New York Law to Help Finance Energy Efficiency Improvements and Accelerate Energy Generation Facility Construction

On June 22, 2011, the New York State Legislature passed The Power NY Act of 2011 (A. 8510/S. 5844) (PNY Act).[1] Governor Cuomo is expected to sign it. The new law, once enacted, would do two very important things: (1) Provide a mechanism to allow owners of residential and nonresidential buildings to borrow money for energy efficiency projects, and pay it back over a period of years through their electric and gas bills; and (2) revive Article X of the Public Service Law, which creates an expedited, state-led program for permitting electric generating facilities while preempting local requirements. The revived Article X procedure covers facilities as small as 25 megawatts (down from the prior 80 megawatts threshold), and thus will cover most commercial wind facilities, which have been plagued by local permitting delays. Additionally, the new law requires a study with respect to increasing solar photovoltaic generation in the state.

I. On-bill Recovery Program to Encourage Energy Efficiency

"On-bill" financing is a mechanism that allows utility customers to pay back loans for energy efficiency upgrades through a charge on their monthly utility bill. This type of financing mechanism helps to overcome some common barriers to energy efficiency, including the up-front capital cost and the complexity of taking out a loan from a third-party lender that requires payment through a separate invoice. In addition, on-bill recovery allows the charge to stay with the property upon its sale or lease. This type of financing is also advantageous because it does not require a separate loan be taken out by a homeowner in the form of a mortgage, which could exclude persons who have poor credit. Although several municipalities and individual utilities have implemented limited on-bill financing programs, this is the first statewide program of its kind in the nation that allows residents, nonprofits, and small businesses access to on-bill recovery for energy efficiency upgrades.

The new program will serve much the same function as the Property Assisted Clean Energy (PACE) program, which issued loans for energy efficiency and paid them back through

1 The Assembly passed the bill by a vote of 120-14. The Senate passed the bill by a vote of 59-3.

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charges on property taxes. PACE collapsed in 2010 because of objections from federal mortgage lenders who did not want their liens to be second priority behind PACE loans. PACE also required municipalities to adopt implementing legislation; on-bill financing does not.

A. Background: Green Jobs/Green New York Act

In 2009, the Legislature enacted the Green Jobs/Green New York Act (GJGNY Act).[2] The GJGNY Act directs the New York State Energy Research Development Authority (NYSERDA) to establish a revolving loan fund to finance "qualified energy efficiency services" for residential, small business, not-for-profit, and multifamily structures.[3] These services include modifications to a structure based on the recommendations of an energy audit approved by NYSERDA that will increase its energy efficiency.[4]

The GJGNY Act further directs NYSERDA to use US$112 million that represented a portion of New York's share of the proceeds from the sale of carbon allowances under the Regional Greenhouse Gas Initiative (RGGI) for the revolving loan fund.[5] RGGI is the first mandatory carbon dioxide mitigation trading system in the US Its members include 10 Northeast and mid-Atlantic states (though Governor Chris Christie is pulling New Jersey out of the program).[6] RGGI regulates carbon dioxide emissions from electric power plants that have a capacity of at least 25 megawatts. Emissions are capped at a certain level and regulated utilities must purchase carbon allowances via auction, the proceeds of which are then returned to the member states.[7]

The GJGNY Act limited the amount of each loan as follows: Loans are not to exceed US$13,000 per applicant for approved qualified energy efficiency services for residential structures and US$26,000 per applicant for approved qualified energy efficiency services for nonresidential structures. For multifamily structures, loans are to be in amounts determined by NYSERDA, provided that it assures that a significant number of residential structures are included in the program.[8]

B. On-bill Recovery Provisions of the PNY Act

The PNY Act makes no substantive changes to the GJGNY Act. Instead, it provides a mechanism that allows customers who take out loans pursuant to the GJGNY Act to repay these loans through a charge on their monthly utility bill.

The on-bill recovery program is located in Sections 2-11 of the PNY Act, the most important of which are Sections 5,8, and 11.

Section 5 amends the Public Service Law by adding a new Section 66-m. This section requires the Public Service Commission (PSC), within 45 days of the effective date of the Act, to commence a proceeding leading to the establishment of billing and collection services for on-bill charges for customers of gas and electric utilities with respect to payment of obligations for energy efficiency projects under the GJGNY Act. Covered utilities are directed to use existing billing systems, to the extent practical, to collect on-bill charges and use money available from NYSERDA for improvements that would streamline the collection of these charges. The program is initially limited to no more than 0.5 percent of the customers of a covered utility; NYSERDA can increase this limit as long as the PSC finds that the program is not causing significant harm to the utility or its ratepayers. (PNY Act § 5; Public Service Law (PSL) § 66-M(1)(A)-(1)(B)).

Participation in the program for residential customers is limited to those individuals who hold primary ownership of the premises and hold primary meter account responsibility for all meters to which such on-site recovery charges will apply. (PNY Act § 5; PSL§ 66-M(2)(A)).

2 Pub. Auth. L. Art. 8, Tit. 9-A.

3 Pub. Auth. L. § 1896.

4 The term "structure" is defined in the GJGNY Act as a nonresidential structure, a residential structure, or a multifamily structure. "Nonresidential structure" is defined as a building that is used or occupied by a small business or not-for-profit corporation. "Small business" is defined as a business that is a resident of New York that employs 100 or less people. *See* Econ. Dev. Law § 131. "Residential structure" is defined as a residential building that has four or fewer dwelling units. "Multifamily structure" is defined as a residential building with five or more dwelling units.

5 Pub. Auth. L. § 1896.

6 These states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, and, until recently, New Jersey.

7 Additional information about RGGI is *available at* http://www.rggi.org.

8 Pub. Auth. L. § 1896(2)(b)(ii).

Unless fully satisfied prior to sale or transfer of the property, the on-bill charges for any services provided at a particular premises will survive changes in ownership, tenancy, or meter account responsibility. In addition, any arrears in on-bill charges at the time of account closure or meter transfer will remain the responsibility of the incurring customer, unless expressly assumed by a subsequent purchaser of the property. It will be NYSERDA's responsibility, rather than the utility, to collect such arrears. (PNY Act § 5; PSL § 66-M(2)(D)-(2)(E)).

While the loan amounts for each applicant remain US$13,000 for residential structures and US$26,000 for nonresidential structures, NYSERDA can increase these amounts to as much as US$25,000 for residential structures and US$50,000 for nonresidential structures if the total cost of the energy efficiency measures will achieve a payback period of 15 years or less. Further, the monthly repayment amount cannot exceed one-twelfth of the annual savings projected to result from the installation of energy efficiency measures financed by the program. (PNY Act § 8; Pub. Auth. L. § 1896(2)(b)(ii), (2)(e)(i)).

For each loan, NYSERDA is required to file a mortgage upon the property that received the loan, which is subordinate to any existing or future mortgage on the property. (PNY Act § 8; Pub. Auth. L. § 1896(4)(a)).

Any entity offering to sell real property that is subject to an on-bill charge pursuant to the GJGNY Act must provide a prospective purchaser with written notice prior to the acceptance of a written offer detailing the property's obligations to the program, the amount of the original charge, the payment schedule, the remaining balance, and a description of the energy efficiency service performed on the property. (PNY Act § 11; Real Prop. L. 242(4)).

II. Reauthorization and Modernization of Article X of the Public Service Law

The second portion of the PNY Act addresses the siting of major electric generating facilities. It reauthorizes and revises Article X of the Public Service Law, which streamlined the process of siting electric generating facilities by giving broad powers to a multiagency state-level board.

A. Background and History of Article X

Article X was in force from July 24, 1992 through December 31, 2002, and applied to new generating facilities with at least 80 megawatts of capacity. (An older version was in effect from 1972 through 1989.) It provided an expedited process that circumvented local opposition to facilities by preempting local approval processes; the local communities were given a voice and allowed to participate in the process, but they were deprived of the veto power that ordinarily accompanies local zoning power. Article X also entailed an extensive environmental review process that substituted for the State Environmental Quality Review Act (SEQRA). Arnold & Porter LLP represented applicants in several Article X proceedings, and found that this was an effective mechanism for securing a relatively rapid decision on whether a project could be built.

Starting in 2003, new generating facilities no longer had Article X available to them. Instead they were subject to local zoning controls and to SEQRA. Several facilities were built under this process, but there were no firm time limits. Municipalities that did not want generating units (especially in wind farms) within their borders had a great deal of leverage in keeping them out or in imposing multiple conditions on their construction. Thus, the absence of a uniform siting law has been cited as a significant contributing factor behind the dearth of new power plant projects in New York over the past eight years.

B. New Version of Article X Lowers Applicability Threshold and Addresses Environmental Justice Issues

Like the expired Article X, the new version centralizes and streamlines control over the siting of electric generating facilities. By lowering the applicability threshold to 25 megawatts from 80 megawatts, the revised Article X will capture a larger number of projects. Once the Act has been triggered, projects are subject to the entire process of New York State Board on Electric Generation Siting and

the Environment and environmental justice review as laid out in detail below. This is particularly important for the development of new wind projects.

Excluded from the Article's coverage are major electric generating facilities over which the federal government has siting jurisdiction (such as hydroelectric facilities, which are covered by the Federal Power Act, and nuclear facilities, which are under the purview of the Nuclear Regulatory Commission), nominal repairs to an electric generating facility that do not result in an increase in capacity of more than 25 megawatts, major electric generating facilities used solely for industrial purposes and constructed on lands dedicated to industrial uses (but not to exceed 200 megawatts in capacity), and facilities that had already applied for a license prior to the effective date of the Article. The revised version of Article X also makes important changes to the earlier version by seeking to address environmental justice issues in a systematic way.

1. Makeup and Powers of Siting Board

The Article vests authority over the siting of electric generating facilities in a seven-member siting board, the New York State Board on Electric Generation Siting and the Environment (Board), which is charged with reviewing all applications for electric generating facilities that meet the 25 megawatts threshold. The Board is to consist of five state energy officials and two ad hoc members who reside in the community in which the proposed facility is to be located. (PNY Act § 12; PSL § 160(4)).

The Board, exclusive of the ad hoc members, has the power to adopt rules and regulations concerning the procedures to be used in certifying facilities under the Article, including the suspension or revocation of a facility's certification. The Board Chair, in consultation with the four other core members, has the authority to issue declaratory rulings regarding the Article's applicability, as well as the authority to grant requests for extensions or amendments. (PNY Act § 12; PSL § 161(1)). While facilities are meant to operate in compliance with the substantive requirements of applicable state and local laws, the Board is given authority to override local laws or ordinances that it deems to be "unreasonably burdensome." (PNY Act § 12; PSL § 168(3)(e)). It also prohibits state agencies and municipalities from requiring any further permits or approvals outside of the Article X process for any facility that files an application for a Certificate of Environmental Compatibility and Public Need Authorizing the Construction of a Major Electric Generating Facility (Certificate). (PNY Act § 12; PSL § 172(1)).

2. Pre-application and Application Processes

Any person who wishes to submit an application for a Certificate needs to first file a preliminary scoping statement with the Board which must include, among other things: (1) A description of the proposed facility and its environmental setting; (2) the potential environmental and health impacts resulting from the construction and operation of the facility; (3) proposed studies evaluating the potential environmental and health impacts; (4) proposed measures to minimize these impacts; (5) reasonable alternatives to the facility; and (6) identification of all other state and federal permits, certifications, or other authorizations needed for construction, operation, or maintenance of the facility. (PNY Act § 12; PSL § 163(1)). The Article X provisions displace the separate SEQRA process for covered facilities and instead require that applicants perform numerous environmental and community impact analyses prior to obtaining a Certificate. This preliminary scoping statement is then publicly circulated.

Significantly, the new Article X requires applicants to create a fund amounting to US $350 for each thousand kilowatts of generating capacity, which is to be used by municipalities and community and environmental groups to hire consultants, experts, and lawyers to participate in the scoping phase.

After meeting the requirements of the preliminary scoping statement and notifying the interested parties, and after the pre-application intervenor funds are allocated, the applicant can consult and seek agreement with any interested person, including but not limited to the Department of Environmental Conservation (DEC), regarding any aspect of the preliminary

scoping statement and any studies made or to be made to support the application. (PNY Act § 12; PSL § 163(5)). The parties can then enter into a stipulation setting forth an agreement on any aspect of the preliminary scoping statement, which must be served on all interested parties, and the applicant must then provide an opportunity for comments and objections. In order to try and resolve any questions that may arise as part of this process, DEC must designate a hearing examiner to oversee the pre-application process (and later the formal application process) and mediate any issues that arise as a result. The hearing examiners are PSC administrative law judges. Within 60 days of the filing of the preliminary scoping statement, the hearing examiner is required to convene a meeting of the parties in order to initiate a stipulation process for issues that are not in conflict. (PNY Act § 12; PSL § 163(5)).

After the stipulation process, an applicant must file an application which contains the following: (1) A description of the site and facility to be built; (2) an evaluation of the expected environmental, health, and safety implications of the facility; (3) the facility's pollution control systems; (4) a safety plan during the construction and operation of the facility, (5) an evaluation of the significant and adverse disproportionate environmental impacts of the facility, if any (in accordance with rules to be promulgated by DEC for the analysis of environmental justice issues); (6) an analysis of air quality within a half mile of the proposed facility; and (7) a comprehensive demographic, economic, and physical description of the community in which the facility is to be located. In the case of wind-powered facilities, the application must also describe and evaluate reasonable alternative locations for the facility as well as the facility's impact on avian and bat species. The applicant must also demonstrate that the facility is reasonably consistent with the most recent State Energy Plan and analyze its potential impact on the wholesale generation markets. The application must be published and circulated. (PNY Act § 12; PSL § 164(1)).

3. Hearing and Decision Processes

Within 60 days of the application's filing, the Board is required to determine whether the application is complete and, if so, fix a date for a public hearing. In addition, DEC is required to advise the Board within this time period whether the application contains sufficient information to qualify for expedited procedures for modified or contiguous facilities that will achieve energy reductions as described in more detail below. Once the Board determines that the application is complete, DEC must initiate its review pursuant to a federally delegated or approved environmental permitting authority. This applies primarily to the State Pollutant Discharge Elimination System for water pollution discharges, and the Clean Air Act Title V program for air emissions; since both of those programs are implemented under US Environmental Protection Agency delegation of authority to DEC, Article X cannot eliminate the DEC permitting process. (This was a major issue under the prior version of Article X.) Once the hearing date is set, the hearing examiner is required to hold a prehearing conference to specify the issues and to obtain stipulations as to matters not in dispute. At the conclusion of this conference, the examiner must issue an order identifying the issues to be addressed by the parties and set a time period to respond to any interlocutory motions or appeals, not to exceed 45 days. (PNY Act § 12; PSL § 165(1)-(2)).

Importantly, proceedings with respect to an application must be completed within 12 months from the date that the Board Chair determines that the application is complete and in compliance with the Article unless the parties agree to waive the deadlines. In extraordinary circumstances, the Board can extend this period for an additional six months. (PNY Act § 12; PSL § 165(4)(a)).

Proceedings with respect to modifying an *existing* electric generating facility or to site a new facility adjacent or contiguous to an existing facility can achieve an expedited six-month review if those projects reduce total annual emissions on-site. To qualify for the expedited review, an application must demonstrate all of the following:

(1) A decrease in the rate of emissions of relevant air contaminants; (2) a reduction in the total annual emissions of each of the relevant siting air contaminants emitted by the existing facility; (3) the facility would introduce a new cooling water intake structure; and (4) it would achieve a lower heat rate than the heat rate of the existing facility. In extraordinary circumstances, the Act allows for no more than three months of additional time unless the parties waive the deadlines. (PNY Act § 12; PSL § 165(4)(b)).

This shortened review process is designed to ensure that development projects do not languish in varying stages of approval. Article X also allows certain kinds of projects which would not otherwise fall within the purview of the Article to opt into the Article by providing notice of such election to the Board Chair. (PNY Act § 12; PSL § 162(5)). This will afford some projects that are concerned with the length of the municipal siting process an opportunity to bypass it.

A second intervenor fund (in addition to the one for the scoping stage) is provided for the hearing stage of the process. Each application must be accompanied by a fee in an amount equal to US$1,000 for each thousand kilowatts of capacity, up to US$400,000. For facilities that will require storage or disposal of fuel waste byproducts, an additional fee of US$500 for each thousand kilowatts of capacity is required, up to US$50,000. The money is to be deposited in an intervenor account and distributed at the Board's direction to defray expenses incurred by municipal and local parties. The money can be used for expert witness, consultant, administrative, and legal fees provided that such expenses will not be available for judicial review or litigation. (PNY Act § 12; PSL § 164(6)). The availability of the funds for legal fees is an important deviation from the original version of Article X.

The Board is required to make a final decision on an application based upon the record of the hearing examiner, and cannot grant a certificate or amendment for the construction or operation of a major electric generating facility without making explicit findings regarding the nature of the probable environmental impacts relating to the project. Additionally, the Board may not grant a certificate unless it determines, among other things: (a) The facility will beneficially add or substitute capacity in the state; (b) the facility serves the public interest; (c) any adverse environmental impacts will be minimized or avoided to the extent practicable; and (d) the facility complies with all state and local regulations. (PNY Act § 12; PSL § 168(3)). In rendering its decision, the Board must issue an opinion stating its reasons for the action taken, and the law includes specific provisions governing rehearing and the scope of judicial review of the Board's decision. (PNY Act § 12; PSL §§ 169-70).

The law also directs the DEC Commissioner to promulgate rules and regulations targeting reductions in emissions of carbon dioxide that would apply to major electric generating facilities that commence construction after the effective date of the regulations. (PNY Act § 21; Env. Con. L. § 19-0312(1)(a)(2)). This provision is important in that it appears to be the first legislative enactment in New York specifically addressing greenhouse gas emissions and their reduction.

4. Environmental Justice

The new law requires applications to include an extensive discussion of environmental justice issues and a cumulative impact analysis of air quality within a half mile of the facility, looking at a broad range of air pollutants. (PSL §164(F), (G)). Moreover, "if the Board finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community." (PSL § 168.3(D)).

III. Increasing Solar Photovoltaic Generation in New York State

The third portion of the PNY Act requires that a study be conducted with respect to increasing photovoltaic generation in the state. (PNY Act § 22). The Act states that increasing solar energy generation "represents a significant opportunity for the development of the State's clean energy economic sector and the creation of new high technology jobs in

New York" and authorizes NYSERDA, in consultation with the Department of Public Service, to conduct a study to increase generation from photovoltaic devices in New York. Specifically, the study is to analyze administrative and policy options to achieve the goal of 2,500 megawatts of generation by 2020 and 5,000 megawatts by 2025. The study is also to include an analysis of the per-megawatt cost of achieving the above-stated goals, as well as analyses of the economic, job creation, and environmental benefits that would result from those targets. NYSERDA is to report the findings and recommendations of the study to the Governor and the Legislature no later than January 31, 2012. (PNY Act § 22).

We hope that you have found this Advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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