

STATE OF NEW YORK  
BOARD ON ELECTRIC GENERATION SITING  
AND THE ENVIRONMENT

CASE 13-F-0436 - Petition of the Town of Brookhaven and American  
Capital Energy, Inc. for a Declaratory Ruling

DECLARATORY RULING CONCERNING JURISDICTION  
OVER PROPOSED GENERATING UNITS

(Issued and Effective January 24, 2014)

By the Chair of the Board:

INTRODUCTION

By petition filed September 19, 2013, the Town of Brookhaven (Town or Brookhaven) and American Capital Energy, Inc. (ACE) (collectively, Petitioners) seek a declaratory ruling from the Board on Electric Generation Siting and the Environment (Board) determining that a set of planned renewable energy projects will not constitute a major electric generating facility, as defined in Public Service Law (PSL) §160(2). The petitioners served the petition pursuant to PSL §161 and 16 NYCRR Part 8, a New York State Public Service Commission (Commission) Rule adopted by the Board at 16 NYCRR §1000.3. No comments were received.

Upon due consideration and consultation, I find and declare that the projects, as proposed, do not constitute a major electric generating facility and therefore are not subject to review under Article 10 of the PSL. Each individual project has a nameplate capacity of less than 25 megawatts (MW). The projects will not be aggregated because they will be located on separate sites, will have separate interconnection points to the grid, and will operate independently of each other.

THE PETITION

Petitioners propose to construct fourteen renewable energy generating facilities with nameplate capacities between 0.4 MW and 23 MW, for a total nameplate capacity of 53 MW. The facilities will be built on fourteen sites owned by the Town.<sup>1</sup> Nine of the facilities will include both solar and wind generation; four will employ only solar generation; and one will employ only wind generation. The facilities will be built and operated by American Capital Energy, Inc. through fourteen to-be-formed LLCs. Each LLC will have a separate lease agreement with the Town and a separate interconnection and power purchase agreement with the Long Island Power Authority (LIPA). The LLCs may share employees under a contract with ACE. Additionally, the generation facilities will share a remote monitoring system. Petitioners state that their proposals will undergo review under the State Environmental Quality Review Act, both individually and cumulatively, prior to the execution of the leases.

Petitioners state that the Public Service Law only requires Article 10 review for the siting of "major electric generating facilities," which are defined in the PSL as electric generating facilities with a nameplate generating capacity of 25 MW or more. Because each individual facility will have a nameplate capacity of less than 25 MW, Petitioners claim that the projects are not subject to Article 10 review.

Petitioners further argue that, based on statutory language and Board precedent, the fourteen proposed facilities should not be aggregated. Petitioners acknowledge that the prior precedents they cite were issued pursuant to Article X,

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<sup>1</sup> Of the fourteen, only Site 1 and Site 9 appear to be adjacent. Because the combined nameplate capacity of the projects proposed for Sites 1 and 9 is only 5.5 MW, it is unnecessary to consider whether aggregation of those two sites is appropriate.

the predecessor of Article 10, and that Article 10 differs from Article X in some ways. They assert that those differences do not affect the conclusions reached in the prior rulings.

DISCUSSION

PSL Article 10 §161 provides that the Chairperson of the New York State Board on Electric Generation Siting and the Environment,

“after consultation with the other members of the board exclusive of the ad hoc members, shall have exclusive jurisdiction to issue declaratory rulings regarding the applicability of, or any other question under, this article and rules and regulations adopted hereunder.”

A developer is required to seek approval under Article 10 before building a “major electric generating facility.” PSL §160(2) defines the term “major electric generating facility” as “an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more.”

Article 10 does not require that the capacity of all generating units owned or proposed by a single developer be combined for jurisdictional purposes. By its terms, the statute relates a facility to a site. PSL §162(1) states that “no person shall commence the preparation of a *site* for, or begin construction of a major electric generating facility in the state . . . without having first obtained a certificate issued with respect to such facility by the board” (emphasis added). PSL §164(1)(a) provides that an application must contain “a description of *the site* and a description of the facility to be built thereon . . .” (emphasis added). Each of these provisions refers to a facility constructed on a single site.

Past declaratory rulings interpreting Article X are consistent with this reading of the new statute.<sup>2</sup> In considering whether Article X applied to multiple-unit projects, the prior Siting Board found the relevant factors to include "physical, legal, and operational separation."<sup>3</sup> In general, "[t]he capacities of proposed generating facilities on different sites are not combined for the purposes of determining whether a proposed facility exceeds Article X's jurisdictional threshold."<sup>4</sup> The Article X Siting Board only considered treating operationally separate generating units as a single facility where those units were on adjacent parcels of land.<sup>5</sup>

Application of Article X precedent is appropriate here because the portions of Article 10 which differ from Article X are not relevant to the question of aggregation. The Article 10 definition of "major electric generating facility" differs in two ways from the Article X definition: first, while Article X covered only facilities with capacity of 80 MW or more, the Article 10 threshold is set at 25 MW or more; second, Article 10 determines capacity by nameplate capacity, while Article X

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<sup>2</sup> See, e.g., Case 01-F-1803 - Joint Petition of Fortistar South Avenue LLC and Fortistar Chelsea LLC for a Declaratory Ruling - Declaratory Ruling Concerning Jurisdiction [hereinafter Fortistar Declaratory Ruling] (issued Nov. 15, 2002); Case 02-F-0674 - Joint Petition of PPL Global, LLC and the Village of Freeport for a Declaratory Ruling - Declaratory Ruling Concerning Jurisdiction over Proposed Generating Units [hereinafter Freeport Declaratory Ruling] (issued July 25, 2002); Case 00-F-1934 - Petition by Power Authority of the State of New York for a Declaratory Ruling - Declaratory Ruling Concerning Standard for Determining Generating Capacity [hereinafter NYPA Declaratory Ruling] (issued Nov. 16, 2000).

<sup>3</sup> Freeport Declaratory Ruling at 4.

<sup>4</sup> Fortistar Declaratory Ruling at 4.

<sup>5</sup> Freeport Declaratory Ruling at 6 (stating that the adjacent units considered will only be treated as separate facilities because they would have separate, unaligned owners).

applied based on actual generation, regardless of nameplate capacity.<sup>6</sup> Article 10 and Article X use the same language describing the law as applying to an individual facility on an individual site.

The projects proposed by the Petitioners are separate generating units on non-adjacent sites, with independent connections to the grid. The projects are operationally distinct except that they may share staff and a remote monitoring system. Because the projects are separate, non-adjacent generating units, their capacity will not be aggregated for the purpose of Article 10.

CONCLUSION

Having considered the petition and consulted with the other members of the Board, pursuant to PSL §161, it is DECLARED:

1. The generating facilities proposed by the Town of Brookhaven and American Capital Energy, Inc., each with a capacity of less than 25 megawatts, are not subject to the Board's jurisdiction as major electric generating facilities within the meaning of §160(2) of the Public Service Law, and are not required to obtain certificates pursuant to Article 10.

2. This proceeding is closed.



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AUDREY ZIBELMAN  
Chair

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<sup>6</sup> PSL §160(2); see also NYPA Declaratory Ruling.