

NEW YORK STATE BOARD ON ELECTRIC  
GENERATION SITING AND THE ENVIRONMENT

CASE 17-F-0451 - Petition of NRG Astoria Power LLC for a  
Declaratory Ruling that its Proposed  
Replacement Project is Exempt from Article 10  
of the New York State Public Service Law.

DECLARATORY RULING CONCERNING JURISDICTION  
OVER PROPOSED GENERATING FACILITIES

(Issued June 12, 2019)

By the Chair of the Board:

INTRODUCTION

By petition filed July 24, 2017, NRG Astoria Power LLC (NRG or Petitioner) seeks a declaratory ruling from the Chair of the New York State Board on Electric Generation Siting and the Environment (Siting Board) determining that the proposed replacement of existing generating units (Proposed Replacement Project)<sup>1</sup> at the NRG Astoria facility (Facility) is exempt from review under Article 10 of the Public Service Law (PSL) and should instead continue to be subject to the State Environmental Quality Review Act (SEQRA) or be considered a normal repair,

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<sup>1</sup> The Proposed Replacement Project consists of repowering an electric generating facility in Astoria, Queens County. According to the Petitioner, the Proposed Replacement Project would replace some of the existing turbines, totaling 646 megawatts (MW) in nameplate capacity with more efficient and cleaner turbines totaling 579 MW in nameplate capacity.

replacement, modification or improvement to a major electric generating facility.<sup>2</sup>

NRG filed its petition pursuant to PSL §161(1) and served it as required by 16 NYCRR §8.2(b), one of the New York State Public Service Commission's (Commission) procedural rules the Siting Board adopted by reference pursuant to 16 NYCRR §1000.3. This section states, in relevant part, that the petition, "shall be served on the affected utility company, if any, and any other entity known to be directly affected by or interested in the requested ruling," and that the Secretary to the Commission, "may require service on other affected or interested persons." NRG served its petition on all relevant state agencies, municipal governments, electric utilities, and active participants in the SEQRA process.

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<sup>2</sup> All of the entities involved in the development of the Proposed Replacement Project are part of the NRG Energy, Inc. corporate structure. Astoria Gas Turbine Power LLC, a subsidiary of NRG Energy, Inc., is currently the owner and operator of the NRG Astoria facility. The SEQRA approval and State Pollutant Discharge Elimination System (SPDES) and Title V permits were issued to Astoria Gas Turbine Power LLC. On April 26, 2010, Astoria Gas Turbine Power LLC petitioned the Commission for a Certificate of Public Convenience and Necessity (CPCN) to replace the generating units at the NRG Astoria facility. On December 13, 2010, Astoria Gas Turbine Power LLC substituted NRG Astoria Power LLC, an indirect subsidiary of NRG Energy, Inc. and the Petitioner in the instant filing as the applicant for the CPCN, and the Commission granted the CPCN to NRG Astoria Power LLC on January 25, 2011. See, generally, Case 10-E-0197, NRG Astoria Power LLC, Supplemental Filing (Dec. 13, 2010); Case 10-E-0197, supra, Order Granting Certificate of Public Convenience and Necessity, Providing for Lightened Regulation and Approving Financing (issued January 25, 2011). On October 16, 2012, NRG Energy, Inc. filed an interconnection request with the NYISO. The resulting NYISO queue position, Q393, was transferred on March 22, 2017 to NRG Berrians East Development LLC, also an indirect subsidiary of NRG Energy, Inc.

PSL §161(1) provides that the Chair of Siting Board, "after consultation with the other members of the board exclusive of the ad hoc members, shall have exclusive jurisdiction to issue declaratory rulings regarding the applicability of, or any other question under, this article and rules and regulations adopted hereunder." Upon due consideration and consultation, and as discussed in more detail below, the Chair finds and declares that PSL Article 10 does not apply to NRG's Proposed Replacement Project as redesigned from its original replacement project in which, as discussed herein, applications were filed, and approvals were granted, between 2009-2011. As such, the Petitioner's request for a declaratory ruling is granted on the sole grounds that the Proposed Replacement Project is exempt from review under Article 10 of the PSL §162(4)(d) and should continue to be reviewed pursuant to SEQRA. Petitioner's separate claim that the Proposed Replacement Project is exempt from PSL Article 10 pursuant to PSL §162(4)(b), for "normal repairs, replacements, modifications and improvements of a major electric generating facility," is, therefore, moot and will not be discussed herein.

#### BACKGROUND

Astoria Gas Turbine Power LLC is the current owner and operator of the Facility and is a subsidiary of NRG Energy, Inc. The current Facility has a nameplate capacity of 646 MW and contains 31 turbines. According to the Petition, NRG Astoria provides blackstart service to Consolidated Edison Company of New York, Inc., runs in the event of an outage, ensures reliability during storms, and operates when the energy demand is high in New York City.

Petitioner seeks a review of the Proposed Replacement Project for three reasons. First, according to the Petitioner,

"there is only a narrow window in time to permit and install the new generating units. The Proposed Replacement Project is in the N[ew] Y[ork] I[ndependent] S[ystem] O[perator]'s Class Year 2017 and NRG management must decide whether to accept any resultant cost allocation by the end of the Class Year process."<sup>3</sup> Second, Petitioner states that the New York State Department of Environmental Conservation (DEC) has created an initiative for the New York Metropolitan Area to reduce air emissions on high energy demand days from peaking combustion turbines. The turbines at the existing Facility would have to be retired when these regulations take effect unless the Proposed Replacement Project is approved and timely implemented.<sup>4</sup> Lastly, Petitioner claims that since the Indian Point Nuclear Facility units are scheduled to be retired in 2020 and 2021, the current in-City generation needs should be modernized as soon as possible to continue service.

The environmental review process under SEQRA to replace the turbines at NRG Astoria began in 2007. NRG contends that, before August 1, 2012, the DEC, as lead agency, accepted all applications as complete.<sup>5</sup> The original replacement project was going to replace the existing turbines with combined cycle

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<sup>3</sup> Petition, pp. 3-4.

<sup>4</sup> NRG Astoria is comprised of 31 turbines, all of which went into commercial operation in 1970; it has three groups of Pratt and Whitney peaking units, each with a nameplate capacity of 167.4 MW, and two groups of Westinghouse peaking units with nameplate capacities of 49 and 95 MW. The Westinghouse units are currently mothballed, but they retain their interconnection and capacity rights, as well as required environmental permits, and could return to service if necessary.

<sup>5</sup> Regulations promulgated by the DEC under the Environmental Conservation Law (ECL) §19-0312 became effective July 12, 2012. The regulations promulgated by the Siting Board, however, became effective August 1, 2012.

units totaling 1,040 MW. A Draft Environmental Impact Statement (DEIS), a Title V air permit application and a SPDES application were submitted in 2009. The NRG Astoria Facility site was designated as the location in each of those documents. The Petitioner states that DEC accepted the DEIS and determined that the Title V air permit and SPDES permit applications were complete in the spring of 2010. Public hearings were held regarding these applications along with approximately 18 meetings with various government agencies, officials, and community and environmental groups. Petitioner States that DEC issued the SPDES permit, the Title V air permit and accepted the Final Environmental Impact Statement (FEIS) in the fall of 2010. The FEIS, according to NRG, indicated that the public was supportive of the original replacement project at the time.

In addition, NRG states that it petitioned the Commission for a CPCN to replace the existing turbines in the spring of 2010. Again, the Petitioner states that the NRG Astoria Facility site was designated as the location for the replacement turbines. The Commission granted a CPCN in early 2011. Moreover, two Notices of Proposed Construction or Alteration were filed by NRG in the spring of 2010 and both indicated the location of the replacement turbines as the NRG Astoria Facility.

Subsequently, however, NRG determined that market conditions did not support completing the original replacement project involving the combine cycle units. According to the Petitioner, market conditions now support replacing the aging NRG Astoria turbines with simple cycle units rather than the previously proposed combined cycle turbines. NRG intends for the Proposed Replacement Project to be treated as a continuation of its prior endeavor to update the NRG Astoria Facility under the SEQRA process. NRG proposes to seek an amendment to its

previous Commission-approved CPCN to reflect the changes to the original replacement project. According to Petitioner, the replacement turbines for the Proposed Replacement Project will still be the same General Electric 7F, dual-fuel models. However, in response to what the Petitioner describes as changing market conditions, including flattening demand and higher intermittent renewable penetration, NRG's Proposed Replacement Project now consists of three, rather than four, turbines, and the units will be operated in simple cycle rather than combined cycle. The nameplate rating of the Proposed Replacement Project (three turbines) will total 579 MW, rather than 1,040 MW. NRG also states that the same emission control systems as proposed in the original replacement project will be included in the Proposed Replacement Project.

The Petitioner further asserts that the Proposed Replacement Project is beyond the scope of PSL Article 10 because Article 10 provides for certain exemptions applicable here. The first, according to NRG, is PSL §162(4)(d), which provides that Article 10 shall not apply to a major electric generating facility "if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant."

The Petitioner argues that its SEQRA submissions, SPDES and updated Title V air permit applications filed with DEC, all designate the location of the original generating unit replacement which is the same location as the Proposed Replacement Project, and were submitted on March 5, 2009 and

February 5, 2010, respectively. Similarly, its CPCN petition to the Commission also designates the location of the original generating unit replacement, which is the same location as the Proposed Replacement Project and was submitted on April 26, 2010. Finally, the construction notices to the Federal Aviation Administration also designate the location of the original generating unit replacement, which is the same location as the Proposed Replacement Project and were submitted on May 7, 2010. These applications, according to NRG, were all submitted before August 1, 2012, the effective date of the rules and regulations, and therefore, Petitioner argues, exempt the Proposed Replacement Project from Article 10 review pursuant to PSL §162(4)(d).

The second exemption that applies here, according to NRG, is PSL §162(4)(b), which provides that Article 10 shall not apply "[t]o normal repairs, replacements, modifications and improvements of a major electric generating facility, whenever built, which do not constitute a violation of any certificate issued under this article and which do not result in an increase in capacity of the facility of more than twenty-five thousand kilowatts." "Capacity" here refers to nameplate capacity according to the Petitioner. Article 10 defines "nameplate" as the "manufacturer's designation, generally as affixed to the generator unit, which states the total output of such generating facility as originally designed according to the manufacturer's original design specifications."

The Petitioner argues that the Proposed Replacement Project fits squarely within the language of the above-referenced section because the Proposed Replacement Project will replace the generators of a major electric generating facility and, the replacement will not increase the nameplate capacity of the existing Facility's generators by more than 25 MW. To the

contrary, according to NRG, the Proposed Replacement Project will reduce the nameplate capacity by 67 MW. The Petitioner goes on to assert that nothing in the language of the exemption nor, for that matter, any other Article 10 provision, its legislative history, or its implementing regulations suggests that a "normal replacement" cannot consist of new nameplate capacity replacing old generation. NRG states that the exemption lacks any applicable restrictive language other than the 25 MW increase limit. Further, Petitioner submits that excluding new equipment from the term "normal replacement" would constitute an interpretation well beyond the plain meaning of the statute.

The Petitioner also argues that narrowing the applicability of the 25 MW threshold to only replacing components of "existing nameplate capacity" (i.e., excluding the installation of completely new generating equipment) would appear to duplicate the scope of PSL §165(4)(b), which, according to NRG, already addresses modifying an existing facility to increase its nameplate capacity by more than 25 MW. If the exemption is interpreted to exclude new generating equipment, Petitioner argues that both provisions (i.e., PSL §162(4)(b) and §165(4)(b)) would solely address alterations to existing facilities and no provision in Article 10 would address new generating equipment replacements that result in a 25 MW or less increase in nameplate capacity. According to the Petitioner this would be an incongruous interpretation of the statute.

In accordance with the Siting Board's regulations, two public comments were received within the initial 21-day period prescribed in 16 NYCRR §8.2(c). The first comment dated August 2, 2017, from Aravella Simotas, New York State Assembly, Michael Gianaris, New York State Senate and Costa



Constantinides, New York City Council and the second comment dated August 14, 2017, on behalf the New York City Mayor's Office of Recovery and Resiliency assert that the Proposed Replacement Project is necessary to replace old, in-City generation with new, more efficient units. Other benefits, according to commenters, include, improvement in air quality and thus health conditions in vulnerable populations, a reduction in greenhouse gas emissions and enhanced system reliability and resiliency. Commenters also state that the Proposed Replacement Project will encourage the conversion to a renewables-based energy supply. Two additional comments in support have subsequently been submitted.

#### LEGAL AUTHORITY

PSL §161(1) provides that the Chair of the Siting Board, "after consultation with the other members of the board exclusive of the ad hoc members, shall have exclusive jurisdiction to issue declaratory rulings regarding the applicability of, or any other question under, this article and rules and regulations adopted hereunder."

Unless excluded by a provision of PSL §162(4), a developer is required to obtain approval under PSL Article 10 before constructing a, "major electric generating facility," defined in PSL §160(2) as an electric generating facility with a nameplate generating capacity of 25 MW or more, including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under PSL Article VII.

PSL §162(4)(d) provides that Article 10 shall not apply to a major electric generating facility "if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the

environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant.”

The regulations promulgated by DEC became effective July 12, 2012. The regulations promulgated by the Siting Board became effective August 1, 2012. The exemption provided in PSL §162(4)(d), therefore, applies to projects which (1) filed an application for a permit or other approval before August 1, 2012, and (2) designated the location of the generating facility in such application.

#### DISCUSSION

PSL §162(4)(d) provides, in pertinent part, that Article 10 does not apply:

[t]o a major electric generating facility if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant...

NRG asserts that the Proposed Replacement Project does not trigger Article 10 because the Petitioner has previously filed applications with DEC and the Commission on or before the effective date of the rules and regulations promulgated pursuant to PSL Article 10 and section 19-0312 of the ECL, “... for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory

body, in which application the location of the major electric generating facility has been designated by the applicant." Through this Ruling, and upon consultation with permanent Siting Board members, I find and declare that the Petitioner's reliance on the SEQRA grandfathering exemption pursuant to PSL §162(4)(d) applies here. Having determined that the Proposed Replacement Project is exempt from PSL Article 10 pursuant to PSL §162(4)(d), the Petitioner's exemption request pursuant to PSL §162(4)(b), for "normal repairs, replacements, modifications and improvements of a major electric generating facility," is moot and, as indicated, will not be furthered discussed.<sup>6</sup>

As discussed above and acknowledged herein, NRG did submit a Title V air permit and a SPDES permit applications and a DEIS in 2009 to the DEC and petitioned the Commission for a CPCN in 2010. The Proposed Replacement Project location was the same as the original replacement project designated in these respective applications, which were submitted prior to August 1, 2012, the implementation date of PSL Article 10. DEC deemed the SPDES and Title V permit applications complete and accepted the DEIS on April 16, 2010. DEC also issued the Title V and SPDES permit applications to NRG on October 4, 2010 and issued its SEQRA Findings Statement for the originally proposed replacement project on October 4, 2010. Finally, the Commission granted a CPCN for the original replacement project in January 2011. NRG's proposal to continue the SEQRA process, for this as yet unbuilt Proposed Replacement Project through a Supplemental Environmental Impact Statement to address the Proposed Replacement Project's impacts and seek to amend the previously-

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<sup>6</sup> According to the Petition, "[i]n the event the Chair agrees with NRG's claim that it qualifies for the Article 10 grandfathering exemption ... our next argument need not be reached."

issued DEC water and air permits and Commission-approved CPCN, is consistent with the "grandfathering" exemption under PSL §162(4)(d).

NRG never commenced the construction of the original replacement project and, therefore, maintains the opportunity to supplement the existing SEQRA review for the Proposed Replacement Project. Nothing in the language of the "grandfathering" provision limits the exemption to pending filings where approvals were not yet granted. Nor does it require a project to have filed for all its permits. Finally, the SEQRA exemption does not preclude projects that have been subject to reasonable updating or revisions. The purpose of the exemption is to allow the previously engaged governmental entity to continue its review of the proposal first brought to it for review and to allow the applicant to continue permitting before the entity to whom it first filed applications.

The Proposed Replacement Project is an extension, amendment or continuation of the originally proposed project. The Proposed Replacement Project consists of three, rather than four, turbines, and the units will be operated in simple cycle rather than combined cycle. The nameplate rating of the updated Proposed Replacement Project (three turbines) will total 579 MW, rather than 1,040 MW. Despite these changes, however, the Proposed Replacement Project seeks to replace the same turbines at the same locations as was originally proposed. The Proposed Replacement Project, therefore, need not be treated as an altogether new project initiated after the enactment of PSL Article 10. DEC, as lead agency, may determine to continue its review under SEQRA for the proposed Replacement Project

The Siting Board's declaratory ruling in Ball Hill Wind Energy, LLC (Ball Hill) lends further support to this

determination.<sup>7</sup> There, the original developer submitted an application to the Town to build a wind generation facility in 2008. The application designated the location of the project. A new developer bought the project and subsequently proposed to revise the types of turbines, the interconnection to the system, and otherwise supplement the record with more studies. The Chair, after consultation with the permanent Siting Board members, declared that the project, continuing under a successor developer, was exempt from Article 10 pursuant to PSL §162(4)(d) so long as Ball Hill Wind Energy constructs the facility in a timely manner in accordance with any siting approvals it receives from the affected Towns.

CONCLUSION

Having considered the Petition and consulted with the other permanent members of the Board, pursuant to PSL §164, it is DECLARED:

1. A Certificate of Environmental Compatibility and Public Need under Article 10 of the Public Service Law is not required for the construction and operation of the Proposed Replacement Project by NRG Astoria Power LLC.
2. NRG Astoria Power LLC's request for an exemption under Public Service Law §162(4)(d) is granted.
3. This proceeding is closed.

(SIGNED)

JOHN B. RHODES  
Chair

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<sup>7</sup> See, Case 16-F-0289, Ball Hill Wind Energy, LLC, Declaratory Ruling Concerning Jurisdiction over Proposed Generating Facility (issued December 20, 2016), pp. 5-6.