

# ENVIRONMENTAL LAW IN NEW YORK

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## Electric Generating Facility Siting and Licensing in New York State's Restructured Electric Utility Industry

by G. S. Peter Bergen

### I. INTRODUCTION

In New York State applications for new electric generating facilities are considered under Article X of the New York State Public Service Law (PSL). Applicants are obliged to meet Article X requirements in order to obtain a "Certificate of Environmental Compatibility and Public Need" based on findings that the proposed facility is both environmentally acceptable and economically justified<sup>1</sup> before constructing a facility in excess of 80 megawatts capacity.<sup>2</sup> However, the fundamental policy change to competition for electricity in New York,<sup>3</sup> gives rise to the question whether the environmental impacts of proposed new competitive generating facilities should continue to be assessed under the existing generating facility siting process set forth in Article X of the PSL, or whether the environmental impacts of proposed new generating plants would be more effectively scrutinized under the New York State Environmental Quality Review Act (SEQRA).<sup>4</sup> This article will examine the impact of restructuring of the electric industry in New York on the State's existing electric generating facility siting process, and whether changes in the siting process would be desirable.

### II. DEVELOPMENT OF A COMPETITIVE MARKET

Development of a truly competitive electricity market in New York is likely to be impeded if the existing electric generating

facility siting process is maintained under Article X. In the past year the Public Service Commission (PSC) has docketed the first Article X cases to have arisen since Article X was enacted in 1992.<sup>5</sup> Six Article X proceedings are ongoing and the PSC has

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September 14-15, 1999

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identified two other announced projects.<sup>6</sup> Additionally, applications are complete and hearings are ongoing in two cases.<sup>7</sup> To the extent that the Article X process acts as a barrier to entry into the market, development of a truly competitive electricity market will be frustrated. In turn, the policy objective of lower cost electricity will not be fully realized.

In a competitive market, electricity prices should be lower than they would be under government regulation. Competition should also produce innovation and new technologies that promote new services. For example, significant environmental benefits can be realized by replacing older less efficient fossil fuel-fired electric generating facilities with newer more efficient facilities. The shift to a competitive electricity market in which new generating technologies are encouraged to compete in the market can be expected to yield significant air quality benefits within the State, as the emissions per kilowatt-hour generated will be lower for newer efficient plants than for older plants.

Finally, in a competitive regime, the relevant generating facility siting issues are (1) land use and (2) environmental compliance and acceptability. These same types of siting issues arise commonly in applications for environmental and land use permits for all kinds of industrial, commercial and municipal facilities, and are not unique to electric generators. This leads to whether the environmental impacts of proposed new electric generators would be more effectively and efficiently reviewed by a lead agency, such as the Department of Environmental Conservation, under the established permitting and environmental review procedures of the Environmental Conservation Law (ECL) than under the multi-agency process set up under Article X. It also raises the question whether the land use issues will be more appropriately addressed at the local level by zoning laws than by a siting board.

### III. RESTRUCTURING OF THE ELECTRIC INDUSTRY

Electric generating facility siting under Article X predates the adoption of competition in May 1997. Article X and its predecessors were drafted on the premise that the electric generating business is a "natural monopoly," and as such would be regulated by the PSC using long-standing rate-making formulas. The PSC's traditional role was to set electric rates based on the utility's reasonable costs of service, including an allowance for a reasonable rate of return on invested capital.<sup>8</sup> With the advent of competition in electric generation, investment decisions concerning proposed new generating facilities will be up to the exclusive business judgment of private investors, without examination by the PSC of the economic need for a proposed new facility, or of the prudence of a decision to commit capital to construction of a proposed new generating plant.

The two notions of economic prudence and environmental impact review carry through into Article X. Under Article X it must be assured that proposed capital investments in new facilities will be prudent, and made only for "needed" facilities, after an examination of reasonable alternatives and their costs, as well as their environmental impacts. New electric generating plants are capital intensive. Large new plants cost hundreds of millions of dollars. Before competition, the prudently invested capital costs of new generating plants would be recovered by the utility from its customers through the rates set by the Commission. However, in this new competitive era, the PSC's examination of economic "need" has become obsolete. The former emphasis on the cost and rate impacts of a proposed new project should be eliminated. But, the environmental impacts of a proposed new facility still need to be examined. This means that so long as the existing Article X process is continued, it will essentially be equivalent to an environmental review under SEQRA, but will be done by a siting board.

In April 1998, the Energy Committee of the Association of the Bar of the City of New York issued a significant report noting that restructuring of New York State's electric utility industry is "premised on the expectation that a competitive market for the supply of electricity will result in lower electricity prices for all classes of consumers."<sup>9</sup> To achieve a competitive electric generation market, New York's regulated electric utilities have agreed to sell their generating facilities to unregulated entities which will auction each facility's output of electricity either to the operator of the electric transmission and distribution grid<sup>10</sup> or to independent purchasers. They will now be in the transmission and distribution business only and will no longer be in the business of generating electricity. Electricity will be delivered over the transmission and distribution system by the traditional regulated utilities for a fee. While the transmission/distribution charge will be set through regulatory processes, the price of generated electricity will be established by the market auction. In short, electricity will be a commodity, like wheat or crude oil, priced at competitive market rates, while delivery of electricity will remain a regulated industry. The Energy Committee's Report on restructuring<sup>11</sup> notes that the remarkable policy shift from a rate-based cost of service pricing mechanism to a market-based system is driven not only by the expectation that a truly competitive market will yield the lowest commodity price, but also by the fact that new computer technologies will make it possible to operate a competitive commodity market for electricity while maintaining a high degree of reliability of service.<sup>12</sup> Service reliability is vital to public safety and societal well-being. Market-based pricing has been adopted in long distance telephone and natural gas markets.<sup>13</sup> New technologies have made these changes away from traditional cost-of-service-based pricing possible, and the results have been positive.

#### **IV. BACKGROUND OF ARTICLE X: POWER PLANT SITING BETWEEN 1965 TO 1992**

This section examines Article X's predecessors, and the circumstances that gave rise to the first and second Article VIIIs

of the PSL.<sup>14</sup> It also evaluates how Article VIII served, or failed to serve, as a tool to expedite the siting of new power plants in New York State.

In the late 1960s and the 1970s, electric utility planners were projecting rapid increases in demand for electricity. There was a major blackout in 1965, and growing summer demand for power forced electric utilities to reduce voltage ("brownouts") on numerous occasions. Utilities sought permission from the federal government (the Nuclear Regulatory Commission (NRC) and Federal Energy Regulatory Commission (FERC)), state government (Department of Environmental Conservation (DEC) and PSC) and local governments to build new plants. Environmental concerns arose over potential air quality impacts, impacts on aquatic life from once-through cooling systems, and visual impacts among others. These had to be addressed. The electricity suppliers, both private utilities and the New York Power Authority, needed to show the jurisdictional permitting agencies and the public that their proposed projects would optimize environmental and cost factors while assuring adequate and reliable electric service. In this context, the issue of "need" arose. Beginning in 1969, following the passage of the National Environmental Policy Act (NEPA), and later under SEQRA, adopted in 1975, information on environmental impacts supplied in environmental impact statements prepared under NEPA and SEQRA also evaluated the costs of alternative scenarios. Cost and economic analyses became intertwined with environmental assessments because regulatory agencies wanted assurance that a regulated utility's capital would not be invested rashly, applicants wanted to show that costs of unwanted alternatives were unreasonable, and opponents wanted to show that proposed projects were uneconomical as well as environmentally damaging. A proponent of a new generating plant would say it was "needed" to meet demand, and that its proposed plant was the best among alternatives, taking cost and environmental impacts into account.<sup>15</sup> The term "alternatives" included economic and environmental examination of alternative sites, as well as alternative fuels, sizes, designs and the like. Examination of the economics of alternatives became formalized in cases involving regulated electric utilities.

By the 1970s, management of power plant permit applications by DEC, other state agencies and by local government building and zoning agencies became complex, costly and time consuming. A policy choice was made in the early 1970s to consolidate review and approval of electric generating plant siting cases into a single board. Article VIII was first enacted in 1972 to provide for "one stop shopping" for permits for new generating facilities. It was re-enacted in 1978. The objective was to provide a fast and efficient forum to consider "environmental" and "need" issues associated with a proposed new power plant. The idea was "one-stop shopping" for permits for new plants.

Throughout this period, environmental legislation evolved, including the Clean Air Act of 1970 (CAA) and the Clean Water Act of 1972 (CWA). In power plant cases of the era, environmental groups urged reducing the growing demand for power by adopting conservation and efficiency measures in order to avoid environmental impacts from "unneeded" new plants. In

fact throughout the 1970s, the costs of constructing new plants soared. So did the costs of fuel (especially oil and natural gas). Rate regulators, including the PSC, were under increasing pressure to keep rates down. By the 1980s, electricity conservation programs and policies developed, along with legislation that gave incentives to builders of smaller (less capital intensive), more efficient new generating plants. As it turned out, many new small independent power production plants (IPPs) having a total capacity in excess of 4,000 megawatts were built in the State. They were built using tax and "take or pay" purchase incentives under both Federal and State laws enacted in response to the energy crisis of that era. These include the Federal Public Utility Regulatory Proceedings Act (PURPA) and the so-called "six cent law" in former PSL § 66(c), which mandated that utilities enter into long term contracts to purchase electricity from independent power production facilities at a price of at least six cents per kilowatt hour.

It is noteworthy that none of the smaller IPPs that were built in response to the incentives of PURPA and the "six cent law" before 1989 were certificated under Article VIII of the PSL. They were sized below the 50 megawatt threshold specified in the definition of "major steam-electric generating facility" in the two former Article VIIIs. Those plants were, however, subject to review under SEQRA and the ECL.<sup>16</sup> They were required to obtain and presumably were granted appropriate air and other environmental permits by the DEC. After the second Article VIII lapsed in 1989, one large gas-fired combustion turbine facility was constructed, having been permitted by DEC, after an environmental review under SEQRA.<sup>17</sup> That plant was permitted without lengthy hearings because the application and environmental review process showed that it would comply with applicable environmental requirements. DEC's, or other lead agency's, SEQRA examination of alternatives to the new non-utility generating plants that were constructed in this era was comparable to that done under SEQRA for any other proposed new privately owned facility in a competitive industry, such as paper or glass-making. Such SEQRA examination recognized that private applicants did not have the power of eminent domain, as does a regulated utility, and that the financial risk of building the proposed facility was on the project sponsor, and not ratepayers or the public. Therefore the formalized economic "need" analysis that regulated utility applicants prepared in the few Article VIII cases that were filed between 1972 and 1989 was not part of the SEQRA review that DEC undertook in electric generating facility cases not subject to Article VIII.

There were only nine applications filed under Article VIII between 1972 and 1989. A summary of the cases docketed under Article VIII between 1972 and 1989 is attached as Appendix A following the conclusion of this article. While six certificates were issued, only one of those proposed plants was actually built (NYSEG's Somerset Station, now called Kintigh). These statistics reflect the fact that the Article VIII process was complex, and extremely difficult to manage, especially from the perspective of the involved state and local agencies. Simply put, Article VIII failed to live up to its intended purpose of providing a swift efficient forum for the siting of new electric generating plants in New York State.

## V. ARTICLE X

Article X, titled "Siting of Major Electric Generating Facilities" was enacted in 1992, three years after Article VIII lapsed.<sup>18</sup> It was part of the same legislative package that repealed the "six cent law" and adopted a competitive bidding process for use by regulated utilities when adding new generating capacity. At the time, these latter two parts of the legislation were no doubt much higher priorities from the standpoint of the utilities and other interest groups. The legislation also modified the former Article VIII in certain respects.<sup>19</sup> One can infer that reenactment of the electric generating facility siting law in 1992 was part of a larger compromise among a variety of interests, including regulators, environmental and consumer groups, industrial energy consumers, and the utilities.

As enacted, Article X prohibits site preparation or construction of an electric generating facility of 80 mw capacity<sup>20</sup> or larger in New York State prior to issuance of a "certificate of environmental compatibility and public need" for the facility. The certificate is to be issued by the "Board on Electric Generation Siting and the Environment." The Board is made up of the PSC Chairman, who presides, and the Commissioners of DEC, Health, and Economic Development.<sup>21</sup> The Commissioner of the State Energy Office is also named as a member, but that office was abolished and the permanent Board now consists of only four members. In addition, two public members are appointed by the Governor. Four members constitute a quorum. The Open Meetings Law<sup>22</sup> applies to the Board. The *ex parte* rule of § 307 of the State Administrative Procedure Act also applies to adjudicatory matters before the Board. Article X applies not only to "steam-electric" plants, to which the former Article VIII applied exclusively, but also to non-steam plants. It also applies to industrial electric generators which sell power offsite.<sup>23</sup>

Article X contains a "sunset" provision by which it will expire January 1, 2003, subject to any intervening legislation. Given the fact that Article X will sunset in less than three years, the question whether Article X should be repealed, amended, or reenacted is timely. Delaying consideration of whether to repeal or amend Article X until 2002 or 2003 could mean that commitments will be made in the interim to larger new facilities out-of-state and/or smaller new facilities in-state and the consequences would be irrevocable. Assuming that Article X is a major impediment to construction of new facilities in excess of 80 mw capacity in New York State, developers of new facilities, in order to gain market share, will be induced to construct smaller facilities within the state. Alternatively, they may seek to build larger facilities in Quebec, Ontario, Pennsylvania, Ohio or other neighboring jurisdictions from which the energy could be transmitted to New York, with resultant loss of property tax revenues to local municipalities. Countering this potential trend may be a preference for reconstruction of older facilities at existing generating facility sites in the State, which would give the competitive edge to the owners of those facilities.

### A. The Article X Application and Board Findings: "Approved Procurement Process"

There are two distinct categories of information required to be submitted with an Article X application, depending on whether a proposed facility has (1) "been selected pursuant to an approved procurement process" or (2) "has not been selected to an approved procurement process." The cumbersome phrase "selected pursuant to an approved procurement process" derives from Section 66-i of the PSL, which was enacted in the same 1992 legislation that adopted Article X.<sup>24</sup> Section 66-i states that any electric utility, prior to making substantial investments in new generating facilities or new purchase agreements, should consider reasonably available alternative sources, taking into account impacts on rates, environment, reliability and other factors. That section also authorizes the Commission to require each utility to conduct competitive bidding auctions or other procurement programs in order to satisfy electric capacity needs. Competitively bid new facilities that had already undergone economic and environmental reviews in connection with the bidding process would not be required to undergo a second review in the Article X process. The general idea was that independent power producers that could operate generating facilities more cheaply than utilities should be encouraged. Thus, less information is required in Article X for facilities "selected pursuant to an approved procurement process" than for those which are not.

Importantly, facilities that are ". . . not selected pursuant to an approved procurement process" must submit detailed cost information. Such applications must submit ". . . plant costs by account, all expenses by categories including fuel costs, plant service life and capacity factor and total generating cost per kilowatt-hour, including both plant and related transmission, and comparative costs of alternatives considered."<sup>25</sup> Facilities that *are* selected pursuant to an approved procurement process need not provide cost information. Similarly, the information to be supplied as to alternatives is more extensive for plants that are not selected pursuant to an approved procurement process than for those which are.<sup>26</sup>

After the adoption of competition, Article X applications have been filed for new competitive facilities. If it was determined that such new facilities were not selected pursuant to "an approved procurement process," they would need to reveal detailed cost information in their applications for certificates. But any such revelations, ironically, would be anti-competitive, because the new competitor's production costs would be revealed to competitors. To avoid this pitfall, the PSC, which has the authority to approve procurement processes that are reasonably consistent with the State Energy Plan,<sup>27</sup> issued a declaratory ruling that competition in the electric industry is "an approved procurement process."<sup>28</sup> The Siting Board in the *Athens* Article X application<sup>29</sup> concurred with the Commission that competition is an approved procurement process, and suggested that if the record at the close of hearings in that case shows that the proposed facility will foster and promote competition, the Board would be in a position to determine that the

proposed project was "selected" pursuant to an approved procurement process.<sup>30</sup>

The Siting Board and the Commission have thereby interpreted Article X in a manner that is consistent with implementing competition in the electric generation market. The necessity for such an intricate interpretative path shows, however, that Article X was not designed to apply in a competitive environment, and further supports a conclusion that Article X should be repealed.

### B. One Stop Shopping

The drafters of Article X intended that a siting board's determination to issue a certificate for a facility would also resolve all issues related to local land use permits, state agency permits and permits required by reason of Federal environmental laws, such as the Federal Clean Air and Water Acts. As a practical matter the Siting Board is unable to carry out this objective. Thus the notion that Article X cuts through the red tape inherent in the multiple permit requirements of local, state and Federal law is simply unrealistic.

#### i. Federal Permits

Under Section 168(3) of the PSL, siting boards have the authority to issue permits pursuant to federal recognition of state authority in accordance with CWA, the CAA, and the Resource Conservation and Recovery Act (RCRA). Without getting into a lengthy analysis, suffice it to say that Article X's drafters anticipated that the Federal Environmental Protection Agency (EPA) would readily recognize that the siting boards could exercise permitting authority under the CWA, CAA, and RCRA permit programs in the same fashion as DEC does. This has not happened. In December 1997, the General Counsels of PSC and DEC jointly requested EPA to approve the Siting Board's authority to issue such permits. By letter dated February 11, 1999, this authority was denied by the EPA's Regional Administrator in New York City.<sup>31</sup> Discussions on this issue are reportedly ongoing as of this writing. It is enough to note at this point that the existence of the Article X process has become a roadblock to new facility siting instead of being a facilitator.

#### ii. Local Approvals

Section 168(2)(d) of the PSL states that if a siting board is to certify a facility, it must find: "That the facility is designed to operate in compliance with applicable state and local laws . . . concerning . . . the environment, public health and safety . . . except that the board may refuse to apply any local ordinance . . . if it finds that as applied to the proposed facility [it is] unreasonably restrictive in view of the existing technology or needs of or costs to ratepayers whether located inside or outside of such municipality." This section goes on to say that the municipality may present evidence in support of application of the local law at issue.<sup>32</sup> The objective therefore is to allow the Board to override unreasonable local restrictions if warranted by the overall public interest in service reliability and cost.<sup>33</sup> The notion that local codes should be able to be overridden,

however, is grounded on the principle that the traditional utility monopolies have the obligation to provide electric service and consequently had to be allowed to build the facilities needed to carry out their obligations.<sup>34</sup> Whether the same principle should be applied in the case of a privately owned "merchant" generating plant is more problematic, since the obligation to serve is absent in the case of the merchant. This suggests that the rationale for state override of home rule in certifications of merchant facilities under Article X has been undermined by the adoption of competition. If electric generating plants are to be non-regulated electricity factories, one could readily claim that they should be held to the same standards as other factories, such as paper mills or glass plants, as far as compliance with local zoning laws is concerned. Thus, the rationale for the local zoning override set forth in Article X is considerably diluted, if not eliminated by the adoption of competition in the electric generating industry.

### iii. Coastal Zone Management

Another area of uncertainty is whether a federal determination of consistency under the Coastal Zone Management Act<sup>35</sup> can be issued by a siting board, or whether such determination is within the exclusive authority of the Division of Coastal Resources of New York State's Department of State. The Department of State believes that its authority is exclusive,<sup>36</sup> which if correct, further undermines Article X's one stop shopping objective.

### C. SEQRA and Article X

Under existing law electric generating facilities subject to Article X are exempt from the need to prepare an environmental impact statement (EIS) under SEQRA.<sup>37</sup> The specific language of this exemption states that the provisions of ECL 8-0109(2), which mandates preparation of an EIS on actions which will have a significant impact on the environment, shall not apply to Article X certification applications. However this does not mean that the environmental impacts of a facility subject to Article X can be ignored. Nor does it mean that none of SEQRA's terms are applicable to an Article X project applicant or the siting board. The Article X process is intended to incorporate the "hard look"<sup>38</sup> at environmental impacts that an EIS under SEQRA would otherwise provide. Moreover the legislature's policies and purposes under SEQRA remain applicable.<sup>39</sup> It would therefore be a mistake for an applicant to conclude that the "hard look" at environmental impacts mandated by SEQRA (including a comparison of the proposed project's environmental impacts to "no action") can be dispensed with under Article X. On the other hand, the "look" under Article X need not be more extensive than would be the case under SEQRA.<sup>40</sup> While the Article X process is intended to carry out a searching environmental impact review, it must be implemented through the cumbersome multi-agency process dictated by Article X. The experience under Article X's predecessors (see the discussion of Article VIII's record set forth above) shows rather convincingly that this cumbersome process has not

worked, which in turn suggests that it is not likely to do so in the future.

## V. CONCLUSION

Adoption of competitive pricing for electricity makes the cumbersome Article X process unnecessary. The Article X process is a barrier to entry into the electricity generation market that hampers development of competition and the environmental benefits that competition can provide. Moreover, Article X's one stop shopping objective has failed to materialize, which means that the necessity for obtaining a certificate under Article X is superfluous as a practical matter. The environmental and land use impacts of proposed new electric generating facilities can more readily and effectively be examined by DEC and local governments under SEQRA than under Article X. Article X should be promptly repealed.

### Appendix A: Article VIII Cases: a Brief Synopsis

Nine applications were filed under Article VIII between July 1, 1972 and December 31, 1988 during the 16 years it was in effect. Six certificates were issued by the Siting Board. Only one facility was actually built. The rest were abandoned because of rising costs, changed circumstances attributable to delays and for various other reasons. The record suggests that Article VIII failed to facilitate construction of new electric generating facilities.

An outline of the nine applications follows:

#### 1. Sterling (Fossil) – Docket # 8001

- 600-800 mw fossil fuel-fired facility proposed by RG&E.
- Case dismissed by Board Order dated February 20, 1980, following request by RG&E for more time to commit to proceeding further with its application. Board ruled that it had no authority to grant more time and it dismissed the application and closed the case. No further information available. Application was apparently filed before February 27, 1974, based on the date that the next application was filed.

#### 2. Kintigh Station – Docket # 8002 [formerly called Somerset]

- 850 mw coal-fired, NYSE&G facility
- Art VIII application filed Feb 27, 1974
- Certificate issued by Board Dec 29, 1978
- Construction start date – June 1979
- Plant put in service Nov 1984
- Art VIII Certificate transferred to AES by Art X Board Order issued on Dec. 31, 1998.
- Petition to modify the Article VIII certificate to allow installation of selective catalytic reduction (SCR) to reduce NOx emissions filed December 29, 1998.

### 3. Jamesport – Docket # 8003

- Application for two 1150 mw nuclear facilities proposed by LILCO, plans changed subsequently to build an 800 mw coal-fired plant.
- Art VIII application filed April 22, 1974, amended in 1976.
- Decision to authorize issuance of a certificate for an 800 mw coal-fired facility issued Sept. 8 1980.
- LILCO petitioned for rehearing, to gain assurance that its Northport plant will not be required to convert to coal, since such a requirement would drain financial resources otherwise available for LILCO to use to build the Jamesport facility. Rehearing was denied. Board extended deadline for LILCO to accept the certificate to Oct 27, 1981. NYSEG then terminated its participation in Jamesport. LILCO tried to keep certificate alive.
- Board allows LILCO until March 15, 1983 to propose a disposition. LILCO tentatively requests rescision of the certificate, but asks the action on the rescision be "suspended" until LILCO has assurance that its Shoreham nuclear plant (then under construction) can be operated.
- Petitions for review filed in AD 2d by project opponents alleging Board lost jurisdiction over Jamesport after 18 months had elapsed following re-enactment of Article VIII. Held: Deadline was directory, not mandatory, so jurisdiction was not lost. But the Court annulled the certificate, because petitioners would be prejudiced by allowing LILCO to modify the project significantly, as it proposed. A new application would be needed to modify.
- Project abandoned.

### 4. Arthur Kill – Docket # 8004

- 700 mw fossil-fuel-fired (coal, to be supplemented with refuse) NYPA facility
- Art VIII application filed Dec. 26, 1974
- Certificate issued by Board July 22, 1981
- Certificate annulled and remanded on judicial review by decision of Appellate Division, Second Department, dated March 23, 1982. *See Koch v. Dyson*, 85 A.D. 2d 346, 448 N.Y.S.2d 698. [Held: Board erred in ruling was NYPA exempt from NYC ordinances; remand to Board to decide whether proposed facility was designed to operate in compliance with local laws, or if not, whether local laws were unreasonably restrictive as applied.]
- NYPA never built the facility.

### 5. Sterling (Nuclear) – Docket # 8005

- 1150 mw nuclear facility jointly proposed by RG&E,

CHG&E, and O&R. This project was intended to be the first of a standardized nuclear power plant design (SNUPPS). Alternatives included two 600 mw coal-fired facilities.

- Application filed Feb 27, 1975. Certificate issued for the SNUPPS nuclear plant by the Board on January 11, 1978, based on a 3 to 2 vote (dissents by PSC and DEC (Berle)). Certificate vacated by Board order issued February 11, 1980 on rehearing (one dissent), based on changed need for the facility. Project was never built.

### 6. Greene County – Docket # 8006

- Application for 1200 mw nuclear facility proposed by NYPA to be built at Cementon, in Greene County.
- Application withdrawn by NYPA on January 18, 1980 and Board closed the proceeding by Order dated January 30, 1980.

### 7. Lake Erie Generating Station – Docket # 8007

- Two 850 mw coal-fired units proposed by Niagara Mohawk.
- Application filed March 3, 1976. Certificate issued April 23, 1980 for one 850 mw unit. Order modified on rehearing, by order issued September 25, 1980. Further modified by order issued January 9, 1981.
- DPS Staff moved Board to vacate the LEGs certificate on March 18, 1985. Notice issued by Board on March 29, 1985 seeking comment on the motion by April 26, 1985.
- No further information available. Plant was never built.

### 8. New Haven / Stuyvesant – Docket # 8008

- 1200 mw nuclear facility proposed jointly by NYSEG and LILCO to be built either in New Haven, Oswego County, or Stuyvesant, Columbia County.
- Board Order issued May 23, 1980 denied rehearing of prior Board order dismissing the application. Ownership uncertain. No credible showing of need. Case closed.
- No further information available.

### 9. Rulemaking Case – Docket # 8009

- This was rulemaking case in which adopted regulations on procedures and requirements relating to siting under Article VIII. The rules were adopted by Order issued September 27, 1988. This docket did not involve an application for a steam-electric generating facility.

### 10. Interpower – Docket # 8010

- 210 mw coal-fired facility proposed by Inter-Power of New York to be built in the Town of Halfmoon, Saratoga County.

- Article VIII application filed in October, 1988, accompanied by a power sales contract w/ NMPC, conditioned on the plant being on-line by Dec. 31, 1993.
- Certificate granted by decision and order dated Sept. 24, 1992. Certificate was conditioned on applicant having a power sales contract by Dec 31, 1992. Extensions granted up to March 12, 1993. Board decided that the certificate would lapse on Sept. 13, 1994 unless before that date Interpower obtained a sales contract, justified the contract prices, and showed that the environmental impacts had not changed materially.
- Intervenor's opposition to the project challenged the Board's issuance of the certificate, asserting that the Board failed to fulfil its statutory responsibilities under Article VIII. Specifically, the Board granted a conditional certificate, based on the PSC determination that the contract prices were justified.
- The Board could not delegate this to the PSC, the court held. Certificate revoked.
- The project was abandoned. Interpower sued DEC for damages – the case was settled with a multi-million dollar award paid to Interpower by the State of New York.

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<sup>1</sup> See Pub. Serv. L., Article X.

<sup>2</sup> Pub. Serv. L. § 160(2).

<sup>3</sup> The Public Service Commission's May 19, 1997 "Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services," Opinion No. 97-5, in Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, can be cited as the beginning of competition in New York's electricity market. Subsequent PSC proceedings and efforts of the utilities and many others are seeking to make competition a reality. But the process is difficult. See, for example, Richard Perez-Pena "Despite Deregulation, Utilities Avoid New York," *N.Y. Times*, Sunday, April 18, 1999, at 37. For more information on the implementation of a competitive electricity market in New York, see the PSC's website, *Your Energy, Your Choice* (last modified May 6, 1999) <<http://www.dps.state.ny.us/yourenergy.htm>>.

<sup>4</sup> See E.C.L. art. 8. See generally 6 N.Y.C.R.R. Part 617.

<sup>5</sup> L. 1992, c. 519.

<sup>6</sup> See *The New York State Board on Electric Generation Siting and the Environment* (last modified May 17, 1999) <<http://www.dps.state.ny.us/articlex.htm>> for a list of the eight docketed and announced cases. Additional Article X applications are reportedly in the planning stage at various generating companies. As a consequence, the staffs of the PSC and the DEC, the two principal providers of staff support to the siting boards, could be quickly overwhelmed without additional experienced support.

<sup>7</sup> These are U.S. Generating's proposed new facility in Athens, N.Y. and Niagara Mohawk's proposal to rebuild its Albany Steam Station in the Town of Bethlehem, N.Y.

<sup>8</sup> See Garfield and Lovejoy, *Public Utility Economics*, Prentice Hall, Inc., 1964, a classic text on the fundamentals of public utility rate regulation, especially chapters 1-4.

<sup>9</sup> See *Electric Utility Restructuring in New York: A Status Report* by the Committee on Energy of the Association of the Bar of the City of New York, April 1998, at 13 [citations are to the Association of the Bar's website edition at <<http://www.abcnyc.org/energy.html>>, hereafter cited as the "Energy Committee Report"]. See Richard Perez-Pena "Despite Deregulation, Utilities Avoid New

York," *N.Y. Times*, Sunday, April 18, 1999, at 37, which suggests that this expectation may not be being realized, at least not as rapidly as some might have hoped.

<sup>10</sup> The operator, called the Independent System Operator, or "ISO" will be the successor to the New York Power Pool, and will serve a comparable function of dispatching electricity throughout the State on a least cost basis with due regard to reliability of the overall system. The ISO will be governed differently than the Power Pool, which is jointly governed by the State's electric utilities and the Power Authority.

<sup>11</sup> See *Electric Utility Restructuring in New York: A Status Report* by the Committee on Energy of the Association of the Bar of the City of New York, April 1998, at 13 [citations are to the Association of the Bar's website edition at <<http://www.abcnyc.org/energy.html>>, hereafter cited as the "Energy Committee Report"]. See Richard Perez-Pena "Despite Deregulation, Utilities Avoid New York," *N.Y. Times*, Sunday, April 18, 1999, at 37, which suggests that this expectation may not be being realized, at least not as rapidly as some might have hoped.

<sup>12</sup> *Energy Committee Report* at p. 9.

<sup>13</sup> *Energy Committee Report* at pp 10-11.

<sup>14</sup> Pub. Serv. L. art. 8. Although Article VIII expired December 31, 1988, it remains in effect as to applications filed on or before that date. See L. 1972 c.385 and L. 1978 c. 708; Historical note in McKinney's Pub. Serv. L. pp. 411-425.

<sup>15</sup> See *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965) [*Scenic Hudson I*]; and *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F. 2d 463 (2d Cir. 1971) [*Scenic Hudson II*], the seminal cases in which adjudications of need and environmental impacts of a proposed electric generating facility were subjected to judicial review.

<sup>16</sup> Some may have received negative declarations, thereby avoiding the need to prepare an environmental impact statement.

<sup>17</sup> Site Energy's gas-fired facility in Scriba, NY.

<sup>18</sup> See L. 1992, c. 519.

<sup>19</sup> Memorandum dated July 20, 1992 from William J. Cowan, PSC General Counsel, to Elizabeth D. Moore, Counsel to the Governor stating that changes from the former Article VIII include substituting a determination that a proposed facility is consistent with the State Energy Plan or selected in a competitive bidding process in place of a "need" finding; adding an intervenor fee if the application is substantially amended; a 12 month deadline for decision; consideration of alternate sources of supply and demand reducing measures for facilities not selected pursuant to a competitive bidding process; and increasing the threshold for certification to 80 mw from 50 mw and applying Article X to all electric generating facilities, not only steam-electric generating facilities. (On file at the Public Service Commission.)

<sup>20</sup> Pub. Serv. L. § 160 (2).

<sup>21</sup> Alternates may be designated by the respective Commissioners. *See* Pub. Serv. L. § 161.

<sup>22</sup> Public Officers Law, Article 7.

<sup>23</sup> Article VIII applied to steam-electric facilities only that were 50 mw capacity or larger. Since large industrial steam boilers did not ordinarily sell into the grid in the early days of Article VIII, Article VIII did not impact on industrial facilities as a practical matter. With the advent of competition some large industrial plants can readily sell electricity into the grid, and Article VIII applies to new industrial plant boilers in excess of 0.20 mw that sell into the grid. *See* Pub. Serv. L. § 162(4)(d). One of the publicly announced Article X cases (Bessicorp/Empire State Newsprint) is such an industrial facility.

<sup>24</sup> L. 1992, c. 519.

<sup>25</sup> Pub. Serv. L. § 164(1)(d).

<sup>26</sup> Pub. Serv. L. § 164 (1)(b) requires that all applications need to discuss and evaluate reasonable alternative locations. Plants that are not selected pursuant to an approved procurement process need to discuss and evaluate alternative fuels, but demand reducing measures need not be discussed by private applicants (non-regulated utilities that have no power of eminent domain), according to a Board rule. (*See* 16 N.Y.C.R.R. §1001.2(d)). In the case of a facility proposed to be constructed by a private entity not having the power of eminent domain, the discussion of alternatives should be comparable to that undertaken by private competitive entities under SEQRA: As a minimum, the environmental impacts of the proposed facility need to be compared to the alternative of "no action."

<sup>27</sup> *See* Pub. Serv. L. § 160(7).

<sup>28</sup> *See* Declaratory Ruling Concerning Approved Procurement Process issued April 16, 1998, Case 98-E-0096. This ruling is being updated.

<sup>29</sup> This refers to U.S. Generating's proposed new facility in Athens, NY. *See* Athens Generating Plant (Athens Generating Co., L.P.) – Case 97-F-1563 (last modified May 3, 1999) <<http://www.dps.state.ny.us/athens.htm>>.

<sup>30</sup> *See* Order Concerning Interlocutory Appeals issued January 28, 1999 by the Board on Electric Generation Siting and the Environment in Case 97-F-1563, Application by Athens Generating Company, L.P. (visited May 26, 1999) <[http://www.dps.state.ny.us/fileroom\\_t/doc5354.t](http://www.dps.state.ny.us/fileroom_t/doc5354.t)>.

<sup>31</sup> Letter from Jeanne M. Fox to Lawrence G. Malone, February 11, 1999.

<sup>32</sup> Applicants apparently take the position that a duly issued certificate preempts local law: *See* Pub. Serv. L. § 162(1), stating that a ". . . facility with respect to which a certificate is issued shall not thereafter be built . . . except in conformity with such certificate . . ." However, it is unclear when in the process a municipality must object or be foreclosed, and when the board must give notice to a municipality that a local law will not be applied.

<sup>33</sup> Case law in New York provides that "a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities . . . However, this has never meant that a utility may place a facility wherever it chooses in the community . . ." *Consolidated Edison v. Hoffman*, 43 N.Y.2d 598 (1978).

<sup>34</sup> The same holds true with respect to the siting of transmission facilities under Article VII of the Pub. Serv. L. In *Consolidated Edison v. Hoffman*, *supra*, note 31, the Court found that the zoning board's refusal to grant a variance to modify an existing nuclear plant by erecting a closed-cycle cooling tower was an undue hardship. But if siting a new generating facility had been the issue, the opinion suggests that the result would have been different.

<sup>35</sup> Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465. The New York State Department of State claims that it has exclusive authority pursuant to Sect. 47 of L. 1975, c. 464 to oversee implementation of New York State's federally approved coastal zone management plan.

<sup>36</sup> *See* correspondence dated December 16, 1998 from Steven C. Resler, Supervisor of Consistency Review and Analysis, New York Coastal Management Program, to Daniel P. O'Connell; and dated January 14, 1999 from Bryan P. Cullen, Associate Attorney, Department of State to J. Michael Harrison.

<sup>37</sup> *See* E.C.L. § 8-0111(5)(b).

<sup>38</sup> For discussion of SEQRA's "hard look" requirement *See Kahn v. Pasnik*, 90 N.Y.2d 569, 687 N.E.2d 402, 664 N.Y.S.2d 584 (1997); and *Akpan v. Koch*, 75 N.Y.2d 561, 664 N.E.2d 53, 555 N.Y.S.2d 16 (1990).

<sup>39</sup> *See* E.C.L. §§ 8-0101 and 8-0103.

<sup>40</sup> *See* Pub. Serv. L. § 164 (1)(b).

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