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New Regulations Expedite New York Article VII Proceedings for Certain Proposed Electric Transmission Lines

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Introduction

In April 2021, the New York Public Service Commission (PSC) amended its regulations under Article VII of the Public Service Law (PSL) to accelerate the review and approval process for certain major electric utility transmission facilities. Entitled "Procedures with Respect to Expedited Proceedings," the new regulations are codified as Subpart 85-3 of the PSC's regulations at Title 16 of the New York Code, Rules and Regulations (NYCRR). The new regulations are the result of a PSC rulemaking process commenced in September 2020 in Case 20-T-0288. This Client Alert summarizes and comments on the new regulations.

The Accelerated Renewable Energy Growth and Community Benefit Act (Act),[1] enacted in April 2020, required the PSC to promulgate rules that would establish an "expedited process" for certain Article VII applications. The Act defined such a process as one "that is completed in all respects, including a final decision by the commission, within nine months" following the date as of which the PSC Secretary determines the application to comply with PSL Section 122 (commonly called the "completeness date").

With the new regulations, the PSC has formally established the nine-month expedited process. This is potentially quite significant to Article VII practice for electric transmission line projects, where the typical duration of an Article VII case is between 12 and 18 months, and often longer.

The eligibility criteria for the expedited process are set forth in the Act and tracked in the new regulations. They are discussed in detail below, but in brief they include projects to be located within existing rights-of-way or within expansion of existing rights-of-way as necessary to comply with electromagnetic field (EMF) requirements, and projects that the PSC, in consultation with the New York Department of Environmental Conservation (DEC), determines do not result in significant adverse environmental impacts.

Eligibility Criteria

The types of Article VII applications eligible for the nine-month expedited process are detailed in the new PSC regulations, which track the statute's eligibility criteria. Eligibility is limited to applications that propose electric lines, not gas pipelines. It is available only if the applicant requests it; eligibility is not automatically applied to

all applications that could qualify. And most significantly, the process is available only to applications that meet one or more of the following descriptions (in Section 85-3.2):

> "(a) applications for a facility that would be constructed within existing rights-of-way;
>
> (b) applications for a facility that the commission determines in consultation with [DEC] would not result in any significant adverse environmental impacts, considering the current uses and conditions existing at the Site; and
>
> (c) applications for a facility where expansion of existing rights-of-way is necessary for the purpose of complying with law, regulations, or industry practices relating to [EMF]."

Parsing this language indicates that the projects eligible for the expedited process are only electric Article VII transmission projects that would meet one or both of the following descriptions:

1. located *only* within rights-of-way that includes *only* (i) existing rights-of-way and/or (ii) expansion of existing rights-of-way necessary to comply with law, regulations or industry practices on EMF; or
2. that the PSC, in consultation with the DEC, determines "would not result in any significant adverse environmental impacts, considering the current uses and conditions existing at the Site."

The definition of "Site," located in Section 85-3.1(b), encompasses not only an existing right-of-way, but also:

a. "necessary extensions or expansions" to the right-of-way;
b. "all areas adjacent to or intersecting the right-of-way that may be impacted by construction activities"; and
c. "areas not adjacent to the right-of-way that will be used during construction or maintenance," and areas to store or stage "associated equipment, such as staging yards, parking, equipment storage areas, access roads, and temporary work areas."

Section 85-3.5 of the new regulations deems certain impacts to result in no significant adverse environmental impacts. These include:

a. Visual impacts due to structure height increases of 10 feet or less, or due to a change in the number of structures on the right-of-way (excepted from this category are changes that affect any of numerous listed types of protected viewsheds).
b. Temporary facilities and access roads, including across streams, as long as "reasonable avoidance or impact minimization efforts are available to assure minimization."
c. Transient or temporary construction impacts (*e.g.*, noise) and non-transient impacts needed to meet established electric system reliability and safety standards (*e.g.*, clearing of danger trees), in both cases as long as such impacts "are mitigated to the extent practicable in accordance with best practices as determined by the Department of Public Service."

Under Section 85-3.1 of the new regulations, "Right-of-way" is defined as:

> "(i) real property that is used or authorized to be used for electric utility purposes, or (ii) real property owned or controlled by or under the jurisdiction of the state, a distribution utility, or a state public authority including by means of ownership, lease or easement, that is used or authorized to be used for transportation or canal purposes."

This definition includes existing electric rights-of-way. It also includes land owned or controlled by a distribution utility, the state or a state public authority (but not other levels of government) that is used for transportation and canal purposes. Thus a project with a proposed route that includes town, village, city or county transportation rights-of-way would appear not to qualify.

The opposite conclusion, however, may be buttressed by the inclusion of land "*authorized to be used for*" either "electric utility purposes" or "transportation or canal purposes." The use of the passive voice obscures the source of the authorization. Its presence in the "electric utility purposes" clause gives at least passing support to the argument that any permit, lease or easement, whether granted by the state *or another source* (*e.g.*, a governmental body other than the state, or possibly even a non-governmental grantor) to install an electric transmission line along a specified route means that land is "authorized to be used for electric utility purposes."

Application Requirements

For eligible applications, the new regulations describe a number of application requirements that are eliminated or modified. These include scaling back the 1:24,000 scale topographic map requirement for Exhibit 2 (16 NYCRR Section 86.3(a)(1)) by eliminating the New York State Department of Transportation (NYSDOT) base map requirement and reducing the required coverage area from five to three miles. The new regulations require that the map "must distinguish existing right-of-way (as of date of filing) from any new right-of-way required to construct and operate the facility." They also require that Exhibit 2 "shall include a statement explaining what new right-of-way would be used and why such new right-of-way is necessary for the construction or operation of the facility." Since the new regulations say the foregoing applies to "Maps submitted pursuant to 16 NYCRR Section 86.3 in Exhibit 2," presumably meaning *all* maps required by that section, it would appear they completely eliminate, for eligible applications, the second of the two Exhibit 2 map requirements: specifically, the system map based on 1:250,000 scale NYSDOT mapping referenced in 16 NYCRR Section 86.3(a)(2).

The new regulations go on to exempt those projects for which the New York Independent System Operator (NYISO) does not require a system reliability impact study (or system impact study) from the 16 NYCRR Section 88.4(a)(4) requirement to include such a study in Exhibit E-4 of the Article VII application.

The new regulations further reduce the application requirements for a subset of projects eligible for the expedited process. This subset of projects must meet two criteria: they must satisfy clauses (a) and/or (c) of Section 85-3.2 (*i.e.*, located within existing or EMF-expanded rights-of-way); and they must "propose to rebuild, replace, or upgrade existing transmission facilities in existing rights-of-way or propose[] new facilities to be built in existing, expanded and/or new rights-of-way that will not result in any significant adverse environmental impacts."

This subset of projects are exempted by the new regulations from the requirement to include the following in their applications: Exhibit 6 - Economic Effects of Proposed Facility (16 NYCRR Section 86.7); Exhibit E-5 - Effect on Communications (16 NYCRR Section 88.5), except for any applicant who expects that its project will have a different effect on communications than that produced by the existing facilities; and Exhibit E-6 - Effect on Transportation (16 NYCRR Section 88.6), except for any applicant who expects that its project's future operation will have a different effect on transportation systems than that produced by the existing facilities.

Applications for this subset of projects are also exempt from most of the requirements of Exhibit 4 - Environmental Impact; specifically, clauses (a) and (b) of 16 NYCRR Section 86.5. The one clause not exempted is clause (c), which requires that Exhibit 4 include statements about clearing, soils, erosion and waterbody impacts, but clause (c) applies only to the underground portion of a facility (if any).

In lieu of the exempted Exhibit 4 requirements, Section 85-3.3(b)(1) of the new regulations adds the requirement that the application include a description of the project's environmental impact. This must include: descriptions of the site's environmental conditions and current uses; a summary (and copies) of environmental impact studies; a description of the planned construction and the potential environmental impacts of construction and operation; a draft of the applicant's plan to minimize or avoid significant adverse environmental impacts to the right-of-way and adjacent areas; a draft site restoration plan; and a plan for vegetation management.

Environmental Management and Construction Plan

A curious feature of the new regulations is their silence on whether and when an applicant under the expedited process is expected to file a proposed Environmental Management and Construction Plan (EM&CP). One ubiquitous component of the Article VII permitting process, albeit one about which the Article VII statute and regulations have always been silent, is the PSC's practice of conditioning an electric project's Article VII certification on the agency's approval of an EM&CP. While some applicants have filed a proposed EM&CP with or shortly after the Article VII application filing, the typical practice is to file a proposed EM&CP just after the PSC issues the Article VII certificate order. The EM&CP filing starts a multi-month process of PSC review, usually culminating in the PSC issuing an EM&CP approval order at least four but sometimes six, eight or more months later. Since this so-called "EM&CP Phase" of the Article VII process can in itself last for most or all of the duration slated for the expedited nine-month process under the new regulations, it is unclear why the new regulations do not speak to whether and when an applicant under the expedited process is expected to file a proposed EM&CP; in fact, they do not mention the EM&CP at all.

The only relevant PSC-issued document that contains any discussion about the EM&CP is the April 16, 2021 Memorandum that accompanied the PSC's Resolution adopting the new regulations.[2] In it, the PSC refers to the EM&CP in a single section of its discussion of comments it received on proposed regulations issued for public comment early in the course of the rulemaking case. Some commenters asserted that the requirement added by Section 85-3.3(b)(1) of the new regulations to include a description of the project's environmental impact, imposed in lieu of the exempted Exhibit 4 requirements, would appear to suffice to avoid the need to file an EM&CP.

The PSC, however, did not agree. It declined to say that mere compliance with Section 85-3.3(b)(1) would be tantamount to submission of an EM&CP. This suggests a PSC belief that compliance with the minimum required by Section 85-3.3(b)(1) would not guarantee the filing of the full scope of environmental impact and construction plan information it requires in an EM&CP. Yet the PSC did suggest that a sufficiently robust set of materials, descriptions, information and analysis included with the application could substitute for an EM&CP, while also meeting the Section 85-3.3(b)(1) requirements if the project was in the subset of projects that satisfy clauses (a) and/or (c) of Section 85-3.2. "Nothing prevents an applicant from submitting final plans in an Application or supplement thereto that could replace the need to submit an EM&CP as a compliance filing," the PSC said in the April 16, 2021 Memorandum.

Nine Month Review Process

The nine-month review timeframe has one significant exception: If the applicant issues a notice of impending settlement discussions in the case, the nine-month clock is stopped (or "tolled") until the negotiations end (whether successfully or not). Article VII settlement negotiations typically last for at least four to six months; for some projects, they can take longer than a year. This tolling would seem to create a significant disincentive for applicants to pursue settlement.

Most electric Article VII cases that do not involve settlement negotiations (and even some that do) will include disputed issues of material fact that require an evidentiary hearing before an administrative law judge (ALJ); that is: litigation. The duration of evidentiary hearings may be anywhere from under one day to a week or more, plus they require the submission of testimony beforehand and briefs after. The litigation phase can run for multiple months, thereby consuming a major fraction of the nine-month period required by the new PSC regulations. While the new regulations toll the nine-month expedited process when settlement takes place, they do not do so for litigation.

Rather, Section 85-3.4 appears designed to move rapidly through the expedited process, even with litigation. Promptly after the public statement hearing, the ALJ is required to determine if a party has raised any "substantive and significant issue concerning the application," If so, the ALJ is to schedule a hearing, though nothing in the new regulations removes such a case from the requirement that the PSC finish the case withing nine months of the completeness date. If the ALJ determines that no party has raised a "substantive and significant issue," the applicant has 30 days to decide either to commence settlement discussions or to make a motion directly to the PSC for issuance of the Article VII Certificate on the basis of the papers already filed. One would think that few developers who have applied for this expedited process would now invoke the settlement process, the only procedural step that automatically tolls the nine-month period, when the ALJ has just determined that substantive and significant issues are absent. In this circumstance, it is unclear what would be gained by settlement.

What seems much more likely is that the applicant would make the motion to the PSC for a Certificate. That raises another question. The new regulations set out only two courses of action for the PSC in response to such a motion: either to grant it and issue the Article VII Certificate, or to find that the project does not satisfy the eligibility criteria for the expedited process set forth in Section 85-3.2 of the new regulations.[3] Presumably the

PSC has the authority outside of the new regulations to take other actions on the motion, such as to deny it, perhaps also reversing the ALJ's conclusion on the absence of substantive and significant issues and basing its denial of the motion on that reversal. Even though the new regulations do not expressly identify these or other PSC actions as possibilities, they also do not foreclose the PSC's broad scope of authority to decide motions before it.

If the PSC decides the motion by finding that the project does not satisfy the Section 85-3.2 eligibility criteria, the new Section 85-3.4 process says the PSC has to suspend consideration of the motion and remand the case back to the ALJ. Notably, this PSC finding does not seem to remove the project from the expedited process. Rather, the PSC only suspends its consideration of the motion and, despite finding the project ineligible for this entire process, remands the case back to the ALJ.

Upon remand, the ALJ is required to hold a hearing on one specific question: whether it is possible to avoid an "identified significant adverse environmental impact." Absence of significant adverse environmental impacts is one of the eligibility criteria for the expedited process set forth in the new regulations (clause (b) of Section 85-3.2), so an ALJ finding, affirmed by the PSC, that such an impact could be avoided would seem to clinch the project's eligibility based on the clause (b) criterion.

Conclusion

The new regulations are likely to be viewed favorably by many developers of electric transmission lines proposed for existing electric and/or state transportation rights-of-way. On the other hand, the following might diminish their appeal:

- The nine-month period is tolled for the duration of any settlement negotiations, which discourages settlement.
- The new regulations create a strong incentive to front-load the EM&CP by filing it with the application, which has the potential to materially delay the application filing date.
- Projects whose routes include any rights-of-way under local (as opposed to state) governmental control are potentially ineligible; related to this issue is the uncertainty as to what land is "authorized to be used for electric utility purposes."
- Applicants with projects of uncertain eligibility for the expedited process due to the above unclear provisions take a significant risk if they assume eligibility and file an abbreviated application (perhaps including robust environmental impact descriptions to substitute for an EM&CP). Some months after filing, they may learn of their ineligibility and have to shift their focus to a full application and non-expedited process at that late date.

If you have any questions concerning the new PSC regulations to accelerate the review and approval process for certain Article VII electric transmission projects, please contact David Metcalfe, Angela Cascione or Brendan Mooney via email at DMetcalfe@CullenLLP.com, ACascione@CullenLLP.com, or BMooney@CullenLLP.com.

Footnotes

[1] The Act (Chapter 58 of the Laws of 2020) was designed to streamline and expedite the siting of major renewable energy projects and associated transmission facilities to help achieve the State's clean energy and climate goals, including the requirement in the State's 2019 Climate Leadership and Community Protection Act (Chapter 106 of the Laws of 2019) that a minimum of 70 percent of the State's electric generation be produced using renewable sources by 2030.

[2] Case 20-T-0288, *Memorandum and Resolution Adopting 16 NYCRR Subpart 85-3*, issued April 16, 2021.

[3] The exact language of the new regulation is "find that the project is not subject to *Section 85.2-17.2* of these rules" [emphasis added]. There is no such section in the PSC regulations, including the new regulations. There was a Section 85.2-17.2 (entitled "Applicability") in the proposed version of the new regulations included in the PSC's *Notice Inviting Comments on Amended Proposed Draft Rulemaking*, issued October 20, 2020; that proposed version was identified as proposed new Part 85.2-17. After issuance of that Notice, the PSC decided to change its rulemaking proposal to codify the new regulations as Subpart 85-3. (See footnote 2 of the *Memorandum and Resolution Adopting 16 NYCRR Subpart 85-3*.) The new regulations adopted by the PSC retain the revised numbering and identify the "Applicability" provision as Section 85-3.2.

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