

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

Petition of Scenic Hudson, Inc. for Declaratory) Case 17-F-0619
Ruling and Motion for Interlocutory Appeal)

**PETITION OF SCENIC HUDSON, INC. FOR DECLARATORY RULING
AND MOTION FOR INTERLOCUTORY APPEAL**

Scenic Hudson, Inc.

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Dated: August 8, 2018

Case 17-F-0619 – Application of Hecate Energy Greene 1, LLC, Hecate Energy Greene 2, LLC, and Hecate Energy Greene County 3, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coxsackie, Greene County.

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INTRODUCTION AND SUMMARY OF RULING REQUESTED

Pursuant to 16 N.Y.C.R.R. §§ 4.7 and 8.1, respectively, Scenic Hudson, Inc. (“Scenic Hudson”) respectfully moves and petitions the Siting Board for interlocutory review of the Examiners’ Ruling on Intervenor Funding Requests issued on July 24, 2018, denying Scenic Hudson’s request for pre-application intervenor funding, and declaratory rulings regarding the showing required by not-for-profit environmental organizations for status as a “local party” eligible for intervenor funding and the type of expenses for which funding may be awarded pursuant to Public Service Law (“PSL”) Article 10. Scenic Hudson makes this motion and petition because the denial of its funding request to defray costs for its salaried staff attorneys was inequitable and because there is a need for the Siting Board to address discrepancies among prior intervenor funding rulings in other cases as to the application of the term “local party” to environmental not-for-profit corporations.

Scenic Hudson seeks a declaration holding that to demonstrate eligibility for intervenor funding as a “local party” under PSL Article 10, an environmental not-for-profit organization need only show that: (1) it has specific interests that may be affected by the proposed energy generating facility, and (2) it has supporters, members, and/or donors who reside in the area of the facility who also may be affected. Based on this standard, Scenic Hudson seeks a ruling that it has demonstrated its status as a local party in this proceeding.

Scenic Hudson also appeals the denial of its request for pre-application funding for its salaried staff attorneys as inequitable and seeks a declaration that intervenor funding may be awarded for the costs of the salaried staff of not-for-profit corporations.

BACKGROUND

Procedural Background

Hecate Energy Greene 1 LLC, Hecate Energy Greene 2 LLC, and Hecate Energy Greene County 3 LLC (collectively, “Hecate Greene”) seeks a Certificate of Environmental Compatibility and Public Need for a 50 megawatt (MW) photovoltaic (PV) solar electric generating facility, to be located on approximately 814 acres of leased or purchased private land in the Town and Village of Coxsackie, Greene County. Hecate Greene submitted a Preliminary Scoping Statement (PSS) on May 29, 2018.¹ Pursuant to PSL § 163(4), a pre-application intervenor fund of \$17,500 was established at the time of submission of the PSS.

Pursuant to notice issued on June 1, 2018, indicating that \$17,500 of pre-application intervenor funding was available,² Scenic Hudson submitted a Request for Intervenor Funding (RFIF) on July 2, 2018, seeking \$4,473 to defray legal, technical and administrative expenses related to its own employees, both attorneys.³ As a non-profit organization, Scenic Hudson has limited financial resources. Its full participation in the proceeding will require considerable staff time and expense.

¹ See Case 17-F-0619 – Application of Hecate Energy Greene 1 LLC, Hecate Energy Greene 2 LLC, and Hecate Energy Greene County 3 LLC for a certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coxsackie, Greene County.

² Case 17-F-0619 – Application of Hecate Energy Greene 1 LLC, Hecate Energy Greene 2 LLC, and Hecate Energy Greene County 3 LLC for a certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coxsackie, Greene County, *Notice of Availability of Pre-Application Intervenor Funds and Deadline for Submitting Funding Requests* (Issued June 1, 2018).

³ A copy of Scenic Hudson’s July 2, 2018, RFIF and supplements dated July 11, 2018, and July 13, 2018, is attached.

The Village and Town of Coxsackie, Saving Greene (a local citizens group), and Sleepy Hollow Lake Association of Property Owners (“SHL APO”) also submitted RFIFs requesting \$17,500, \$8,750 and \$6,000, respectively. The funding requests exceeded the amount of available funding.

Scenic Hudson’s RFIF

Since, 1963, Scenic Hudson has been dedicated to preserving the scenic, ecological, recreational, historic and agricultural treasures of the Hudson River Valley. In its July 2, 2018, RFIF, Scenic Hudson indicated that it was seeking intervenor funding as an “Eligible Group Local Party” and that it will represent its own interests as both a conservation organization and landowner in Greene County, as well as the interests of its many supporters who live in the Hudson Valley and those who reside in Greene County. It further indicated that its affiliate, The Scenic Hudson Land Trust, Inc., holds, in fee or conservation easement, over 290 acres of land in Coxsackie, and almost 1,700 in Greene County, and therefore Scenic Hudson itself will be potentially impact by the proposed solar facility. Scenic Hudson also stated that because the project has the potential to impact agricultural, scenic and ecological resources of the Hudson Valley, its mission and specific interests as a regional environmental non-profit organization will also be affected by the proposed project. Finally, Scenic Hudson indicated that the siting of solar energy facilities in the Hudson Valley, in particular, is relevant to its mission, and that it has recently published a guide and held a symposium on the topic.

Via e-mail on July 2, 2018, Hon. James Costello, NYDPS ALJ, asked for additional information:

Dear Ms. Friedrichsen:

A preliminary review of your request for pre-application intervenor funds raises an issue regarding Scenic Hudson's status as a "local party" entitled to an award of pre-application intervenor funds. Pre-application intervenor funds are available for award only to municipal and local parties (Public Service Law section 163(4); 16 NYCRR 1000.5(j)). Under Public Service Law section 160(9), "local parties" must be "persons residing in a community who may be affected by the proposed major electric generating facility." Scenic Hudson's request for pre-application intervenor funds indicates that the majority of Scenic Hudson's supporters reside in the Hudson Valley region, including Greene County. Given that the preliminary scoping statement proposes that the solar facility be built within the Town of Coxsackie, please explain further how Scenic Hudson qualifies as a "local party" within the meaning of Article 10 of the Public Service Law.

Please note that this communication is not intended as a ruling on the merits of Scenic Hudson's application, but simply to put you on notice of preliminary concerns raised by your application and to give you the opportunity to address such concerns before the upcoming Pre-Application Conference.

In response, Scenic Hudson submitted extensive documentation on July 11, 2018, addressing both the factual and legal basis for its status as a "local party" under PSL Article 10. As New York not-for-profit corporations, Scenic Hudson and its affiliate The Scenic Hudson Land Trust, Inc. are "persons" under the Public Service Law, with legal residence in the State and a presence in Greene County and Coxsackie in particular, both through their mission and land ownership.

Via e-mail dated July 12, Judge Costello asked for additional information:

Dear Ms. Friedrichsen:

Thank you for your supplemental response. I have one follow-up question: Can you state whether you have supporters residing in the Town or Village of Coxsackie or within the study areas for the proposed project?

Scenic Hudson’s second supplement included information regarding the numbers of e-mail subscribers and donors within the zip code areas covered by the 5-mile radius of the study area for the proposed solar facility, showing that it has a total of 285 subscribers and 549 historic donors within the Facility area, with 16 each located within the Coxsackie zip code. Scenic Hudson is not a “membership” organization, but counts its supporters by e-mail subscribers and historic donors. In addition, Scenic Hudson provided a copy of a 1998 Ruling Making Supplemental Award of Funds where Scenic Hudson was awarded intervenor funding for experts as a “local party” under former Public Service Law Article X for a project review in a town adjacent to Coxsackie.⁴

The Ruling on Intervenor Funding

The examiners issued a ruling from the bench at a Preliminary Conference held on July 18, 2018. No further questions were asked of Scenic Hudson at the Preliminary Conference. The examiners awarded \$8,750 to the Town and Village of Coxsackie, \$4,375 to Saving Greene, and \$4,375 to SHL APO. Scenic Hudson’s request for intervenor funding was denied, apparently on the grounds that it did not qualify as a “local party” pursuant to PSL Article 10.⁵

On July 24, 2018, a written Ruling on Intervenor Funding Requests and Commencement of Stipulations Process (the “Ruling”) was issued.⁶ The monetary awards issued from the bench were confirmed, except that Scenic Hudson’s request was denied on the grounds that “the limited intervenor funds available at the pre-application stage of this proceeding should not be awarded

⁴ Case 97-F-1563 – Application by Athens Generating Company, L.P. for a certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,080 megawatt natural gas-fired combined cycle combustion turbine generating facility, in the Town of Athens, Greene County, Riling Making Supplemental Award of Funds (Issued December 22, 1998).

⁵ A copy of the relevant pages of the transcript of the Preliminary Conference is attached.

⁶ Case 17-F-0619 – Application of Hecate Energy Greene 1 LLC, Hecate Energy Greene 2 LLC, and Hecate Energy Greene County 3 LLC for a certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coxsackie, Greene County, Ruling on Intervenor Funding Requests and Commencement of Stipulations Process (Issued July 24, 2018)(“Ruling”).

to offset payment of work to be performed by Scenic Hudson’s salaried attorneys where other groups are also requesting an award of those limited funds.”⁷

The Ruling did not determine whether or not Scenic Hudson was a “local party,” but stated that “[r]equests for the award of pre-application intervenor funds as group local parties ... have been granted where the organization has demonstrated that it has at least one member who resides in a nearby community that may be affected by the proposed project and wants the organization to represent that person’s interest in the proceeding.”⁸ The Ruling goes on to say that “although Scenic Hudson has supporters in the area, it does not have ‘members’ residing in the affected community who have indicated an interest in having the organization represent their interests in this proceeding.”⁹

ANALYSIS

Interlocutory Appeal and Request for Declaratory Judgment

Under Rule 4.7 of the Siting Board’s Rules, the party seeking interlocutory review of a ruling issued by a presiding officer must establish that “extraordinary circumstances” justify such review prior to the conclusion of proceedings before that officer. Because this Ruling has the potential to significantly limit the ability of Scenic Hudson as well as other environmental organizations to obtain intervenor funding for participation in this and other Article 10 proceedings across New York State, it presents a matter of extraordinary circumstances and Scenic Hudson now seeks interlocutory relief and declaratory rulings.

Under 16 NYCRR § 8.1, a declaratory ruling may be issued with respect to “the applicability of any rule or statute enforceable by the Commission of the validity of any such rule.” In this case, the issue concerns the threshold matter of the status of Scenic Hudson Inc., a

⁷ Ruling, p. 11.

⁸ Ruling, p. 10.

⁹ Ruling, p. 11.

statutory party to the proceeding, as a “local party” eligible for intervenor funding under Public Service Law Article 10, as well as what type of expenses are covered by Article 10 and may be defrayed by intervenor funding through an equitable distribution among the eligible local parties.

Intervenor Funding Eligibility and Equitable Disbursement

PSL Article 10 requires applicants to submit fees with each pre-application preliminary scoping statement, as well as each application, based upon the amount of generating capacity of the proposed facility.¹⁰ In the pre-application phase, the hearing examiner may disburse such funds “to defray pre-application expenses incurred by municipal and local parties ... for expert witness, consultant, administrative and legal fees.”¹¹ The funds are to be awarded “on an equitable basis ... provided use of the funds will make an effective contribution to review of the preliminary scoping statement, and thereby provide early and effective public involvement.”¹²

In the application phase, intervenor funds may likewise be disbursed “to defray expenses incurred by municipal and other local parties to the proceeding ... for expert witness, consultant, administrative and legal fees, provided, however, such expenses shall not be available for judicial review or litigation.”¹³ In this phase, funds shall be awarded on an equitable basis “so long as the use of the funds will contribute to a complete record leading to an informed decision as to the appropriateness of the site and the facility and will facilitate broad participation in the proceeding.”¹⁴

Therefore, intervenor funding plays an important role in ensuring a complete record and broad public participation in decision-making under PSL Article 10.

¹⁰ PSL § 163(4)(a); 164 (6)(a).

¹¹ PSL § 163(4)(a).

¹² 6 NYCRR § 1000.10(a)(9).

¹³ PSL § 164(6)(a).

¹⁴ 6 NYCRR § 1000.10(b)(6).

The Definition of “Local Party”

Pursuant to PSL Article 10, “‘local parties’ shall mean persons residing in a community who may be affected by the proposed major electric generating facility who individually or collectively seek intervenor funding pursuant to section one hundred sixty-three and one hundred sixty-four of [Article 10].”¹⁵

The implementing regulations define the term “local party” as “any person residing in a community who may be affected by a proposed major electric generating facility at a proposed location, or any alternative location identified, who is a party to the proceeding.” The regulatory definition continues: “For the purposes of this definition, the term ‘residing’ shall include individuals having a dwelling within a community who may be affected.”¹⁶

Application of the Term “Local Party”

The Ruling cites a 2014 decision regarding the award of pre-application intervenor funding in an Article 10 proceeding for the proposed repowering of the E.F. Barrett Power Station on Long Island.¹⁷ In that case, Citizens Campaign for the Environment (CCE), a New York and Connecticut-based environmental non-profit organization, was ultimately awarded pre-application intervenor funding, but only after its member, who “dwells within close proximity of the proposed site” and would have been eligible for funding as an individual local party,

¹⁵ PSL § 160(9).

¹⁶ 16 NYCRR § 1000.2(s).

¹⁷ Ruling, p. 9; *see* Case 13-F-0464 – Application of National Grid for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for the Repowering of its E.F. Barrett Power Station in the Town of Hempstead, Nassau County, *Ruling on Intervenor Funding Request* (Issued May 27, 2014); *see also* Case 16-F-0559 – Application of Bluestone Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sanford, Broome County, *Ruling on Intervenor Funding*, (Issued November 21, 2017).

appeared and stated that he adopted CCE’s request, and “would utilize those funds precisely in the way CCE has proposed.”¹⁸

The 2014 ruling rejects CCE’s argument that “the regulation stating ‘the term “residing” shall include individuals having a dwelling within a community who may be affected’ (16 NYCRR § 100.2(s)) is inapplicable to applicants who are not individuals.”¹⁹ Rather, the 2014 decision holds that “given the Legislature’s specific inclusion of a definition of ‘local parties’ in the new Article 10, we must presume an intent to ensure that those receiving funding have a strong nexus to the community by limiting the scope of applicants eligible for funding to individuals, who actually reside within the impacted community or have members that reside within the community.”²⁰

In addition, CCE was required to demonstrate “the specific, articulated support of individuals who maintain dwellings nearby the proposed facility.”²¹ Therefore, “although CCE demonstrated interests that certainly may be affected by the proposed facility and represented that it has many members residing on Long Island,” this was not enough to be deemed a local party eligible for intervenor funding, according to the 2014 decision.²²

In contrast, a line of several intervenor funding rulings have found sufficient “nexus” to demonstrate an organization’s status as a local party without the need to demonstrate the specific, articulated support of an individual member. Most recently, Tug Hill Tomorrow Land Trust was awarded pre-application funding in the Article 10 proceeding for the proposed Mad River Wind Farm based upon its demonstration that it has worked for more than two decades to

¹⁸ Case 13-F-0464 – Application of National Grid for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for the Repowering of its E.F. Barrett Power Station in the Town of Hempstead, Nassau County, *Ruling on Intervenor Funding Request* (Issued May 27, 2014), p. 5.

¹⁹ *Id.* p. 3.

²⁰ *Id.* p.4.

²¹ *Id.*

²² *Id.*

protect the natural resources of the Tug Hill region, and that several of its member-donors are residents of the town where the project is proposed to be located.²³

Because of this split among intervenor funding rulings, a declaratory ruling as to the proper standard for determining intervenor funding eligibility of not-for-profit environmental organizations is warranted. Scenic Hudson seeks a declaration holding that to demonstrate eligibility for intervenor funding as a “local party” under PSL Article 10, an environmental not-for-profit organization need only show that: (1) it has specific interests that may be affected by the proposed energy generating facility, and (2) it has supporters, members, and/or donors who reside in the area of the facility who also may be affected.

Clearly, by using the term “person” to define a “local party,” the legislature meant to include all kinds of persons – defined as “any individual, *corporation*, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate”²⁴ – in the broad scope of parties who may be eligible for intervenor funding. It follows that the “nexus” required for the eligibility as a “local party” under Article 10 of a not-for-profit corporation is demonstrated when it shows that it has a specific interest that may be affected, and that it has supporters, members, and/or donors who reside in the affected community.

²³ See Case 16-F-0713 – Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for the Mad River Wind Farm Project in the Towns of Redfield and Worth in Owego and Jefferson Counties, *Ruling on Intervenor Funding Requests* (Issued March 13, 2018); see also Case 14-F-0490 – Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Facility, *Ruling on Request for Intervenor Funds* (Issued February 6, 2017) (upheld in Ruling on Request for Reconsideration Issued March 2, 2017)(Awarding intervenor funding to the citizen group Concerned Citizens of the Cassadaga Wind Project upon a showing that the group includes 12 local residents, 10 of whom live within the project’s study area.); Case 14-F-0485 – Application of Lighthouse Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a 201 MW Wind Energy Facility, *Ruling on Intervenor Funding Requests* (Issued January 26, 2016) (Awarding pre-application intervenor funding to Save Ontario Shores, Inc., a not-for-profit corporation formed to educate the public and government officials about potential impacts from the siting of large commercial wind turbines along the shore of lake Ontario with approximately 50 members who own land in the towns of Yates and Somerset where the project was proposed to be located.)

²⁴ PSL § 160(3); 16 NYCRR § 1000.2(ab) (emphasis added)

The regulatory specification that “for the purposes of this definition, the term ‘residing’ shall include individuals having a dwelling within a community who may be affected” is simply read to mean that anyone with a dwelling in the affected community may be deemed a “resident” whose interests may be affected, not just those who are permanent residents or domiciled in the community. Nothing in either the statutory or regulatory definitions of the term “local party” can be read to limit eligible local parties to only “individuals” or impose a requirement that an organization must “stand in the shoes” of an identified individual supporter, who would otherwise be eligible as a local party, in order for the organization itself to be eligible. To continue to apply such a rule is unduly burdensome and will significantly limit the ability of not-for-profit corporations, which operate on donor funds and have limited resources, to participate in Article 10 proceedings.

Equitable Disbursement of Intervenor Funding

Scenic Hudson also appeals the denial of its request for intervenor funding and seeks an additional declaration that intervenor funding may be awarded for the costs of the salaried staff of not-for-profit corporations, and further that such a request does not stand in lower stead to the requests of other non-municipal local parties who seek funding for the costs of outside experts, even in the case of limited funds.

Scenic Hudson’s RFIF was denied on the grounds that “the limited intervenor funds available at the pre-application stage of this proceeding should not be awarded to offset payment of work to be performed by Scenic Hudson’s salaried staff attorneys where other groups are also requesting an award of those limited funds.”²⁵ We recognize that the award of intervenor funding is made in the discretion of the ALJs, and that they are making an effort to balance a limited amount of intervenor funding with the goal of ensuring broad and meaningful public

²⁵ Ruling, p. 11.

participation. However, Scenic Hudson's request should not be viewed as of lesser importance than those of other non-municipal local parties simply because it seeks funding for its employees rather than contractors. While the amount of funding available here, which is based upon the size of the project, is limited, Scenic Hudson's interest is no less than the other non-municipal parties to the proceeding, and is unique. It would be an absurd result if, had Scenic Hudson had requested funding for outside counsel, almost certainly at a higher hourly rate, its request would then be considered more favorably.

Moreover, Scenic Hudson and other environmental not-for-profit organizations have repeatedly been awarded intervenor funding for the expense of both salaried staff and consultants under PSL Article VII.²⁶ Scenic Hudson has demonstrated an ability to add significantly to the record of the proceedings with the use of such funds. Therefore, the denial of Scenic Hudson's request was inequitable, and we respectfully appeal the determination and seek an equitable award of funds.

CONCLUSION

Based on the foregoing, Scenic Hudson respectfully requests the following relief:

- 1) A declaratory ruling that an environmental not-for-profit organization need only show that it has specific interests that may be affected by the proposed energy generating facility, and that it has supporters, members, and/or donors who reside in the area of the facility who also may be affected, in order to qualify as a "local party" under PSL Article 10;

²⁶ See Case 10-T-0139 - Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City; Case 13-E-0488 - In the Matter of Alternating Current Transmission Upgrades - Comparative Proceeding and related cases.

- 2) A declaratory ruling that Scenic Hudson has demonstrated its status as a “local party” eligible for intervenor funding in this proceeding;
- 3) A declaratory ruling that the expense and administrative costs for salaried staff of a not-for-profit corporation are eligible fees which may be defrayed by an equitable award of intervenor funding under PSL Article 10; and
- 4) Reversal of the examiners’ denial of Scenic Hudson’s’ RFIF and an award of an appropriate and equitable amount of pre-application intervenor funding in this matter.

Respectfully submitted,

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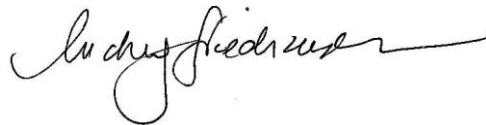
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PLEASE TAKE NOTICE that pursuant to 16 NYCRR § 3.6, parties wishing to respond to this motion shall do so within 8 days of service.

PLEASE TAKE FURTHER NOTICE that pursuant to 16 NYCRR § 8.2, responses to a petition for declaratory ruling may be filed within 21 days of the date the petition is filed.