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MEMO TO FILE

N.Y. Public Service Commission, Final Regulations implements P.S.L. Article 10, dated July 9, 2012 (CASE 12-F-0036 - In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, contained in 16 NYCRR, Chapter X, Certification of Major Electric Generating Facilities).[1]

Following a "pre-draft stakeholder" process where representatives of the electric generation industries, municipalities and local and state-wide advocacy groups participated in the development of draft regulations, PSC received public comments on the draft regulations and, in its responses to comments, made few changes in the draft regulations. In general, non-industry stakeholders requested that the provisions in the draft regulations be retained, and industry stakeholders asked for several changes to reduce the burden on them.

Specifically, PSC:

- turned back industry comments requesting a reduction in the five-mile study area as a minimum, (pp. 28-29; cf. 1002.(ar));

- retained the requirement for public participation and project sponsor outreach and disclosure during the development of a preliminary scoping statement (PSS) and prior to the commencement of the 12-month application review, (1000.4);

- retained the requirement that public notice of the filing of a PSS include communities that would host an alternate site identified in the PSS, (1000.5);

- retained the three-week period for public comments on the PSS, (*id.*), followed by mediation of any remaining scoping issues, (100.5(h)(i);

- clarified that the identification of local laws that may be applicable to the project in the PSS are "preliminary," and thus may be revisited during the application review, by adding this word to the regulations, (1000.5(k)(1)(4), (5));

- at the request of a locality advocacy organization, added a requirement that applications

[1] References to regulatory sections refer to the "redline" copy of the final regulations; references to page number refer to PSC's responses to comments, dated July 9, 2012. Both documents have been posted on the website of Concerned Citizens of Cattaraugus County, Inc., <http://www.concernedcitizens.homestead.com>.

be posted in searchable format on the internet, (1000.6);

- notes that anyone can "file a statement with the [PSC] secretary to be put on the list of persons to receive notices" (i.e., any member of the public upon request will be included on the "service list" of those who will automatically be provided with any required public notices) (p. 17);

- confirmed that project sponsors will be required to demonstrate compliance with state and federal Clean Water Act ("CWA")requirements, (1000.8(a)(3));

- extended the time for review of a Water Quality Certification from 60 days to up to one year, consistent with the CWA, with the effect that if the review still cannot be completed within that time frame, the Certification will be denied and the applicant may re-apply, (1000.8(a)(5) (p. 19);

- clarified that applicants must submit sufficiently detailed information for the Siting Board to make findings regarding degradation of impaired waters identified on the CWA Section 303 list (waters subject to additional antidegradation measures), and impacts on coastal zones designated for additional protection under the federal Coastal Zone Management Act, (pp. 19-20);

- rejected industry requests to shorten the time to apply for intervenor funding (30 days from notice of availability of funding, following the initial filing of a PSS, 1000.10(a)(3));

- expressed sympathy for allowing "community-based parties to determine their funding needs as the application process progresses and as they obtain expert advice," rather than locking in funding awards made during the pre-application phase, clarifying that such flexibility is allowed, (p. 23; *cf.* 1000.10(a)(8));

- clarifies that "[a]ll parties have equal rights to rehearings and appeals," not just municipalities, (p. 25);

- clarifies that transfer of a Certificate to another entity (*e.g.*, a subsequent purchaser of the project) requires public notice and opportunity to comment by any party, *(cf.* 1000.17(b)(6), (c));

- rejects industry requests that aerial photos of the study area not be required, (1000.4 Exhibit 4, secs. (m)-(o)), and that such photos be publicly disclosed unless a "significant invasion of privacy" can be shown, (*id.*, sec. (h)(1));[2]

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[2] A request for confidentiality of submitted information is available to project applicants under the Rules of Procedure of the Public Service Commission, 16 NYCRR Ch. I(A). "Pursuant to these rules, the presiding examiner may, if needed, provide for sharing of such information with the parties under a protective order setting the limits on its disclosure." (p. 48).

- rejects wind industry assertions that the reliability study requirements, (1001.5 Exhibit 5, secs. (a) through (e)), should be limited to what NYISO requires, and enhances the reliability study requirement by adding a new requirement that the applicant demonstrate compliance with reliability requirements of the "Northeast Power Coordinating Council Inc., New York State Reliability Council, and the local interconnecting transmission utility," (*id.*, sec. (n)), because these requirements are needed "in relation to estimating the effects of the proposed facility on emissions and the energy dispatch of existing must-run resources, such as wind, hydroelectric and nuclear facilities" (pp. 32, 38-39);

- rejects a wind developer's request that reliability determinations be made after certification, because "[t]hese matters cannot be put off" (p. 43);

- rejects wind industry requests to add "fully" to the word "owned," regarding available alternative sites, in order to limit alternatives to be considered, because that change "could open the door to gaming by allowing a small fraction of ownership by another to be manufactured to defeat the provision" (p. 41);

- rejects wind developers objections to having to provide preliminary scaled drawings, because "[s]ite layout, construction operations areas, grading, landscape screening, basic architectural and other similar design details are needed to understand the proposal, its impacts, and the possible need for revisions" (p. 44);

- rejects wind developers' assertion that the requirement to map out publicly recorded the easements, grants and related encumbrances for the proposed site and adjacent properties is overly burdensome (pp. 45-46);

- retains the requirement that applications for wind-powered facilities provide "[a] statement and evaluation that identifies, describes, and discusses . . . low-frequency noise," (1001.15 Exhibit 15, sec. (e)), but as to whether C-weighted sound must be measured, or sound level limits must be included, concludes that determination of these issues should be left to "case by case basis," noting however that if C-weighted noise limits are ultimately imposed in the Certificate, DPS "shall monitor, enforce and administer compliance with the terms and conditions of the Siting Board's order" (pp. 50, 54-55);

- rejects wind developers' objection to mapping wetlands on adjacent properties, beyond 500 feet from disturbed on-site areas (p. 57);

- clarifies "that nighttime visibility and views across water bodies are already included within the parameters of the required visual impact assessment" (p. 60);

- adds a requirement that, if a proposed facility requires FAA review (due to height), the applicant must also show it has obtained at least an informal review by the Department of Defense regarding impacts on Military Use Airspace and Special Use Airspace as defined by the military (1000.25 Exhibit 25, new sec. (f));

- increases the allowable radius of study beyond two miles for potential impacts on microwave, weather and military radar, (1000.26 Exhibit 26); and

- strengthens the requirement to offset impacts by removing the allowance to minimize impacts in lieu of offsetting them (as allowed under SEQRA), (p. 65).

However, PSC also:

- turned back requests by non-industry stakeholders that the intervenor fund be enhanced, (p. 22);

- clarified that third-party review and certification of wind turbines requires no more than "a status report, not a mandate of final third party review and certification at the time of application" (p. 34);

- allowed wind developers to withhold raw wind resource data and to provide no more than their analysis of the data (p. 35);

- rejected requests for an analysis of effects on property values (*id.*);

- added "average sound condition" (i.e., L_{eq}) to the required ambient and worst case scenarios for noise impacts, even though average sound levels are not meaningful when assessing substantially modulating sound emissions (p. 55; *cf.* 1001.19 Exhibit 19); and

- removes the draft requirement to evaluate amplitude modulated sound during construction, (*cf.* p. 55, relying on "limits on construction hours" to address amplitude modulated sound), but retains the requirement to evaluate amplitude modulated sound during operations, (1001.19 Exhibit 19, sec. (e)).

In addition, some new information emerged from the commenting process:

"Wind developers," as indicated in their comments, contemplate "pending applications that become Article 10 cases," (p. 10), confirming concerns that wind developers may abandon applications made under local laws and elect instead to pursue Article 10 permitting.

Finally, the PSC responses clarify the relationship of Article 10 to "home rule" in New York:

- "Article 10 is a general law not subject to the home rule prohibitions. Article 10 and the proposed implementing regulations are not in conflict with the New York State Constitution or the home rule powers granted to New York local governments." (p. 75).

- In general, Article 10 "supplants all local procedural requirements applicable to the *construction or operation*" of covered power plants, (*id.* (italics added)), and "also supplants all local procedural requirements applicable to the interconnection to or use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way

that the Siting Board elects not to apply, in whole or in part, (pp. 75-76), which means in the latter instances the Siting Board must make an affirmative determination that "the requirement is 'unreasonably burdensome' in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality." (p. 76).

- Article 10 "does not supplant any local *substantive* requirements applicable to the construction or operation of a proposed major electric generating facility," (*id.* (italics added)), but an applicant may nevertheless seek Siting Board override of substantive requirements, subject to the host municipality's contrary arguments, with the burden on the applicant to overcome the municipality's case. This would seem to recognize an expansive authority of municipalities consistent with the home rule principle.

- It is also recognized that the view "that despite Article 10, municipalities remain free to limit the use of land by prohibiting certain types of power plants, or restricting the area in which they may be sited," may be valid except for "some uses such as the provision of a fair share of multifamily housing," and "necessary public utility uses."[3]

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[3] Note however, wind farms have never been deemed necessary public utility uses for purposes of New York common law. The two New York judicial decisions concluding that a wind farm is a public utility were decided based upon the host town's local law that defined a public utility to include wind farms. *See*: *Wind Power Ethics Group v. Zoning Board of Appeals of the Town of Cape Vincent, St. Lawrence Wind Power, LLC, et al.*, 60 A.D.3d 1282, 875 N.Y.S.2d 359 (4th Dep't 2009); *West Beekmantown Neighborhood Association v. ZBA of Beekmantown, et al.*, 53 A.D.3d 1282, 1283, 875 N.Y.S.2d 359, 361 (3d Dep't 2008). Where the municipality has not done this, the common law requirement that, in order to be deemed a public utility, a facility must be operated under a utility "franchise" and provide service "at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery," would seem to preclude the conclusion that a wind farm is a public utility. *Cellular Telephone Company v. Rosenberg*, 82 N.Y.2d 364, 371, 624 N.E.2d 990, 993 (1993). Thus, despite "judicial precedent that what constitutes a utility use is rather broad," (p. 79), the precedent does not appear to be broad enough to embrace intermittent renewables that are unconnected to recognized utilities.