

New York State Legislature Passes Article X Legislation Reestablishing Comprehensive Statewide Process for Siting Electric Generating Facilities

By Stanley B. Klimberg

The New York State Legislature passed on June 23 legislation (S. 5844/A.8510) reestablishing a comprehensive, statewide process for siting new and repowered existing electric generating facilities with a nameplate generating capacity of 25 megawatts (MW) or more, pursuant to Article X of the Public Service Law. Governor Cuomo is expected to sign the legislation into law in the near future.

Since 2003, when the prior Article X legislation expired, developers of proposed electric generating facilities have had to obtain state and local permits and approvals, and undergo environmental review under the State Environmental Quality Review Act (“SEQRA”) (Article 8 of the Environmental Conservation Law). Project developers which were electric corporations under the Public Service Law also needed to obtain a certificate of public convenience and necessity pursuant to section 68 of the Public Service Law.

Under the new Article X legislation, developers of proposed major electric generating facilities may not submit an Article X application (or a pre-application preliminary scoping statement) until the Department of Environmental Conservation (“DEC”) and the New York State Board on Electric Generation Siting and the Environment (“Siting Board”) adopt certain rules and regulations, which are required to be adopted within 12 months of the effective date of the legislation. Article X would not apply to electric generating facilities for which project developers applied for a permit or approval from any federal, state or local agency or regulatory body prior to the adoption of such regulations. In that case, the facilities would be subject to state and local laws and regulations as well as SEQRA, although such project developers could elect to become subject to the provisions of Article X.

Unlike the expired Article X legislation, the new Article X legislation has no expiration date, which provides regulatory certainty to development of electric generating facilities.

The principal elements of the new Article X legislation are follows:

Siting Board

The Siting Board, reestablished within the Department of Public Service (“DPS”), consists of seven persons: the chair of the DPS, who shall be chair of the Siting Board; the commissioner of the DEC; the commissioner of the Department of Health; the chair of the New York State Energy Research and Development Authority; the commissioner of the Department of Economic Development; and two ad hoc public members who shall reside within the municipality in which the facility is proposed to be located (except in New York City, where the ad hoc members shall reside in the community district in which the facility is proposed to be located). One ad hoc member shall be appointed by the president pro tem of the Senate and one ad hoc member shall be appointed by the speaker of the Assembly, from a list of candidates submitted to them by local officials.

The Siting Board is charged with the responsibility to make the final decision on an application under Article X for a certificate of environmental compatibility and public need authorizing the construction of a major electric generating facility (“Certificate”).

Power Plant Size Threshold

The legislation applies to any type of electric generating facility with a nameplate generating capacity of 25 MW or more, and applies to an increase in the capacity of an existing major electric generating facility by more than 25 MW. The legislation includes interconnection electric transmission lines and fuel gas transmission lines that are not subject to Article VII of the Public Service Law. Notably, the expired Article X legislation applied to electric generating facilities with a nameplate generating capacity of 80 MW or more.

Regulations Regarding Environmental Justice Issues, Cumulative Impacts on Air Quality and Carbon Dioxide Emissions

The legislation requires that DEC issue rules and regulations no later than 12 months after the effective date of the legislation regarding environmental justice issues and the cumulative impacts on air quality within a half-mile of the proposed facility, or other radius as determined by standards established by the DEC. The legislation also requires DEC to issue rules and regulations targeting reductions in emissions of carbon dioxide that would apply to electric generating facilities that commenced construction after the effective date of the regulations.

Pre-Application Procedures

The legislation requires that a person proposing to submit an Article X application shall file with the Siting Board a preliminary scoping statement containing certain information, including a description of the proposed facility, its environmental setting, potential environmental and health impacts resulting from the facility, proposed studies regarding potential impacts on avian and bat species for wind-powered facilities, measures to minimize environmental impacts, and reasonable alternative locations for the facility.

The legislation provides that the person submitting the pre-application may consult and seek agreement with any interested person, including the staffs of DPS, DEC and the Department of Health, on any aspect of the preliminary scoping statement and any study or program of studies made or to be made to support an Article X application; any such proposed agreement or stipulation would be subject to public comments before being executed.

Timeline for Siting Board Decisions

An application for an Article X Certificate may be filed upon completion of the pre-application procedures.

The legislation generally provides that proceedings on an Article X application shall be completed within 12 months from the date of a determination by the chair of the Siting Board that the Article X application complies with the information requirements provided for in the legislation (the chair of the Siting Board is required to make that determination within 60 days of receipt of the application). The Siting Board may, however, extend the 12 month deadline in extraordinary circumstances for no more than six months.

However, in the case of an application to modify an existing electric generating facility or site a new electric generating facility adjacent to or contiguous to such existing facility (“Repowering”), whenever such an application demonstrates that operation of the modified facility, or operation of the existing facility and new facility in combination, would result in certain environmental benefits specified in the legislation, including a reduction in total annual emissions on site, proceedings on such an application shall be completed within six months from the date of a determination by the chair of the Siting Board that the application is complete. The Siting Board may, however, extend the deadline in extraordinary circumstances by no more than three months.

Thus, taking into account the time for completion of the pre-application process, most Article X proceedings (other than proceedings involving a proposed Repowering) are likely to take approximately

two years or more to complete.

Funding for Participation by Municipal and Other Local Parties

The legislation requires developers to provide up to \$750,000 for intervenor funding to defray expenses incurred by municipal and other local parties for witnesses, consultants, and administrative and legal fees during the pre-application and Article X application processes, based on the capacity (MW) of the proposed electric generating facility. Municipal parties would be entitled to at least one-half of the amount of the intervenor funds. Such intervenor funds may not be used for judicial review or litigation. Required intervenor funding under the expired Article X had been up to \$400,000.

No State or Local Approvals Generally Required For Facilities Subject to Article X

As was the case with the expired Article X, the legislation also provides that no State agency, municipality or any agency thereof may, except as expressly authorized by the Siting Board, require any approval, consent, permit, certificate or other condition for the construction or operation of the proposed facility. Further, the Siting Board may elect not to apply, in whole or in part, any local law or regulation that the Siting Board determines to be unreasonably burdensome.

For projects that are likely to be met with considerable local opposition, Article X thus provides substantial benefits for a prospective developer compared with the need for the developer to obtain state and local permits and approvals.

Issuance of Permits by Department of Environmental Conservation Pursuant to Federally-Delegated or Approved Authority

The record in the Article X proceeding would provide the basis for a decision by the DEC commissioner whether to issue permits pursuant to federally-delegated or approved authority under the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act. Such permits would be provided to the Siting Board prior to its determination whether to issue an Article X Certificate.

Siting Board Findings and Determinations

The Siting Board is required to make certain findings and determinations before issuing a decision to grant a certificate for the construction or operation of a facility. These include, among others,

determinations of the nature of the probable environmental impacts of construction and operation of the facility, the cumulative impacts of emissions on the local community, that the applicant will avoid, offset or minimize any significant and adverse disproportionate environmental impact in the local community, and that the facility would be a beneficial addition to or substitution for the electric generation capacity of the State, and would serve the public interest. In making these latter determinations, the Siting Board is required to consider, among other things, the consistency of the construction and operation of the facility with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan.

The new Article X legislation is part of an Act known as the Power NY Act of 2011. The Act also includes provisions designed to allow utility residential, multi-family and business customers to pay back loans for the performance of qualified energy efficiency services under the green jobs-green New York program through a charge on their utility bills, and provisions requiring the New York State Energy Research and Development Authority to prepare a study with respect to increasing generation from photovoltaic devices.