

# Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law

By Sam Laniado

## Introduction

By now, most electric generation developers of projects 25 megawatts (“MW”) or over are familiar with Article 10 of the New York Public Service Law (“NYPSL”). Article 10 is the almost one-stop-shopping proceeding administered by the New York Department of Public Service (“NYDPS”) on behalf of the New York State Board on Electric Generation Siting and the Environment (“Siting Board”). If a project triggers the 25 MW threshold, it must proceed under Article 10.<sup>1</sup> The siting procedure is fuel-neutral; there are no exceptions for any technology that produces electricity. That means with New York State’s major initiatives to promote carbon-free, renewable generation, such as wind turbines and solar, these proposed projects will require Siting Board certification. In that vein, stand-alone battery storage systems (untethered to the development of new generation facilities) are not considered electricity producers and must proceed instead to obtain state and local approvals from each applicable governmental authority under the State Environmental Quality Review Act (SEQRA) rubric.

## The Siting Board’s Preemptive Authority

In general, Article 10 authorizes the Siting Board to issue all state and municipal approvals within the Article 10 certificate and preempts the issuance of most state and local permits that would otherwise be applicable.<sup>2</sup> This means that an Article 10 applicant need not adhere to the procedural requirements in these laws, but must show compliance with their respective substantive provisions. That is the so-called one-stop-shopping element to this law. There are exceptions; a major exception is that air, water, and resource recovery permits, typically issued by the New York State Department of Environmental Conservation (“NYSDEC”), are still issued by NYSDEC, but within the Article 10 proceeding and schedule.<sup>3</sup> There are also some local approvals that the Siting Board will not issue such as subdivision approval, overt grant of property rights, or an approval to withdraw water from a municipal system.<sup>4</sup> Importantly, the Siting Board, although reluctant to do so, is empowered to refuse to apply an unreasonably burdensome, local substantive requirement, such as a zoning restriction on height, use, area or noise.<sup>5</sup>

## Siting Board Decision Deadlines

Once an applicant has satisfied the pre-application requirements for filing its public involvement plan, its preliminary scoping statement, and the negotiation of the “optional” study stipulations with the parties, and the

public participation processes for the latter two have been completed, it may file the Article 10 application.<sup>6</sup> After the Siting Board Chair has determined the application is compliant with the statutory filing requirements, the Article 10 proceeding must be concluded within twelve months, with some provision for extensions, and a six-month proceeding for an eligible repowering.<sup>7</sup> Judicial review is expeditious, centered at the appellate level, and the scope of review is limited.<sup>8</sup>

## Public Participation

Together with the preemptive powers granted to the Siting Board, the hallmark of Article 10 is its extensive public participation provisions. The applicant is required to post an “intervenor fund” of up to \$650,000, depending upon the size of the proposed project, covering the pre- and post-application review processes.<sup>9</sup> That money will be disbursed to eligible municipalities and local parties by the Presiding Examiner conducting the proceeding in order to fund attorneys and consultants for intervention in the proceeding before the Siting Board.<sup>10</sup> The funds may not be used for judicial review.<sup>11</sup> The applicant is also required to actively seek public participation through public outreach throughout the proceeding. There are many detailed requirements for service, publication, notices, and other means to notify and engage the public about the proposed project.<sup>12</sup>

The balance of this article will not provide a step-by-step guide for preparing and prosecuting an Article 10 application. It instead will zero in on several issues key to the efficient, timely, and successful development of a generation project.

## Acquiring Real Property Rights to the Project Site

Whether the project is a wind, solar, new natural-gas, or repowering facility, a client inevitably will ask what property rights are required in order to comply with the filing requirements for an Article 10 application. Remember, the twelve-month Siting Board clock to decide an Article 10 application does not commence with the filing of an application, but at the date it is determined “compliant” with the law’s filing requirements.<sup>13</sup>

The Article 10 regulations, 16 NYCRR 1001.13(c), require a demonstration in the application that, for the project site, “...the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or is under binding contract or option to obtain such title or leasehold interest, or

can obtain such title or leasehold interest.”<sup>14</sup> For interconnections, a statement is required that “the applicant has obtained, or can obtain, such deeds, easements, leases, licenses, or other real property rights or privileges as are necessary for all interconnections for the facility.”<sup>15</sup>

It is certainly preferable that all real property rights be in place when the application is filed. There is an exception, however, if all rights have not been obtained. The application can contain a demonstration for the project site, and a statement for the interconnection real property rights, that the applicant “can obtain” the real property rights.<sup>16</sup> The insertion of this wording occurred during the discussions on developing the Article 10 regulations in order, *inter alia*, to deter affected landowners who might seek to block the filing of an application. Note, however, that the interconnection process at the New York Independent System Operator (“NYISO”) appears to require a demonstration of “site control” before a system reliability impact study (“SRIS”) may be commenced. As explained below, an SRIS is required to be included in an Article 10 application in order to be determined compliant. Query whether the interplay between the Article 10 regulations and the NYISO tariff might create an unintentional issue for a project seeking to avail itself of the aforementioned real property provision in the Article 10 regulation.

As to interconnections such as electric, water, fuel, or steam lines to be placed in public rights of way, Article 10 now explicitly authorizes the Siting Board to refuse to apply unreasonably burdensome local ordinances, laws, or other requirements.<sup>17</sup> Similarly, local approvals such as consents or permits to site interconnections in public rights of way are preempted by Article 10.<sup>18</sup> An Article 10 applicant is still required to demonstrate compliance with the substance of a local requirement in its application or else ask the Siting Board to not apply it, showing that it is unreasonably burdensome.<sup>19</sup> Furthermore, the affected municipality must have received notice of the filing.<sup>20</sup> Importantly, “any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof.”<sup>21</sup>

An Article 10 developer (and Article VII developers seeking to build transmission lines), if it successfully receives Siting Board certification of its proposed project, could very well invoke the power of eminent domain to obtain real property rights required for its certified project. Care must be taken to comply with the requirements of the New York Eminent Domain Procedures Law<sup>22</sup> and New York Transportation Corporations Law<sup>23</sup> in the early stages of preparing the Article 10 application.

### The System Reliability Impact Study

The submission of a SRIS is also required in the application for a certificate.<sup>24</sup> The Article 10 regulations further

describe the SRIS in relevant part as “performed in accordance with the open access transmission tariff of the New York Independent System Operator, Inc....”<sup>25</sup> In contrast to the requirement in Article VII (pertaining to the siting of major utility transmission facilities), the SRIS submitted with the Article 10 application need not have first been submitted to the Transmission Planning Advisory Subcommittee (“TPAS”) for review and recommendation to the NYISO Operating Committee. It is to be expected, however, that NYDPS Staff will want the submission of the TPAS-filed SRIS early in the Article 10 process.

Because the SRIS must be conducted in accordance with the NYISO tariffs, the project developer should start the interconnection process at the NYISO very quickly in the development of an Article 10 project so the study can be included in the Article 10 application. The NYISO, though, conducts, or has conducted on its behalf, many SRIS studies simultaneously. The NYISO engages many consultants to conduct the SRIS studies. Some developers believe, however, that if they engage their own consultant, that might expedite the process. Indeed, there are provisions in the NYISO tariff allowing a developer to contract to have the SRIS done by a consultant it engages.<sup>26</sup> But there have also been concerns about developers slowing the preparation of an SRIS by its consultant because of other project delays, which in turn could affect other processes at the NYISO. Moreover, there is the perception that an SRIS, conducted by a consultant engaged by the NYISO, will carry more credibility with other stakeholders such as the connecting transmission owner, affected transmission systems, and other generation owners. Developers should devote resources to an early, critical step in expediting the preparation of an SRIS: make sure that the equipment data and modeling requirements necessary for the NYISO’s consultant to commence the study are complete and validated.

### Conclusion

No project has been certified under Article 10 as of yet, although many have been certified under the predecessor statutes, Articles VIII and X. The process is certainly doable and it is this author’s belief that the state agencies and, indirectly the NYISO, are dedicated to making the process work, considering the aggressive policies being promulgated in the renewables space, together with the need to repower or replace fossil fueled facilities.

### Endnotes

1. N.Y. Pub. Serv. Law § 162.
2. *Id.* § 161.
3. *Id.* § 172.
4. *Id.* § 168.
5. *Id.* § 164.
6. *Id.* § 163.
7. N.Y. Pub. Serv. Law § 165.

8. *Id.* § 170.
9. *See id.* § 164(6)(a).
10. *Id.*
11. *Id.*
12. *See generally id.* §§ 163, 164, 166.
13. N.Y. Pub. Serv. Law § 165.
14. 16 NYCRR 1001.13(c).
15. 16 NYCRR 1001.13(d).
16. *See id.* §§ 1001.13(c), (d).
17. N.Y. Pub. Serv. Law § 172.
18. *Id.*
19. *Id.* § 169.
20. *Id.* § 172.
21. *Id.* § 166(j).
22. N.Y. Em. Dom. Proc. Law § 402.
23. N.Y. Transp. Law § Corp § 11.
24. *Id.* § 164(1)(b)(viii).
25. 16 NYCRR 1001.5(a).
26. NYISO, NYISO Tariffs, OATT, Attachment X (Standard Large Facility Interconnection Procedures), § 30.13.4.

**Sam Laniado served as staff counsel with the New York State Public Service Commission from 1976 to 1983. He represented staff in Article VIII (generation) and Article VII (transmission) siting proceedings, in utility rate cases and other proceedings.**

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