

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

PETITION OF THE TOWN OF
BROOKHAVEN AND AMERICAN
CAPITAL ENERGY, INC. FOR A
DECLARATORY RULING

Case 13-F-_____

PETITION OF THE TOWN OF BROOKHAVEN
AND AMERICAN CAPITAL ENERGY, INC.
FOR A DECLARATORY RULING

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Date: September 19, 2013

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Introduction

Pursuant to Part 8 of the Rules and Regulations of the Public Service Commission (the “Commission”), 16 NYCRR Part 8, the Town of Brookhaven (“Town”) and American Capital Energy (“ACE”) (collectively, “Petitioners”) hereby jointly petition the New York State Board on Electric Generation Siting and the Environment (“Board”) for a Declaratory Ruling determining that the fourteen separate distributed renewable energy projects, discussed more fully below, none of which has a nameplate capacity in excess of 25 MW, will not be aggregated for purposes of Article 10 of the Public Service Law (“PSL”), and therefore, will not constitute a “major electric generating facility” for purposes of Article 10. The requested determination is supported by relevant law and precedent and will benefit the State of New York by encouraging the siting and construction of renewable energy on Long Island and within the Town of Brookhaven. In support of this Petition, Petitioners state the following.

I. Background

A. The Town of Brookhaven

The Town is located in central Suffolk County, New York, and stretches from the Long Island Sound on the North Shore of Long Island to the Atlantic Ocean on the South Shore of Long Island. The Town is geographically the largest of all Long Island's towns with a total land area of approximately 326 square miles, and is also the most populous of the ten (10) towns within Suffolk County with a 2010 US Census population of 486,040. The Town is located within the Long Island Power Authority's ("LIPA's") electric service territory.

The Town is committed to sustainable renewable energy and energy efficiency projects. In 2006, the Town adopted a Clean Energy Action Plan, in order to lead by example. The Clean Energy Action Plan was designed for the Town to act as a role model on energy issues through demonstration that technologies are available which would reduce air pollution, improve energy efficiency, fight global change, increase energy independence, and reduce long term operating costs associated with energy usage. The Town's Clean Energy Action Plan also established the Clean Energy Task Force to assist the Town in implementing the Plan. The Task Force was directed to set benchmarks and goals in order to assist the Town in its transition to cleaner and more efficient energy technologies in its buildings and vehicle fleet. Other commitments and/or incentives that have subsequently been implemented by the Town include the Town of

Brookhaven Office of Energy and Sustainability; the Town of Brookhaven Green Homes Program; and the Town of Brookhaven Go Solar Initiative.

To date, the Town has sponsored various energy and energy efficiency projects on Town-owned properties. Most prominent of these are the following:

- A 10 kW wind turbine at Town Hall, operating since 2003;
- A 5 kW wind turbine at the Holtsville Ecology Center operating since 2009; and
- Incorporation of geothermal and solar thermal heating at the Town's newly constructed Department of Parks and Recreation Administrative Building located at the Centereach Pool.

Other actions taken by the Town to facilitate the development of renewable energy projects include the following:

- Adoption of the Residential Solar Energy Fast Track Permit Process which provides a streamlined application process for the installation of residential rooftop solar electric and solar hot water energy systems; and
- Various Town Code amendments to require LEED (Leadership in Energy and Environmental Design) standards for new municipal and in some cases private construction.

The Town is also a member of the International Council for Local Environmental Initiatives ("ICLEI") – Local Governments for Sustainability Program. This program provides the Town technical and analytical assistance in measuring its carbon footprint for the purposes of reducing the Town's greenhouse gas emissions.

B. American Capital Energy

American Capital Energy, Inc. ("ACE") is a New Jersey Corporation, founded in 2005 by former RWE Schott Solar executives. Its project management team

has a combined 90 years of experience in designing, planning and executing large-scale solar electric projects. ACE is an award winning energy solutions developer and contractor building large commercial and utility scale photovoltaic solar power plants across the United States and globally. In New York, ACE has offices in Larchmont, Westchester County.

American Capital Energy has installed over 48 MW of PV projects to date. In addition to projects currently operating in the field, ACE has over 70 MW of PV projects under construction or under contract. ACE provides turnkey solar power solutions using the best equipment, technology, engineering and project management experience available in the industry. ACE focuses exclusively on utility-scale and large-scale commercial PV systems for business, education, government, and utilities with completed projects ranging in size from 200 kW to 6.2 MW.

ACE has a growing list of “best in class” projects. In 2008 ACE commissioned a 2.36 MW array on the rooftop of the Atlantic City Convention Center. That project held the status of the largest rooftop array in North America until ACE completed a 3 MW rooftop array for GlaxoSmithKline in February 2011. In addition to ACE’s roof mount efforts, ACE commissioned a 6.2 MW ground-mounted array in December 2010 that was the largest ground-mounted system in NJ at the time of construction.

ACE is also a pioneer in engineering solar arrays on contaminated sites. In 2010, ACE successfully engineered and constructed a 1.8 MW array on a contaminated

brownfield. This project earned several awards, including the Environmental Business Council of New England's John A.S. McGlennon Environmental – Energy Award for Corporate Leadership, as well as the PV project of distinction from the Solar Electric Power Association. ACE also engineered and constructed a 2.2 MW array on a separate brownfield that was awarded the 2011 James D.B. Farrell Brownfields Project of the Year Award from the Environmental Business Council of New England. In addition, ACE was awarded an 18.3 MW solar project to be constructed on 9 sites, 7 of which are capped landfills, on Cape Cod and Martha's Vineyard.

C. *The Proposed Projects*

In furtherance of the Town's Clean Energy Action Plan, on July 5, 2012, the Town publicly noticed and issued a competitive Request for Proposals ("RFP") #12-12 for the Development of Distributed Utility-Scale Renewal Energy Generating Facilities Solar & Wind on Town-Owned Host Properties. In the RFP, the Town identified Town-owned sites throughout the Town which it believed could support the installation of either solar energy generating facilities ("SGF") or wind energy generating facilities ("WEF"). Proposals were due to the Town on September 28, 2012. The Town received six proposals in response to the RFP, and on March 11, 2013, following evaluation of the proposals, formally announced its selection of ACE's proposal as the preferred proposal.

ACE originally proposed to construct and operate SGFs and WEFs on 15 separate Town-owned sites. However, following further due diligence regarding the

sites, three additional sites were considered, and four sites deleted. The final project consists of fourteen separate sites, each with various types of SGFs and/or WEFs proposed for each site. Attached hereto as Exhibit A is a chart showing the names of each of the locations, what ACE proposes for each site (SGF groundmount, SGF roofmount, SGF carport, SGF planeport and/or WEF), the nameplate capacity for each type of facility, and the total nameplate capacity for each of the sites. As demonstrated in Exhibit A, no single site will have an installed nameplate capacity in excess of 25 MW. A map showing the location of each of the sites throughout the Town is attached hereto as Exhibit B. The Town will enter into separate leases for each of the sites with fourteen different to-be-formed special purpose LLCs, which will each be indirect subsidiaries of ACE. Each of the special purpose LLCs will have separate interconnection and power purchase agreements with LIPA. Although the subsidiaries may share employees through a contract with ACE, and will share a remote monitoring system, each of the fourteen projects will be legally and operationally separate. No changes to the Town's wind turbines located at Town Hall and the Holtsville Ecology Center are proposed as part of these projects.

II. Ruling Requested

The Petitioners request, pursuant to Section 161 of the PSL and Public Service Commission Rules 8.1,¹ that the separate renewable energy projects on the

¹ 16 NYCRR § 8.1

fourteen sites will not, either individually, or as a whole, constitute a “major electric generating facility” under Article 10 of the PSL.

III. Discussion

Article 10, like its predecessor, Article X, prohibits preparation of a site for, or construction of, a “major electric generating facility” until a certificate is obtained from the Board pursuant to Article 10.² Article 10 defines a “major electric generating facility” as “an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more”³ Former Article X did not define a major electric generating facility by reference to its nameplate capacity; rather, similar to Article 10, the focus of Article X review was on environmental impacts. As a result, the Siting Board eventually interpreted the Article X threshold to measure capacity, by actual output, not nameplate capacity.⁴ Thus, the ability to impose an operational limit on a facility’s output to the grid in order to avoid review, authorized under former Article X in

² PSL § 162(1).

³ PSL § 160(2).

⁴ Case 00-F-1934, *Power Authority of the State of New York*, Declaratory Ruling Concerning Standard for Defining Generating Capacity (Issued and Effective November 16, 2000) (“*NYPA Declaratory Ruling*”).

the NYPA Declaratory Ruling and subsequent Declaratory Rulings,⁵ is no longer available under Article 10.

It is respectfully submitted however, that the Declaratory Rulings interpreting almost identical provisions of the PSL under former Article X should apply to the current Article 10. In the NYPA Declaratory Ruling, for instance, the New York Lawyers for the Public Interest, Inc., amongst others, (“NYLPI”) argued that NYPA’s proposal to install 11 turbines in New York City at various different sites, with a total nameplate rating of 517 MW was subject to review under Article X. In rejecting that interpretation, the Siting Board stated:

[T]here is no basis for a contention that Article X requires the capacity of all generating units installed by a given developer in a city to be combined for the purposes of determining jurisdiction under Article X. PSL § 162(1) provides, in pertinent part, that “no person shall commence the preparation of a site for, or begin construction of a major electric generating facility in the state without having first obtained a certificate issued with respect to such facility by the board.” Moreover, PSL § 164(1)(a) provides that the application for such certificate must contain “a description of the site and a description of the facility to be built thereon. . . .” These provisions indicate that *a certificate is granted with respect to a particular major electric generating facility on a given site.*

⁵ See, e.g., Case 01-F-1127, *KeySpan Energy Development Corp. (Glenwood Landing)*, Declaratory Ruling Concerning Jurisdiction over a Proposed Facility (Issued and Effective November 20, 2001) (accepting operational limitations on output of the facility); Case 01-F-1653, *KeySpan Energy Development Corp. (Port Jefferson)*, Declaratory Ruling Concerning Jurisdiction over a Proposed Facility (Issued and Effective December 10, 2001)(same); Case 01-F-1633, *PPL Global (Shoreham)*, Declaratory Ruling Concerning Jurisdiction over a Proposed Facility (Issued and Effective December 10, 2001)(same); Case 01-F-1632, *PPL Global (Edgewood)*, Declaratory Ruling Concerning Jurisdiction over a Proposed Facility (Issued and Effective December 12, 2001)(same).

NYPA Declaratory Ruling, p.8 (emphasis supplied). The Siting Board's Declaratory Ruling in this regard was upheld by the Appellate Division, Second Department, in *Matter of Uprose, et al. v. New York Power Authority, et al.*⁶ The language of PSL §§ 162(1) and 164(1)(a) quoted by the Siting Board in the NYPA Declaratory Ruling is identical to the language contained in the current version of those statutory provisions. Thus, Declaratory Rulings under former Article X should be applied in interpreting current Article 10.

Subsequent Declaratory Rulings under former Article X focused on both physical and legal separation, as well as operational independence, in determining whether a particular facility constituted a major electric generating facility. For instance, in a Declaratory Ruling sought by NRG Energy, Inc.,⁷ the Siting Board determined that a new 79.9 MW gas turbine unit installed on property already owned by an affiliate of NRG, but leased to NRG, would not be considered a major generating facility subject to Article X. The owner of the proposed peaking station was to be a new, wholly-owned subsidiary of NRG. NRG proposed to construct the new peaking station on the site of an electric generating complex with an existing capacity of 759 megawatts, on property that would be leased from an indirect affiliate of the owner of the new peaking station.⁸ That indirect affiliate was also the owner of existing generation situated on the site.

⁶ 285 A.D.2d 603 (2nd Dept. 2001)

⁷ Case 01-F-0222, *NRG Energy, Inc.*, Declaratory Ruling Concerning Facility Proposed by an Affiliate of Existing Facility Owner (Issued and Effective June 20, 2001) ("*NRG Declaratory Ruling*")

⁸ *NRG Declaratory Ruling*, at 2.

The proposed NRG facilities, though located in close proximity to the existing units on the site, would be physically and operationally independent from such other units. NRG had designed its peaking station to be physically separate from the existing electric generating complex, with a separate structure, exhaust stacks, control system and gas metering system. Given the location of the proposed peaking station, however, the new station would share certain services and facilities with its lessor (its indirect affiliate) and other companies at the complex. For example, the new peaking station would share a remote monitoring system, gas interconnection, and back-up fuel tank with its affiliated lessor. The peaking station would also be operated pursuant to an operating agreement that might use staff working at other units in the complex. Furthermore, the peaking station would share roadways, entrances, security guards, loading docks, water and waste systems, and natural gas headers with the other companies at the complex, and be party to all applicable easement agreements for the operation and maintenance of equipment and transmission systems.

The Siting Board reviewed these arrangements and agreed with NRG that the proposed peaking station would not be a “major electric generating facility” within the meaning of Article X. The Siting Board also found that the proposed station was not a repair, replacement, modification or improvement of the existing electric generating complex within the meaning of PSL § 162(4)(c):

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 . . . [T]he 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.

NRG Declaratory Ruling, at 8.

In a Declaratory Ruling issued in Case 01-F-1631,⁹ the Board granted the petition of CPN Bethpage 3rd Turbine, Inc. that allowed CPN Bethpage to construct, without being subject to Article X review, a 47 MW gas turbine unit adjacent to the site of an existing 55 MW combined cycle facility owned by petitioner's affiliate, TBG Partners. The Siting Board found:

The two generators are physically and legally separate and no changes to the 55 MW TBG [unit] are proposed. The argument that the generating capacity of separate facilities on different sites should be combined for purposes of determining jurisdiction under Article X has been rejected. Neither the fact that the facilities would share certain limited elements, such as an access roadway, sewer lines, and certain personnel, nor the fact that the facilities' owners are indirectly affiliated, changes the analysis that the CPN Bethpage plant is a distinct generating unit for purposes of determining jurisdiction under Article X.

⁹ Case 01-F-1631, *CPN Bethpage 3rd Turbine, Inc.*, Declaratory Ruling Concerning Jurisdiction Over Proposed Facility (Issued and Effective December 3, 2001). *See also*, Case 02-F-1225, *Jamaica Bay Peaking Facility, LLC*, Declaratory Ruling Concerning Jurisdiction at 4 (Issued and Effective December 12, 2002)(finding that the construction of a 48 MW unit by Jamaica Bay adjacent to an existing 44 MW generating facility owned by an affiliate, despite some shared components, did not constitute the construction of a major electric generating facility under former Article X because each would "operate independently in supplying electricity to the grid.").

CPN Bethpage Declaratory Ruling, at 4-5.

In a similar Declaratory Ruling in Case 01-F-1632,¹⁰ the Siting Board found that a proposed PPL Global 79.9 MW simple cycle generating station located on a parcel adjacent to an existing 47 MW turbine unit (owned by NYPA), but owned and operated independently, would not be combined with the existing unit for purposes of determining jurisdiction under Article X. Despite the construction of the new facility on an appurtenant parcel, a separate parcel was established by a lease to PPL Global, an unaffiliated entity. This, combined with the legal and operational independence of the two generating stations, was sufficient to justify the Board's decision not to combine "separate generating facilities on different sites" for purpose of determining Article X jurisdiction. PPL Global, Declaratory Ruling, at 7.

It is respectfully submitted that the fourteen separate renewable energy projects presents a factual scenario similar to those discussed by the Siting Board in Declaratory Rulings issued under former Article X. As shown on Exhibit A hereto, although the total megawatts to be installed across all of the sites is 53.455 nameplate, none of the fourteen sites will have a nameplate capacity greater than 25 MW. The largest site, Calabro Airport, will host a total of 22.739 MW (nameplate capacity). As demonstrated on Exhibit B, each of the sites are geographically dispersed throughout the Town. As discussed above, the Town will enter separate leases for each of the sites with

¹⁰ Case 01-F-1632, *PPL Global LLC*, Declaratory Ruling Concerning Jurisdiction Over Proposed Facility (issued and effective December 12, 2001).

fourteen different subsidiaries of ACE. Each of the fourteen subsidiaries will have separate interconnection points to LIPA's grid.

These facts are virtually indistinguishable from those in the NYPA, NRG and other Declaratory Rulings issued by the Siting Board under former Article X. As discussed above, NYPA proposed to construct and operate 11 turbines at numerous sites throughout the city, with a total capacity of over 500 MW. Nonetheless, the Siting Board held that former Article X applied to a major electric generating facility for a particular site, not the total MW proposed throughout the City. *NYPA Declaratory Ruling* at 9. Here, the projects are proposed throughout the 326 square miles of the Town. Although the subsidiaries may share employees through a contract with ACE, and will share a remote monitoring system, similar to the facts of NRG, CPN Bethpage 3rd Turbine, and Jamaica Bay, each of the fourteen facilities will be legally and physically separate, and will operate independently of the other.

In sum, it is respectfully submitted that, as each of the fourteen new proposed renewable energy projects are separate and distinct from each other, and none of the projects have a nameplate capacity which exceeds twenty-five thousand kilowatts, the Siting Board should declare that the projects are separate generating facilities on

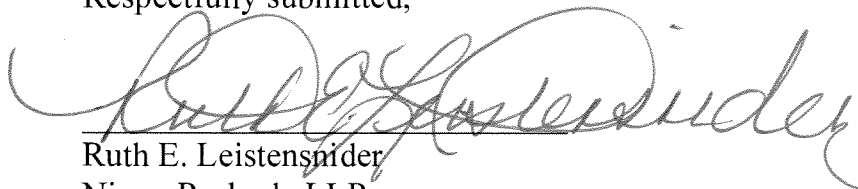
distinct sites and therefore, the projects should not be considered to be a “major electric generating facility” for purposes of Article 10.¹¹

Conclusion

Petitioners respectfully request that the Siting Board issue a Declaratory Ruling determining that the fourteen separate distributed renewable energy projects, discussed more fully above, none of which has a nameplate capacity in excess of 25 MW, will not be aggregated for purposes of Article 10 of the PSL, and therefore, will not constitute a “major electric generating facility” for purposes of Article 10. The requested determination is supported by relevant law and precedent and will benefit the State of New York by encouraging the siting and construction of renewable energy on Long Island and within the Town of Brookhaven.

Dated: September 19, 2013

Respectfully submitted,



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¹¹ Granting the requested ruling does not mean the ACE proposal will evade any environmental review. Rather, as required under the State Environmental Quality Review Act, Environmental Conservation Law Article 8, the Town Board will review the environmental impacts of the proposed projects, both individually, and cumulatively, prior to executing any leases with ACE for the Town owned properties.

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BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT**

**PETITION OF THE TOWN OF
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DECLARATORY RULING**

Case 13-F-_____

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SUFFOLK)SS:


EDWARD P. ROMAINE, being duly sworn according to law, upon his oath,
deposes and says:

1. I am the Supervisor of the Town of Brookhaven, and am authorized to make this Verification on behalf of the Town of Brookhaven.
2. I have read the contents of the foregoing Petition and hereby verify that the statements therein contained are true and accurate to the best of my knowledge and belief as to the Town of Brookhaven.

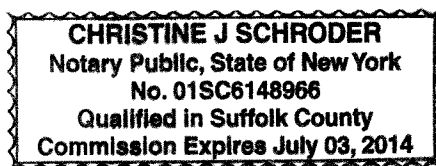


EDWARD P. ROMAINE

Sworn to and subscribed before me
this 16 day of September, 2013



Notary Public



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

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Case 13-F-_____

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)
COUNTY OF MIDDLESEX)SS:

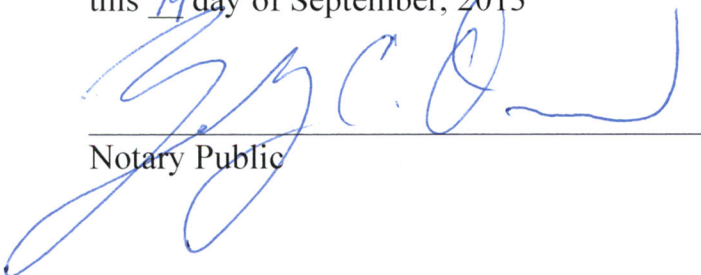
TOM HUNTON, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Chief Executive Officer of American Capital Energy, Inc., and am authorized to make this Verification on behalf of American Capital Energy, Inc.
2. I have read the contents of the foregoing Petition and hereby verify that the statements therein contained are true and accurate to the best of my knowledge and belief as to American Capital Energy, Inc.



TOM HUNTON

Sworn to and subscribed before me
this 19 day of September, 2013



Notary Public

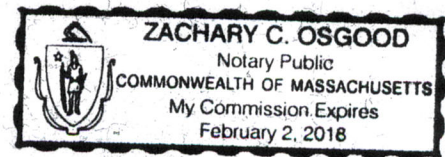


Exhibit A

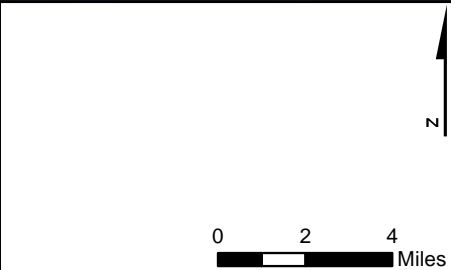
**TOWN OF BROOKHAVEN
UTILITY-SCALE DISTRIBUTED RENEWABLE ENERGY
ON
TOWN-OWNED PROPERTIES**

TOWN-OWNED HOST SITES		PORTFOLIO ENERGY YIELD (MW)					
		SOLAR GENERATING FACILITIES (SGF)				WIND ENERGY FACILITIES (WEF) MW	HOST SITE TOTALS MW
		GROUND MOUNT MW	ROOF MOUNT MW	CARPORT MW	PLANEPORT MW		
NO.	NAME	GROUND MOUNT MW	ROOF MOUNT MW	CARPORT MW	PLANEPORT MW	WIND ENERGY FACILITIES (WEF) MW	HOST SITE TOTALS MW
1	TOWN HALL	0.500	0.333	1.999		0.300	3.132
2	SOLID WASTE MANAGEMENT COMPLEX	7.083					7.083
3	HOLTSVILLE ECOLOGY PARK	2.833		0.833			3.666
4	MORICHES ATHLETIC COMPLEX			0.500		0.200	0.700
5	CENTEREACH POOL			1.333		0.300	1.633
6	DELETED						
7	CALABRO AIRPORT	20.739			2.000		22.739
8	MANORVILLE COMPOST FACILITY	4.750				0.300	5.050
9	BALD HILL CULTURAL ARTS CENTER			2.160		0.200	2.360
10	MEDFORD ATHLETIC COMPLEX			0.175		0.200	0.375
11	PERCY RAYNOR PARK			0.666		0.200	0.866
12	MARTHA AVENUE RECREATION CENTER	1.000		0.468			1.468
13	AQUATIC CENTER			0.250		0.200	0.450
14	DELETED						
15	DELETED						
16	MAPLE STREET	2.833				0.100	2.933
17	DEFENSE HILL					1.000	1.000
18	DELETED						
RENEWABLE ENERGY ARRAY TOTALS (MW)		39.738	0.333	8.384	2.000	3.000	53.455

Exhibit B



TOWN OF BROOKHAVEN, NY UTILITY-SCALE DISTRIBUTED RENEWABLE ENERGY PROJECT HOST SITES		
NO.	NAME	LOCATION/ADDRESS
S-1	Town Hall	One Independence Hill Farmingville, NY 11738
S-2	Waste Management Complex	350 Horseblock Road Yaphank, NY 11960
S-3	Holtville Ecology Park	249 Buckley Road Holtville, NY
S-4	Moniches Athletic Complex	640 Moniches Middle Island Road Moniches, NY
S-5	Centereach Pool Complex	Hawkins Road @ Wireless Road Centereach, NY 11720
S-6	Deleted	
S-7	Calabro Airport	135 Dawn Drive Shirley, NY 11967
S-8	Manorville Compost Facility	Papermill Road Manorville, NY 11949
S-9	Amphitheater - Arts & Cultural Center at Bald Hill	1 Bicycle Path Farmingville, NY 11738
S-10	Medford Athletic Complex	Horseblock Road Medford, NY 11763
S-11	Percy Raynor Memorial Park	NY Rte. 347 at Bete Meade Road Setauket, NY 11739
S-12	Martha Avenue Recreation Center	Martha Avenue @ Bellport Avenue North Bellport, NY 11713
S-13	Aquatic Center & Mastic Skate Park	300 Mastic Beach Road Mastic Beach, NY 11961
S-14	Deleted	
S-15	Deleted	
S-16	Maple Street	Blue Point Avenue at Maple Street Blue Point, NY 11715
S-17	Defense Hill	(End of Defense Hill Road Shoreham, NY 11786
S-18	Deleted	



TRC 500 North Broadway, Ste. 233
Jericho, NY 11753
516-822-2045

**HOST SITE LOCATION MAP
UTILITY-SCALE DISTRIBUTED
RENEWABLE ENERGY FACILITIES ON
TOWN OF BROOKHAVEN-OWNED PROPERTIES**