

April 30, 2020

Michelle L. Phillips, Secretary
New York State Public Service Commission
3 Empire State Plaza
Albany, New York 12223-1350

Re: Case Number: 20-F-0067 - In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, Contained in 16 NYCRR, Chapter X, Certification of Major Electric Generating Facilities, Proposed Amendments to Parts 1000 and 1001.

Dear Secretary Phillips:

Three pivotal laws will work together to achieve the electricity infrastructure investments and emission reductions needed to address climate change: Article 10 of the Public Service Law; the Climate Leadership and Community Protection Act (“CLCPA”); and the Accelerated Renewable Energy Growth and Community Benefit Act, which is the State’s new renewable energy project siting law. Meeting the goals of the CLCPA will require rigorous investment and significant growth in clean energy resources, and the appropriate siting of projects is ever more important.

Having a functioning Article 10 siting process, in addition to that of the new renewable energy siting law, is essential to allow the necessary projects to be permitted and constructed. Importantly, the new renewable energy siting law includes the ability for existing project developers, who have submitted a draft Pre-Application Public Involvement Program Plan under Article 10, to remain in the Article 10 siting process, as these developers may wish to retain the certainty of a process they already know.

Agencies involved in the Article 10 siting process have led the way to identify administrative improvements to make the siting process more effective. Between the fall of 2018 and spring of 2019, NYSERDA, DPS, and DEC worked with IPPNY to host two symposiums to discuss possible adjustments to the Article 10 process. IPPNY has also reached out to expert firms that are involved in the current siting process to get their input on how to improve the law’s implementation.

Attached is a summary of the feedback of those firms and recommendations from the forums. Notably, the current siting process can be improved through steps, such as:

- Article 10 ombudsmen (in addition to the Article 10 Public Information Coordinator) should serve as points of contact for developers and other parties.

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- Standards, guidelines, templates, best practices, and model notices should be established, based upon the precedents from approved projects, in order to avoid duplicative efforts for each project.
- Agency staff should review, and refer to, prior Siting Board decisions on local laws and precedent endorsed by the courts.
- The stipulation process needs deadlines, and all parties should be required to submit stipulation comments within 30 days of receipt of a proposed stipulation.
- All agency staff responses should be coordinated to eliminate conflicting or duplicative opinions about requirements to avoid delays.
- Ad Hoc Members of the Siting Board need to be appointed in a timely manner and should not have conflicts of interest.
- More agency staff is needed to review the Article 10 applications.

IPPNY and its Members look forward to remaining centrally involved in working with the State to improve the implementation of the siting process. Thank you for your consideration.

Respectfully submitted,

/s/Radmila P. Miletich

Legislative and Environmental Policy Director
Independent Power Producers of New York

Enclosure

Recommendations for Administrative Improvements for the Existing Article 10 Power Plant Siting Process

Article 10 Ombudsmen

Article 10 ombudsmen would be points of contact for developers and other parties to gain clarity on specific issues and to have their outstanding questions answered. Each project should have an ombudsman appointed to it at the pre-application stage.

The role of ombudsmen should not conflict with the existing roles of agency supervisory staff and Administrative Law Judges.

Ombudsmen also could serve the following coordination roles:

- Reviewing draft deficiency letters to ensure they are complete in terms of the issues that are outstanding in applications and consistent with the implementing Article 10 regulation requirements, in order to avoid the raising of additional issues at a later date
- Ensuring timelines are met
- Recommending process improvements to the Siting Board chairman
- Ensuring issues for litigation are truly in dispute and require adjudication
- Reporting to the Siting Board chairman on the status of applications
- Overseeing agency staff assignments and scheduling
- Ensuring agency staff are fully prepared for scheduled meetings

Also, each involved agency in the review process should have a point person and an attorney for each project, with whom the Article 10 ombudsmen would coordinate to address any raised issues and questions.

Sticking to Specifics of Regulations

The scope of the siting process should be focused upon the requirements of the Article 10 implementing regulations, and additional requirements should not be added.

- A practical assessment is needed as to the applicability of specifics in the regulations to the particulars of projects, and unrelated requirements should not need to be considered by the applicant.
- Requirements and studies should not be added beyond provisions of the Article 10 law, implementing regulations, and Siting Board decision precedents, to the extent that those existing provisions are applicable to specific projects.

The Article 10 implementing regulations are intended to focus the issues to be addressed by applications, and not expand them, by being specific as to the content of applications.

- State agencies and parties should look at the orders that adopted the Article 10 regulations to see the Siting Board's intent for approving the regulations.

- Unfortunately, studies being requested of certificate applicants are well beyond the requirements of the regulations.
- Despite Public Involvement Plans (PIPs) filed well in advance of the applications and reviewed by DPS staff, the hearing examiners are requiring more outreach and additional mailings to adjacent landowners, which enlarges the approved outreach methods beyond the requirements of the PIPs and Article 10 regulations.
 - Discourage Administrative Law Judges from unnecessarily exercising their authority to require additional outreach and public notices so long as the applicant has complied with its filed PIP and the Article 10 regulations.

Pre-Application Stage

Stipulations

Agency staff and project developers should engage in the stipulation process as early as possible and reach settlement.

The hearing examiner should be identified within ten days of the submittal of the pre-application preliminary scoping statement.

The stipulations process should be initiated earlier, and the hearing examiner should be directed to schedule the meeting to start the stipulations process within 15 days of the filing of the preliminary scoping statement; the meeting should take place within 45 days of the filing of the preliminary scoping statement.

The stipulation process needs deadlines. All parties should be required to submit stipulation comments within 30 days of receipt of a proposed stipulation unless extraordinary circumstances are shown.

Issues should be resolved as part of the stipulation process and not litigated by State agencies during the testimony phase.

Application Stage

Conduct More Predictable and Timely Application Completeness Reviews

When reviewing an application, agency staff should be encouraged to informally communicate with the project developer to ask clarifying questions or warn of likely deficiencies as they are identified. Completeness reviews have been run from the bottom up rather than top down.

Agency staff, including the DPS, DEC, Department of Agriculture and Markets and Department of Health (or other agency staff), should coordinate their reviews of applications to ensure

identified issues are not duplicative or conflicting and pertain to the completeness of applications (and are not issues in dispute).

Letters of deficiency of application completeness should be limited to material issues, e.g., issues related to the Siting Board's assessment of probable environmental impact.

If the agency staff finds non-material issues, e.g., technical non-compliance with regulations / stipulations or typographical errors, those could be identified in letters but not used to declare an application "deficient" or "incomplete."

Matters that are undisputed (or, perhaps, not disputed by the applicant or the State agencies / Siting Board) should be identified at the time of the pre-hearing conference. The presiding examiner should respond within 30 days to motions and appeals.

- Any and all deficiencies in a submitted application must be identified within 60 days.
- The Siting Board should impose on itself the obligation to issue a single deficiency letter, if needed, no later than 30 days from the application filing.
- In reviewing a cure to a deficiency letter, the Siting Board should take no longer than 21 days to issue a compliance determination.

The date for the public hearing should be provided at the same time that the application is deemed complete, and, within 30 days of the application being deemed complete, the presiding examiner shall hold a prehearing conference.

Improved Communication Between State Agencies and Developers

More open communication should be encouraged between agency staff and applicants, as is more typical for permit issuance processes.

Clarity should be provided as to what topics are set based on prior decisions, what matters are non-controversial, and what topics need to be resolved via stipulations.

Issues should be discussed openly to resolve them and to avoid adversarial steps through testimony and briefings, and issues requiring adjudication should be identified earlier in the process.

Executive DPS staff should review testimony filed in prior cases, such as those involving renewable energy resources and eliminate inconsistent views among DPS Staff (e.g., need for renewables in the State and economics of renewables).

All agency staff responses should be coordinated to eliminate conflicting or duplicative opinions about requirements to avoid delays.

The Article 10 Interagency Task Force should meet on a monthly basis, and the Article 10 Ombudsmen should coordinate agency efforts.

- Each Siting Board agency should have a designated and active member on the task force.
- The Article 10 Public Information Coordinator also should help parties and localities navigate the Article 10 process and should have a consumer advocacy role beyond just public relations.

Developing Standards

Basic standards should be developed for what projects should meet under Article 10, consistent with the requirements of the Article 10 regulations for specific topics.

- Projects that have been approved should set precedent, and, if anything different is to be required, a case should be made by the proponent as to why something different should be required; a decision should be made on the facts as to whether something different should be required.
- The scope of issues should be narrowed, based upon precedent, and the review should focus upon remaining key issues that are specific to the project.

An intervenor code of conduct under Article 10 should be developed to bring certainty as to what can be done and said with the use of intervenor money. Intervenors should submit a plan or proposal (including a communication plan) for approval by the Siting Board for what intervenors will do with intervenor money. This code of conduct would be in addition to the requirements of “The Fund for Municipal and Local Parties: A Guide to Intervenor Funding Pursuant to Article 10 of the Public Service Law,” which is available on the Siting Board’s website, and this existing document could be updated.

- There should be higher scrutiny over the use of intervenor funding by the Administrative Law Judges.

State agencies should, in consultation with developers:

- Develop guidelines or best practices for speedier permitting
 - National wind energy guidelines should be stepped down to apply to New York State.
 - More specific guidelines are needed to support a more efficient decision-making process.
- Develop model conditions to be used as the starting point for all certificates
- Develop general standards and templates for the exhibits
- Develop and pre-approve standardized/template stipulations and certificate conditions that are specific to fuel sources (wind, solar, gas, etc.) to help streamline and expedite the process
- Provide standard guidance and methods for studies required by developers
- Provide model notices for local governments
- Streamline negotiations of noise and visual impacts for individual projects to have a more standard process
- Define a decibel standard and a sleep standard

- Clarify when *ex parte* rules would apply and to which agency staff - advisory or trial
- Update NYSEDA's guidelines for PILOTs
- Consider a standard for PILOTs

Relevant State agencies should be encouraged to communicate with applicants, prior to their submittal of an application, regarding the application requirements, contents, and completeness to facilitate comprehensive applications and an efficient and cost-effective application review process.

Post-certificate compliance filing process required by regulations is taking too long.

- Model conditions for compliance filing at the certificate stage should be provided, in order to narrow issues and have more expedient review
 - Reduce the number of post-certificate filings
 - Encourage agency staff to agree with applicants on completed plans prior to issuance of a certificate
 - Encourage DPS Staff to respond within a 21-day period for comments and share comments with the applicant to allow for discussion on disagreement on compliance filings and for Siting Board / Public Service Commission to expeditiously review compliance filings (at next available session) taking into consideration any comments from applicant on DPS Staff comments
 - Discourage DPS Staff from attempting to change language and requirements that were in an application and / or final order
- The Siting Board should allow, in the application, final design information and other filings, e.g. invasive species plan, tree clearing plans, etc., that typically are made in the post-certification compliance filing.
- The Siting Board, in the 12-month review process, can approve these filings concurrent with the issuance of a certificate so that the applicant can begin construction as soon as the certificate is issued.

Cumulative Impact

State agencies should work with project developers to prioritize what is to be considered in cumulative impacts and which should be mitigated.

Generic environmental impact statements should look at cumulative impacts.

Guidelines could be developed on how to pre-define and find preferred and least impact sites for project development (but these sites should not be a requirement)

- Could take into account environmental impacts, farm and agriculture impacts, interconnection options and local viewpoints, and overlays of energy and environmental justice criteria

Wetlands delineation should be clarified to be for the facility site, all areas disturbed by construction, and 100 feet from all areas to be disturbed by construction.

Regulations should be interpreted, so that desktop mapping of wetlands meets the requirements.

Role of Local Laws

How local laws are treated during the Article 10 process should be clarified so that applicants / developers can better know what to expect as far as local laws that conflict with the project.

- The Siting Board should confirm that it will determine to elect not to apply local laws to a project, if sufficient justification is shown.
- There should be a cut-off time by which new local laws enacted at a certain point during the Article 10 process would not be considered applicable to the project.
- The right balance should be struck between participation by local municipalities and allowing a project to move forward through the process.

Agency staff should review, and refer to, prior Siting Board decisions on local laws and precedent endorsed by the courts.

- The Siting Board should confirm that, if a town is willing to waive its local laws and takes action to waive them, that waiver should be adequate for the Siting Board, and the Siting Board should not require an applicant to still demonstrate that the local law is unreasonably burdensome.
- The Siting Board should consider whether local laws would be unreasonably burdensome if they are more restrictive than Siting Board precedent.

Other Issues

Party Status

The Article 10 process needs clarification on party status, the rights of parties to participate, and consistency on party status decisions. State agencies should ensure that parties are impacted entities and have nexus to the proposed facility.

Submittals

Requiring numerous copies of the various required filings consumes time and money unnecessarily. Relatively inexpensive technology improvements should be evaluated and would simplify the process for all parties.

State agencies should reduce the number of mandatory paper copies of submittals and encourage electronic submittals of all documents, except for documents to be held at local document repositories.

Applicants should be able to arrange delivery of formal documents to statutory parties electronically.

Large format submittals should be minimized to just those that are required.

Adjudication

At the initial post-completeness administrative conference, agencies must come prepared to identify, with specificity, all issues that they intend to litigate.

Schedules for testimony should be reasonable and early in the process to ensure time is available to resolve issues for adjudication, if issues are not fleshed out until testimony.

Efficient Use of Resources

State agencies should prioritize and streamline review based upon likelihood of project completion.

- NYSERDA needs to meet commercial operation date deadlines to fulfill PTC / Investment Tax Credit requirements.

State agencies need to make better use of current resources:

- Reallocate resources to get projects reviewed in a timely manner to meet State goals
- Better allocate work among agency staff / colleagues; don't need an expert to review every element of the application
- Engage outside technical support to assist agency staff in reviews
 - NYSERDA has a number of contractors, and those contracted resources could be redirected to help coordinate the review of Article 10 projects.

Staffing is still an issue, despite the additional staff members funded for DPS. In addition to DPS, the other statutory agencies, including DEC, Dept. of Ag & Markets, DOH, etc., are also understaffed in terms of handling the number of Article 10 projects currently in the queue and potentially entering the queue.

Better coordination is needed between NYSERDA, the Governor's office, the DEC's global warming policy group and program staff, DPS staff, and the Siting Board.

Article 10 Implementation Guidebook

An Article 10 guidebook would be similar in concept to the handbook that DEC has for navigating the implementation of the review process under the State Environmental Quality Review Act (SEQRA). The DEC also could update its SEQRA handbook to reflect the new provisions of its recently updated SEQRA regulations, especially in relation to the review of certain types of solar energy projects.

NYSERDA has developed its New York Solar Guidebook, a Solar PILOT Toolkit, and a fact sheet entitled, “Understanding New York State’s Real Property Tax Law Section 487,” as part of the NY Sun Program. A Solar Permitting Process Guide also has been developed for the City of New York. This new Article 10 guidebook can build upon those efforts, and those existing materials could be updated to reflect new information.

The Article 10 guidebook would help developers and host communities understand the State’s Article 10 power plant siting law and its implementing regulations and how to best navigate the siting process to have a fair and comprehensive review of projects that apply for an Article 10 certificate, in order to meet the State’s energy and environmental goals.

The Article 10 guidebook also should include information for navigating how to obtain the associated air and water permits and how to comply with the DEC’s Article 10 environmental justice regulations.

The guidebook would include information on how to get through the existing process more efficiently and would not include additional requirements beyond the current law, regulations, and Siting Board decisions.

More specifically, the guidebook also should include information, such as:

- Specific steps for how to get through the Article 10 process and what State agencies are looking for in successful projects (for each fuel type and technology) in a manner consistent with the Article 10 law and regulations
 - For example, guidance is needed to define what is necessary to move a project forward to ensure adequate protection, such as of bats, while at same time being mindful of the of the goals of the project.
- Article 10 implementation process improvements upon which the Article 10 inter-agency working group currently is working to improve the process to reach the State’s energy and environmental goals
- List of needed permits and who is the contact person at the DEC’s Albany headquarters
- How the involved Article 10 permitting agencies will have a coordination and mediation role during the permitting and hearing process (instead of an adversarial role)
- The name and contact information for Article 10 ombudsmen, who will act as project review facilitators (in addition to the Article 10 Public Information Coordinator)

Communicating Project Benefits and Importance of State Goals

State agencies should work with developers of existing projects that have gone through the current and previous versions of the Article 10 law to communicate the benefits of those projects to communities, including their economic and environmental benefits.

State agencies should show more leadership and work together to help communities understand the State's energy and environmental goals and the importance of meeting those goals:

- Conduct additional outreach to help communities see the importance of the vision of increasing projects, such as renewable projects, including solar and wind projects, so that they understand the benefits of projects, even if individuals do not personally benefit
- Provide additional community support to improve knowledge and understanding and to prevent misinformation among communities
 - Give information on what minimized noise would be to increase project acceptance
 - Provide examples of what a decibel actually is, in terms of showing actual impacts in context (which may be less than communities assume)
- Provide more information to local leaders and Ad Hoc Siting Board members to make sure they understand their role
- State officials need to appoint local members in a timely manner, so that localities can have confidence in their views being represented on the Siting Board, and Ad Hoc Siting Board members should not have conflicts of interest.

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