the Orion subsidiaries' ownership of Erie.

3. Erie is certified as a Qualified Empire Zone Enterprise (QEZE) in multiple locations, including the Fulton Empire Zone, the Potsdam Empire Zone, the Albany County Empire Zone, the City and Town of Watertown Empire Zone, the Lewis County Empire Zone, the Oswego Empire Zone and the Oneida/Herkimer County Empire Zone. Erie's earliest certification date is August 23, 1999.

4. The tax year ended December 31, 2001 was the first year of the benefit period for Erie for all Empire Zone tax credits, including the tax reduction credit, the real property tax credit and the wage tax credit. Erie first had Empire Zone employees in 2001. Accordingly, the tax year ended December 31, 2001 was the first year of the benefit period for Erie for all Empire Zone tax credits.

5. In July 2004, Brascan Power, Inc., created subsidiaries Brascan Power New York, Inc., and Brascan Power New York GP, Inc., to acquire Erie from the Orion subsidiaries. Brascan Power New York, Inc., and Brascan Power New York GP, Inc., began conducting business in New York State on July 6, 2004.

6. On September 28, 2004, Brascan Power New York, Inc., purchased Orion Power New York, LP's entire 99% interest in Erie. On September 28, 2004, Brascan Power New York GP, Inc., purchased Orion Power New York GP, LP's entire 1% interest in Erie.

7. Orion-owned Erie filed New York State and federal partnership tax returns for the period January 1, 2004 to September 28, 2004. It filed a federal form 1065, U.S. Return of Partnership Income, for the period ended September 28, 2004; on the form 1065, Orion-owned

Erie checked the box entitled “Final return.” For the period ended September 28, 2004, Orion-owned Erie filed a New York form IT-204, Partnership Return, to which it attached the following statement: “Effective 9/28/2004, Erie Boulevard Hydropower, LP (FEIN: 52-2157261) was sold. Therefore, this is the final return filed.”

Orion-owned Erie filed a New York form IT-601, Claim for EZ Wage Tax Credit, for the period January 1, 2004 through September 27, 2004. On the portion of the form IT-601 where the taxpayer was directed to mark an “X” in the appropriate box to indicate the tax year for which the Empire Zone (EZ) wage tax credit was being claimed, Erie placed an X in the box entitled “4th.”

8. For the period September 29, 2004 through December 31, 2004, Brascan Power-owned Erie filed a form 1065, U.S. Return of Partnership Income; on the form 1065, an “X” was placed in the box “Initial return.” For the period September 29, 2004 through December 31, 2004, Brascan Power-owned Erie filed a New York form IT-204, Partnership Return, on which it checked the box “Initial return.”

9. Brascan Power New York, Inc., and Brascan Power New York GP,, Inc. filed New York State and federal corporation tax returns for the period July 6, 2004 to December 31, 2004. The returns reflected the date the companies began business in New York.

10. For the period January 1, 2004 through December 31, 2004, Orion Power Holdings, Inc., as a taxpayer with calendar based taxable year, filed New York State and federal combined corporation tax returns which included its subsidiaries, Orion Power New York, LP, and Orion Power New York GP, LP.

11. In or about September 2005, Brascan Power New York, Inc., changed its name to Brookfield Power New York Corp. and Brascan Power New York GP, Inc., changed its name to Brookfield Power New York GP Corp.

12. For the tax period January 1, 2005 through December 31, 2005, Brookfield Power New York Corp. (f/k/a Brascan Power New York Corp.) and Brookfield Power New York GP Corp. (f/k/a Brascan Power New York GP Corp.) each filed a form CT-3, General Business Corporation Franchise Tax Return.

13. For the year, 2005, Erie filed a form IT-204, Partnership Return, on which it claimed an EZ wage tax credit in the amount of \$22,125.00.

14. For the period July 6, 2004 through December 31, 2004, as part of its New York General Business Corporation Franchise Tax Return, Brascan Power New York GP Corp. filed a New York form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$716.00 which it used to reduce its tax liability for this period.

15. For the period July 6, 2004 through December 31, 2004, as part of its New York General Business Corporation Franchise Tax Return, Brascan Power New York Corp. filed a New York form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$70,909.00 which it used to reduce its tax liability for this period.

16. For the year 2005, Brookfield Power New York GP Corp., on its General Business Corporation Franchise Tax Return, attached a form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$2,311.00 that was passed through from its ownership of Erie. This credit was used to reduce Brookfield Power New York GP Corp's tax liability for this period.

17. For the year 2005, Brookfield Power New York Corp., on its General Business Corporation Franchise Tax Return, attached a form CT-601, Claim for EZ Wage Tax Credit, on which it claimed an EZ wage tax credit of \$228,814.00 that was passed through from its ownership of Erie. Of this amount, Brookfield Power New York Corp. used \$168,417.00 to reduce its tax liability for this period. The balance, or \$60,397.00, was carried forward for use in future years.

18. On November 17, 2006, the Income/Franchise Desk Audit Bureau of the New York State Department of Taxation and Finance (the Audit Bureau) began a desk audit to review the 2004 and 2005 franchise tax returns of Brookfield Power New York Corp. and Brookfield Power New York GP Corp.

19. From April 30, 2007 to April 30, 2008, Brookfield Power New York Corp. and Brookfield Power New York GP Corp. and their attorneys corresponded with the Audit Bureau regarding Erie's Empire Zone benefits for the years 2004 and 2005, including the wage tax credit and the real property tax credit.

20. For the period September 29, 2004 through December 31, 2004, when computing its average qualified number of employees for purposes of its EZ wage tax credit, Erie had divided the total of its employees as of September 20, 2004 and December 31, 2004 by four. The Audit Bureau recomputed Erie's average number of employees by dividing by two rather than by four.

Based on its recalculation of Erie's average number of employees, the Audit Bureau increased Brookfield Power New York GP Corp.'s wage tax credit, passed through from Erie, to \$1,485.00 for the period September 28, 2004 through December 31, 2004.

Based on its recalculation of Erie's average number of employees, the Audit Bureau increased Brookfield Power New York Corp.'s wage tax credit, passed through from Erie, to \$147,015.00 for the period September 28, 2004 through December 31, 2004.

21. Based on its recalculation of Brookfield Power New York GP Corp.'s EZ wage tax credits, the Audit Bureau applied \$779.00 of the credit against its tax due for the period ended December 31, 2004. After this adjustment, Brookfield Power New York GP Corp. had an EZ wage tax credit carry forward of \$707.00. For the year 2005, the Audit Bureau applied the \$707.00 in full to reduce Brookfield Power New York GP Corp.'s tax liability for this period.

22. Based on its recalculation of Brookfield Power New York Corp.'s EZ wage tax credits, the Audit Bureau applied \$13,773.00 of the credit against its tax due for the period ended December 31, 2004. After this adjustment, Brookfield Power New York Corp. had an EZ wage tax credit carry forward of \$133,242.00. For the year 2005, the Audit Bureau applied the \$133,242.00 in full to reduce Brookfield Power New York Corp.'s tax liability for this period.

23. In their reply brief, petitioners did not dispute the Audit Bureau's recalculation, but asserted that petitioners and the sellers of Erie (the Orion companies) worked together to ensure that each claimed only the amount of EZ wage tax credits which were properly allocated to them and to further ensure that such credits were not claimed twice.

24. In its audit, the Audit Bureau claimed that the January 1, 2004 to September 28, 2004 filing constituted a full year of benefits for purposes of the Empire Zone program.

25. In correspondence dated January 3, 2008, the Audit Bureau claimed that Erie's two filings in 2004 (one for the period ended September 28, 2004 and one for the period ended December 31, 2004) each constituted a full benefit year and, therefore, constituted its final two years of wage tax credits.

26. By letters dated January 3, 2008, the Audit Bureau disallowed the claims by Brookfield Power New York Corp. and Brookfield Power New York GP Corp. for wage tax credits passed through from Erie for the year 2005. The amount of the disallowed claims for Empire Zone wage tax credits for the 2005 tax year is \$228,814.00.

SUMMARY OF THE PARTIES' POSITIONS

27. Petitioners contend:

a. Following Brascan Power New York Corp.'s purchase of Orion Power New York, LP's entire 99% interest in Erie and Brascan Power New York GP Corp.'s purchase of Orion Power New York GP, LP's entire 1% interest in Erie, Erie remained the same certified entity prior to and subsequent to the aforesaid purchases on September 28, 2004. The transfer of partnership interests in a Delaware limited partnership (such as Erie) did not dissolve or otherwise terminate the limited partnership. In addition, to ensure that Empire Zone benefits were not duplicated, Erie apportioned the benefits claimed for the 2004 taxable year between petitioners and the prior owners (the Orion companies) on a pro-rata basis;

b. The sale by the Orion companies of their interests in Erie was a technical termination only. Erie never filed its tax returns or conducted business under any other name. Therefore, the technical termination experience by Erie does not lead to its having two taxable years during the calendar year 2004. Because its existence as a partnership was never terminated, Erie continues to determine its taxable year based on reference to its partners in accordance with Internal Revenue Code (IRC) § 706(b)(1)(B). Both the Orion companies and petitioners operate on a calendar year basis and Erie has always used a calendar year basis for its taxable year. Because Erie experienced only a technical termination, it is not affected by Treas Reg § 1-708-1(b)(3) which provides that when a partnership is terminated, its taxable year closes. Moreover, IRC §

706(b)(1)(B) should be applicable rather than Treas Reg § 1-708-1(b)(3) since it is well established that a statute which has been enacted by a legislature carries more authority than a regulation enacted by an executive department;

c. For purposes of the Empire Zone Programs, the term “taxable year” is defined in certain sections of the Tax Law, including Article 22 for a partnership. Pursuant to Tax Law § 658(c), “taxable year” means “a year or period which would be a taxable year of the partnership if it were subject to tax under this article.” For Erie, this period would be the calendar year;

d. The short period filings during 2004 were required pursuant to the Internal Revenue Code and do not correspond to a taxable year period to claim Empire Zone credits. Orion Power Holdings, Inc., and petitioners each operate and file their returns on a calendar year basis. Accordingly, the short year filings required of Erie under the Internal Revenue Code do not control the benefit periods for claiming Empire Zone benefits under the Tax Law;

e. Since the legislative history underlying Empire Zone wage tax credits indicates that the program was enacted to create jobs for citizens of the State of New York and not merely to provide tax credits to businesses, the Legislature could not have intended that a partnership’s Empire Zone wage tax credits be cut short by a technicality in the Internal Revenue Code requiring short period tax filings by partnerships, because to do so would lessen the economic opportunities for New Yorkers; and

f. The relevant statutes, if ambiguous, must be construed in favor of petitioners.

28. In response, the Division asserts the following:

a. For purposes of New York’s taxation of income earned by corporations and individuals, the phrase “taxable year” is defined by reference to federal law. Under Article 22, a taxpayer’s taxable year “shall be the same as his taxable year for federal income tax purposes.”

Under Article 9-A, a corporation's taxable year means its taxable year for federal income tax purposes or the part thereof during which the taxpayer is subject to tax under Article 9-A; and

b. Under federal law (IRC § 708[b][1][B]) a partnership is terminated when “within a 12-month period there is a sale or exchange of more than 50 percent or more of the total interest in partnership capital and profits.” When a partnership is terminated, its taxable year closes with respect to all partners on the date which the partnership terminates (Treas Reg § 1-708-1[b][3]). The September 28, 2004 sale of the partnership interests in Erie, therefore resulted in Erie having two taxable years during the period January 1, 2004 through December 31, 2004. Under federal law, the Orion-owned Erie partnership was terminated and its taxable year closed as a result of the sale to the Brascan companies. The period January 1, 2004 through September 28, 2004 became Erie's first taxable year during the 2004 calendar year and its fourth taxable year for purposes of reporting its earned Empire Zone wage tax credits.

After the sale, Brookfield Power-owned Erie filed, in addition to its federal form 1065 for the period September 29, 2004 through December 31, 2004, its New York State tax forms and reported its Empire Zone wage tax credits as well. This period became Erie's second taxable year during the 2004 calendar year and its fifth and last taxable year to claim Empire Zone wage tax credits, and therefore, petitioners cannot claim an Empire Zone wage tax credit for the tax year 2005.

CONCLUSIONS OF LAW

A. Tax Law § 606(k)(1) and § 210(19) provide the statutory authority for the Empire Zone wage tax credit for individuals and corporations, respectively. As relevant to the corporate petitioners, pursuant to Tax Law § 210(19)(c), the Empire Zone wage tax credit is a credit against New York State corporation franchise tax and is calculated based upon the number of new jobs

created at an Empire Zone location. The credit is calculated at the rate of \$1,500.00 per qualified employee (\$3,000.00 per employee if such employee is “targeted” as the term is defined by Tax Law § 210[19][b][2]).

As is particularly relevant to this proceeding, Tax Law § 210(19)(c) provides that:

[t]he credit shall be allowed only with respect to the first taxable year during which payments of empire zone wages are made and the conditions set forth in this paragraph are satisfied, and with respect to each of the four taxable years next following

B. The parties are in agreement that Erie, while created in 1999 and later certified as a QEZE in several locations, first had Empire zone employees in 2001 and, accordingly, the tax year 2001 was the first year of the benefit period for Erie for all Empire Zone tax credits. Pursuant to the provisions of Tax Law § 210(19)(c), therefore, the Empire Zone wage tax credit was allowable for the tax year 2001 and for each of Erie’s four taxable years following the tax year 2001.

C. IRC § 708(b)(1)(B) provides that a partnership will terminate for federal income tax purposes if 50 percent or more of the total interest in partnership profits and capital is sold or exchanged within a 12-month period. This type of partnership termination is also referred to as a constructive termination or technical termination because, in most cases, the partnership will continue to operate its business following the termination (Standard Federal Income Tax Reporter [CCH], § 25,202.03).

On September 28, 2004, Brascan Power New York, Inc., purchased Orion Power New York, LP’s entire 99% interest in Erie while, on the same date, Brascan Power New York GP, Inc., purchased Orion Power New York GP, LP’s entire 1% interest in Erie. Pursuant to Treas Reg § 1.708-1(b)(2), termination occurs on the date that cumulative sales and exchanges equal or

exceed 50 percent. Therefore, pursuant to IRC § 708(b)(1)(B) and Treas Reg § 1.708-1(b)(2), Erie, the partnership which was created in 1999 and was owned by the Orion companies, terminated on September 28, 2004.

D. IRC § 706(c)(1) provides that a constructive partnership termination will close the partnership's tax year and will also end any partnership elections that were in effect prior to the termination (Standard Federal Income Tax Reporter [CCH], § 25,202.04). Therefore, unless the termination took place on the last day of its tax year, termination will result in a short tax year. To comply with this provision, Orion-owned Erie filed state and federal partnership tax returns for the period January 1, 2004 to September 28, 2004 and indicated on both returns that they were final returns. Orion-owned Erie also filed a claim for the EZ wage tax credit for the period January 1, 2004 through September 27, 2004.¹

In compliance with IRC § 706(c)(1), the predecessors to petitioners, Brascan Power New York, Inc., and Brascan Power New York GP, Inc., filed state and federal partnership tax returns for the period September 29, 2004 through December 31, 2004. The Brascan companies also filed claims for the EZ wage tax credit, based upon their ownership of Erie, on their New York corporation franchise tax returns filed for the period July 6, 2004 through December 31, 2004.²

E. It is assumed that the Empire Zone wage tax credit was claimed (and allowed) by Orion-owned Erie for the tax years 2002 and 2003, which tax years would have been the first and second taxable years following the tax year 2001. Accordingly, pursuant to Tax Law § 210(19)(c), Erie had two additional taxable years within which to claim the EZ wage tax credit.

¹ It is unclear why the claim was not made for the period ended September 28, 2004, the date on which the Orion companies sold their interests in Erie to the Brascan companies.

² The franchise tax returns were filed for the period beginning on July 6, 2004 which was the date on which the Brascan companies began doing business in New York.

F. Petitioners contend that after Brascan Power New York Corp. and Brascan Power New York GP Corp. purchased a combined 100% interest in Erie, such transfer of partnership interests in Erie did not dissolve or otherwise terminate the partnership since it remained the same entity (it did not file returns or conduct business under any other name) after such transfer. While, in practical terms, petitioners are correct, since Erie continued to exist and operate as before, it is clear that for tax purposes, the provisions of IRC § 708(b)(1)(B) state that a partnership will terminate for federal income tax purposes if 50% or more of the total interest in partnership profits and capital is sold or exchanged within a 12-month period. On September 28, 2004, the Brascan companies, the predecessors to petitioners, purchased a 100% interest in Erie. Accordingly, per IRC § 708(b)(1)(B), the Erie partnership was terminated.

In support of their position, petitioners state that the Empire Zone benefits were not duplicated, i.e., Erie apportioned the tax benefits claimed for the 2004 tax year between petitioners and the prior owners, the Orion companies. It must be noted that the Division has not claimed any wrongdoing on the part of petitioners with respect to the Empire Zone benefits for the 2004 tax year. It is petitioners' entitlement to Empire Zone benefits for the tax year 2005 which is at issue herein.

G. Petitioners assert that IRC § 706(b)(1)(B), which provides that the taxable year of a partnership shall be determined by reference to its partners, should be applicable to this proceeding rather than Treas Reg § 1-708-1(b)(3), which provides that when a partnership is terminated, its taxable year closes. Petitioners make this assertion on the basis that a statute that has been enacted by a legislature carries more authority than a regulation enacted by an executive department. While, in some instances, this argument could be meritorious, petitioners are choosing to ignore IRC § 708(b)(1)(B) which has been addressed above. Although petitioners

state that the sale by the Orion companies of their interest in Erie resulted in a technical termination only, the termination is for tax purposes, which is precisely what is at issue in the present matter. As noted in Conclusions of Law C and D, after transfers of more than a 50% interest in a partnership, the partnership will, in most cases, continue to operate its business following the termination. Moreover, not only will such a constructive partnership termination close the partnership's tax year, it will also end any partnership elections that were in effect prior to the termination. While Empire Zone wage tax credits are not specifically addressed, because such credits are New York State credits rather than federal credits, it can reasonably be argued that QEZE certification and the resulting claims for Empire Zone tax credits are "partnership elections that were in effect prior to the termination."

H. Petitioners state that the short year filings required of Erie under the Internal Revenue Code do not control the benefit periods for claiming the Empire Zone benefits under the Tax Law, since the short year filings do not correspond to a taxable year period to claim such benefits. They assert that federal law does not shorten benefit periods under the Empire Zone Program.

As previously noted, the provisions of the Internal Revenue Code which provide for termination of the partnership upon the transfer of 50% or more of partnership profits and capital within a 12-month period cannot be expected to address state tax credits which are affected thereby. Since the duration of entitlement to claim Empire Zone wage tax credits is clearly impacted by the federal termination provisions of IRC § 708(b)(1)(B) and the term "taxable year" is defined in the Tax Law by reference to federal law (the Internal Revenue Code), it is the New York State Legislature which must provide for an exception to Tax Law § 210(19)(c) which allows an Empire Zone wage tax credit for "the first taxable year during which payments of

empire zone wages are made . . . and with respect to each of the four taxable years next following.” There is no statutory (or regulatory) exception in the Tax Law which addresses a situation such as the one at issue herein, i.e., one in which a partnership is sold and, therefore, constructively terminated, while continuing to operate as before.

I. Petitioners also assert, quite convincingly, that the legislative history underlying Empire Zone wage tax credits makes it seemingly clear that the Legislature could not have intended that the program’s purpose, which was to create jobs for New Yorkers, would be so greatly impacted by a technicality in the Internal Revenue Code which terminates the partnership and requires short period tax filings by partnerships. While there is merit to this assertion, it is not this forum’s function to legislate where the New York State Legislature has failed to or chosen not to do so.

J. Citing case law relating to statutory construction, petitioners claim that since it is apparent that there could be ambiguities resulting from the relevant statutes applicable to this matter, such ambiguities must be construed in favor of the taxpayer.

20 NYCRR 1-2.7 provides, in relevant part, as follows:

The term *taxable year* means, in most cases, the taxpayer’s taxable year for Federal income tax purposes, or the part thereof during which the taxpayer is subject to the tax imposed by article 9-A of the Tax Law. In the case of a report made for a fractional part of a year, *taxable year* means the period for which such report is made.

Since, under federal law, the Erie partnership was terminated, pursuant to IRC § 708(b)(1)(B), as result of the sale or exchange of more than 50% of its interest from the Orion companies to the Brascan companies on September 28, 2004, Erie’s taxable year closed on the date on which the partnership terminated (IRC § 706[c][1]). Therefore, for the period January 1, 2004 through December 31, 2004, Erie had two taxable years, to wit, the period January 1, 2004

through September 28, 2004 when it was owned by the Orion companies and the period September 29, 2004 through December 31, 2004 when it was owned by the predecessors to petitioners, the Brascan companies. The fact that Erie did, in fact, have two taxable years is validated by the fact that Orion-owned Erie filed state and federal partnership tax returns for the period January 1, 2004 through September 28, 2004 and filed a claim for the EZ wage tax credit for the same period while the Brascan-owned Erie filed state and federal partnership tax returns for the period September 29, 2004 through December 31, 2004 and filed a claim for the EZ wage tax credit for the same period. Accordingly, it cannot be found that the relevant statutes and regulations are ambiguous and, after careful consideration of the federal and New York State statutes and regulations cited above, it must be found that Erie had two taxable years during the 2004 calendar year. As a result, the Division properly denied petitioners' claim for Empire Zone wage tax credits for the tax year 2005, since the final two taxable years for which Erie was eligible for such credits were the periods ended September 28, 2004 and December 31, 2004.

K. The petitions of Brookfield Power New York Corp. and Brookfield Power New York GP Corp. are denied.

DATED: Troy, New York
October 15, 2009

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE