

# Power NY Act of 2011 Swings the Door Open for Renewable Development

By: **Joseph G. Tirone, David A. Domansky and Brian J. Kelly**

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On August 4, 2011, Governor Cuomo signed into law the Power NY ACT of 2011 (A. 8510/S. 5844), a comprehensive energy bill that, among other things, reimplements and significantly revises Article X of the New York State Public Service Law. As revised, new Article X provides power project developers a more efficient, streamlined "one-stop" siting process. The new law was sought and supported by both business and environmental groups to remedy a patchwork of inconsistent local siting rules throughout New York, which have hampered project development efforts. Old Article X, which expired on January 1, 2003, was limited to power plants with 80-megawatts or more of nameplate generating capacity. New Article X reduces the capacity threshold to 25-megawatts, thereby allowing smaller generation projects, such as wind, solar and other renewable project developers, an opportunity to take advantage of the streamlined siting process.

## **Creation and Composition of the Review Board**

Following the expiration of former Article X, developers were required to seek the requisite regulatory and environmental permits mandated by state and local laws from the various state and municipal regulatory authorities who had jurisdiction over the site where the proposed power project was to be developed. Under new Article X, the siting and licensing of electric generation facilities of at least 25-megawatts, or the increase in nameplate capacity by 25-megawatts or more of a current power facility, will fall within the purview of the New York State Board on Electric Generation Siting and the Environment ("Board"). The seven member Board will consist of five state agency officials (Department of Environmental Conservation, Department of Economic Development, Department of Health, Department of Agriculture and Markets and the New York State Energy Research and Development Authority), as well as two ad hoc members who are required to reside in the community in which the proposed facility is to be located. The Board will be tasked with determining if the contemplated project should receive a Certificate of Environmental Compatibility and Public Need ("Certificate"), which must be obtained before commencement of any site development or facility construction.

## **Filing Process**

New Article X separates the Certificate process into two distinct phases, a pre-application preliminary scoping statement (the "Pre-Application") and the actual Certificate application. In the Pre-Application, an applicant is required to provide the Board with, among other things: (a) a description of the proposed facility and its environmental setting; (b) potential environmental and health impacts resulting from the construction and operation of the proposed facility; (c) proposed studies or programs of studies designed to evaluate the potential environmental and health impacts; (d) measures proposed to minimize environmental impacts; and (e) identification of all other state and federal permits required for the construction, operation or maintenance of the proposed facility.

Prior to submission of the Pre-Application, the applicant must meet with interested parties, including community groups and interested state agencies to address these groups' concerns with regard to the proposed facility. Following the applicant's submission of the Pre-Application, the applicant has the ability to enter into side agreements or stipulations to address any concerns regarding the siting and location of the proposed facility. Once completed, the applicant is then required to file a

Certificate application with the Board, which includes: (a) a description of the site and facility to be built; (b) an evaluation of the anticipated environmental and health impacts and safety and security ramifications that the facility will have on the surrounding community; (c) a comprehensive environmental impact analysis; and (d) a comprehensive demographic, economic and physical description of the community within which the facility is to be located, compared and contrasted with the county and with the adjacent communities in which the facility is proposed.

### **Board Decision Process and Timeline**

New Article X requires that the Board issue a final decision on a Certificate application no later than: (a) 12 months after submission of a Certificate application deemed complete by the Board for a new-build facility, and (b) six months after the submission of a complete Certificate application deemed complete by the Board for modifications to (1) an existing facility, or (2) the site of a new facility adjacent or contiguous to an existing facility, provided the new facility would result in greater operating efficiencies and lower environmental impact than the original facility.

New Article X also requires that the Board schedule a hearing on the Certificate application no later than 60 days after the date the Board determines the Certificate application is complete. After conducting and taking testimony at the hearing, the Board may grant the Certificate if it finds that: (a) the facility is a beneficial addition to or substitution for the electric generation capacity of New York; (b) the construction and operation of the facility will serve the public interest; (c) the facility's environmental impact has been minimized or eliminated to the maximum extent practicable; and (d) the facility complies with all state and local laws and regulations.

Any appeal of the Board's decision denying or granting a Certificate is first heard by the Board itself. The application for rehearing must be filed no later than 30 days after issuance of the Board's decision. The Board is required to render a decision on the application no later than 90 days after the expiration of the period for filing rehearing petitions. Thereafter, an aggrieved party may seek judicial relief in the Appellate Division of the New York Supreme Court. Such proceeding must be initiated within 30 days after the issuance of a final decision by the Board on the application for rehearing.

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