STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

Case 17-F-____ -	Petition of NRG Astoria Power LLC for a Declaratory Ruling That Its Proposed Replacement Project Is Exempt from Article 10 of the New York Public Service Law

PETITION FOR DECLARATORY RULING

Sam M. Laniado
Tyler W. Wolcott
READ AND LANIADO, LLP
Attorneys for NRG Astoria Power LLC
25 Eagle Street
Albany, NY 12207-1901
(518) 465-9313
sml@readlaniado.com
tyler@readlaniado.com

Dated: July 24, 2017
Albany, New York

STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

Case 17-F-____ -	Petition of NRG Astoria Power LLC for a Declaratory Ruling That Its Proposed Replacement Project Is Exempt from Article 10 of the New York Public Service Law

PETITION FOR DECLARATORY RULING

I. INTRODUCTION

Pursuant to Section 161(1) of the New York Public Service Law ("PSL") and Part 8 of the Rules of Procedure of the New York State Public Service Commission ("Commission"), NRG Astoria Power LLC ("NRG")[1] hereby petitions the Chair of the Board on Electric Generation Siting and the Environment ("Chair" or "Siting Board," as the case may be) for a ruling declaring that its proposed replacement of existing generating units (the "Proposed Replacement Project") is exempt from review under Article 10 of the PSL and therefore should continue to be reviewed under the State Environmental Quality Review Act ("SEQRA"). As explained herein, NRG seeks to modernize its electric generating facility by replacing the

[1] All of the entities involved in the development of the Proposed Replacement Project are part of the NRG Energy, Inc. corporate structure. Astoria Gas Turbine Power LLC, a subsidiary of NRG Energy, Inc., is currently the owner and operator of the NRG Astoria facility. The SEQRA approval and SPDES and Title V permits discussed in this Petition were issued to Astoria Gas Turbine Power LLC. On April 26, 2010, Astoria Gas Turbine Power LLC petitioned the Commission for a CPCN to replace the generating units at the NRG Astoria facility, as discussed below. On December 13, 2010, Astoria Gas Turbine Power LLC substituted NRG Astoria Power LLC, an indirect subsidiary of NRG Energy, Inc. and the Petitioner in the instant filing as the applicant for the CPCN, and the Commission granted the CPCN to NRG Astoria Power LLC on January 25, 2011. *See generally* Case 10-E-0197, *NRG Astoria Power LLC*, Supplemental Filing (Dec. 13, 2010); Case 10-E-0197, *supra*, Order Granting Certificate of Public Convenience and Necessity, Providing for Lightened Regulation and Approving Financing (Jan. 25, 2011) ("CPCN Order"). On October 16, 2012, NRG Energy, Inc. filed an interconnection request with the NYISO. The resulting NYISO queue position, Q393, was transferred on March 22, 2017 to NRG Berrians East Development LLC, also an indirect subsidiary of NRG Energy, Inc. Once all regulatory approvals are obtained, all rights and permits necessary for the Proposed Replacement Project to close on construction financing will be consolidated into one entity. In the instant Petition, the various affiliated companies will be collectively referred to as "NRG."

existing turbines, totaling 646 MW in nameplate capacity, with cleaner, more efficient turbines totaling 579 MW in nameplate capacity.

In the first instance, NRG respectfully requests that the Chair declare that the Proposed Replacement Project is exempt from Article 10 pursuant to PSL § 162(4)(d). The Section 162(4)(d) exemption grandfathers from Article 10 a project which designated its location in an application for a license, permit, certificate, consent, or approval submitted on or before August 1, 2012 to any federal, state, or local commission, agency, board, or regulatory body. NRG filed several applications for an earlier version of the Proposed Replacement Project seeking approvals to replace the same turbines at the same location well before August 1, 2012 with the New York State Department of Environmental Conservation ("DEC"), the Federal Aviation Administration ("FAA"), and the Commission. The Proposed Replacement Project, therefore, satisfies the requirements for this exemption.

NRG's second claim to an exemption, being presented herein in the alternative, need not be reached if the Chair agrees that the Proposed Replacement Project qualifies for the grandfathering exemption. If, however, the Chair does not agree that NRG qualifies for the grandfathering exemption, NRG respectfully requests that the Chair declare that the Proposed Replacement Project is exempt from Article 10 pursuant to PSL § 162(4)(b). Section 162(4)(b) states in relevant part that Article 10 does not apply to replacements or improvements at a major electric generating facility that do not increase the nameplate capacity of the facility by more than 25 MW. Here, the Proposed Replacement Project will both replace and improve the facility's existing generating equipment while also reducing its nameplate capacity; therefore, it qualifies for this exemption as a replacement or improvement.

II. BACKGROUND

A. Petitioner

NRG, a subsidiary of NRG Energy, Inc., was formed in 2008 as a limited liability company under the laws of the State of Delaware, and is authorized to do business in the State of New York. The existing NRG Astoria Generating Station ("NRG Astoria") has a nameplate capacity of approximately 646 MW. NRG Astoria is comprised of 31 turbines, all of which went into commercial operation in 1970: it has three groups of Pratt and Whitney peaking units, each with a nameplate capacity of 167.4 MW, and two groups of Westinghouse peaking units with nameplate capacities of 49 and 95 MW. The Westinghouse units are currently mothballed, but they retain their interconnection and capacity rights, as well as required environmental permits, and could return to service if necessary.

The New York Independent System Operator, Inc. ("NYISO") typically calls on the NRG Astoria facility to operate during periods of high energy demand in the New York City market, as well as for real-time contingency support to ensure reliability during thunderstorms or in the event of an unexpected outage of generating or transmission equipment. NRG Astoria also provides blackstart service to Consolidated Edison Company of New York, Inc. ("Con Edison") under the NYISO tariffs and, therefore, is a critical generating asset for restoring service in the event that a systemwide outage occurs in New York City.

While NRG believes there is an immediate opportunity to replace the 47-year-old combustion turbines at Astoria, there is only a narrow window in time to permit and install the new generating units. The Proposed Replacement Project is in the NYISO's Class Year 2017 and NRG management must decide whether to accept any resultant cost allocation by the end of the Class Year process. Pursuant to the NYISO's tariff, upon accepting the cost allocation, NRG

must achieve Commercial Operation within 4 years. As the sole sponsor of the Proposed Replacement Project, NRG must fund all development costs and absorb all project risks. Accordingly, the anticipated project budget and schedule are critical inputs for NRG's decision to move forward with the Proposed Replacement Project and accept the cost allocation from the Class Year process. As a minimum, the budget and schedule must include (i) obtaining final licenses and permits, (ii) resolving any judicial or administrative appeals, (iii) completing detailed engineering, (iv) arranging project financing, (v) procuring materials, (vi) constructing the facility and (vii) commissioning the power generation equipment.

Another reason the Proposed Replacement Project requires the timeliest review process possible is the recently announced DEC initiative aimed at reducing air emissions in the New York Metropolitan Area from peaking combustion turbines (such as those at NRG Astoria) on high energy demand days ("HEDD"). As it makes no practical sense to retrofit peaking units approaching 50 years of age with modern emissions controls, NRG expects that it will be compelled to retire the existing units when the new DEC regulations go into effect. Consequently, to ensure continuous service from the NRG Astoria site, the Proposed Replacement Project must move forward expeditiously.

Finally, the recently-announced retirement dates for the Indian Point nuclear facility units—2020 and 2021 respectively—creates an urgent need to modernize in-City generating capacity as soon as possible. Projects such as this Proposed Replacement Project are especially well-suited for this task because they also support New York State's goal of substantially increasing renewable generation by providing vital 10-minute quick-start capability and fast ramping service to firm up these intermittent resources while at the same time significantly reducing in-City air emissions.

B. Prior Permitting Applications for Replacing the Existing NRG Astoria Peaking Turbines

1. Applications Filed with the DEC

NRG initiated the environmental review process to replace the existing NRG Astoria turbines in late 2007 under SEQRA.[2] It originally proposed to replace the existing turbines with four General Electric 7F combined cycle units totaling 1,040 MW.[3] Although the proposal would have significantly decreased emission rates from the facility, NRG agreed with a request from the DEC to complete a Draft Environmental Impact Statement ("DEIS") studying the environmental impacts of the replacement.[4]

The DEC assumed the role of lead agency because the primary discretionary permits required for the replacement were a modified Title V air permit and a modified State Pollution Discharge Elimination System ("SPDES") permit.[5] NRG submitted its Title V air permit application to the DEC on February 20, 2009, its DEIS on February 27, 2009,[6] and its SPDES permit application on March 5, 2009.[7] All applications designated the proposal location as the NRG Astoria facility site. On February 5, 2010, NRG submitted an updated Title V air permit application, which also designated the location of the proposal as the NRG Astoria facility.[8] The DEC deemed the SPDES and Title V air permits applications complete and accepted the DEIS

[2] Case 10-E-0197, *supra*, Petition (Apr. 26, 2010), at 11 ("CPCN Petition").

[3] *Id.* at 4–5.

[4] *Id.* at 12. The DEIS and its appendices comprise 880 pages. They are easily located on DMM. *See* Case 10-E-0197, *supra*, DEIS (Apr. 26, 2010) ("CPCN Petition DEIS"); CPCN Petition Appendices A–F.

[5] CPCN Petition at 12.

[6] *Id.*

[7] CPCN Petition Appendix B.

[8] Updated Title V Air Permit Application, the applicable pages of which are attached hereto as Appendix I.

on April 16, 2010.[9] Two public hearings were held on May 20, 2010 to receive public comment on the DEIS, Title V air permit, and SPDES permit.[10] NRG filed, and the DEC accepted, the proposal's Final Environmental Impact Statement ("FEIS") on September 22, 2010.[11] The DEC issued the Title V air permit and SPDES permit to NRG on October 4, 2010.[12] The DEC also issued its SEQRA Findings Statement for the originally proposed replacement project on October 4, 2010.[13]

The DEC described the review process it undertook in its SEQRA Findings Statement:

> As lead agency, the New York State Department of Environmental Conservation (DEC) must consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS in its SEQR Findings Statement, and then certify that, consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable. In developing this SEQR Findings Statement, the DEC has reviewed and considered the following documents:
>
> - Final Scoping Document for Draft Environmental Impact Statement - December 24, 2008.
> - Draft Environmental Impact Statement (DEIS), Astoria Repowering Project, accepted April 16, 2010 by DEC as SEQR Lead Agency.
> - Final Environmental Impact Statement (FEIS), accepted September 22, 2010 by DEC as SEQR Lead Agency.

[9] Notice of Complete Application, attached hereto as Appendix II; SEQRA Findings Statement, attached hereto as Appendix III.

[10] *See* CPCN Petition at 12; Appendix IV at 11.

[11] Appendix III at 1.

[12] DEC Permit Cover Letter, attached hereto as Appendix IV.

[13] Appendix III.

- Updated Permit Modification for Four CC-FAST Combined Cycle Units, Repowering Project, Astoria Gas Turbine Power LLC Facility, Astoria, Queens County, New York, February 5, 2010.
- State Pollutant Discharge Elimination System (SPDES) INDUSTRIAL APPLICATION, March 5, 2009.
- Acid Rain Permit Application, April 9, 2010.

DEC finds that the project has been designed, and where necessary, revised, to avoid, minimize, and mitigate adverse environmental impacts in the areas where DEC has jurisdiction.[14]

2. Petition Filed with the PSC

In April 2010, NRG petitioned the Commission for, *inter alia*, a certificate of public convenience and necessity ("CPCN") under PSL § 68 to replace the existing turbines.[15] The petition designated the location where the proposed turbine replacement would occur as the NRG Astoria plant site.[16] Several appendices to the CPCN Petition also identified the location of the proposal.[17] The Commission granted the CPCN to NRG in January 2011.[18] The Commission concluded, *inter alia*, that, "based upon a thorough review of the record developed here and as part of DEC's SEQRA analysis, that the Astoria Repowering Project is necessary and convenient for the public service."[19]

[14] *Id.* at 1.

[15] CPCN Order at 2.

[16] CPCN Petition at 1.

[17] *See* CPCN Petition Appendix A at Figure 2-1; CPCN Petition Appendix B at 1, Figure 1-1; CPCN Petition Appendix D at Figure 1; CPCN Petition DEIS at 5; CPCN Figures at 4.5.1-11.

[18] *See generally* CPCN Order.

[19] *Id.* at 14.

3. Notice Filed with the FAA

In May 2010, NRG filed two Notices of Proposed Construction or Alteration for the construction of exhaust stacks for the proposed turbine replacement.[20] Both notices designated the location of the stacks as the NRG Astoria plant site.[21]

4. Public Participation Process

As part of the SEQRA process, NRG completed an extensive public outreach program and underwent significant pre-application consultation with the DEC. The Enhanced Public Participation Plan ("EPPP") was approved by the DEC on February 27, 2009 and updated on February 15, 2010.[22] The EPPP was included in the project's FEIS, which summarized the extensive public outreach.[23] As part of that plan, over the period from October 2008 through January 2010, NRG held three public meetings and approximately eighteen meetings with community organizations, environmental groups, government agencies, and elected officials, formally and informally, to obtain feedback on potential community concerns regarding the replacement project. As noted in the FEIS, the public response was overwhelmingly supportive of the project.[24]

[20] The May 7, 2010 Notices of Proposed Construction are attached hereto as Appendix V.

[21] *Id.*

[22] *See* CPCN Petition Appendix E; CPCN DEIS at vii. The DEC references the completed EPPP as an example of a comprehensive environmental justice review Public Participation Plan for future applicants. *See EJ Related Policy and Regulations*, N.Y. State Dep't of Envtl. Conservation, http://www.dec ny.gov/public/36929.html (last visited July 21, 2017).

[23] *See* Case 10-E-0197, *supra*, FEIS – Appendix E-1 (Sept. 28, 2010); Case 10-E-0197, *supra*, Final Environmental Impact Statement (Sept. 28, 2010), at 75 ("CPCN Petition FEIS").

[24] CPCN Petition FEIS at 75.

C. The Proposed Replacement Project

Following the extensive environmental review, permitting, and public participation process described above, market conditions did not support completing the proposal. Market conditions have shifted, however, and now support replacing the aging NRG Astoria turbines with new, efficient simple cycle units. The Proposed Replacement Project is a continuation of the efforts to modernize NRG's Astoria site described above.

NRG proposes to continue the SEQRA process that originally commenced some ten years ago. Based on recent discussions with DEC, NRG anticipates submitting a Supplemental Environmental Impact Statement to address the Proposed Replacement Project, and seeking to amend the previously-issued DEC water and air permits, so that it may replace the same existing turbines at the same location with the same, originally-proposed turbines, in a slightly different configuration. NRG also proposes to seek to amend its CPCN previously issued by the Commission to reflect the minor changes made to the originally-planned replacement.

The replacement turbines for the Proposed Replacement Project will still be the same General Electric 7F, dual-fuel models. However, in response to changing market conditions, including flattening demand and higher intermittent renewable penetration, NRG's Proposed Replacement Project now consists of three, rather than four, turbines, and the units will be operated in simple cycle rather than combined cycle. The nameplate rating of the updated replacement project (three turbines) will total 579 MW, rather than 1,040 MW.

The replacement turbines will be equipped with selective catalytic reduction ("SCR"), a carbon monoxide catalyst, a tempering air system, an ammonia storage tank, and an ammonia vaporizer. They will also be equipped with water injection for nitrogen oxides ("NOx") control

while firing ultra-low sulfur diesel ("ULSD") and evaporative coolers. These same emission control systems were part of the original replacement proposal.[25]

The Proposed Replacement Project will provide significant air quality improvements compared to the current turbines operating at NRG Astoria. For example, on September 3, 2015 (a high energy demand day), the existing Pratt and Whitney units ran for a total of 124 engine hours, emitting 5.6 tons of NOx and 0.024 tons of volatile organic compounds ("VOCs"). Under the same conditions, if the Proposed Replacement Project had been operating, NOx and VOCs emissions would have been reduced by 98.4% and 63%, respectively.

Like the original generator replacement, the Proposed Replacement Project will also provide operational benefits. The replacement generators will have blackstart capability to support system restoration efforts by NYISO and Con Edison in the event of a total system outage. In addition, the replacement generators will have 10-minute quick start and fast ramping capabilities that will support the addition (and import) of substantial new intermittent renewable generation in the downstate region. Additionally, the Proposed Replacement Project will provide a significant heat rate improvement versus the turbines currently operating on site. This efficiency improvement translates directly into lower-cost power and significantly reduced carbon emissions rates. And, as with the original replacement, the Proposed Replacement Project does not require offsite improvements because it will use the existing interconnections, natural gas supply, and liquid fuel storage tanks.

[25] *See* CPCN Petition at 4, 6.

Finally, the Proposed Replacement Project will provide economic benefits. It will create up to 175 construction jobs over three years and retain high value jobs on the site for many years to come. In total, the Proposed Replacement Project will constitute over $500 million of private capital investment in New York State.

III. DISCUSSION

THE CHAIR SHOULD DECLARE THAT THE PROPOSED REPLACEMENT PROJECT IS EXEMPT FROM PSL ARTICLE 10.

Article 10 generally requires a developer of a major electric generating facility—i.e., a generator 25 MW or larger—to obtain a certificate from the Board before commencing construction.[26] Article 10 also requires a certificate to increase the nameplate capacity of an existing major electric generating facility by more than 25 MW.[27] But, Article 10 also exempts certain projects.[28] Two of these exemptions are applicable to the Proposed Replacement Project.

A. The Proposed Replacement Project Is Exempt from Article 10 Because It Satisfies the Grandfathering Exemption Requirements.

PSL § 162(4)(d) provides that Article 10 shall not apply to a major electric generating facility "if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant."[29]

[26] N.Y. Pub. Serv. Law § 162(1) (McKinney 2017).

[27] *Id.*

[28] *Id.* § 162(4).

[29] N.Y. Pub. Serv. Law § 162(4)(d).

The regulations promulgated by the DEC became effective July 12, 2012. The regulations promulgated by the Siting Board, however, became effective August 1, 2012.[30] The exemption provided in PSL § 162(4)(d), therefore, applies to projects which (1) filed an application for a permit or other approval before August 1, 2012, and (2) designated the location of the generating facility in such application.

Nothing in the language of the grandfathering provision limits the exemption to pending filings where approvals were not yet granted. Nor does it require a project to have filed for all of its permits. Finally, it does not preclude projects that have been subject to reasonable updating or revision. Rather, NRG respectfully submits that the purpose of this exemption is to allow the previously engaged governmental entity to continue its review of the proposal first brought to it for review and to allow the applicant to continue permitting before the entity to whom it first filed applications. In this case, it would also allow the applicant and permitting agencies to take advantage of previously completed, comprehensive environmental studies and a thorough public participation process (although both would certainly need to be updated). Switching forums and beginning the review process from scratch, especially in this case where the project will serve the public interest by reducing production costs, reducing emissions, and enhancing electric system reliability—all while facing a tight in-service deadline—is incongruous with the purposes of SEQRA, Article 10, and State energy and environmental policies generally to facilitate the approval of beneficial projects.[31]

[30] *See* Case 16-F-0289, *Ball Hill Wind Energy, LLC*, Declaratory Ruling Concerning Jurisdiction over Proposed Generating Facility (Dec. 20, 2016), at 5–6 ("Ball Hill Declaratory Ruling").

[31] *See, e.g.*, *2015 New York State Energy Plan: Impacts and Considerations Vol. 2*, N.Y. State Energy Planning Bd. (2015), at 31–32, 119, https://energyplan.ny.gov/-/media/nysenergyplan/2014stateenergyplan-documents/2015-nysep-vol2-impacts.pdf.

Accordingly, under a reasonable interpretation of the grandfathering provision, NRG satisfies both statutory requirements in multiple ways. Its SEQRA submissions, SPDES and updated Title V air permit applications filed with the DEC designated the location of the original generating unit replacement, which is the same location as the Proposed Replacement Project, and were submitted on March 5, 2009 and February 5, 2010, respectively.[32] Similarly, its CPCN Petition to the Commission also designated the location of the original generating unit replacement, which is the same location as the Proposed Replacement Project, and was submitted on April 26, 2010.[33] Finally, the construction notices to the FAA also designated the location of the original generating unit replacement, which is the same location as the Proposed Replacement Project, and were submitted on May 7, 2010.[34] These applications were all submitted before August 1, 2012.

Declaring that the Proposed Replacement Project satisfies the grandfathering exemption is consistent with the Chair's declaratory ruling in Ball Hill Wind Energy, LLC ("Ball Hill"). There, the original developer submitted an application to a town to build a wind generation facility in 2008.[35] The application designated the location of the project.[36] A new developer bought the project and proposed to revise, *inter alia*, the types of turbines, the interconnection to the system, and otherwise supplement the record with many more studies. The Chair declared that the project, continuing under a successor developer, was exempt from Article 10 pursuant to PSL § 162(4)(d).[37] NRG's case for an exemption is even more compelling because there will be

[32] CPCN Petition Appendix B; Appendix I.

[33] CPCN Petition.

[34] Appendix V.

[35] Ball Hill Declaratory Ruling at 3.

[36] *Id.*

[37] *Id.* at 2, 5–6.

no change in the developer. The fact that permits were issued to it but not to Ball Hill's predecessor is of no regulatory or legal consequence because that is not an explicit criterion in the exemption's wording.

B. The Proposed Replacement Project Also Is Exempt from Article 10 Because It Constitutes a "Normal Replacement" and "Normal Improvement" That Does Not Increase the Nameplate Capacity of the Existing Facility by More Than 25 MW.

In the event the Chair agrees with NRG's claim that it qualifies for the Article 10 grandfathering exemption, discussed *supra*, our next argument need not be reached. If, however, the Chair disagrees with NRG's claim to the grandfathering exemption, we respectfully request that the Chair declare that the Proposed Replacement Project is exempt from Article 10 under the "replacement/improvement" exemption.

PSL § 162(4)(b) provides that Article 10 shall not apply "[t]o normal repairs, replacements, modifications and improvements of a major electric generating facility, whenever built, which do not constitute a violation of any certificate issued under this article and which do not result in an increase in capacity of the facility of more than twenty-five thousand kilowatts."[38] "Capacity" here refers to nameplate capacity.[39] Article 10 defines "nameplate" as the "manufacturer's designation, generally as affixed to the generator unit, which states the total output of such generating facility as originally designed according to the manufacturer's original design specifications."[40]

[38] N.Y. Pub. Serv. Law § 162(4)(b).

[39] *See, e.g., id.* § 160(2).

[40] *Id.* § 160(7).

It is routine in the electric industry to replace generating units with new, more efficient technology.[41] Generator modernization is generally encouraged because it leads to cleaner, more efficient, and more reliable electric generation, which serves the public interest and promotes current energy and environmental policies in New York State.[42] Interpretations of laws—in this case, Article 10—that discourage such modernizations should therefore be avoided unless the language of the statute, or its underlying statutory history, explicitly dictates otherwise.

Here, the Proposed Replacement Project fits squarely within the language of the Section 162(4)(b) exemption. The Proposed Replacement Project will replace the generators of a major electric generating facility.[43] And, the replacement will not increase the nameplate capacity of the existing plant's generators by more than 25 MW; to the contrary, the Proposed Replacement Project will reduce the nameplate capacity by 67 MW.

Nothing in the language of the exemption—nor, for that matter, any other Article 10 provision, its legislative history, or its implementing regulations—suggests that a "normal replacement" cannot consist of new nameplate capacity replacing old. The exemption lacks any applicable restrictive language other than the 25 MW increase limit. Further, excluding new equipment from the term "normal replacement" would constitute an interpretation well beyond the plain meaning of the exemption.

---

[41] Atkins Aff., attached hereto as Appendix VI.

[42] *See, e.g.*, *2015 New York State Energy Plan: Impacts and Considerations Vol. 2*, N.Y. State Energy Planning Bd. (2015), at 31–32, 119, https://energyplan.ny.gov/-/media/nysenergyplan/2014stateenergyplan-documents/2015-nysep-vol2-impacts.pdf.

[43] "Major electric generating facility" is defined as "an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more, including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under article seven of this chapter." N.Y. Pub. Serv. Law § 160(2).

The New York laws of statutory interpretation support this plain reading of the exemption. According to these rules,

> "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction."[44]

Although the exemption lacks legislative history that would aid in its interpretation, its legislative intent is clear: an equipment replacement that increases a facility's nameplate capacity by more than 25 MW carries with it potential environmental and other impacts that trigger the rigorous Article 10 review process. Reading into the exemption an extra-statutory constraint on the type of replacement violates its intent by excluding typical industry replacements that can dramatically reduce a facility's environmental impacts. Such an interpretation would discourage private capital investment in, and environmental improvements from, critical energy infrastructure in New York.

In addition, the New York laws of statutory interpretation state that general words are not to be limited unless the Legislature intended to do so:

> If there is nothing to indicate a contrary intent on the part of the lawmakers, terms of general import in a statute ordinarily are to receive their full significance.[45]

Reading into the Article 10 exemption words that would limit the exemption's general language solely to replacements of parts within existing generators, absent any legislative history to support that interpretation, would violate this rule of statutory construction.

In *Tucker*, the New York Court of Appeals explained that where "the statute unequivocally describes in general terms the particular situation in which it is to apply and

[44] N.Y. Stat. Law § 94 (McKinney 2017).

[45] *Id.* § 114.

nothing indicates a contrary legislative intent, the courts should not impose limitations on the clear statutory language."[46] There, a teacher was denied tenure with less than 60 days' notice as required by the applicable statute, and sought payment for the days that the notice was late.[47] The statute provided that "[e]ach person who is not to be recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period."[48] The respondents had argued that events beyond their control, and the teacher's misconduct, justified the earlier termination. The Court of Appeals rejected those arguments, holding that because the statute did not provide any exception to the 60-day period, the Legislature did not intend to provide one.[49] According to the Court, they saw nothing in the ". . . statute or its legislative history that persuades us to read in an exception which would be contrary to the statute's broader purpose . . . ."[50]

The New York laws of statutory interpretation also call for consistency within a statute:

> "A statute or legislative act is to be construed as a whole"[51] and "[a]ll parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."[52]

Article 10 contains four provisions that address when a proposed project will fall within its scope as it relates to the 25 MW threshold. First, Section 162(1) prohibits construction of a

[46] Tucker v. Bd. of Educ., Cmty. Sch. Dist. No. 10, 82 N.Y.2d 274, 278 (1993) (citations omitted).

[47] *Id.* at 276–77.

[48] *Id.* at 276 (citation omitted).

[49] *Id.* at 278.

[50] *Id.* at 279.

[51] N.Y. Stat. Law § 97.

[52] *Id.* § 98.

new major electric generation facility 25 MW or greater without an Article 10 certificate.[53] This provision also prohibits increasing the capacity of an existing major electric generation facility by more than 25 MW without an Article 10 certificate.[54] Third, Section 165(4)(b) provides an expedited six-month review for new major electric generation facilities to be located adjacent or contiguous to existing facilities, or modifications to existing facilities that result in an increase to nameplate capacity of more than 25 MW.[55] Last is the exemption that heretofore has been the subject of this petition: "normal repairs, replacements, modifications and improvements of a major electric generating facility" that do not increase the existing nameplate capacity by more than 25 MW.

Narrowing the applicability of the 25 MW threshold to only replacing components of "existing nameplate capacity"—i.e., excluding the installation of completely new generating equipment—would appear to duplicate the scope of Section 165(4)(b), which already addresses modifying an existing facility to increase its nameplate capacity by more than 25 MW. The Board's regulations define the term "modify":

> When used in the context of PSL §165(4)(b), alterations that increase by more than 25 MW the Base Nameplate Generating Capacity of an existing electric generating facility already having a nameplate generating capacity of 25 MW or more.[56]

If the exemption is interpreted to exclude new generating equipment, both provisions would solely address alterations to existing facilities and no provision in Article 10 would

[53] N.Y. Pub. Serv. Law § 162(1).

[54] *Id.*

[55] *See id.* § 165(4)(b); 16 NYCRR § 1000.2(y).

[56] 16 NYCRR § 1000.2(y).

address new generating equipment replacements that result in a 25 MW or less increase in nameplate capacity. This would be an incongruous interpretation of the statute.

Moreover, declaring that the Proposed Replacement Project is exempt from Article 10 is supported by Chair and Siting Board precedent. In 2012, GenOn Bowline, LLC ("Bowline") sought guidance from the Chair concerning its proposal to replace its three Article X certified generators with two, more efficient units.[57] The proposed replacement would increase the certified facility's nameplate capacity by less than 25 MW.[58] The Chair concluded that replacing the certified generators with new generators would not trigger Article 10 so long as the replacement increased the nameplate capacity by less than 25 MW.[59]

The Bethlehem Energy Center ("Bethlehem") case does not change this result. There, a developer proposed upgrades to the software and some hardware of an existing facility that would increase its output by 36 MW.[60] The Siting Board ruled that Article 10 would not apply to the proposal because the upgrades did not replace "the equipment that actually generates the electricity (which establishes the nameplate rating)."[61] The Siting Board did not indicate that the exemption only applied to existing, to the exclusion of new, nameplate capacity.[62]

Finally, an earlier Chair ruling under Article X supports the logical reading of the exemption to include replacements with new generating equipment as well as new components for the existing generators. In 2001, NRG proposed to construct a 79 MW peaking plant

[57] Case 12-F-0311, *GenOn Bowline, LLC*, Petition (July 16, 2012), at 1-1.

[58] Case 12-F-0311, *supra*, Letter (June 27, 2013), at 2–3.

[59] *Id.*

[60] Case 15-F-0040, *PSEG Power N.Y., Inc.*, Order Granting Amendment of Certificate of Environmental Compatibility and Public Need Subject to Conditions (Jan. 12, 2017), at 2, 5.

[61] *Id.* at 7–8.

[62] *See generally id.*

adjacent to NRG Astoria.[63] The new facility would, for the most part, operate independently from the existing plant.[64] NRG sought a ruling that the new, separate facility would not be subject to Article X because it would constrain output below the 80 MW threshold specified in Article X.[65] In granting NRG's request, the Chair also addressed the scope of the "replacement" and "improvement" exemptions that is very similar to the Article 10 exemptions:

> Section 162(4)(c) provides, in pertinent part, that PSL Article X does not apply:
>
> To normal repairs, replacements, modifications and improvements of a major electric generating facility, whenever build [sic] . . . which do not result in an increase in capacity of the facility of more than fifty thousand kilowatts.
>
> The question is whether, under PSL §162(4)(c), the new unit constitutes a normal repair, replacement, modification or improvement of AGTP's existing major electric generating facility. Because there is no legislative history regarding this provision and Article X does not define the terms used therein, the words of the paragraph should be given their ordinary meaning. The proposed unit is not a repair or modification because it is a new unit unrelated to a condition in the existing facility in need of repair or being modified in any way. *Moreover, NRG does not propose to replace any part of the existing major electric generating facility. The new unit does not constitute the improvement of the existing facility, because the proposed facility is essentially separate from the existing facility.* Contrary to NYLIR's contention, a fence is not the only thing that separates the proposed unit from the existing facility. Indeed, as discussed in the petition and reflected supra, the proposed unit is distinct from the existing facility, except that there are a few common features – namely, the remote monitoring system, the gas interconnection, a fuel tank, and some roads and water systems.[66]

[63] *See* Case 01-F-0222, *NRG Energy, Inc.*, Declaratory Ruling Concerning Facility Proposed by an Affiliate of Existing Facility Owner (June 20, 2001), at 1 ("NRG Declaratory Ruling").

[64] *Id.* at 1–2.

[65] *Id.* at 4.

[66] *Id.* at 8 (emphasis added).

Accordingly, by stating that the proposed project did not trigger the normal replacement exemption because NRG did not propose to replace any part of the existing major electric generating facility with the new generator, it is reasonable to read this ruling to exempt from Article 10 the replacement of existing generating equipment with new generating equipment.

Moreover, this ruling supports the Proposed Replacement Project qualifying for the exemption as an "improvement." In the 2001 Ruling, the Chair stated that locating a new generator adjacent to and separate from the existing plant did not constitute an "improvement."[67] Logically, it follows that the instant Proposed Replacement Project, which does replace existing generators with new generators and is therefore not separate from the existing plant, would constitute an "improvement" and be entitled to exemption from Article 10.

"Improvement," like "replacement," is an unrestricted general term that should be read with its full significance.[68] In *SIN, Inc.*, a case involving a tax assessment on commercial rent, the Court of Appeals rejected the New York City Department of Finance's proposed interpretation of the word "improvement," which would have read into that word only those improvements that were "minor, non-structural" and not designed "to save the landlord the expense of doing the work itself."[69] Thus, the Department sought to increase the rent to be taxed by including capital improvements made by the petitioner tenant. The local tax statute at issue, however, excluded from the term "rent" ". . . expenses for the improvement, repair or maintenance of the tenant's premises."[70] The reading of the wording advocated by the

[67] *Id.*

[68] *See Tucker*, 82 N.Y.2d at 278.

[69] SIN, Inc. v. Dep't of Fin. of City of N.Y., 71 N.Y.2d 616, 619 (1988).

[70] *Id.*

Department was rejected.[71] The Court of Appeals explained that the petitioner tenant's capital expenditures clearly fell within the general sense of the term "improvement":

> The interpretation urged by respondent—which would exclude the capital alterations and additions made by petitioner—is not merely a narrow reading of the term; it is a peculiarly cramped one. It denudes the term "improvement" of that which is an integral part of its ordinary meaning—i.e., the substantial enhancement of property value or utility. The statutory provision in question contains no words of limitation or modification justifying such a construction, and there is nothing in the statute to suggest that the term "improvement" should not be given its full significance. Moreover, to accept respondent's contention—that "improvement" is limited to minor nonstructural work which does not significantly enhance the value of the property—would render that term superfluous and redundant in the statute; "improvement" would then add nothing to the words "repair" and "maintenance". Such a construction, which would deprive the term of its own separate meaning, should be avoided for that reason as well.[72]

Similar to the statute in *SIN, Inc.*, Section 162(4)(b) does not restrict the term "improvement" to only those efforts that would preserve the existing generators. A power plant can be improved in multiple ways, and as the Commission held in *NRG Energy, Inc.*, *supra*, the improvement should be to the plant itself and not the construction of a separate facility.[73] Therefore, excluding the Proposed Replacement Project from the interpretation of "improvement" would run contrary to New York's laws of statutory interpretation and be inconsistent with Court of Appeals and Commission precedent.

The attached affidavit of Mr. Thomas Atkins, Vice President for NRG Energy, Inc., explains that it is routine and quite normal to replace and improve old generating units with new,

[71] *Id.* at 621.

[72] *Id.* (citations omitted).

[73] NRG Declaratory Ruling at 8.

more efficient units within a generating facility.[74] He cites seven examples where this has occurred nationwide, including unit replacements very similar to the Proposed Replacement Project.[75] Accordingly, interpreting the exemption to include generator unit replacements, such as the Proposed Replacement Project, would be consistent with electric industry practice.

[74] Appendix VI ¶¶ 3–4.

[75] *Id*. ¶¶ 5–6.

IV. CONCLUSION

Based on the foregoing, NRG Astoria respectfully requests that the Chair declare that the Proposed Replacement Project is exempt from Article 10.

Respectfully submitted,

By: /s/

Sam M. Laniado
Tyler W. Wolcott
READ AND LANIADO, LLP
Attorneys for NRG Astoria Power LLC
25 Eagle Street
Albany, NY 12207-1901
(518) 465-9313
sml@readlaniado.com
tyler@readlaniado.com

Dated: July 24, 2017
Albany, New York