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Missed Opportunities: California Energy Fears, New York Energy Policy and the New York Power Authority's New York City Turbine Projects

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I. Introduction

Energy policy is at a crossroads in New York State. New York State Energy Law requires the New York State Energy Planning Board to develop a statewide energy plan every four years and the next plan will be finalized in the spring of 2002.¹ New York's primary law dealing with electric power plant siting, Article X of the Public Service Law, will sunset on January 1, 2003.² The federally initiated era of deregulation of the early 1990's has posed multifarious environmental, economic, and health problems that states, like New York, have been left to come to grips with and, although the state has made several attempts to work within the landscape of deregulation, it has yet to prove successful.³ With

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1. See NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, NEW YORK STATE ENERGY PLAN - JUNE 2002, at <http://www.nyserda.org/sep.html> (last visited Jan. 22, 2003).

2. See N.Y. PUB. SERV. LAW §§ 160-72 (McKinney 2002) (noting each statute to be effective until January 1, 2003). The authors would like to note that this article was completed in December of 2001 and was intended to offer a contemporaneous look at the New York State energy issues it addresses. Many of the issues remain unsettled, and Article X of the Public Service Law has sunset.

3. See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (proposed May 10, 1996) (to be codified at 18 C.F.R. pts. 35 & 385) (calling for the opening of wholesale power sales to competition); Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21,737 (proposed May 10, 1996) (to be codified at 18 C.F.R. pt 37) (ensuring that transmission owners do not have an unfair advantage in using transmission to sell power).

the expiration of two critical energy policies and the continued problems of energy deregulation, New York enters a decisive period of how to correct the ills of irrational energy policy.

Last year, actions by several state agencies have demonstrated the need for improved energy policy. Forecasts have predicted an electricity shortage in the future, but as we will illustrate, it is not the ominous portent the state is portraying. Since September of 2000, the Department of Public Service ("DPS"), the Power Authority of the State of New York ("PASNY"), the Department of Environmental Conservation ("DEC") and New York Independent System Operator ("ISO") forecasted California-style blackouts for the summer of 2001. These agencies have perpetuated fears that New York will be the next California, and in response have made a series of questionable legal moves which may have a detrimental effect on the environment and health of the state. We will illustrate that Article X, as well as the current State energy system of production and distribution, is seriously flawed and that deregulation has not been good for the consumer or the environment.⁴

Recent developments illustrated a number of decisions to build new power plants and restart older power plants without following state environmental laws. We shall focus on one example, the State's decision to install 10 generators in the New York City area, and illustrate how the State's accelerated siting process subverted environmental laws because of preexisting flaws within the state energy market.

By focusing on one example, it will be shown that this new system has brought New York to its current situation—the building of numerous plants without a comprehensive or rational energy plan, and a push for distributed generators, increasing pollution of the State's air, water, and other natural resources, such as approving the Athens power plant in the historically rich and natural landscape of the Mid-Hudson Valley. The decision to build these generators in New York City in 2001 has set the precedent for use of this strategy elsewhere, raises environmental justice concerns, and illustrates the current shortsighted approach of New York's energy policy.

4. In California, deregulation became so unpopular that the California Energy Commission Internet Homepage once provided a whole section of how consumers could file a complaint "about [their] Bills or Deregulation."

II. Power Authority of the State of New York's Siting of Electric Turbines In New York City: Legal and Policy Issues

In August of 2000 PASNY sited 10 gas turbines in various locations around New York City for the explicit purpose of closing "the anticipated gap in electrical generating capacity and [to] ensure the reliability of the New York City metropolitan area's electric system."⁵ According to PASNY, "the Department of Public Service informed PASNY that immediate action is needed to assure adequate electrical supply next summer, and to help protect and preserve human life, health, property, and natural resources."⁶ PASNY claimed that in response to this request, the "NYPA Trustees on August 29, 2000 approved a resolution to purchase up to eleven" gas turbines.⁷

PASNY's description shows the expedited nature of the process that was followed to install the gas turbines. In a letter dated October 12, 2000, DPS indicated to PASNY that there was the need for an additional 315 MW of generating capacity in New York City.⁸ The letter, identifying the need for additional generating capacity, was dated over one month after PASNY approved the resolution to purchase the gas turbines raising questions. The authorization to purchase before the statement of need was received raises questions about process the agency followed for its determination of need. The October 12, 2000 letter also raised questions about PASNY's assertion that the turbine purchase was in response to the Public Service Commission ("PSC") request.

PASNY installed General Electric LM 6000 simple-cycle gas turbines, each of which is essentially a jet engine housed in a modular unit, that are coupled with air-cooled electric generators.⁹ The gas turbines "can provide a constant power output of 47 MW at ambient temperatures up to 100° F, of which 3 MW are required for onsite operations and 44 MW are available for distribution on the electrical grid."¹⁰ The maximum capacity for the dual

5. NEW YORK POWER AUTHORITY, ENVIRONMENTAL ASSESSMENT FORM FOR SITE SELECTION AND INSTALLATION OF TEN NATURAL GAS TURBINE GENERATORS IN NEW YORK CITY AND LONG ISLAND A-2 (2000) [hereinafter PASNY EAF].

6. PASNY EAF, *supra* note 6, at A-3.

7. *Id.*

8. Letter from Howard Tarler, Chief, Bulk Transmissions System for the Public Service Commission, to Robert Hiney, Executive Vice President-Project Operations, New York Power Authority 1 (Oct. 12, 2000).

9. PASNY EAF, *supra* note 6, at A-3.

10. *Id.* at S-14.

gas turbine site would be 94 MW, with a net output of 88 MW of electricity to the grid. The number of gas turbines installed and the chosen sites included:

Sunset Park, Brooklyn:	23rd and 3rd Avenues – 2 turbines
Williamsburg, Brooklyn:	North 1st Street and River Street – 1 turbine
Long Island City, Queens:	42 – 30 Vernon Blvd. – 2 turbines
South Bronx:	Harlem River Rail Yards at East 132nd Street – 2 turbines
South Bronx:	East 132nd to East 134th Street, Locust Avenue – 2 turbines
Brentwood, Long Island:	Pilgrim State Hospital, Islip – 1 turbine. ¹¹

State Law requires an environmental review when a new power plant is sited. The review may be conducted pursuant to either Article X of the Public Service Law (“PSL”), or to the State Environmental Quality Review Act (“SEQRA”), depending upon the plant’s generating capacity.¹² In this case, PASNY concluded that Article X did not apply; a decision by the Siting Board confirmed their interpretation, and concluded that no environmental impact statement was required under SEQRA because the project had no “significant” adverse environmental impact.

A. PSL Article X Review

Article X of the PSL sets forth a process for the siting of major electric generating facilities. The statute applies to electric generating facilities with “a generating capacity of eighty thousand kilowatts or more.”¹³ The Electric Generating Facility Siting Board (“Siting Board”) oversees the Article X review process.¹⁴ The review concludes when the Siting Board decides whether to

11. *Id.* at A-3. As will be discussed, the locations of the turbines are critical in understanding the problems with the current state of energy policy in New York.

12. N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2002); N.Y. PUB. SERV. LAW § 164 (McKinney 2002) (outlining application requirements); N.Y. PUB. SERV. LAW § 160(2) (McKinney 2002) (defining “[m]ajor electric generating facility” as facility with generating capacity of greater than 80,000 kilowatts).

13. N.Y. PUB. SERV. LAW § 160(2).

14. The seven member Siting Board consists of the Commissioners of the Department of Public Service (“DPS”), Environmental Conservation, Health, State Energy Office, Economic Development, and two ad-hoc members. The Commissioner of the DPS chairs the Siting Board. *Id.* § 160(4).

issue a "certificate of environmental compatibility and public need" which is required for operation.¹⁵ There was no question that Article X did not apply to the proposed sites that had one gas turbine capable of producing 47 MW at maximum capacity. The Siting Board agreed that under that condition, Article X would not apply to the dual turbine sites. On October 31, 2000, PASNY sought a declaratory ruling from the Siting Board that Article X did not apply to the siting of four sites that had two turbine generating facilities.¹⁶ In the petition to the Siting Board, PASNY agreed to a "legally binding commitment" that the units will not operate at or above 80 MW.¹⁷

For many, the Siting Board's decision raised more questions than it answered. On its face, the Siting Board's decision allowed the dual turbine facilities to generate 85.9 MW in direct violation of the 80MW threshold language found in Article X.¹⁸ Many argued that the decision was contrary to the statutory language and therefore illegal. Two separate lawsuits were brought, but the courts did not reach the 80 MW question.¹⁹ Under the statutory language, a "major electric generating facility" means an electric generating facility with a generating capacity of eighty thousand kilowatts or more."²⁰ The Siting Board concluded that if a "legally binding commitment" is made the "units will not be operated at a *total net generating capacity of 80 MW or more*," then "the generating facility so constructed and so operated will not be a major electric generating facility," and therefore, not subject to Article X.²¹ The Siting Board's decision cleverly added the term "net" to the statutory "generating capacity" language, which can be read

15. *Id.* § 160(6). See also N.Y. PUB. SERV. LAW §§ 162(1), 168, & 169 (describing the certification requirements).

16. See Petition by the Power Auth. of New York for a Declaratory Ruling that a Bd. Certificate is Not Required for Combinations at a Site of Generators that Shall Be Operated at a Combined Wattage of Less than Eighty Thousand Kilowatts, Declaratory Ruling Concerning Standard for Defining Generating Capacity, N.Y.S. Pub. Serv. Comm'n Bd. on Elec. Generation Siting & the Env't, 2000 N.Y. PUC LEXIS 911, *1 (No. 00-F-1934) (Nov. 16, 2000) [hereinafter Siting Board Decision].

17. *Id.*

18. *Id.* at *1-2.

19. See generally *UPROSE v. Power Auth.*, 729 N.Y.S.2d 42 (App. Div. 2001); *Silvercup Studios, Inc. v. Power Auth.*, 729 N.Y.S.2d 47 (App. Div. 2001) (finding in *UPROSE* that it was sufficient to prepare an environmental assessment form whereby the Power Authority promised they would not exceed the 80 MW capacity, while *Silvercup Studios* focused on the importance and necessity of an Environmental Impact Statement).

20. N.Y. PUB. SERV. LAW § 160(2) (McKinney 2002).

21. Siting Board Decision, *supra* note 17, at *13-14 (emphasis added).

as effectively allowing an 85.9 MW generating capacity for each double turbine site. Net capacity is gross MW capacity minus operational MW which equals net operational MW. In this case, the "net" calculation allows actual generation of 85.9 MW, or 79.9 MW plus 6 MW to operate the two units.

The Siting Board concluded that the statute left the "nature of the 80,000-kilowatt test for exemptions to the discretion of the Chairman of the Board."²² The Siting Board's analysis focused on whether the Legislature intended "generating capacity" to mean "a design standard" or "an operational standard."²³ The Siting Board reasoned that an operational standard "is logical because whether one is concerned with the environment, the consumer, or both, a plant's actual generation is much more significant than its theoretical capacity."²⁴ The Siting Board's reasoning is in response to arguments by various petitioners that Article X should apply in this case because two generating facilities have a "nameplate rating of 94 MW and a net capacity of 88MW."²⁵

The Siting Board reasoned, "[b]ecause an exemption based on a plant's *actual operation*, as opposed to its nameplate capacity, is not only consistent with Article X's legislative history, but a more accurate gauge of a project's potential environmental impact, the operational standard is a more realistic method for deciding which projects must follow Article X."²⁶ The Siting Board relied upon "legislative intent" specifically referred to in a Division of Budget

22. *Id.* at *10.

23. *Id.*

24. *Id.* at *8. While the Article X statutory language explicitly includes exemptions from its provisions, it does not include an exemption for 'operational restrictions' as suggested by the Siting Board. Exemptions from Article X include: (a) facilities that applied for a permit within 180 days of signing into law or if under construction, (b) facilities over which the federal government exercises exclusive jurisdiction, (c) facilities under repairs that do not "result in an increase in capacity of the facility of more than fifty thousand kilowatts," (d) facilities constructed on lands dedicated to industrial uses and generating capacity for such premises does not exceed 200,000 kilowatts, or (e) facilities generating electricity from combustion of solid waste. N.Y. PUB. SERV. LAW § 162(4)(a)-(e).

25. Siting Board Decision, *supra* note 17, at *5. The petitioning parties were, "Citizens United for Responsible Energy (CURE), Environmental Advocates (EA), Natural Resources Defense Council (NRDC), New York Institute of Legal Research (NYILR), New York Lawyers for the Public Interest, Inc. (NYLPI), New York Public Interest Research Group (NYPIRG), Southern Energy Bowline, L.L.C.; Southern Energy Lovett, L.L.C.; and Southern Energy NYGen, L.L.C. (the Southern parties)." *Id.* at *4 n.2.

26. *Id.* at *9 (emphasis added).

report to support its position.²⁷ The memo, from an Executive branch agency, characterized the bill as applying on a “mandatory basis” to “‘a facility . . . that *produces* eighty thousand kilowatts or more.’”²⁸ The language relies on the term ‘produces’ for the proposition that an “operational” capacity is what the legislature intended. The Siting Board concluded “[w]hile the legislative history does not expressly spell out the purpose of the 80,000-kilowatt cutoff, it suggests that the 80,000-kilowatt standard should be based on a plant’s actual production, rather than its nameplate.”²⁹ The Siting Board does not explain how the word “produces” in a Department of Budget memo, with no other reference to any other document in the Legislative record justifies its legal interpretation. In light of the plain language of the statute, the legal reasoning appears dubious at best, but the Department of Budget memo provides tenuous authority to allow the Board to conclude that the legislature intended an actual production definition versus a nameplate capacity definition.

27. *Id.* at *9 n.4; see also 1992 N.Y. Laws 1471. Only two of the sixteen memos in the S. 4912-A bill jacket reviewed by the authors use the word “produces” when discussing the 80 MW threshold requirement of the statute. Two memoranda state “produces.” One states, “[a] new article of the Public Service Law reestablishes a certification process for the siting of new electric generating facilities producing 80 MW or more.” Memorandum from William E. Davis, Senior Vice President, Niagara Mohawk Power Corporation, to Elizabeth D. Moore, Counsel to the Governor (July 21, 1992), *reprinted in* Bill Jacket 1992 ch. 519, S. 4912-A (N.Y. 1992). The other states, “[d]efinition of ‘major electric generating facility’ has been revised from a facility that produces fifty thousand kilowatts or more to one that produces eighty thousand kilowatts or more.” Memorandum, Budget Report on 10 Day Bills (July 9, 1992), *reprinted in* Bill Jacket 1992 ch. 519, S. 4912-A (N.Y. 1992). Other memoranda in the bill jacket do not state “produce,” but rather refer to “capacity.” See Memorandum from Howard A. Fromer, General Counsel, N.Y.S. Energy Office, to Elizabeth D. Moore, Counsel to the Governor (July 14, 1992), *reprinted in* Bill Jacket 1992 ch. 519, S. 4912-A (N.Y. 1992) (stating “[t]he new siting provision . . . would apply to both steam and non-steam facilities with generating capacities of 80 MW or more.”); Memorandum from Stanley B. Klimberg, General Counsel, Long Island Power Authority, to Elizabeth D. Moore, Counsel to the Governor (July 8, 1992), *reprinted in* Bill Jacket 1992 ch. 519, S. 4912-A (N.Y. 1992) (stating “[i]n addition, the new Article X provisions would apply to both steam and non-steam facilities . . . with a generating capacity of 80 megawatts or more.”); Memorandum from Langdon Marsh, Executive Department Commissioner, N.Y.S. Department of Environmental Conservation, to Elizabeth D. Moore, Counsel to the Governor (July 16, 1992), *reprinted in* Bill Jacket 1992 ch. 519, S. 4912-A (N.Y. 1992) (stating “[t]hey extend to all major electric generating facilities, as opposed to all major steam electric facilities, with a threshold of 80 MW.”).

28. Siting Board Decision, *supra* note 17, at *9 n.4 (citing “the Budget Report on 10 Day Bills for S4912A, which describes the definition of ‘major electric generating facility.’”).

29. *Id.* at *8.

B. The Siting Board's Decision Sets a Precedent for Energy Policy in New York that May Compromise Public Health Protections

The precedent set by the PASNY petition is far reaching. In December 2000, the PSC asked that utilities "consider identifying appropriate sites for small-scale generation (less than 80MW) and provide information regarding small-scale generation units that they expect to be installed in the near future."³⁰ The PSC's call for additional sites also became a *de facto* energy policy of the state, particularly in the New York City metro area and on Long Island, due to electrical infrastructure issues, such as transmission of electricity to these regions.

Under the Siting Board's decision, government or private entities can effectively bypass the procedural safeguards and environmental review afforded by Article X. Other power plant operators were quick to exploit PASNY's approach. In mid-2001, the Long Island Power Authority ("LIPA") proposed an almost identical plan to use turbines on Long Island.³¹ LIPA proposed "10 new mini-plants" (the same General Electric LM 6000 models used by the PASNY) to avoid potential energy shortfalls in the summer of 2002.³² Calling the mini-plants "peaking stations," LIPA argues that they will be used only when demand is high and energy supply is low. Turbines that will be placed in Port Jefferson, Glenwood Landing, Shoreham and Brentwood have each been earmarked to *produce* only 79.9 MW, and are therefore not subject to Article X.³³ On November 13, 2001, LIPA approved the Environmental Assessment ("EA") under SEQRA and issued a nega-

30. In re a Status Report on the Demand/Supply Component of the Department's Electric Price and Reliability Task Force Including Recommendations for Specific Utility Actions on the Demand-Side, Order Requiring Filings and Reports on Utility Demand Response Programs, N.Y.S. Pub. Serv. Comm'n, No. 00-E-2054 (Dec. 20, 2000), 2000 N.Y. PUC LEXIS 1041, at *5.

31. See Press Release, Long Island Power Authority, LIPA and KeySpan Announce Second Plan for New Generation (July 12, 2001), at http://www.lipower.org/newscenter/pr/2001/july12_01.htm (explaining the proposal to construct two new combustion turbines fueled by natural gas); see also LONG ISLAND POWER AUTHORITY, COMBUSTION TURBINE PROJECT ENVIRONMENTAL ASSESSMENT (Nov. 13, 2001), at <http://www.lipower.org/pdfs/EA/Global%20EA.pdf> (last visited Jan. 31, 2003) (providing project description and project-wide Environmental Assessment of five proposed facilities).

32. Elissa Gootman, *Proposed Mini-Plants Are Part of a Long-Term Energy Plan*, N.Y. TIMES, Oct. 19, 2001, at D6.

33. Press Release, Long Island Power Authority., LIPA Announces Five New Turbine Generators for Shoreham, Brentwood and Bethpage (Oct. 18, 2001), at http://www.lipower.org/newscenter/pr/2001/oct18_01.htm (last visited Jan. 31, 2003).

tive declaration, fast tracking the turbines which are set to move forward subject to DEC approval.³⁴ The LIPA turbine proposal and the ability to avoid Article X review shows the true implications of PASNY's actions on energy policy in New York.

III. SEQRA Review of the Siting of the Electric Generators

The Siting Board's determination that Article X did not apply to PASNY's dual turbine sites in Brooklyn, Bronx and Queens triggered the environmental review provisions under SEQRA.³⁵ SEQRA requires state agencies to take a "hard look" at the environmental impacts of their actions, and to consider alternatives.³⁶ The intent of the environmental impact statement ("EIS") process is for government decision makers to have all of the relevant and necessary facts *before* making decisions on projects that may have an environmental impact.³⁷ The statute's aim is that the agency will have sufficient information at the end of the process to decide whether to approve the project.³⁸ If the agency chooses to move forward, it must mitigate those impacts identified.³⁹

In this case, PASNY was the lead agency charged with implementing SEQRA. PASNY conducted a single environmental assessment for all six of the turbine sites, with each sites' characteristics and analysis included as attachments to the main analysis. The EA concluded that the siting of these turbines was a Type I action, which the law defines as "those actions and projects that are *more likely* to require the preparation of an EIS."⁴⁰ A Type I action "carries with it the *presumption* that it is likely to have a significant adverse impact on the environment."⁴¹ An

34. Press Release, Long Island Power Authority, LIPA Board Approves Environmental Assessment of Powering LI 2002 Turbine Projects (Nov. 13, 2001), at http://www.lipower.org/newscenter/pr/2001/nov13_01_b.htm; see also Christine Woodside, *Cross-Sound Cable Takes Step Forward*, N.Y. TIMES, Jan. 13, 2002, § 14LI, at 2.

35. SEQRA review is required for the single turbine sites because these facilities fall below the Article X 80 MW threshold. See *UPROSE v. Power Auth.*, 729 N.Y.S.2d 42, 46 (App. Div. 2001); *Silvercup Studios, Inc. v. Power Auth.*, 729 N.Y.S.2d 47, 49 (App. Div. 2001). The Siting Board in its decision also explicitly recognizes the applicability of SEQRA. Siting Board Decision, *supra* note 17, at *11.

36. See N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0106 (McKinney 2002); *H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832 (App. Div. 1979).

37. See N.Y. ENVTL. CONSERV. LAW § 8-0103(7); *WEOK Broadcasting Corp. v. Planning Bd.*, 568 N.Y.S.2d 974 (App. Div. 1991).

38. See N.Y. ENVTL. CONSERV. LAW § 8-0103(7); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(d) (2002).

39. N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

40. N.Y. COMP. CODES, R. & REGS. tit. 6, § 617.4(a) (emphasis added).

41. *Id.* § 617.4(a)(1) (emphasis added).

agency can rebut this presumption if the record "show[s] that it identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasoned elaboration' of the basis for its determination."⁴²

SEQRA regulations require the lead agency to "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment," and provide a "reasoned elaboration" of its conclusions.⁴³ The threshold for a full environmental review is very low, requiring only "the *potential for at least one significant adverse environmental impact*" for the lead agency to issue a "positive declaration," and prepare a full EIS.⁴⁴ PASNY concluded that there were no significant environmental impacts, and issued a negative declaration or "neg. dec." which effectively ended the substantive environmental review process.⁴⁵ Upon review of PASNY's EA, the court concluded that a full Environmental Impact Statement was required.⁴⁶

Community groups raised many substantive environmental issues regarding the siting of the turbines. The issues raised include particulate matter, noise, and the impact of the project on community character. The groups alleged that the EA failed to address whether the turbines would release air pollution called particulate matter of 2.5 microns or less ("PM 2.5"), which are fine soot particles that when inhaled are linked to health problems, including asthma and premature death, into the communities surrounding these facilities. Particulate matter is recognized as a non-threshold pollutant, meaning that any ambient concentration may cause adverse health threats.⁴⁷ This fact raises a significant enough environmental and public health issue to warrant full en-

42. *H.O.M.E.S.*, 418 N.Y.S.2d at 832.

43. N.Y. COMP. CODES, R. & REGS. tit. 6, § 617.7(b)(3)-(4) (2002).

44. *Id.* § 617.7(a)(1) (emphasis added).

45. PASNY EAF, *supra* note 6, at 1-2. The negative declaration applies to the SEQRA review of all of the proposed gas turbines. *Id.* The power plant proposed for Staten Island originally received a positive declaration, but subsequently was withdrawn from consideration as a power plant location.

46. *See UPROSE*, 729 N.Y.S.2d at 46 (concluding that in light of the "potential adverse health effects that can result from PM 2.5 emissions," NYPA failed to take the requisite "hard look"); *see also Silvercup Studios*, 729 N.Y.S.2d at 49-50 (ruling the Supreme Court properly annulled the neg. dec. and required preparation of a full EIS because EAF revealed several areas of potentially significant environmental impact).

47. *See UPROSE*, 729 N.Y.S.2d at 45 (defining non-threshold pollutant as having some possibility of causing an adverse health impact at any concentration).

vironmental review. On this issue the Court concluded that PASNY's analysis of particulate matter "is not sufficiently detailed in the EAF and is not an adequate substitute for addressing the health impacts of PM 2.5 emissions."⁴⁸ The issue is of particular relevance because the turbines are located in neighborhoods that have some of the highest asthma hospitalization rates in the world.⁴⁹

Community residents also commented on noise impacts. They alleged that the noise coming from the fully operating facility exceeded city noise limitations.⁵⁰ They also alleged that the EA was based upon testing methods that can overestimate background noise levels. Noise can have an adverse impact on people living or working near the turbines. Increased noise levels can have a range of adverse impacts on people, including stress, illness, sleep deprivation, and interference with learning.

The EA analysis stated that the turbine buildings would be similar to existing neighborhood buildings, and therefore, were consistent with the existing uses.⁵¹ The turbines are located in minority communities that are in the process of reclaiming their waterfront areas. The PASNY analysis effectively concluded that since these communities are industrial in character, no industrial project could negatively affect the neighborhoods. This conclusory assertion is not based on any analysis of the actual impact on the communities. Additionally, the sites are located next to parks and

48. See *id.* at 46.

49. See Kenneth M. McConnochie et al., *Socioeconomic Variation in Asthma Hospitalization: Excess Utilization or Greater Need?*, 103 PEDIATRICS e75 (1999), available at <http://www.pediatrics.org/cgi/content/full/103/6/e75> (last visited Jan. 31, 2003) (noting that the high incidence of severe asthma among inner-city children is attributable in part to adverse environmental conditions); see also CLEAN AIR TASK FORCE, TOP NEW YORK COUNTIES SUFFERING THE GREATEST PUBLIC HEALTH IMPACTS DUE TO POWER PLANT PARTICULATE EMISSIONS (2000) (figure provided by the American Lung Association, Brooklyn); NEW YORK CITY DEPT. OF HEALTH, ASTHMA FACTS, fig. 5, at 5 (1999) available at <http://www.asthma-nyc.org/publications/AsthmaFacts.pdf> (indicating higher rates of asthma hospitalization in NYC's poor neighborhoods).

50. PASNY acknowledged technical violations of city noise ordinances. PASNY EAF, *supra* note 6, at S-18, D-24 to D-27; see also NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, CEPO-CEQR NOISE EXPOSURE STANDARDS §§ 42-20 & 42-21 (1993) (stating that "any new activity shall not increase the ambient noise level by 3 dBA or more").

51. PASNY EAF, *supra* note 6, at C-10.

schools.⁵² PASNY eventually added a brief Environmental Justice section to the EA, after the sites were approved.⁵³

In the Siting Board's decision to 'exempt' the dual turbine installation sites from the requirements of Article X, it suggested at a minimum that the siting of these facilities would require a SEQRA review.⁵⁴ SEQRA requires the applicant to make a "demonstration that the facility will satisfy electric generating capacity needs."⁵⁵ This showing would have answered many questions that still remain regarding whether there was a need for these turbines. However, the PASNY neg. dec. ended the review process at the Environmental Assessment stage, and allowed PASNY to avoid showing electric capacity 'need,' and thereby precluded a full and substantive environmental impact review.

IV. Energy Need, California and New York's Rationale for Fast Tracking the NYPA Turbines

PASNY cited the PSC's letter of an "urgent and compelling need" for additional electric generating capacity to justify, in part, the installation of the turbines in New York City.⁵⁶ The additional electricity capacity, the PSC argued, was required for the City to meet the New York Independent Systems Operator's ("NY-ISO") 80% locational capacity requirement.⁵⁷ NYISO is a private organization that was created in New York after deregulation to monitor electricity sales, prices, needs, and electricity distribution in the State.

The locational requirements in New York City are in place because of congestion, or 'bottlenecking' in the electricity supply

52. See *Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York: Hearing Before the Assembly Standing Comm. on Energy, Assembly Standing Comm. on Corps., Authorities & Comm'ns, & Assembly Standing Comm. on Envtl. Conservation*, 224th Leg. (N.Y. 2001) (testimony of Michael D. Zarin, Esq., Attorney, Zarin and Steinmetz, & Elizabeth C. Yeampierre, Executive Director, UPROSE).

53. *Id.* (testimony of New York Power Authority).

54. Siting Board Decision, *supra* note 17, at *11.

55. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(h) (McKinney 2002).

56. See Tarler Letter, *supra* note 9, at 1. There were similar predictions for summer of 2000. On May 22, 2000, the NYISO concluded that in-city generation capacity would be short by approximately 300 MW. N.Y. INDEP. SYS. OPERATOR, *LOCATIONAL REQUIREMENTS STUDY COVERING THE NEW YORK CONTROL AREA FOR THE 2000-2001 CAPABILITY YEAR 7* (2000), available at http://www.nyiso.com/services/documents/planning/pdf/locational_reqmts_study_master_rev5.pdf [hereinafter NYISO *LOCATIONAL REQUIREMENTS STUDY*].

57. See Tarler Letter, *supra* note 9, at 1; NYISO *LOCATIONAL REQUIREMENTS STUDY*, *supra* note 57, at 3, 7.

grid that restricts the transmission of upstate and out of state generated electricity to the City. The resulting shortage can increase the City's susceptibility to power outages. In response, NY-ISO requires the City to have the ability to generate 80% of its electric needs in-city.⁵⁸ In 2001, the 80% requirement translated into a need for 8,427 MW of in-city generation.⁵⁹ This projection was based upon the PSC's finding that the summer 2000's capacity requirement was 8,272 MW, plus a 1.5% (155 MW) projected demand increase in 2001, yielding a 2001 Summer Capacity Requirement ("2001 SCR") of 8,427 MW.⁶⁰

Several questions were raised regarding the accuracy of the PSC assertion that an additional 315 MW were needed. Environmental advocates pointed out that several generating sources that were to be available in summer 2001 were not included by the PSC in its October 2000 electricity needs analysis. These uncounted, but available generating sources, totaled up to 527 MW of in-city capacity.⁶¹ As advocates pointed out and available documents showed, the additional unaccounted capacity erased the 315 MW deficit, resulting in a surplus of up to 212 MW of in-city generation capacity for the summer of 2001. The conflicting numbers offered by different sources underscores the difficulty in forecasting electric generating capacity needs, and raises questions about the adequacy of the analysis that the PSC relied upon. This is not to say that all of these facilities would have been online or that there was no need for concern. However, it appeared that the PSC may not have been as thorough in its analysis as it could

58. NYISO LOCATIONAL REQUIREMENTS STUDY, *supra* note 57, at 3, 7.

59. *Id.*

60. *See id.* at 7. (indicating 155 MW figure derived from taking 1.5% of the PSC estimate for the summer 2001 MW load of 10,340); *see also* Tarler Letter, *supra* note 9, at 1 (indicating that "electric load growth in the City will continue to increase by at least 1.5% per year."); ENERGY COMMITTEE, NEW YORK BUILDING CONGRESS, A MATTER OF URGENCY: NEW YORK CITY'S ELECTRIC SUPPLY NEEDS 14 (2001) (using the 8,272 MW figure).

61. Affidavit of Ashok Gupta in support of Verified Petition ¶¶ 2, 6, 25, 27, 29, 32, UPROSE v. Power Auth., 729 N.Y.S.2d 42 (App. Div. 2001). The additional generating capacity comes from the following currently available facilities: Astoria at 170 MW, an increased capacity of existing sources at 157 MW, a Key Span site at 40 MW and Linden Cogeneration at 70 MW; other sites available by June 2001: ConEd Unit 10 at 60 MW and increased capacity of ConEd Gowanus at 30 MW, totaling 527 MW. The analysis is based, in part, upon Natural Resources Defense Council Senior Energy Economist Ashok Gupta's review and analysis of publicly available documents on generating capacity in New York City in preparation for litigation against NYPA. It is important to note that Mr. Gupta's analysis is the only detailed analysis specifically looking at the PSC's claimed 315 MW deficiency. The PSC and NYPA have produced no equivalent analysis, but would be required to do so under SEQRA.

have been. Subsequent studies from NYISO and the PSC confirm the apprehension on this point.

The question regarding how much electricity capacity was needed for summer 2001 was further complicated by other electricity initiatives. The amended System Benefits Charge ("SBC") for utilities has provided a monetary incentive for efficiency. Beginning in 2001, the PSC increased overall SBC funding from \$78.1 million to \$150 million.⁶² This funding caused a decreased energy demand, which was *not* factored into the original PSC needs analysis. As the PSC stated in its order, "[a]long with the newly added \$10 million set aside program, these intensive peak load reduction programs and the other energy saving programs of the extended five-year program are expected to substantially reduce demand by the summers of 2001 and 2002."⁶³ The New York State Energy Research and Development Authority ("NYSERDA") projected that SBC programs would "result in peak demand reduction of 250 - 300 MW by summer 2001," and the entire project is "projected to reduce peak demand by nearly 1,300 MW by 2006."⁶⁴

In addition to the SBC changes, NYISO is considering a Demand Response Program that would pay large customers and suppliers who could aggregate their customers in order to scale back electricity demand at peak times.⁶⁵ The program would provide a tremendous financial incentive to reduce electricity use, and would also result in decreased electricity needs during peak load times in summer 2001.

PASNY spent over \$510 million to purchase the ten turbines from General Electric.⁶⁶ PASNY stated that it had sufficient re-

62. In re Competitive Opportunities Regarding Electric Service, Order Continuing and Expanding the System Benefits Charge for Public Benefit Programs, N.Y. Pub. Serv. Comm'n, No. 94-E-0952, 2001 N.Y. PUC LEXIS 77, at *22-23 (Jan. 26, 2001).

63. *Id.* at *39. The issue here is whether the PSC forecasters had knowledge of the proposed changes to the SBC, and how those changes would impact electricity need forecasts.

64. NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, SYSTEMS BENEFITS CHARGE: PROPOSED OPERATING PLAN FOR NEW YORK ENERGY SMART PROGRAMS (2001-2006) 2 (2002), available at <http://www.nyserda.org/sbc2001-2006.pdf> (last visited Feb. 4, 2003) [hereinafter NYSEDA, SYSTEM BENEFITS CHARGE].

65. See NEENAN ASSOCIATES L.L.C., NYISO PRL PROGRAM EVALUATION: EXECUTIVE SUMMARY E-2 to E-3 (2002), available at http://www.nyiso.com/services/documents/groups/bic_price_responsive_wg/demand_response/evaluation/exec_summary_final.pdf (last visited Feb. 4, 2003).

66. *Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York: Hearing Before the Assembly Standing Comm. on Energy, Assembly Standing Comm. on Corps., Authorities &*

sources on hand to make this purchase, and the deal would not cause tax increases, or loss of services from the agency. The price is significant because experts have conservatively estimated that a 1 MW reduction can be reached for each \$1 million spent in electricity conservation efforts.⁶⁷ There are also environmental and public health benefits from reduced electricity consumption because the pollution caused by its generation is decreased.⁶⁸ Removing, reducing or eliminating the need for electricity where possible is *the environmentally responsible long-term solution* for New York because that electricity, and the pollution caused by its generation will no longer be necessary.

PASNY took a considerable concerted effort to install the turbines and have them operational by June 1, 2001. Public statements illustrated the "immediate action" mode of the agency on this project. PASNY created the impression that New York was on the verge of an energy crisis like California's, where "rolling blackouts" had significant impacts on the state. PASNY recently stated in its public comments on a lawsuit brought by environmental and public interest groups challenging PASNY's siting decisions that "[e]very day's delay . . . will push New York City one day closer to California".⁶⁹ The publicly available record shows that the agency's allegations that New York was about to enter a California-style energy crisis were without merit.

V. The California Comparison Was Unwarranted

In 2001, New York did not have problems similar to those that struck California. This is because of electricity system differences with California, such as electric generating capacity reserve requirements, in-state generating capacity, and market struc-

Comm'n's, & Assembly Standing Comm. on Envtl. Conservation, 224th Leg. 184 (N.Y. 2001) (testimony of Eugene W. Zeltmann, President, PASNY), available at <http://www.nypa.gov/interest/10322a.htm> (last visited Feb. 4, 2003); see also N.Y. Power Auth., *Power Now! Generators*, at <http://www.nypa.gov/PowerNow/pn.htm> (last visited Feb. 4, 2003) (indicating \$5,000,000 per unit was spent to "equip the plants with the most advanced technology available for controlling pollution and reducing noise.").

67. NYSEDA, SYSTEM BENEFITS CHARGE, *supra* note 65, at 21.

68. *Id.* at 3 (noting "programs from 2001 through 2006 electric savings of 13,000 GWh and emissions reductions of approximately 10,000 tons of NO_x, 20,000 tons of SO₂ and nearly 6.0 million tons of CO₂.").

69. Kirk Johnson, *Critics of Power Generators Sue, Citing Threat to Environment*, N.Y. TIMES, Feb. 8, 2001, at B4.

ture.⁷⁰ As William Museler, head of the New York Independent System Operator stated, "California's electricity market is designed and operates in a materially different way from New York's market . . . we need to be very careful not to draw generalized conclusions and impose quick fixes."⁷¹

New York's installed reserve requirement is a NYISO 'margin of error' established annually to ensure there is adequate electricity in case of forced outages, deratings, and capacity/load relief.⁷² The installed reserve requirement is 18%, which translates to an approximate 5,000 MW cushion, or supply surplus available under peak demand.⁷³ California does not have such a requirement.

New York's peak demand was expected to be 30,200 MW in 2001, but the State had the capacity to generate over 35,636 MW.⁷⁴ In addition to the generating capacity currently available to the City, the installed reserve requirement will further be eased by the 5,547 MW capacity currently moving through the Article X process.⁷⁵ Several years must pass and a significant increase in

70. California electricity demand has increased by 2-3% a year for the past several years but supply has not kept pace. Between 1996-1999 California's growing economy caused peak period demand to increase by over 5,500 MW. California's rate of increase is considerably higher than current increases in New York. New York's demand for electricity has been rising about 1.5% a year, and the amount of electricity demand for next year is still well beneath the state's electricity generation capability. See MICHAEL KAHN & LORETTA LYNCH, CALIFORNIA'S ELECTRICITY OPTIONS AND CHALLENGES: REPORT TO GOVERNOR GRAY DAVIS, available at http://www.cpuc.ca.gov/published/report/Gov_Report.htm#TopofPage (last visited Feb. 4, 2003).

71. NYISO Responds to PSC Market Examination, 2 CURRENTLY . . . INSIGHT FOR MARKET PARTICIPANTS 1 (2001) available at http://www.nyiso.com/services/documents/newsletters/pdf/currently_vol2no1_jan.pdf (last visited Feb. 4, 2003).

72. See ANJALI SHEFFRIN, DEVELOPING AN EFFICIENT CA MARKET—COMPARISON OF OTHER US ISOs (2000), available at <http://www.caiso.com/docs/09003a6080/05/a8/09003a608005a8c8.pdf> (last visited Feb. 4, 2003); see also NEW YORK INDEP. SYS. OPERATOR, NYISO INSTALLED CAPACITY MANUAL, OVERVIEW OF INSTALLED CAPACITY PLANNING AND PROCUREMENT PROCESS (2001), available at http://www.nyiso.com/markets/icap_auctions/icap_manual_nov_01/2_stage_2_icap_nov_2001.pdf (last visited Feb. 4, 2003).

73. NYISO LOCATIONAL REQUIREMENTS STUDY, *supra* note 57, at 3. Imported electricity can count as part of the reserve margin. Currently that level is set at 3165 MW.

74. David Robinson, *Electricity—Will There Be Enough?*, BUFFALO NEWS, Jan. 21, 2001, at 1A.

75. See NEW YORK STATE DEP'T OF PUB. SERV., ARTICLE X CASES, at <http://www.dps.state.ny.us/xtable.PDF> (revised Dec. 31, 2002). Pending applications include Astoria Energy, LLC, Astoria Queens totaling 1000 MW (estimated in-service date 2004); East River Repowering, Lower Manhattan totaling 360 MW (estimated in-service date 2002); Poletti Station Expansion, Astoria Queens totaling 500 MW (estimated in-service date 2004); Ravenswood Cogeneration Project, Long Island City, Queens totaling 250 MW (estimated in-service date 2004); and Sunset Energy Fleet

demand must occur before an electric generating capacity shortage similar to California's could develop in New York. Overall, New York generates more than enough electricity in state. The total amount of in-state generation will increase as more power plants come online in the next few years.⁷⁶ This does not include the agreements that New York has established with the surrounding electricity market. Even with the increased demand in 2001, New York did not run out of electricity supply, contrary to the assertions of the PSC, PASNY and NYISO. New York imports only 10% of the electricity it consumes. New York has also made several contingent arrangements with out-of-state suppliers, should New York's electricity import needs increase above the current 10% import level.⁷⁷

There are also market differences that separate New York and California. Currently, California has a retail price cap that is much lower. There is no equivalent in New York.⁷⁸ The California cap resulted in losses for utilities because they could not pass the increases onto consumers, regardless of how high the wholesale market price went. To further exacerbate the impact of this system, California prohibits utilities from reaching long-term electric supply contracts in favor of purchasing electricity on the spot market where prices can shift dramatically. The unintended consequences of the price cap and spot market fluctuation resulted in California utilities approaching bankruptcy because they are forced to absorb the increased wholesale prices paid to their electricity suppliers. "The caps prevented the state's utilities from passing their costs onto ratepayers, creating no incentive for con-

LLC, Brooklyn totaling 520 MW. Preliminary scoping includes Oak Point Energy, Brooklyn totaling 1075 MW and Orion Power Astoria Repowering Project, Astoria, Queens totaling 1842 MW. *Id.*

76. See *infra* Part V (illustrating the 527 MW of new generating capacity currently in the Article X siting process).

77. See *infra* Part V. New York has agreements and power arrangements for additional power supply with Hydro-Quebec, Pennsylvania-Maryland-New Jersey Independent System Operator, and New England Independent System Operator. N.Y.S. RELIABILITY COUNCIL, L.L.C., NEW YORK CONTROL AREA INSTALLED CAPACITY REQUIREMENTS FOR THE PERIOD MAY 2001 THROUGH APRIL 2002: EXECUTIVE COMMITTEE RESOLUTION AND TECHNICAL STUDY REPORT (2000).

78. *Power Disruptions, Price Increases, and Customer Issues in New York City and Westchester: Hearing Before the Assembly Standing Com. on Energy*, 223d Leg. (N.Y. 2000) (testimony of Kevin McGrath, Representative, Consolidated Edison Solutions).

sumers to conserve.”⁷⁹ As a result, California’s major electricity suppliers are reluctant to sell electricity to distributing utilities for fear that they will not be paid. The financial problems at the California utilities will ensure continued emergency situations.

VI. Energy Costs and the Flawed Market Structure of Energy Deregulation

While public statements were made that installing the turbines would avoid California-style blackouts in New York, PASNY officials clearly indicated price considerations were playing just as significant a role in the decision making process. In New York, utility rates had doubled, and in some cases tripled. Consumers were feeling these increases. As one owner of a small grocery store indicated, “[a]nd last year’s, this gentleman was charged \$11,432.98, and this year for the same period of time, he’s charged \$22,398.”⁸⁰ The PASNY turbines were also intended to influence those market prices. The candid admission amounts to PASNY getting “back into” the power business after selling such assets as the Indian Point 3 nuclear generating facility. PASNY admitted that the turbines would be “bid into the New York ISO on a day-ahead basis.”⁸¹ This is on top of the fact that turbines could be run twenty-four hours a day, seven days a week.⁸²

79. Alex Berenson, *Deregulation: A Movement Groping in the Dark*, N.Y. TIMES, Feb. 4, 2001, § 4, at 6 (quoting Stephen Slifer, Chief American Economist, Lehman Brothers).

80. *Power Disruptions, Price Increases, and Customer Issues in New York City and Westchester: Hearing before N.Y. State Assembly Standing Comm. on Energy*, 223d Leg. 207 (N.Y. 2000) (testimony of Nelson Eusebio).

81. *Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York: Hearing Before the Assembly Standing Comm. on Energy, Assembly Standing Comm. on Corps., Authorities & Comm’ns, & Assembly Standing Comm. on Envtl. Conservation*, 224th Leg. 190 (N.Y. 2001) (testimony of New York Power Authority).

82. In a 2001 public hearing on energy issues PASNY President admitted that the generators would be bid into the market each day, leaving the significant potential that the generators will be running all the time. As President Zeltmann stated, “[t]hey [(generators)] are going to be bid in the New York ISO on a day-ahead basis.” *Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York: Hearing Before the Assembly Standing Comm. on Energy, Assembly Standing Comm. on Corps., Authorities & Comm’ns, & Assembly Standing Comm. on Envtl. Conservation*, 224th Leg. 191 (N.Y. 2001).

To which Assemblyman Richard Brodsky replied, “In other words, you are going to bid it [power supply from the New York City Turbines] on an every day, every day, no matter what the capacity, we could be well beneath that next capacity need, no hint of brownout, no hint of blackout and these generators will run?” *Id.* (comments of New York State Assemblyman Richard Brodsky).

There is little doubt that the ten turbines could provide an electric supply cushion that the state hoped would offset the tremendous price spikes in tight energy markets. When consumer energy demand is high and energy supply tight, energy producers can bid their supply into the market at a much higher price, knowing that their energy will be used because of such a demand. The reasoning behind increased supply is to provide a cushion and therefore this competition will lower energy prices. Running the turbines 24-hours a day, 7-days a week regardless of need would supply electricity that could lower prices for consumers. PASNY's calculation, however, did not factor the environmental costs and the community impacts and disruptions that the siting of these turbines would cause. The residents of the communities where the turbines were placed by PASNY, who are already dealing with heavy industrial pollution and one of the highest asthma rates in the world, would have to live deal with these costs during continuous operation of the turbines.

Even by increasing the amount of generation within the state, the current market structure is much to blame for the over-charging and market manipulation that will continue to increase consumer rates. The system of energy bidding is fundamentally flawed. The state energy system works on the premise of the 'market-clearing price.'⁸³ Under this system all energy producers place bids for electricity they are willing to supply in the day-ahead, real-time or both markets. The ISO selects bids from the generators up to a point where enough generation is available to meet anticipated demand. When reconciled, suppliers are paid the 'clearing price' based upon bid price paid. In other words, when suppliers bid their energy into the system, all energy at the lowest prices will be taken until the need is fulfilled. However, fluctuation in supply can alter the balance of the market, allowing those who charge higher prices for electricity to be purchased because that electricity is needed. Every supplier is paid the market clearing price, which is the highest bid paid. So some suppliers can bid their energy at next to nothing and actually get paid what the highest bidder charged per MW, whether it is \$250.00, \$500.00 or \$1,000.00.

83. For a thorough review of the energy market rules and policy see NYISO's Manuals, *available at* <http://www.nyiso.com/services/documents/manuals/index.html> (last visited Feb. 4, 2003).

Under this structure, market manipulation can and has occurred.⁸⁴ There have been several instances of market manipulation and abuse.⁸⁵ The ISO market structure keeps the abuses private. As a quasi-public institution, the ISO that is entrusted with the job of overseeing a fair energy process should but does not disclose market manipulation to the consumers who are directly affected by such actions. The market clearing price mecha-

84. See Robert J. Michaels & Jerry Ellig, *Energy—Price Spikes by Design?*, 22 REGULATION 20 (1999) (commenting that the wholesale electricity market operated with efficiency and price spikes are not evidence of the need for price controls); William A. Hogan, *Electricity Market Restructuring: Reforms of Reforms*, (2001), available at <http://64.2.134.196/EnergyConf/hogan.pdf> (last visited Feb. 4, 2003); Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSP., 119, 119-38 (1997) (explaining that changes are being made to encourage competition in the electric industry and to reform regulations and distribution functions); Scott Harvey et al., *Transmission Capacity Reservations Implemented Through a Spot Market With Transmission Congestion Contracts*, 9 ELEC. J. 42 (1996) (noting that capacity reservations can be traded and would fully support the competitive market).

85. See *Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York: Hearing Before the Assembly Standing Comm. on Energy, Assembly Standing Comm. on Corps., Authorities & Comm'n's, & Assembly Standing Comm. on Envtl. Conservation*, 224th Leg. 443-44 (N.Y. 2001):

Assemblyman Richard Brodsky: It is my understanding you've identified around a hundred market manipulations, suspected market manipulations.

NYISO, William Museler: I'm not familiar with that number, sir. We have identified instances of abuse of market power which in terms that—

Assemblyman Richard Brodsky: Who have you referred those abuses to?

CEO Museler: In the cases where we have authority to take action, we've taken action. Our action is typically to do one of a number of things. One is we could change bids; change a generator's bid (from) prospectively going forward. We do not have the authority to retroactively correct prices, so that's—where we have the authority, we do that, we correct the problem going forward.

Assemblyman Richard Brodsky: Could we have a list of those instances?

CEO Museler: We're not, based on the FERC order that we operate under and the code of conduct that we operate under, we are not allowed to relate that information.

Assemblyman Richard Brodsky: May you refer to a law enforcement agency?

CEO Museler: In certain instances we would have the ability to refer things to the FTC.

Assemblyman Richard Brodsky: Other than the FTC, could you refer to the Attorney General of the State of New York?

CEO Museler: I am not aware of anything in the regulations or the FERC orders that we operate under that allow us to do that. . .

Id. (emphasis added).

nism and its susceptibility to market manipulation is part of the new 'free market' for electricity that consumers are faced with, and is one without substantial safety nets that ensure that electricity suppliers cannot use market forces to maximize their profits at the expense of consumers.

VII. Conclusion: A Look Toward the Future

PASNY can and should play a role in achieving price stability and system reliability in New York's electric market. The California crisis of the past few years has drawn much public attention to the electricity system in the United States. California has also illustrated what can go wrong when the state does not adequately address or prepare for electric generating needs of its residents. Addressing issues of price and supply, however, require a rational and open process to develop the best strategy for state residents. There are environmental and public health implications to how we choose to deal with the future of our electricity markets. A knee-jerk reaction to potential crises justified by questionable analyses is not in anyone's long-term interests.

The PASNY turbine case was about more than making sure electricity could be supplied to meet "peak load" requirements. PASNY made it clear that price considerations also played a role. In the haste to install and operate the turbines, two major environmental review statutes in state law were effectively by-passed. The courts heard arguments from community groups that chose to challenge PASNY's environmental review process. They won.⁸⁶ A legally valid siting review process may have ultimately allowed the ten power turbines to be built as proposed. The environmental review would have provided a statutory mechanism for citizens to raise concerns, and if significant, have them mitigated. Such statutorily required review was undertaken after the turbines were sited and constructed. The sites for the turbines are located in predominately low-income, minority areas, with already high levels of asthma and other health concerns from numerous environmental facilities. Any price savings or mitigation resulting from operation of these turbines must be judged in light of the costs to these communities.

86. See *UPROSE v. Power Auth.*, 729 N.Y.S.2d 42 (App. Div. 2001); *Silvercup Studios v. Power Auth.*, 729 N.Y.S.2d 47 (App. Div. 2001) (holding that there were deficiencies in the Environmental Assessment, but the nameplate capacity issues were not part of the decision).

Deregulation of the electric market has been economically and environmentally costly for many New Yorkers. As Assemblyman Paul Tonko stated, "(i)t is ironic that three years after the (Public Service) Commission and Company testified that deregulation would drive down prices and would have no impact on reliability, quite the opposite has happened."⁸⁷ Electricity needs of New York is not a problem that will go away by itself. The state needs a long-term, environmentally sound energy policy, not mass production of generator facilities without long-term vision or regard for the law. There needs to be public and legislative input into what this vision will be. New York is not California. Scare tactics must not be used by government to push through an agenda fraught with so many adverse effects. It is time to fix this energy problem once and for all. The health and safety of New York's residents as well as the preservation of the environment depend on it.

In addition to the problems of deregulation, the NYPA turbines and the LIPA turbines have significant costs: time and money. Several hundred million dollars of state money have been on the "temporary" and expensive operation of electric generating turbines. Considerable effort and time is being put into their construction and operation. The money and time would be much better spent in reducing electricity demand and by developing effective conservation programs. NYSERDA believes that current proposals could have resulted in significant reductions in the amount of electricity that must be generated to meet our electricity needs. Conservation and reduced consumption strategies also have considerable environmental and public health savings that are not easily quantifiable in money terms. New York should learn one valuable lesson from California: conservation can and does work, and should be part of a carefully developed strategy for our future electricity and energy needs.

87. *Power Disruptions Price Increases, and Customer Issues in New York City and Westchester: Hearing before N.Y. State Assembly Standing Comm. on Energy*, 223d Leg. (N.Y. 2000) (comments of Assemblyman Paul Tonko).