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New NYS Article 10 Powerplant Siting Statute

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Article 10 of the Public Service Law ("PSL"), providing for a one-stop forum for an application to construct, operate and/or modify an electric generating facility, is back in New York following its expiration on January 1, 2003. On August 4, 2011, Governor Andrew M. Cuomo signed into law the "Power NY Act of 2011" which included, among other things, a new version of PSL Article 10, with some noteworthy modifications when compared with the expired version.

Proposals to construct an electric generating facility with a nameplate generating a capacity of twenty-five megawatts or more, or to increase the capacity of an existing electric generating facility by more than twenty-five megawatts, must obtain a certificate of environmental compatibility and public need ("Certificate") under PSL Article 10. The expired version of Article X had an eighty-megawatt threshold. (Unlike the new law, the old Article X used a Roman numeral designation.) The new Article 10 also includes a fast track to modify existing major electric generating facilities.

PSL Article 10 applications will be reviewed by the New York State Board on Electric Generation Siting and the Environment ("Siting Board"). The Siting Board is comprised of five commissioners (or their designees), one each from the New York State Departments of Public Service, Environmental Conservation, Health, Economic Development, and the State Energy Research and Development Authority. Also, two ad hoc public members will be appointed, one selected by the president pro tem of the Senate and one selected by the speaker of the Assembly, both residing within the municipality where the facility is proposed to be located. (In the old Article X, both were appointed by the governor.)

In order to approve an application, the Siting Board must determine that: (a) the facility is a beneficial addition to or substitution for the electric generation capacity of the state; (b) the construction and operation of the facility will serve the public interest; (c) the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable; (d) if the facility contributes to significant and adverse disproportionate environmental impact in the local community, the applicant will avoid or minimize the impacts to the maximum extent practicable for the duration that the certificate is issued; and (e) the facility is designed to operate in compliance with applicable state and local laws and regulations, other than those local legal provisions that the Siting Board finds unreasonably restrictive.

A major new element of PSL Article 10 is the expansion of the pre-filing process, and the requirement for the applicant to file a preliminary scoping statement, to encourage early participation from state agencies, municipalities, environmental organizations, and other interested groups. The preliminary scoping statement will contain the company's proposal and identify information needed for the preparation of a complete application,

such as the studies the company plans to conduct in support of its application. Although the filing of the preliminary scoping statement adds time to the Article 10 process, the information gathered in this statement will ultimately form the basis for the application to be filed with the Siting Board.

The Article 10 application must describe the proposed facility, demonstrate compliance with various health, safety and environmental regulations, including new rules and regulations (to be promulgated by the DEC) governing projected emissions of air pollutants to the surrounding community, and provide a comprehensive review of the demographic, economic and physical description of the community within which the facility is located, as compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county. Applications also must contain an analysis of the potential impact the proposed facility will have on the wholesale generation markets, specific environmental impacts associated with wind-powered facilities, a plan for the security of the proposed facility to be reviewed in consultation with the New York state division of homeland security, and proof of the adequacy of the facility's on-site back-up fuel storage and supply, when applicable to the proposed facility.

The Siting Board will determine, within 60 days of filing, whether the application complies with Article 10. Once the application is determined to be in compliance, the Siting Board will conduct public hearings (at a location within two miles of the proposed location of the facility) to clarify project-related issues, receive public comments and review evidence. The Siting Board must make its determination within one year from the date the application is deemed to fully comply with Article 10 unless that timeframe is waived by the applicant.

To help municipal and local parties participate in the Article 10 process, the new law requires an applicant to submit, with both its pre-application scoping statement and its application, a fee to fund an "intervenor fund." The fund will be distributed by the Siting Board to qualified parties to defray the expense of fees for expert witnesses and consultants.

Unlike the old Article X, the new statute contains no expiration or sunset provision.

The New York Public Service Commission and the Department of Environmental Conservation are expected to issue proposed regulations under this statute in the first quarter of 2012.

If you have any questions or would like further information from Cullen and Dykman concerning this topic, please contact David T. Metcalfe at 516-357-3733 or by e-mail at dmetcalfe@cullenanddykman.com, or Angela N. Cascione at 516-296-9102 or by e-mail at acascione@cullenanddykman.com.

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