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# Watt's Going On?: Illuminating New York's Electric Generation Siting Process

JOHN A. POAKEART\*

## Introduction

To rank the myriad of human discoveries, inventions, and creations is at once an exhilarating and perplexing task. What is above all other of humanity's greatest discovery? For many, the answer would surely be electricity. Since the time when humans first harnessed electricity, its uses have been limited only by our imagination. The world's population expanded with technological advances, and the number of people with access to electricity has increased as well. It can be said without much debate that throughout the years, electricity has become a necessity instead of merely a luxury. Electricity pervades every aspect of modern life—virtually every waking (and non-waking) moment of one's day involves electricity in some way. Thus, electricity's worth is confirmed.

Naturally, the value of electricity as a resource was recognized early on, and an electricity industry developed. In New York State today, electricity ratepayers have been introduced to a term that has not been seen in the electricity industry for many years: change. The electricity industry in New York, like certain other states around the country,<sup>1</sup> has been deregulated to clear the way for a competitive market. Like a chrysalis, a deregulated electricity market contains incredible anticipation. Indeed, deregulation brings many hopes, such as newer, cleaner power plants, more power production, and lower energy costs;<sup>2</sup> however, many fears also come with deregulation. With more power plants

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1. As of February, 2001, all but eight states had electric industry restructuring activity. ENERGY INFORMATION ADMINISTRATION, STATUS OF STATE ELECTRIC INDUSTRY RESTRUCTURING ACTIVITY, at [http://www.eia.doe.gov/cneaf/electricity/chg\\_str/regmap.html](http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html) (n.d.) [hereinafter STATUS OF STATE ELECTRIC INDUSTRY].

2. Roger Ridlehoover, *The Role of Entry in Deregulating Gas and Electricity*, 19 ENERGY L.J. 307 (1998).

may come more pollution, and perhaps higher, instead of lower, energy prices. It presents a delicate balance, and states undergoing deregulation of the electricity industry have examined their own plans for the transition with great detail.<sup>3</sup>

Picture this: After years of a regulated market, with ever-increasing power demand and prices, during which very few new plants were built in New York, the electricity market explodes with the promise of a competitive marketplace. However, while the market is opened up to competition, an array of issues exist in favor of and against the process instituted by the state regarding its potential fallout. The State clearly needs to attract new power companies New York, which has been ruled by natural monopolies for so long. These new companies will bring new power plants, and new market forces. To spur this action, the state has streamlined the process for obtaining approval for the construction of new electric generation sources. In New York, a power company interested in constructing a new power plant need only apply to a single agency for siting approval of that plant. This entity is granted authority under Article X of the New York State Public Service Law (PSL)<sup>4</sup> and is called the Board on Electric Generation Siting and the Environment ("Siting Board"). The Siting Board consolidates the authority of several state agencies into a single review board. By taking this step, the state hopes to quell fears felt by companies that wish to enter New York's market. For instance, the fears of wasting great amounts of money into the historically lengthy and time consuming application process before numerous agencies for construction of new plants, which may, or may not, be ultimately approved and constructed.

However, with speed comes a price. It may be that thorough and proper analysis of the socioeconomic, conservation, historic preservation, and adverse environmental impacts inherent in the construction and maintenance of major electricity generation plants has been sacrificed for the desire for competition and the need for more power. The state has not only streamlined the siting process, but expedited it as well. In June of 2000, the first

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3. For an article reporting on Michigan's effort to deregulate, see Richard F. Vander Veen, *Michigan is Now Entering a New Electrical Energy Field: Competition*, 78 MICH. B.J. 164 (1999).

4. N.Y. PUB. SERV. LAW § 160-72 (2000).

project to go through the entire permitting process under a deregulated market was approved by the state.<sup>5</sup>

The purpose of this paper is to examine Article X and determine whether it provides the Siting Board with enough strength to stem the electric tide of deregulation. This analysis will consist of four parts:

Part I will outline the electricity industry, including the purposes and effects of the movement from a regulated to a deregulated industry.

Part II will examine the provisions of New York state laws involved in the siting of electric generation plants and environmental statutes. These laws include Article X of the Public Service Law,<sup>6</sup> the State Environmental Quality Review Act (SEQRA),<sup>7</sup> and other related regulations.

Part III will explore the process of applications before the Board on Electric Generation Siting and the Environment, including present projects, the two Board decisions to date, and the subsequent legal challenge to one of the decisions.

## Part I—Regulation and Deregulation

### A. The Electricity Industry Generally

We are in the midst of electrifying times, literally. The monolithic electric industry is undergoing deregulation, after being subject to government regulation for decades. The issues involved with a deregulated electric industry are novel to New York, which is still making the transition to a market industry, although other states have begun or completed the effort to deregulate electricity as well.<sup>8</sup> The deregulation of the electricity industry comes after the deregulation of other large industries, such as the transportation, telecommunications, natural gas production, and delivery industries.<sup>9</sup> However, the electricity industry in the United States is very big business compared to other industries. In fact, the

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5. The first plant approved is to be constructed in Athens, New York in Greene County. See *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

6. N.Y. PUB. SERV. LAW §§ 160-72 (2000).

7. N.Y. ENVTL. CONSERV. LAW § 8-0101-0117 (2001).

8. See STATUS OF STATE ELECTRIC INDUSTRY, *supra* note 1.

9. N. Beth Emery, *In Whose Backyard?* FERC Order No. 2000's Jump-Start for Electric Facility Expansion, 32 TRENDS A.B.A. SEC. OF ENV'T, ENERGY, & RESOURCES NEWSL. 10 (Sept./Oct. 2000).

electricity market is larger than the cellular and long-distance telephone markets combined.<sup>10</sup>

In its earliest form, when streets and certain buildings in larger cities were first illuminated by electric light, the industry was in a free market state which was advantageous to consumers.<sup>11</sup> Over the years, electricity use became more mainstream, and when more people began using electricity, it became increasingly apparent that the electricity industry, like other industries, was prone to a disproportionate balance between the utilities and the consumers.<sup>12</sup> This was especially true of the electricity industry, an industry in which a single utility can successfully generate, transmit and distribute electricity, creating a "natural monopoly," free from competition and prone to consumer exploitation.<sup>13</sup> Thus, the electric industry was regulated to combat this and other issues.

## B. Federal Industry Controls

Government regulation first came to the power industry in the United States when the Federal Power Commission (FPC) was created in 1920. The FPC was created under the Federal Water Power Act of 1920,<sup>14</sup> which contained provisions for the regulation of water resources based on the protection of public interests.<sup>15</sup> The FPC was initially comprised of members of other government agencies, but was revamped and became an independent agency in 1930.<sup>16</sup>

The Public Utilities Act of 1935 (PUA)<sup>17</sup> was comprised of two divisions. The Public Utility Holding Company Act of 1935 (PUHCA),<sup>18</sup> was contained in Title I, and the Federal Power Act (FPA)<sup>19</sup> was found in Title II. The PUHCA sought to remedy the abuses prevalent in the electricity industry due to the monopolis-

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10. *The Electric Revolution*, THE ECONOMIST, Aug. 5, 2000, at 19.

11. Robert L. Bradley, Jr., *The Origins of Political Electricity: Market failure or Political Opportunism?*, 17 ENERGY L.J. 59, 60 (1996).

12. John B. Gaffney, *What Blight Through Yonder Window Breaks? A Survey of the Environmental Implications of Electric Utility Deregulation in Connecticut*, 32 CONN. L. REV. 1443, 1447 (2000).

13. *Id.*

14. 16 U.S.C. § 791 (repealed 1935).

15. Bradley, Jr., *supra* note 11, at 90-93.

16. See Pub. L. No. 71-412, 46 Stat. 797 (1930).

17. 16 U.S.C. §§ 791a-828c (2001).

18. 15 U.S.C. §§ 79-79z-6 (2001).

19. 16 U.S.C. § 791a (2001).

tic practices.<sup>20</sup> Essentially, the PUHCA required holding companies whose subsidiaries were engaged in the sale of electricity to register with the Securities and Exchange Commission (SEC).<sup>21</sup> The FPA, however, delineated control of companies in the electricity market through provisions for federal and state regulation. Thus, the sale of wholesale electricity is subject to federal regulation. "[S]uch Federal regulation, however [extends] only to those matters which are not subject to regulation by the States."<sup>22</sup>

Major changes to the regulated electricity industry were not made until 1978, with the passage of the Public Utility Regulatory Policies Act (PURPA).<sup>23</sup> PURPA was enacted in response to several concerns: (1) regulated industries have an effect on interstate commerce; and (2) interests in public health would be furthered by a program which encouraged more electricity conservation.<sup>24</sup> In a sense, competition in the electricity industry was born again under PURPA, which sought to allow qualifying facilities (QFs)<sup>25</sup> to enter the wholesale electricity market.<sup>26</sup>

When the Energy Policy Act of 1992 (EPAct)<sup>27</sup> was enacted, it marked another step in facilitating the shift to competition in the electricity industry. The EPAct amended the FPA, and in doing so gave power to FERC<sup>28</sup> to order owners of transmission lines to transfer power for other utilities, a process known as "wheeling."<sup>29</sup>

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20. Terri L. Carver, *Administrative Law*, 50 MERCER L. REV. 827, 830 n.37 (1999).

21. Joseph P. Tomain, *Electricity Restructuring: A Case Study in Government Regulation*, 33 TULSA L.J. 827, 831 (1998).

22. Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205 (1964) (quoting 16 U.S.C. § 824(a) (2001)).

23. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of U.S.C.).

24. F.E.R.C. v. Mississippi, 456 U.S. 742, 755-57 (1982).

25. PURPA encouraged the proliferation of QFs through two provisions of the Act. 16 U.S.C. §§ 824a-3(a), (b) (2000); see also Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electricity Industry*, 16 ENERGY L.J. 347, 351 (1995).

26. See Rudy Perkins, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C. L. REV. 993, 1004-05 (1998).

27. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified as amended in scattered sections in U.S.C.).

28. Under the FPA, Congress gave the Federal Power Commission (FPC) the power to regulate "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a) (2000). The FPC was succeeded by the Federal Energy Regulatory Commission (FERC). 42 U.S.C. §§ 7172(a)(1)(B), 7293 (2000).

29. "Wheeling" is the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility." Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973).

### C. Deregulation Comes to New York

It is reasonable to appreciate the impetus behind the interest in creating a robust market in New York State by attracting new companies and new projects. New York State began to investigate a competitive electricity market in earnest in 1994.<sup>30</sup> The New York Public Service Commission (PSC) issued an opinion and order regarding issues and plans to be effected in implementing a deregulated electricity market in New York.<sup>31</sup> New York was the first state to implement a government entity to oversee market entry and rates for gas and electricity industries when the PSC was organized in 1907.<sup>32</sup>

It has been forecast that the next two years will be a true test for New York City in terms of being able to meet the increasing demand for power, especially if no new power is being generated.<sup>33</sup> Accordingly, New York State is interested in stemming the tide of increased power scares and shortages experienced over the peak summer months, especially in New York City.<sup>34</sup> The state is understandably interested in attracting new businesses to build plants and increase competition in the new deregulated marketplace; however, the companies are often interested in seeing the availability of concrete and quick decisions in the process of project applications.<sup>35</sup>

One of the hopes of a deregulated market is that it will drive down costs for ratepayers.<sup>36</sup> With increased power demand also comes highly increased costs;<sup>37</sup> nevertheless, there are some who

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30. *In re Competitive Opportunities Available to Customers of Elec. and Gas Serv.*, 157 P.U.R. 4th 534 (Nov. 30, 1994).

31. *In re Competitive Opportunities Regarding Elec. Serv.*, 1996 N.Y. P.U.C. LEXIS 329 (May 3, 1996).

32. Riddlehoover, *supra* note 2, at 323.

33. Philip Lentz, *10 New Power Projects Eyed for NYC: Utilities, Energy Firms Rush to Build as Shortage Looms; Many Hurdles Ahead*, CRAIN'S N.Y. BUS., July 3, 2000, at 3.

34. See, e.g., Kirk Johnson, *The Energy Rush – Promise and Peril in New York Power Plans*, N.Y. TIMES, Aug. 14, 2000, at A1 [hereinafter Johnson, *The Energy Rush*].

35. See Claire Hughes, *Plant Proposal Wins or Loses in New World*, THE TIMES UNION (Albany, N.Y.), Mar. 14, 1999, at C1 [hereinafter Hughes, *Plant Proposal Wins*].

36. "Increased competition is expected to reduce generating costs which will lead to reduced prices." *In re Competitive Opportunities Regarding Elec. Serv.*, 1996 N.Y. P.U.C. LEXIS 329, at \*18.

37. PSC Chairman Maureen Helmer stated that "[e]conomic growth in New York State has increased the demand for electricity to the point where we must move forward with siting new, cleaner, state-of-the art generation facilities, otherwise the

would argue that the path to electric deregulation is not bathed in glorious light, at least not for ratepayers. While the hope of deregulation is that prices will be driven down while power supplies are increased, another deregulated market, California, has not seen such effects yet.<sup>38</sup> In fact, California has continued to experience serious threats to the capacity of the power grid in parts of the state.<sup>39</sup> In addition, other deregulated industries have experienced ill effects. For example, the deregulation of the telecommunications industry has not delivered the savings for ratepayers that was projected. Just the opposite has happened, and there is no compelling evidence to show that this effect will not also occur in the electricity market.<sup>40</sup>

Likewise, the motivations behind important investment decisions by power companies will likely change under a deregulated market.<sup>41</sup> That is, while it has been opined that deregulation generally will diminish any systems previously in place where power companies were compelled to take environmental concerns into serious consideration, this seems to be a real possibility for New York State. The effectiveness of the mechanism driving the new procedure under Article X is uncertain, and the future of the environmental concerns is also uncertain at this point.<sup>42</sup> It is possible that investment decisions under deregulation will be fueled by increased desire for profitability rather than environmental prudence.<sup>43</sup>

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state will face power shortages and higher electricity prices." *N.Y. Okays PG&E'S 1,080 MW Project After Long Battle On Environment*, GLOBAL POWER REP. (New York, N.Y.), July 21, 2000, at 15 [hereinafter *N.Y. Okays PG&E's Project*].

38. Donald F. Santa Jr., *California's Power Crisis: Catalyst for National Reform?*, 138 NO. 22 PUB. UTIL. FORT. 18 (Dec. 1, 2000).

39. *Id.*

40. See generally Michael Evan Stern & Margaret M. Mlynyczak Stern, *A Critical Overview of the Economic and Environmental Consequences of the Deregulation of the U.S. Electric Power Industry*, 4 ENVTL. LAW. 79 (1997).

41. See Peter Navarro, *A Guidebook and Research Agenda for Restructuring the Electricity Industry*, 16 ENERGY L.J. 347, 365-66 (1995).

42. To date, the Siting Board has decided only two applications for new power plants. See *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000); see also *Application of Heritage Power*, 2001 N.Y. P.U.C. LEXIS 34 (Jan. 19, 2001).

43. See M.E. Stern & M.M. Stern, *supra* note 40, at 155.



## Part II—Article X

### A. The Board on Electric Generation Siting and the Environment

The Siting Board is composed of seven persons: 1) the chairman of the Public Service Commission, 2) the Commissioner of the Department of Environmental Conservation (DEC), 3) the Commissioner of the Department of Health, 4) the Chairman of the New York state Energy Research and Development Authority, 5) the Commissioner of the Department of Economic Development, 6) an ad hoc member of the public residing in the judicial district of the proposed location of the project, and 7) an ad hoc member of the public who resides in the county in which the proposed project is to be located.<sup>44</sup>

### B. Article X Replaces Article VIII

Article X was first legislated in 1992, and it served to modify and replace Article VIII of the New York Public Service Law, which expired in 1989.<sup>45</sup> While they are in most respects similar, there are nevertheless important distinctions between the two Articles in terms of the provisions, impacts and significance of the provisions set forth.

Article VIII was written when the electricity industry was a regulated market in New York, while Article X operates under a deregulated electricity industry. This consideration raises several concerns among environmental groups, especially in light of the projected increase in new power plants in New York.<sup>46</sup> Issues include public need for new plants, adverse environmental impacts in low socio-economic areas, and the long distances between the place of energy generation and the location of the consumer. For example, Article X provides that the function of the Siting Board is to examine applications and, if approved, issue a certificate of environmental compatibility and public need ("Certificate").<sup>47</sup> However, in a deregulated market, "need" is no longer an issue, at least not in an area where a power plant will be built. According to the Siting Board, Article X "does not require an applicant to

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44. N.Y. PUB. SERV. LAW § 160(4) (2000).

45. *Id.* §§ 140-49a (expired Jan. 1, 1989).

46. See Karen Cook, *Shock Corridor*, VILLAGE VOICE, (New York City) Mar. 14, 2000, at 57.

47. N.Y. PUB. SERV. LAW §§ 164-68 (2001).

demonstrate capacity or system need for proposed plants.”<sup>48</sup> The power generated by a plant will not necessarily be used to power the immediate area surrounding the plant, as was the case in the former “natural monopoly” state of a regulated industry.<sup>49</sup> Now, the power produced may be put up on the power grid and sold to ratepayers located far from the source of the power.<sup>50</sup> Therefore, it is a reality that environmental impacts of a new plant will be felt in areas away from where the primary customer base is located.<sup>51</sup> In the regulated market, “need” was necessary for the approval of any new power plant. In the deregulated market, the hurdle to show “need” is much lower and in fact different. Need may be shown simply if the competition the state is seeking would be created by the new plant, thus, replacing the older notion of need under the regulated market; that is, system need or capacity.<sup>52</sup> In fact, while the market was regulated, new power plant construction in New York was rare.<sup>53</sup>

### C. The Siting Application Process

The Article X process applies to major generating facilities. A major electric generating facility is defined as a, “facility with a generating capacity of eighty thousand kilowatts or more.”<sup>54</sup> Article X does not specifically state whether the 80 MW capacity limitation refers to the design or operational standard, and this became an issue in *Uprose v. Power Authority of State of New York*.<sup>55</sup> The case dealt with eleven natural gas-powered turbine electric generator units that the Power Authority of the State of New York (NYPA) installed at various points around New York City.<sup>56</sup> The Siting Board used an operational standard to determine that Article X review was not necessary for the units because they would not generate more than 80 MW of power at any one

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48. *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

49. Claire Hughes, *Athens Power Plant Proposal is Ready for State Scrutiny*, THE TIMES UNION (Albany, N.Y.), Oct. 28, 1998, at A1. [hereinafter Hughes, *Athens Power Plant*].

50. *Id.*

51. *See id.*

52. Hughes, *Plant Proposal Wins*, *supra* note 35, at C1.

53. Alan Moore, *State Electricity Siting Board, PSC Hit with Lawsuit Over Athens Approval*, CAP. DISTRICT BUS. REV., Sept. 18, 2000, at 3.

54. N.Y. PUB. SERV. LAW § 160(2) (2000). Eighty thousand kilowatts equals eighty megawatts (MW).

55. 729 N.Y.S.2d 42 (N.Y. App. Div. 2001).

56. *Id.* at 44.

location.<sup>57</sup> In response, the New York appellate court ruled that the Siting Board did not act outside the scope of its authority in interpreting the capacity threshold exempting the units from review.<sup>58</sup>

In all, the siting process consists of four parts: 1) Pre-Application Phase; 2) Application Phase; 3) Hearing and Decision Phase; and 4) Post-Certification Phase.<sup>59</sup>

The Pre-Application Phase is set out generally in PSL section 163.<sup>60</sup> Subsection one sets out the requirements of a preliminary scoping statement (PSS) which must be submitted by any party seeking to submit a siting application.<sup>61</sup> Significantly, the requirements provided under this subsection were added when Article X was amended in 1999.<sup>62</sup> In addition, applicants are required to submit the PSS to state authorities,<sup>63</sup> and are also required to involve the public "early in the application process."<sup>64</sup> The studies referring to the PSS include studies on the environmental impacts of the proposed facility, including anticipated gaseous, solid, and liquid wastes that would be produced;<sup>65</sup> waste treatment processes;<sup>66</sup> the anticipated amounts of wastes to be produced by the plant;<sup>67</sup> architectural and engineering plans to demonstrate

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57. *Id.*

58. *Id.*

59. See generally NEW YORK STATE PUBLIC SERVICE COMMISSION, THE NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT: ARTICLE X PROCESS FLOW CHART, at <http://www.dps.state.ny.us/articlex.htm> (revised May 30, 2001).

60. PUB. SERV. LAW § 163 (2000).

61. New York Public Service Law section 163(1) requires that:

any person proposing to submit an application for a certificate shall file . . . a preliminary scoping statement containing . . . (a) description of the proposed facility and its environmental setting; (b) potential environmental impacts from the construction and/or operation of the proposed facility; (c) any proposed study or program of studies designed to evaluate potential environmental impacts; (d) any measures proposed to minimize environmental impacts; (e) reasonable alternatives to the proposed facility as may be required by paragraph (b) of subdivision one of section one hundred sixty-four of this article; and (f) any other information that may be relevant or that the board may require.

N.Y. PUB. SERV. LAW § 163(1) (2000).

62. See PUB. SERV. LAW § 163 as amended by L. 1999, ch. 636, § 4, effective Dec. 1, 1999 [adding paragraphs (a) – (f)].

63. *Id.* § 163(2).

64. *Id.* § 163(3).

65. *Id.* § 164(c)(i).

66. *Id.* § 164(c)(ii).

67. *Id.* § 164(c)(iii).

the compatibility of the facility and the environment;<sup>68</sup> and how environmental health and safety standards would be achieved.<sup>69</sup> Applications must be filed with several entities, including state agencies and local libraries where the plant would be located.<sup>70</sup> The submittal to libraries again reflect the importance of the public participation in the project set out in Article X.<sup>71</sup> Parties may negotiate stipulations regarding provisions of the PSS. However, notice of any such stipulations must be published, and the public must be afforded opportunity to submit comments on the proposed stipulations as well.<sup>72</sup>

Applicants face more requirements during the Application phase, as Article X outlines the elements which constitute a proper application for a Certificate. For example, an application must contain: "(a) A description of the site and a description of the facility to be built thereon . . . ;<sup>73</sup> (b) A description and evaluation of reasonable alternative locations to the proposed facility, if any . . . ;<sup>74</sup> (c) Studies . . . ;<sup>75</sup>" as well as cost information, excluding applications falling under certain circumstances,<sup>76</sup> evidence offered to show the facility will comply with air and water permits,<sup>77</sup> and "[s]uch other information as the applicant may consider relevant or as may be required by the board."<sup>78</sup>

In addition, applicants must submit a fee for an intervenor fund, "to defray expenses incurred by municipal and other local parties to the proceeding . . . for expert witness and consultant fees."<sup>79</sup> This fee is calculated at \$1,000 per megawatt of generating capacity of the proposed facility, but may not exceed \$300,000.<sup>80</sup>

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68. N.Y. PUB. SERV. LAW § 164(c)(iv) (2000).

69. *Id.* § 164(c)(v).

70. *Id.* § 164(2)(a)(i)-(vii).

71. New York Public Service Law section 163(3) provides in part: "The primary goals of the citizen participation process shall be to facilitate communication between the applicant and interested or affected persons. The process shall foster the active involvement of the interested or affected persons." N.Y. PUB. SERV. LAW § 163(3) (2000).

72. *Id.* § 163(4).

73. *Id.* § 164(1)(a).

74. *Id.* § 164(1)(b).

75. *Id.* § 164(1)(c). See discussion *supra* Part II.C.

76. *Id.* § 164(1)(d).

77. N.Y. PUB. SERV. LAW § 164(1)(f) (2000).

78. *Id.* § 164(1)(g).

79. *Id.* § 164(6)(a).

80. *Id.*

When the Siting Board receives an application, Article X provides for a 60-day review period during which it will be determined if the application is "complete," that is, whether it complies with the requirements set out by Article X.<sup>81</sup> If the Siting Board finds in the affirmative, a date will be fixed for a public hearing on the application.<sup>82</sup> However, if the Siting Board finds in the negative, that is, the application is deficient and lacking information required for the Siting Board to determine the fate of the application, the applicant will be informed of the existing deficiencies, and will be allowed to file supplemental information required for the application to conform to the requirements.<sup>83</sup> Nevertheless, if an application complies with the prescribed requirements and is found complete, the hearing date is set, thus beginning the Hearing and Decision Phase of the process.

#### D. Siting Board Decisions

The deadline for Siting Board decisions runs from the date on which an application is deemed complete.<sup>84</sup> According to Article X, twelve months is allowed from the date on which an application is deemed complete for ultimate disposition of an application, including final decision by the Siting Board.<sup>85</sup> This provision marks a departure from the previous provision of Article VIII, and has sparked much debate concerning environmental interests. Article VIII provided a more liberal time period, specifically, a twenty-four month time limit for consideration of applications.<sup>86</sup> The reasons for this shortening of the deadline coincide with the purposes behind the deregulation of the electric industry. In essence, the new one-year procedure, coupled with a single permitting authority, streamlines the application process considerably, since a prospective generating company would not have to obtain permits from each agency involved in the process.<sup>87</sup> In addition, Maureen O. Helmer, the chair of the PSC and chair of the Siting Board has

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81. *Id.* §§ 164, 165(1).

82. *Id.* § 165(1).

83. N.Y. PUB. SERV. LAW § 165(1) (2000). For example, in Sept. 2000, the Siting Board determined that an application filed by Sunset Energy Fleet LLC for a barge mounted plant in New York City was deficient. The Board determined that "the application failed to provide enough information on the project's impact on 'aquatic resources, noise, geology, cultural resources and visual resources.'" Bob Liff, *State: Power Plant Request 'Deficient,'* N.Y. DAILY NEWS, Oct. 3, 2000, at 1.

84. N.Y. PUB. SERV. LAW § 165(4) (2000).

85. *Id.*

86. *Id.* § 143(4) (expired Jan. 1, 1989).

87. See N.Y. *Okays PG&E's Project*, *supra* note 37, at 15.

said the Board also serves the interests of the state by "having a single forum for the consideration of the multifaceted, complex and potentially interrelated issues involved in siting power plants."<sup>88</sup> Traditionally in New York, "[p]ower plant proposals usually took years to resolve, sometimes delaying plants to death."<sup>89</sup> Indeed, it may cost a potential energy company a huge amount of money in presenting a traditional environmental impact statement (EIS), which is usually necessary in reviews under SEQRA. By streamlining the system for approving new projects under Article X, and also cutting the time factor down, the state hopes to attract companies who would otherwise be hesitant to invest time and capital into a project that ultimately might not be approved anyway. Ironically, the interests sought by the state are the same ones which have caused environmental groups great concern. The biggest concern is the possibility that by limiting the time of review to only one year, and further limiting the review to a single entity, the state may be sacrificing "a thorough review of environmental issues for speed."<sup>90</sup>

Nevertheless, during the Decision phase, the Siting Board is not free to make any findings it deems appropriate. The question is one of degree: Whether the depth of any analysis undertaken by the Siting Board is sufficient given the spirit and purpose of SEQRA, as well as the unique circumstances created by a deregulated electric marketplace. The Public Service Law provides:

The board shall render a decision upon the record either to grant or deny the application . . . [t]he board shall issue, with its decision, an opinion stating in full its reasons for its decision . . . [t]he board may not grant a certificate for the construction or operation of a major electric generating facility, either as proposed or as modified by the board, unless it shall first find and determine: (a)(i) [T]hat the facility will satisfy additional electric capacity needs or other electric system need . . . ; (b) [t]he nature of the probable environmental impacts, including an evaluation of the predictable adverse and beneficial impacts on the environment and ecology, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air and water quality, including the cumulative effect of air emissions from existing facilities and the potential for significant de-

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88. *N.Y. Governor May Act to Boost Permit Authority*, 4 MEGAWATT DAILY 105 (Boulder, CO), June 3, 1999.

89. Hughes, *Plant Proposal Wins*, *supra* note 35, at C1.

90. Cook, *supra* note 46, at 57.

terioration in local air quality . . . fish and other marine life and wildlife; (c) [T]hat the facility (i) minimizes adverse environmental impacts, considering the state of available technology, the nature and economics of such reasonable alternatives that are required to be examined pursuant to paragraph (b) of subdivision one of section one hundred sixty-four of this article, the interest of the state with respect to aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations . . . .<sup>91</sup>

### E. Article X and SEQRA

A natural question which arises amidst the issues associated with Article X proceedings is how this all fits with the New York State Environmental Quality Review Act,<sup>92</sup> the major environmental review statute for the state. While the primary engine for analysis of environmental impacts associated with new projects is provided for in SEQRA,<sup>93</sup> the proposed power plant projects are exempted from SEQRA review under Article X.<sup>94</sup> Therefore, the state has sidestepped the more thorough and lengthy analysis traditionally afforded by SEQRA review for a single review by the Siting Board which is time restricted.

This appears to be contrary to the general holding that the primary purpose of SEQRA is “‘to inject environmental considerations directly into governmental decision making’ and that, to that end, the statute mandates the preparation of an environmental impact statement when a proposed action . . . may have a significant effect on the environment.”<sup>95</sup> In essence, the state has predetermined that any action subject to Article X review by definition does not have the potential for significant environmental impacts, so any new proposed power plants will escape the process set out by SEQRA. Meanwhile, “‘the overriding purpose of SEQRA is to assure that the decision maker has considered pertinent environmental information before making a decision.’”<sup>96</sup>

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91. N.Y. PUB. SERV. LAW § 168(2) (2000).

92. N.Y. ENVTL. CONSERV. LAW § 8-0101.

93. *Id.* § 8-0109.

94. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(35) (2001).

95. *New York City Coalition for the Preservation of Gardens v. Giuliani*, 670 N.Y.S.2d 654, 660 (Sup. Ct. 1997) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 569 (N.Y. Ct. App. 1990)).

96. *Tinker St. Cinema v. Town of Woodstock Planning Bd.*, 681 N.Y.S.2d 907, 909 (N.Y. App. Div. 1998) (quoting *In re Seymour v. County of Saratoga*, 598 N.Y.S.2d 93, 94 (N.Y. App. Div. 1993)).

The main vehicle of SEQRA is the EIS, a comprehensive report detailing foreseeable environmental impacts resulting from a proposed action, and also includes alternatives to the proposed action, as well as mitigating factors. However, the process in creating an EIS involves several steps, which costs time and tremendous effort for all parties involved. A notable issue is whether, in creating the role of the Siting Board, Article X has created a watered-down version of an EIS-like mechanism. This mechanism, to be used by the Siting Board alone, may cut down on time constraints, but will undoubtedly have a narrower scope than any EIS that would have been generated. This in turn may frustrate the very purpose of SEQRA, which was always to provide for a mechanism for an in-depth analysis of environmental impacts associated with various proposals. The EIS was meant to be more than a bare-bones disclosure, and although the statute provides that proposals subject to Article X review by definition have no significant environmental impacts, this determination must itself be determined only after an EIS has been completed. An EIS "is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."<sup>97</sup>

Under state regulations, there are two types of actions for purposes of determining whether or not an EIS must be performed.<sup>98</sup> Type I actions require an EIS, while Type II actions do not. As previously stated, actions under Article X are listed as Type II actions, and are thus exempted from EIS requirements.<sup>99</sup> The regulations list thirty-seven such actions including Article X actions, and curiously, the other actions classified as Type II actions appear to be markedly different from Article X actions in terms of nature, size, and scope. For example, while Article X covers "major electric generating facilities," other Type II actions include "maintenance or repair involving no substantial changes in an existing structure or facility,"<sup>100</sup> "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site . . .,"<sup>101</sup> "repaving of existing highways not involving the addition of new travel lanes,"<sup>102</sup> "maintenance of existing landscaping

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97. *Town of Henrietta v. Dep't of Env'tl. Conservation of N.Y.*, 430 N.Y.S.2d 440, 445 (N.Y. App. Div. 1980).

98. N.Y. COMP. CODES R. & REGS. tit. 6, § 618.2 (2001).

99. *Id.* §§ 617.5(a), (c)(35), 618.2.

100. *Id.* § 617.5(c)(1).

101. *Id.* § 617.5(c)(2).

102. *Id.* § 617.5(c)(4).



or natural growth,"<sup>103</sup> "routine activities of educational institutions . . .,"<sup>104</sup> "minor temporary uses of land having negligible or no permanent impact on the environment,"<sup>105</sup> "mapping of existing roads . . .,"<sup>106</sup> and more such unobtrusive actions. What seems plausible is that the state has created a system with a "Catch-22;" it has determined that new power plant construction does not pose significant environmental impacts, but has done so before such impacts have sufficiently been examined.

### Part III—Board Actions: Considerations Past, Present and Future

#### A. Generally

Finally, we will review the actions presented to the Siting Board on Electric Generation Siting and the Environment in light of the Article X process. The Article X process appears to offer an escape route for electric generators from proper environmental review procedures. However, Article X is really a compromise—middle ground in between the competing concerns of prudent environmental practices and expedient power plant siting and construction. The two concerns are independently compelling. Let us assume that the provisions set out in Article X afford enough attention to the concerns of adverse environmental impacts associated with power plants, even without the benefit of an EIS. Above all, the State Energy Plans (SEPs)<sup>107</sup> are meant to guide actions carried out under Article X, and the state has declared that the SEP is in conjunction with SEQRA. "The policy objectives and strategies set forth in the SEP promote enhanced environmental quality."<sup>108</sup> One may wonder why Article X actions were exempted from EIS requirements, but it is enough to assume that the requirements imposed by Article X are enough to replace a traditional EIS. Indeed, while there are compelling justifications

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103. *Id.* § 617.5(c)(6).

104. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(8) (2001).

105. *Id.* § 617.5(c)(15).

106. *Id.* § 617.5(c)(17).

107. The State Energy Plan (SEP) is revised every four years, and is related to Article X through Public Service Law § 168(2)(a) which provides: "[t]hat the facility is reasonably consistent with the policies and long-range energy planning objectives and strategies contained in the most recent state energy plan . . ." N.Y. PUB. SERV. LAW § 168(2)(a)(i).

108. NEW YORK STATE ENERGY RESEARCH & DEV. AUTH., N.Y. STATE ENERGY PLAN COMPLIANCE WITH THE STATE ENVIRONMENTAL QUALITY REVIEW ACT 4-1 (1998), *available at* <http://www.nyserda.org/sect4.pdf> (n.d.).

for the mechanism of Article X, that is, the desire for speedy siting decisions, this concern should be quelled as long as the Siting Board adheres to the provisions in deciding siting applications; that for the most part remains to be seen. That said, the Siting Board has conducted necessary hearings in which industry and public comments have been offered, and Article X maintains judicial review for Siting Board actions, which affords another level of security for environmental concerns.

To further stress that the SEP fits with SEQRA, the State has asserted that “[b]esides promoting enhanced environmental quality, the SEP advances economic growth and social well-being,”<sup>109</sup> and furthermore, “[t]he SEP considers the environmental impacts of its energy policy objectives and strategies, including social, economic, and other essential considerations.”<sup>110</sup> That accepted, the next question is whether the Siting Board will accept and apply those provisions in a manner consistent with environmental concerns, i.e., in the spirit of SEQRA. Thus, we will now look at the practical actions taken by the Siting Board, and look ahead to possible issues involved in future siting applications.

A principal danger facing the Siting Board will be the prognostication it must perform in forecasting the effect new plants will have on the electricity industry in New York. The problem lies in that numerous issues simultaneously exist; the need for new power, adverse environmental impacts, and the uncertainty of a deregulated market. All these problems must compete for the Siting Board's attention, and prudent attention to each issue is essential.

As the Siting Board decides applications, it must include environmental impacts in the equation. Such attention is adequately provided in the application requirements under Article X.<sup>111</sup> Therefore, it is up to the Siting Board to properly implement the provisions. More uncertain dangers are possible in the way decisions to site or not to site new plants will affect the newly deregulated industry. A glaring example of how deregulation can cause chaos in the electricity market is California, where it is not deregulation per se, but California's implementation of deregulation that is being blamed for the state's major power scares and price

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109. *Id.*

110. *Id.* at 4-2.

111. See discussion *supra* Part II.C.

spikes.<sup>112</sup> In addition, it is environmental concerns which are being blamed in part for the energy crisis. California has been slow to build new plants because of environmental concerns, yet demand has grown. Consequently, few new plants have been built, the result is demand outweighing supply, a classic scenario for a power shortage.<sup>113</sup> Therefore, it is a great challenge for the Board to effectively balance environmental concerns while allowing the electricity supply to grow effectively in New York, where summer power shortages of its own are certainly not uncommon.<sup>114</sup>

## B. Past Actions

As of September 1, 2001, the Siting Board has approved three new power plant applications. The Siting Board stamped its approval on an application submitted by Athens Generating Company to construct and operate a 1,080 megawatt, gas-fired, combined-cycle plant on 150 acres in the Village of Athens, New York, in Greene County.<sup>115</sup> In addition, in January, 2001 the Siting Board approved an 800 megawatt natural-gas fired, combined-cycle plant to be built in Oswego County, New York by Heritage Power.<sup>116</sup> The third accepted application was Con Edison's project for the expansion of an existing plant in New York City. This project calls for the addition of 360 megawatts of generating capacity to an existing power station. The project also incorporates the closing of another of Con Ed's stations in a more affluent section of the city near the United Nations. The expanded plant will replace gas-and oil-fired turbines with new natural gas turbines.

The Athens application was the first to go through the Article X procedure under deregulation, and also the first to be approved under the new industry structure. This plant, if constructed, would be the country's largest natural gas-fired power plant,<sup>117</sup> and would be built in an area "locally zoned for light industrial use."<sup>118</sup>

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112. See, e.g., Editorial, *There's No Going Back; California is Again Suffering from Electricity Shortages, but a Return to the Regulated Monopolies of the Old Days Isn't the Answer*, L.A. TIMES, Nov. 20, 2000, at B6.

113. See Josiah Cantwell, *It Can Work or Fail; 2 Deregulation Cases*, MORNING STAR (Wilmington, N.C.), Nov. 26, 2000, at A1.

114. Johnson, *The Energy Rush*, *supra* note 34, at A1.

115. *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

116. *N.Y. OKs Sithe Energies' Plant*, GENERATION WK. (Arlington, VA), Jan. 24, 2001. Heritage Power is a joint project of Sithe Energies affiliates and General Electric.

117. Hughes, *Athens Power Plant*, *supra* note 49, at A1.

118. *In Re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

The process regarding the Athens plant lasted almost two years, since 1997 when the pre-application was filed.<sup>119</sup> This in itself should immediately call into question the effectiveness of Article X to provide an expedited application process, as the state claims is one of its interests. The Siting Board made all necessary findings<sup>120</sup> as mandated under section 168 of the Public Service Law:

1. That the facility is reasonably consistent with the policies and long-range energy planning objectives and strategies contained in the most recent state energy plan; or that the facility was selected pursuant to an approved procurement process.<sup>121</sup>
2. The nature of the probable environmental impacts, [specifying] . . . predictable adverse and beneficial impacts on the [normal] environment and ecology, public health and safety, aesthetics, scenic, historic, and recreational value, forest and parks, air and water quality, [and] . . . fish and other marine life and wildlife.<sup>122</sup>
3. That the facility minimizes adverse environmental impacts, considering the state of available technology, the nature and economics of such reasonable alternatives as are required to be [considered under PSL §164(1)(b)] . . . and the interest of the state with respect to aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations.<sup>123</sup>
4. That the facility . . . is compatible with public health and safety.<sup>124</sup>
5. That the facility will not be in contravention of water quality standards or . . . in case no classification has been made of the receiving waters, . . . [that it] will not discharge effluent that will be unduly injurious [to] fish and wildlife, the industrial development of the state, and public health and public enjoyment of the receiving waters.<sup>125</sup>
6. That the facility . . . will not emit any [air] pollutants . . . in contravention of applicable air emission control requirements or air quality standards.<sup>126</sup>

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119. *PG&E Gen Moves on N.Y. Plant*, GAS DAILY (Boulder, CO), May 5, 2000.

120. *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

121. N.Y. PUB. SERV. LAW § 168(2)(a) (2000).

122. *Id.* § 168(2)(b).

123. *Id.* § 168(2)(c)(i).

124. *Id.* § 168(2)(c)(ii).

125. *Id.* § 168(2)(c)(iii).

126. *Id.* § 168(2)(c)(iv).

7. That the facility . . . will control the runoff and leachate from any solid waste disposal facility.<sup>127</sup>
8. That the facility . . . will control the disposal of any hazardous waste.<sup>128</sup>
9. That the facility is designed to operate in compliance with applicable state and local laws and regulations, except that the Siting Board may refuse to apply specific local laws, ordinances, regulations, or requirements it regards as unduly restrictive.<sup>129</sup>
10. That the construction and operation of the facility is in the public interest, considering its environmental impact . . . and reasonable alternatives [considered under §164(1)(b)].<sup>130</sup>

The Athens project met opposition from environmental groups whose concerns were addressed in the order issued by the Siting Board. Issues involved included claimed harm to aquatic life, as well as obstruction of the scenic views provided by a historic site located across the Hudson River. The Athens plant would draw water from the Hudson River to cool the plant. This activity requires a State Pollutant Discharge Elimination System (SPDES) permit under the federal Clean Water Act.<sup>131</sup> A SPDES permit is a water discharge permit issued by a state under the state's self-administered permitting program,<sup>132</sup> which is approved by EPA. After initially authorizing an average water intake of 4.2 million gallons (4.2 mgd), appeals eventually yielded a reduction to 0.18 mgd, and the water permit was issued by the DEC which reflected that limitation.<sup>133</sup> The DEC also issued a prevention of significant deterioration (PSD)<sup>134</sup> air emission permit, as provided under the federal Clean Air Act. The reduction of water use "essentially require[s] dry cooling,"<sup>135</sup> and reflects measures designed to mitigate harm to aquatic life so that a water permit could be issued.

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127. N.Y. PUB. SERV. LAW § 168(2)(c)(v) (2000).

128. *Id.* § 168(2)(c)(vi).

129. *Id.* § 168(2)(d).

130. *Id.* § 168(2)(e).

131. 33 U.S.C. § 1342(b) (2001).

132. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW art. 17 (2001).

133. *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

134. Certain areas are classified as nonattainment for purposes of air quality standards under the Clean Air Act. Such areas are subject to additional emissions limitations based on the level of pollution in the area under the PSD program. 42 U.S.C. § 7471 (2001); 40 C.F.R. pts. 51-52. *See generally* *Detroit Edison Co. v. Michigan Dept. of Env'tl. Quality*, 39 F. Supp. 2d 875 (E.D. Mich. 1999).

135. *N.Y. Okays PG&E's Project*, *supra* note 37, at 15.

The challenge to the project based on historic preservation issues involves the location of the Athens plant in relation to the location of Olana, the home site of the 19<sup>th</sup>-century landscape painter Frederic Church.<sup>136</sup> While Olana is a state historic site, it has perhaps more appropriately been described as an "earth-scape."<sup>137</sup> It is feared that the scenic views of this home site will be threatened by the completion of a power plant across the river.<sup>138</sup> Feeding on the idea that there is no "need" based on the ordinary use of the word, but according to law, only "need" in relation to contributing to the competitive electric industry, the lawyer for a group opposed to the plant, which advocates for historic preservation, was quoted as saying, "If there is no reason for the need for this plant in the sense of reliability of electricity supply why would we want to give away something that is part of our collective landscape and that is internationally renowned, and that has been painted by people for 150 years?"<sup>139</sup>

Apart from adverse environmental impacts, the Siting Board considered effects on local electricity transmission lines, local and regional socioeconomic impacts, as well as alternative locations for the plant.<sup>140</sup>

Even after an approval by the Siting Board, it will still be necessary to obtain a federal permit from the Army Corps of Engineers under section 404 of the Clean Water Act.<sup>141</sup> Nevertheless, the United States Environmental Protection Agency (EPA) questioned whether the Siting Board created by New York has authority to issue any approvals at all.<sup>142</sup> The EPA had in fact delegated authority to issue air and water permits to the New York DEC under the procedures provided under Article VIII. However, the authority to do so under the new Article X has been questioned, since the EPA did not expressly delegate under this new Arti-

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136. Frederic Church was "a meticulous craftsman who could create stunning representations of any scene he chose." Sheila Farr, *Church's Works Show Nature in All Her Splendor*, SEATTLE TIMES, Nov. 12, 2000, at K1.

137. Tom O'Brian, *The Hudson Valley's Big Draw; Frederic Church's Greatest Landscape was His N.Y. Mansion*, WASH. POST, Sept. 24, 2000, at E1.

138. See, e.g., Citizens for the Hudson Valley, *Frequently Asked Questions About Energy Deregulation and Athens Generating*, at [http://www.citizensforthehudsonvalley.org/frequently\\_asked\\_questions\\_about.htm](http://www.citizensforthehudsonvalley.org/frequently_asked_questions_about.htm) (last modified Jan. 7, 2001).

139. Joel Stashenko, *Panel's Decision a Blow to N.Y. Power Plant Foes*, BERGEN REC. (New Jersey), Aug. 9, 2000, at A4.

140. *In re Athens Generating Co., L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

141. 33 U.S.C. § 1344 (2001).

142. Claire Hughes, *Power Plant Faces Hurdle*, THE TIMES UNION (Albany, N.Y.), Feb. 20, 1999, at A1 [hereinafter Hughes, *Plant Faces Hurdle*].

cle,<sup>143</sup> and the EPA believes that the DEC should review the permits for the federal Clean Air and Clean Water Acts.<sup>144</sup> The EPA is understandably concerned that the Siting Board lacks the same level of expertise as that of the DEC.<sup>145</sup> Nevertheless, regulations provide for delegation under Article X.<sup>146</sup> In addition, the Siting Board stated that “‘this issue is DEC’s to decide, not ours. In any event, a SPDES permit has been issued . . . [i]t is DEC’s responsibility as the permitting authority to comply with EPA regulations.’”<sup>147</sup> Meanwhile, the Public Service Law expressly provides that “[t]he board may . . . issue permits pursuant to federal recognition of state authority in accordance with the federal Clean Water Act, the federal Clean Air Act and the federal Resource Conservation and Recovery Act.”<sup>148</sup> In contrast to the Athens plant’s path to approval, the Sithe plant went through the process in only nine months.<sup>149</sup> While this undoubtedly reflects the true intention of the state; that is, an expedited approval process, it nevertheless raises questions about the process. For instance, when the two completed application processes are compared, it is noteworthy that while the recent application was approved in nine months, the Athens application took two years to reach approval. This disparity in time should itself raise eyebrows regarding the viability of the expedited approval process sought by the state. Admittedly, while it is true that only two plants have gone all the

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143. *N.Y. Siting Board Issues Final Approval for 1,080-MW PG&E Generating Athens Unit*, ELEC. UTILITY WK. (New York, N.Y.), Jun. 19, 2000, at 17 [hereinafter *N.Y. Siting Board Issues Final Approval*].

144. Hughes, *Plant Faces Hurdle*, *supra* note 142.

145. *N.Y. Governor Considers Challenging EPA Authority*, THE ENERGY REP., June 14, 1999, at 1.

146. This Part shall take effect upon the receipt by the chairman of a statement from the U.S. Environmental Protection Agency that the board has delegation of the permit program under the Federal Clean Water Act involving major electric generating facilities reviewed pursuant to Public Service Law article X or upon publication of a notice of adoption in the State Register, which ever is later.

N.Y. COMP. CODES R. & REGS. tit. 16, § 1002.1 (2001). “The provisions of 6 NYCRR Parts 750 through 757 that are in effect on the date of adoption of this Part shall apply in connection with each certification proceeding under Public Service Law article X.” *Id.* 6 NYCRR Parts 750 through 757 are DEC’s SPDES regulations, which were in effect when EPA granted delegation. *See In re Implement Article X of the Public Service Law*, No. 97-F-0809 slip op. (P.U.R. 4th Apr. 22, 1999).

147. *N.Y. Siting Board Issues Final Approval*, *supra* note 143.

148. N.Y. PUB. SERV. LAW § 168(3) (2000).

149. *Merchant Generation 800-MW Sithe Plant Wins New York Okay After ‘Expeditions’ Nine-Month Review*, POWER MARKETS WK. (New York, N.Y.), Jan. 22, 2001, at 10.

way through the new project, it cannot be denied that the fact that the second application took half the time than the first application to be approved is interesting. Is the Sithe plant application going to be the norm, or the exception?

### C. Present and Future Actions

The two approved plants are by no means the only projects proposed for the state. In fact, many more projects are being considered for the Hudson Valley, as well as for New York City.<sup>150</sup> It is somewhat ironic that the Hudson River, a longtime symbol of abuse and irresponsible industry practice, has recently begun a metamorphosis into a cleaner and more environmentally healthy resource, while the state may be unintentionally endangering any good that has been done. Many of the projects currently proposed under Article X are located on the Hudson due to the need for water to cool the generators. Other rivers are involved as well, such as a project in Glenville, New York, which will use water from the Mohawk River. Environmental groups involved in opposition to that project hope that water limitations will be imposed, as was the case with the Athens plant.<sup>151</sup> While New York, like many states, modeled its own State Environmental Protection Act, (SEPA) after the federal act (NEPA), the shadow of pollution still looms large in the state, especially in the wake of deregulation. If the state lowers standards for the analysis of environmental impacts through provisions such as Article X, it may be hampering all the work that has been done through the establishment of SEQRA.

It is true that the state does have an interest not only in seeing new plants built, but also newer, cleaner and more technologically advanced plants. The Siting Board has made it clear that they desire expedient review of applications to build “clean, efficient and state-of-the-art generation facilities in the manner envisioned” by state law.<sup>152</sup> In fact, instead of a dirtier coal- or oil-fired plant, the Athens plant will be gas-fired. In addition, the Siting Board has taken steps to assure that the effects on the

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150. See generally NEW YORK STATE PUB. SERV. COMM'N, ARTICLE X CASES, *available at* <http://www.dps.state.ny.us/xtable.html> (last modified Mar. 2, 2001).

151. Theola S. Labbe, *Proposed Plant Picks City Water*, TIMES UNION (Albany, N.Y.), Aug. 20, 2000, at E1.

152. See William Murphy, *More Info Sought About Proposed Power Plant*, NEWS-DAY, Sept. 30, 2000, at A16.



water quality of the Hudson River will be mitigated under the terms of its approval of the Athens plant.<sup>153</sup>

However, the stakes may be higher in New York City, where still other projects have been proposed. The last plant was built in New York City 25 years ago.<sup>154</sup> One proposed project involves a barge-mounted plant in Sunset Park, Brooklyn. This project is situated in an area of lower socioeconomic status, as are other projects planned in the city. The barge-mounted plant project has caught a temporary snag, as the Siting Board recently sent the application back with a request to supply the Board with more information needed to render the application complete and thus begin the 12-month statutory deadline for application approvals.<sup>155</sup> Another project is planned for Astoria, Queens, in an area where other plants currently operate.<sup>156</sup> This has sparked debate over the prudence of constructing plants in these areas, where pollution is already at dangerous levels, and where advocacy for groups in those areas is either inadequate or nonexistent. Lower socioeconomic areas have a much higher incidence of asthma in children, which is a major concern of citizens living in those areas.<sup>157</sup> Once plants are built, even if the market is once again regulated, the city would still suffer in terms of energy need, because the power companies could simply sell their power in other markets. In short, as Edward A. Smeloff of the Pace Law School Energy Project said, "You can't put the genie back in the bottle."<sup>158</sup>

#### D. The Athens Decision is Challenged

Citizens for the Hudson Valley (CHV) instituted an Article 78 action<sup>159</sup> to halt the construction of the plant in the aftermath of the Athens decision.<sup>160</sup> Notwithstanding the Board's final deci-

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153. *In re Athens Generating Co. L.P.*, 202 P.U.R. 4th 82 (June 15, 2000).

154. Kirk Johnson, *City Needs More Power Plants, Lawmakers are Told*, N.Y. TIMES, July 12, 2000, at B4 [hereinafter Johnson, *City Needs More Power Plants*].

155. See Murphy, *supra* note 152, at A16.

156. N.Y. Group Cites 'Environmental Justice' in Fighting NYPA Plans for 500-MW Unit, UTILITY ENV'T REP., May 19, 2000, at 13.

157. Robert Santiago, *Power Plant Turnoff Say Some Areas Get Too Many*, N.Y. DAILY NEWS, Oct. 6, 2000, Suburban Sec., at 1.

158. See Johnson, *City Needs More Power Plants*, *supra* note 154, at B4.

159. An "Article 78" action refers to action against a state body or officer, as provided by statute. See generally N.Y. C.P.L.R. §§ 7801-06 (2001).

160. Citizens for the Hudson Valley v. New York State Bd. on Elec. Generation Siting and the Env't, 723 N.Y.S.2d 532 (3d. Dep't 2001); see also Brief for Petitioner, Citizens for the Hudson Valley v. New York State Bd. on Elec. Generation Siting and

sion, after such decision has been set forth, the last resort lies with judicial remedy. The Public Service Law provides that:

The board shall make the final decision on an application under this article for a certificate or amendment thereof, upon the record made before the presiding examiner, after receiving briefs and exceptions to the recommended decision of such examiner and to the report of the associate examiner, and after hearing such oral argument as the board shall determine. Except for good cause shown to the satisfaction of the board, a determination under subdivision five of section one hundred sixty-seven of this article that the applicant's proposal is preferable to alternatives shall be final.<sup>161</sup>

CVH sought a rehearing regarding the Athens project, and the Siting Board denied a rehearing, based on issues such as local zoning ordinances, alternative sites, dry cooling, and public and policy considerations.<sup>162</sup> Consequently, the groups seeking reconsideration of these issues, having exhausted their administrative remedies, were entitled to bring an action in court.<sup>163</sup>

The CHV suit was based upon several grounds, including "disregard for a locality's home rule,"<sup>164</sup> and inadequate review of the siting application as a matter of law.<sup>165</sup>

The home rule challenge was based upon the guarantee provided by the New York State Constitution that the state legislature

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the Env't, 723 N.Y.S.2d 532 (3d. Dep't 2001) (No. 87928) available at [http://www.citizensforthehudsonvalley.org/to\\_be\\_argued\\_by\\_carl\\_g.htm](http://www.citizensforthehudsonvalley.org/to_be_argued_by_carl_g.htm) (last modified Dec. 12, 2000); see also Press Release, Citizens for the Hudson Valley, Citizens for the Hudson Valley Files Suit Against the Athens Generating Siting Board (Sept. 9, 2000), at <http://www.citizensforthehudsonvalley.org/PressReleaseArticle78.htm> [hereinafter *Citizens for the Hudson Valley Files Suit*]; see also Kenneth Aaron, *Group Sues to Halt Athens Power Plant Project*, TIMES UNION (Albany, N.Y.), Sept. 12, 2000, at E1.

161. N.Y. PUB. SERV. LAW § 168(1) (2000).

162. Application by Athens Generating Co., L.P., 2000 N.Y. P.U.C. LEXIS 697 (Aug. 10, 2000) (denying petition for rehearing).

163. Judicial review will be brought in the appellate division of the supreme court "in the judicial department embracing the county wherein the facility is to be located . . . ." N.Y. PUB. SERV. LAW § 170 (2000).

164. *Citizens for the Hudson Valley Files Suit*, *supra* note 160; Petitioners' Brief at Point VI, *Citizens for the Hudson Valley*, available at [http://www.citizensforthehudsonvalley.org/to\\_be\\_argued\\_by\\_carl\\_g.htm](http://www.citizensforthehudsonvalley.org/to_be_argued_by_carl_g.htm) (last modified Dec. 12, 2000).

165. See, e.g., Petitioners' Brief at Points II, III, & IV, *Citizens for the Hudson Valley*, available at [http://www.citizensforthehudsonvalley.org/to\\_be\\_argued\\_by\\_carl\\_g.htm](http://www.citizensforthehudsonvalley.org/to_be_argued_by_carl_g.htm) (last modified Dec. 12, 2000).

[s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership . . . .<sup>166</sup>

This rule is implicated when the Siting Board acts pursuant to Article X, section 168(d), as it did in the Athens case. Under Article X, section 168(d), the Siting Board can ignore existing local zoning ordinances under certain circumstances.<sup>167</sup> Recall that the area of the proposed Athens plant is zoned light industrial. CHV alleged that this disregard of home rule, as applied in the Athens case, was unconstitutional.<sup>168</sup> The home rule provision of the New York state constitution "grants significant autonomy to local governments,"<sup>169</sup> and allows local laws to survive possible preemption by state laws, except for the requirements set out in the constitutional provision.<sup>170</sup> However, those restrictions are excepted if "the subject matter of the statute is of sufficient importance to the State generally to render it a proper subject of State legislature."<sup>171</sup>

In *City of New York v. Policemen's Benevolent Association*, it was asserted that the state interest should be analyzed using the "rational basis" standard used in equal protection challenges, i.e., the "any conceivable legitimate objective" standard.<sup>172</sup> However, the Court of Appeals rejected this argument, holding that in resolving home rule issues, the rational basis standard "is not an appropriate analogy to the sensitive balancing of State and local interests required"<sup>173</sup> because then almost all state legislation will survive such minimal scrutiny, and therefore defeat the very con-

166. N.Y. CONST. art. IX, § 2.

167. Section 168(2)(d) provides that the Siting Board may "refuse to apply any local ordinance, law, resolution or other action or any regulation issue thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive . . . ." N.Y. PUB. SERV. LAW § 168(2)(d) (2000).

168. Petitioners' Brief at Point VI, *Citizens for the Hudson Valley*, *supra* 165.

169. *City of New York v. Patrolmen's Benevolent Association*, 89 N.Y.2d 380, 387 (1996).

170. The exceptions allow infringement of home rule "only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership . . . ." N.Y. CONST. art. IX, § 2.

171. *Patrolmen's Benevolent Association*, 89 N.Y.2d at 389 (quoting *Matter of Kelley v. McGee*, 57 N.Y.2d 522, 538 (1982)).

172. *Id.* (citing *Maresca v. Cuomo*, 64 N.Y.2d 242, 251 (1984)).

173. *Id.*

cept of the home rule.<sup>174</sup> Thus, the court held that, in order for state legislation to overcome the home rule requirements, the state interest must be substantial.<sup>175</sup>

Under this ruling, it was doubtful that CHV's challenge on these grounds would survive and, in fact, the appellate court rejected CHV's assertions. The CHV claim that "the record is entirely devoid of any information which either establishes that the proposed facility satisfies any substantial New York statewide concern or demonstrates that the proposed facility will even serve New York State"<sup>176</sup> misses the mark. Among the state's interests set out in the 1998 SEP is "to promote continued economic growth and the development of energy industries within the State that create and retain jobs."<sup>177</sup> This interest is not only substantial, but is clearly related to Article X and the action of the Siting Board. Whether the Athens plant will actually provide the anticipated benefits is speculation and involves circular reasoning. If the requirement that a plant must actually serve New York is valid, as CHV asserted, then arguably no new plants will ever be built, since 1) more of the same foresight is necessary and 2) building plants that only serve New York state is contrary to the basic structure of a competitive, deregulated electricity industry.

Instead, the rule is: Where "State concern is involved 'to a substantial degree, in depth or extent,' the State may freely legislate notwithstanding the legislation's impact on local concerns."<sup>178</sup> CHV misread this rule, and instead asserted that the legislation must be substantially related to a substantial state interest. That is, the Athens plant is substantially certain to further the substantial interests set out in the SEP, namely, economic growth and expanded energy industries.<sup>179</sup> Accordingly, the appellate court held that the appropriate test used to address whether a statute deals with a matter of state-wide concern "cannot be determined through subjective analysis on a case-by-case basis. To the

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174. *See id.* at 390.

175. *Id.* at 391.

176. Petitioners' Brief at Point VI, *Citizens for the Hudson Valley*, *supra* note 165.

177. N.Y. STATE ENERGY RESEARCH & DEV. AUTH., *supra* note 108, at 1-2.

178. *Patrolmen's Benevolent Association*, 89 N.Y.2d at 390 (quoting *Wambat Realty Group v. State of New York*, 41 N.Y.2d 490, 494 (1977)).

179. This is evidenced by CHV's assertion that "[t]he condition precedent to a finding of constitutionally-valid override of local law, i.e., that the facility will *actually* serve a statewide interest, just doesn't exist in this case." (emphasis added). Petitioners' Brief at Point VI, *Citizens for the Hudson Valley*, *supra* note 165.

contrary, a statute qualifies as a 'general law' if it 'in terms and in effect applies alike to . . . all cities, all towns or all villages.'"<sup>180</sup>

CHV also asserted that there was no support in the record for the Siting Board's determination that the Athens plant would be in the public interest.<sup>181</sup> This argument was based largely on the potential impacts on Olana, and the assertion that the Siting Board did not take this impact, or alternative sites, fully into consideration.<sup>182</sup> The appellate court rejected CHV's assertion that the plant would have had an unreasonable impact on Olana's viewshed.<sup>183</sup> The court cited the fact that the new facility would be situated on the opposite bank of the Hudson, "approximately 3.1 miles north of Olana and two miles inland," not directly across from Olana, as CHV asserted.<sup>184</sup> Furthermore, the court had confidence that Olana's "renowned views to the southwest [would be] unaffected."<sup>185</sup>

Regarding the issue of alternative sites, in an order denying a rehearing on the approval of the Athens application, the Siting Board stated that "an intervenor advocating an alternative to the site proposed by a private applicant must submit evidence that the alternative is superior to that proposed by the applicant."<sup>186</sup> The Board held that it must not consider alternative sites that the applicant does not own or have options to.<sup>187</sup> This stance appears to square with Article X; however, the question of who bears the burden of proving the superiority of alternate sites is open to debate. Article X requires "[a] description and evaluation of reasonable alternative locations to the proposed facility, if any."<sup>188</sup> This suggests that an applicant must have alternate sites available to it, or else alternate sites will not be considered. If an applicant has alternate sites, this will enhance their chances for approval, since it will increase the chance that at least one site will be approved. However, it should not follow that just because an applicant does not own or have options to another site, their sole site

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180. *Citizens for the Hudson Valley*, 723 N.Y.S.2d at 536 (citations omitted).

181. Petitioners' Brief at Points III & IV, *Citizens for the Hudson Valley*, *supra* note 165.

182. *Id.*

183. *Citizens for the Hudson Valley*, 723 N.Y.S.2d at 538.

184. *Id.*

185. *Id.*

186. Application by Athens Generating Company, L.P., 2000 N.Y. P.U.C. LEXIS at \*9.

187. *Id.* at \*8.

188. N.Y. PUB. SERV. LAW § 164(1)(b) (2000).

should be automatically approved. This does not seem to be the case with the Athens plant; the issue appears to be who has the burden of proving the superiority of a proposed site. The appellate court sidestepped this issue, ruling that the burden of showing alternative sites was not an issue in this case, since AGC could not be required to present alternative sites that it does not own or have an option to purchase for review.<sup>189</sup> Nevertheless, the resolution of the alternative site issue is key; this issue is sure to come up again in other applications, especially in cases where an applicant *does* have access to viable alternative sites.

### Conclusion

Does the Article X process work to put new, cleaner power plants online expeditiously? It appears there has been an effort to plan newer, cleaner plants using technological advancements. However, the process also appears to be bogged down in the usual manner of bureaucratic snafus and other delays caused by public comment procedures and timelines. The future of electric industry in New York remains uncertain. Indeed, the fate of electricity deregulation is cast in serious doubt all over the country, in light of the California crisis. It has been suggested that the heart of California's problems lies in the way the state implemented and rolled out its deregulated system. Some argue that simple conservation is the fastest and cheapest way to meet increasing energy needs.<sup>190</sup> It has also been suggested that Article X be revamped further in order to facilitate cleaner technology upgrades for older and dirtier plants.<sup>191</sup>

The ever-increasing demand for power, especially in New York City, presents an unflagging problem. In short, too few power plants have been built in relation to the increasing power demand. New York has put Article X into place to combat this problem, by affording a shorter siting application process. This shorter process is meant to have the net effect of getting new plants constructed faster, so that supply will keep pace with New York's demand. Unfortunately, only time will tell how New York responds to the new system. Since Article X became effective, only three plants have been approved, while over twenty projects remain within the siting process. The most recent Con Ed plant to

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189. See *Citizens for the Hudson Valley*, 723 N.Y.S.2d at 538.

190. Kenneth Aaron, *Albany, N.Y.-Based Group Wants Faster Power-Plant Approval Process*, THE TIMES UNION (Albany, N.Y.) Aug. 14, 2001.

191. *Id.*

be approved in New York City was delayed approximately one month because of community opposition;<sup>192</sup> similar situations threaten almost every application on the Board's calendar. Meanwhile, a recent report predicted that, even given a 1.5% growth rate in power demand, New York state will have an approximate load of 31,500 megawatts in the summer of 2002.<sup>193</sup> However, the state should only have about 34,000 megawatts of capacity, dangerously close for assuring continuous power supply, especially if any unexpected occurrence causes generators to go offline.<sup>194</sup> There are compelling arguments for and against expediting the application process. What is certain is that environmental concerns cannot be sacrificed through arbitrary decisions of siting applications, and due to the importance of the issues involved, it will not be shocking to see other challenges follow future Siting Board decisions.

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192. Philip Lentz, *4 Power Plants Steam Toward Approval in NYC: Heated Words Over Shortages End with Smoother Process; Small Projects Fill Gap*, CRAIN'S N. Y. BUS., July 2, 2001, at 1.

193. *Tight Capacity, Slow Project Siting will Haunt New York in 2002, Study Says*, POWER MARKETS WK., Aug. 6, 2001, at 6.

194. *Id.*