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Siting Transmission Lines For New York Offshore Wind Projects

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offshore wind front and center in New York’s energy development discussions.

Obtaining the permits necessary to build an offshore wind facility requires developers to understand permitting requirements at all levels of government.¹ Federal law governs site leasing, turbine siting, and construction activities, among other issues, in the waters of the United States. At the state level, New York law covers, *inter alia*, the use of state territorial underwater land for transmission line siting. Use of such lands involves real property, environmental, energy, and construction issues. Depending on the location of the onshore transmission line route, and the identity of the applicant for the new line, local zoning and municipal requirements may also come into play.

This article will principally focus on the New York State component of the licensing effort: Public Service Law (PSL) Article VII, New York’s one stop shopping proceeding for transmission line siting, and the Article VII precedent on which offshore wind project developers may rely.

Introduction

The development of offshore wind electric generating facilities to serve New York’s electricity needs is a topic currently on the minds of New Yorkers thinking about the state’s energy future. New York is at the forefront of efforts in the United States to decarbonize a good portion of the energy supply mix. The New York State Energy Research and Development Authority (NYSERDA) and the Long Island Power Authority (LIPA), together with the federal government, have placed

New York State Policy Promotes Wind Power

New York made its commitment to aggressive renewable energy development clear with its 2015 State Energy Plan.² The State Energy Plan set goals for the State: it called for steep reductions in greenhouse gas emissions from the energy sector (40% below 1990 levels by 2030) and sharp increases in renewable energy production (50% of electricity consumed in the state to be produced by renewable sources by 2030).³ The State Energy Plan also discussed the role that offshore wind

¹ See Philip E. Karmel et al., *The Proposed Wind Farm Off the Shore of Long Island*, 27 ENVTL. L. IN N.Y. 143 (Sept. 2016).

² N.Y. STATE ENERGY PLANNING BD., *THE ENERGY TO LEAD: 2015 NEW YORK STATE ENERGY PLAN*, vol. 1, at 7 (2015) [hereinafter *STATE ENERGY PLAN*], https://energyplan.ny.gov/media/nysenergyplan/2015_state_energy_plan.pdf.

³ *STATE ENERGY PLAN*, *supra* note 2, at 112.

could play in New York, and recommended studies that would help spur development.⁴

In 2016, the State Energy Plan's renewable energy goals became mandates when the New York State Public Service Commission (PSC) adopted its Clean Energy Standard (CES).⁵ The CES imposes an obligation on load serving entities (e.g., utilities, energy service companies) to procure renewable energy to serve their customers.⁶ The amount of renewable energy required is based on the size of a load serving entity's load, and this requirement will increase through 2030.⁷ Generally, load serving entities must purchase renewable energy credits (RECs) or sign power purchase agreements with renewable facilities to demonstrate compliance with the CES mandate.⁸

NYSERDA is coordinating New York's efforts to encourage offshore wind development⁹ and is currently developing a master plan for offshore wind development in New York.¹⁰ The master plan will address, among other things, site issues (i.e., identification, leasing, and assessment), cost benefit and interconnection studies, economic impacts, and impact mitigation.¹¹ NYSERDA's first step toward its master plan was to issue a blueprint, which outlined the process and timeline for the master plan.¹²

In his 2017 State of the State report, New York Governor Andrew Cuomo committed the State to developing up to 2.4 gigawatts of offshore wind by 2030.¹³ In addition, LIPA recently approved a contract for the proposed 15 turbine Deepwater Wind project off the Long Island coast.¹⁴ When talking about the Deepwater Wind project, LIPA's chief executive stated that the

project was a "gateway project," not its last.¹⁵ A recent auction to lease underwater lands off the coast of New York yielded a price higher than all previous offshore wind auctions combined.¹⁶

Offshore Wind Involves Multiple Jurisdictions

Both state and federal government jurisdictions are triggered when siting offshore wind facilities.¹⁷ States have jurisdiction over the territorial waters in their respective coastal zones, which extend from their shorelines out three nautical miles.¹⁸ The federal government has jurisdiction from the state coastal zones out 200 miles, an area known as the Outer Continental Shelf (OCS).¹⁹ It appears that new offshore wind turbines will, for the most part, be located in the OCS;²⁰ therefore, the federal government will have jurisdiction over the siting of these components. State jurisdiction applies once a facility's transmission lines hit the state coastal zone.²¹

A. Federal Jurisdiction

The Energy Policy Act of 2005 (EPA 2005) authorized the U.S. Department of Interior (DOI) to grant leases, easements, and rights of way for activities that "produce or support production, transportation, or transmission of energy from sources other than oil and gas."²² EPA 2005 also authorized the DOI to develop a renewable energy program.²³ In 2009, the DOI promulgated its renewable energy program regulations, which

⁴ STATE ENERGY PLAN, *supra* note 2, at 74-75.

⁵ PSC Case 15 E 0302, Proceeding on Motion of the Commission to Implement a Large Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (Aug. 1, 2016) [hereinafter CES Order], <http://on.ny.gov/2aKtpgA>.

⁶ CES Order, *supra* note 5, at 154.

⁷ CES Order, *supra* note 5, at 154.

⁸ CES Order, *supra* note 5, at 155. Load serving entities also have the option to make alternative compliance payments in lieu of purchasing RECs or entering power purchase agreements. *Id.* at 109-10.

⁹ *Offshore Wind Energy*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH. (NYSERDA), <https://www.nyserdanewyork.gov/offshorewind> (last visited June 6, 2017).

¹⁰ NYSERDA, BLUEPRINT FOR THE NEW YORK STATE OFFSHORE WIND MASTER PLAN 4 (2016) [hereinafter OFFSHORE WIND BLUEPRINT], [https://www.nyserdanewyork.gov/media/Files/Publications/Research/Biomass Solar Wind/New York State Offshore Wind Blueprint.pdf](https://www.nyserdanewyork.gov/media/Files/Publications/Research/Biomass%20Solar%20Wind/New%20York%20State%20Offshore%20Wind%20Blueprint.pdf).

¹¹ OFFSHORE WIND BLUEPRINT, *supra* note 10, at 4.

¹² OFFSHORE WIND BLUEPRINT, *supra* note 10, at 5.

¹³ GOVERNOR ANDREW M. CUOMO, NEW YORK STATE: EVER UPWARD 2017 STATE OF THE STATE 54 (2017), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>.

¹⁴ Diane Cardwell, *Nation's Largest Offshore Wind Farm Will Be Built Off Long Island*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/business/energy-environment/long-island-power-authority-offshore-wind.html>.

¹⁵ See Diane Cardwell, *Nation's Largest Offshore Wind Farm Will Be Built Off Long Island*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/business/energy-environment/long-island-power-authority-offshore-wind.html>.

¹⁶ Diane Cardwell, *Off Long Island, Wind Power Tests Waters*, N.Y. TIMES, Jan. 21, 2017, <https://www.nytimes.com/2017/01/21/business/energy-environment/offshore-wind-energy-long-island.html>.

¹⁷ 43 U.S.C. § 1311.

¹⁸ 43 U.S.C. § 1312.

¹⁹ 43 U.S.C. § 1333.

²⁰ See EUROPEAN WIND ENERGY ASS'N, THE EUROPEAN OFFSHORE WIND INDUSTRY: KEY TRENDS AND STATISTICS 2009, at 5 (Jan. 2010) (average distance to shore of offshore wind farms installed during 2009 was 14.4 km (almost nine miles)), <http://www.ewea.org/fileadmin/emags/statistics/2009offshore/pdf/offshore%20stats%2020092.pdf>.

²¹ See 16 U.S.C. §§ 1452(2), 1455(d).

²² 43 U.S.C. § 1337(p)(1)(C).

²³ BOEM's Renewable Energy Program, BOEM (last updated Apr. 2017), [https://www.boem.gov/BOEM RE Programs Fact Sheet/](https://www.boem.gov/BOEM%20RE%20Programs%20Fact%20Sheet/).

assigned its Minerals Management Service (now the Bureau of Ocean Energy Management (BOEM)) responsibility for overseeing offshore renewable energy development leasing in federal territorial waters.²⁴

Where an offshore wind developer proposes to site the facility's turbines in the OCS, New York's comprehensive power plant siting statute, Public Service Law Article 10, would not apply. (But, if a developer proposed to locate turbines with a total nameplate capacity of 25 megawatts or more within New York's coastal zone, or within its lakes or other waterways, Article 10 would apply.²⁵) Any federal siting decision would, however, be subject to the National Environmental Policy Act (NEPA).²⁶ NEPA requires federal agencies to take a "hard look" at the environmental impacts of their proposed activities through environmental assessments and environmental impact statements.²⁷

In the OCS, an offshore wind developer will need to obtain, at a minimum, permits from the U.S. Army Corps of Engineers (Army Corps). Section 10 of the Rivers and Harbors Act of 1899 requires Army Corps authorization for construction in or over the navigable waters of the U.S.²⁸ In addition, dredging activities in U.S. waters require a permit from the Army Corps pursuant to Section 404 of the Clean Water Act.²⁹ These permits will require consultations with other federal agencies, including the U.S. Fish and Wildlife Service.³⁰

B. State Jurisdiction

As noted above, once an offshore wind facility's transmission line reaches New York territorial waters, PSL Article VII will come into play.³¹ Article VII governs virtually all aspects of transmission line siting in New York.³² It was enacted in 1970 to ensure that the siting process considered and minimized environmental and other impacts, and that stakeholders would be

given reasonable notice, participation opportunities, and funding to support their intervention in the Article VII review.³³ The process is administered by the New York State Department of Public Service, the technical arm of the PSC. The PSC decides whether a transmission line proposal should be certified and under what conditions.³⁴ Central to the Article VII process are (1) the preemption, *ab initio*, of State and local procedural permitting processes and (2) the authority of the PSC to refuse to apply an unreasonably restrictive local substantive requirement.³⁵ Courts upheld Article VII soon after its enactment by rejecting claims that it was unconstitutional.³⁶

Article VII applies to a "major utility transmission facility," which in the offshore wind context is "an electric transmission line of a design capacity of one hundred twenty five kilovolts or more extending a distance of one mile or more, or of one hundred kilovolts or more and less than one hundred twenty five kilovolts, extending a distance of ten miles or more."³⁷ Article VII does not provide a statutory deadline for the PSC to complete its review of an application, although there are several tried and true, administratively accepted strategies to facilitate the process (e.g., early stakeholder outreach, meeting with the State agency staffs and other parties to identify issues, and joint proposals for settlement).

The PSC is statutorily required to make several findings to grant an Article VII certificate of environmental compatibility and public need (CECPN) to a transmission facility:

- the basis of the need for the facility;³⁸
- its probable environmental impact;³⁹
- that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;⁴⁰

²⁴ 74 Fed. Reg. 19,638 (Apr. 29, 2009). See also *BOEM's Renewable Energy Program*, BOEM (last updated Apr. 2017), <https://www.boem.gov/BOEM-RE-Programs-Fact-Sheet/>. BOEM administered the recent auction mentioned above that yielded historic results. See Diane Cardwell, *Off Long Island, Wind Power Tests Waters*, N.Y. TIMES, Jan. 21, 2017, <https://www.nytimes.com/2017/01/21/business/energy-environment/offshore-wind-energy-long-island.html>.

²⁵ Sam M. Laniado, *Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law*, N.Y. ENVTL. LAW., Spring/Summer 2016, vol. 36, at 38.

²⁶ 42 U.S.C. § 4332.

²⁷ See, e.g., *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002).

²⁸ *Section 10 of the Rivers and Harbors Act*, U.S. ARMY CORPS OF ENG'RS, <http://www.spl.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Section-10-of-the-Rivers-Harbors-Act/> (last visited June 6, 2017).

²⁹ *Section 404 Permit Program*, U.S. ENVTL. PROT. AGENCY (EPA), <https://www.epa.gov/cwa-404/section-404-permit-program> (last visited June 6, 2017).

³⁰ *Section 404 Permit Program*, EPA, <https://www.epa.gov/cwa-404/section-404-permit-program> (last visited June 6, 2017).

³¹ See discussion accompanying *supra* note 21. See also PSC Case 01 T 1679, Long Island Power Auth., Order Adopting the Terms of the Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need (June 21, 2007) [hereinafter Northport Order], <http://on.ny.gov/2s18f5c>.

³² N.Y. PUB. SERV. LAW § 121(1).

³³ Governor's Approval Mem., Bill Jacket, L.1970, c.272.

³⁴ N.Y. PUB. SERV. LAW § 121.

³⁵ N.Y. PUB. SERV. LAW § 126(1)(g).

³⁶ *Cnty. of Orange v. N.Y. State Pub. Serv. Comm'n*, 39 A.D.2d 311 (2d Dept. 1972), *aff'd*, 31 N.Y.2d 843 (1972).

³⁷ N.Y. PUB. SERV. LAW § 120(2)(a).

³⁸ N.Y. PUB. SERV. LAW § 126(1)(a).

³⁹ N.Y. PUB. SERV. LAW § 126(1)(b).

⁴⁰ N.Y. PUB. SERV. LAW § 126(1)(c).

- that the facility represents a minimum adverse impact on active farming operations that produce crops, livestock, and livestock products;⁴¹
- that the facility conforms to a long range plan for expansion of the electric power grid of the electric systems serving New York and interconnected utility systems, which will serve the interests of electric system economy and reliability;⁴²
- that the location of the facility as proposed conforms to applicable State and local laws, except that the PSC may refuse to apply local ordinances that it finds unreasonably restrictive;⁴³ and
- that the facility will serve the public interest, convenience, and necessity.⁴⁴

The PSC has granted CECPNs for several submarine transmission lines. The PSC granted a CECPN for a line between Long Island and Connecticut (Cross Sound) in 2001.⁴⁵ A line connecting Long Island and New Jersey (Neptune) obtained a CECPN in 2004.⁴⁶ The PSC granted another CECPN for a line between Long Island and Connecticut in 2007 (Northport).⁴⁷ In 2009, a line connecting a new generating facility in New Jersey to New York City (Bayonne) received a CECPN.⁴⁸ A line between New Jersey and midtown Manhattan (Hudson Transmission) obtained a CECPN in 2010.⁴⁹ And most recently,⁵⁰ the PSC granted a CECPN for a line running from Canada to Queens

under Lake Champlain and the Hudson River (Champlain Hudson) in 2013.⁵¹

The PSC has found several bases of need⁵² for submarine transmission lines that could be applicable to a line from an offshore wind facility. The PSC has cited the need to develop additional capacity and supply for Long Island,⁵³ and the need to replace output from facilities planning to retire.⁵⁴ Additionally, the PSC has relied in part on the increases in competition and supply diversity that result from new resources.⁵⁵ The PSC has also found need related to air emissions reductions.⁵⁶

The PSC has also relied on local electric planning to establish need. For example, the PSC found need for Neptune in LIPA's draft energy plan, which supported expanding transmission capacity to increase supply.⁵⁷ In addition, the PSC found need for Bayonne based in part on the New York City's Master Electric Transmission Plan, which called for a project like Bayonne.⁵⁸ Similarly, the PSC cited New York City's PlaNYC, which promoted emissions reductions and enhanced fuel diversity by providing a pathway for renewable resources, to help justify the need for Champlain Hudson.⁵⁹

Among the environmental issues that a submarine transmission line sponsor will need to address in the Article VII proceeding are the impacts on any aquatic habitats of various species within the proposed route. Construction of a line will disturb the bottom sediment of the body of water, thereby temporarily increasing turbidity and affecting benthic organisms upon which fish feed.⁶⁰ In addition, the PSC has considered

⁴¹ N.Y. PUB. SERV. LAW § 126(1)(d) ("as defined in section three hundred one of the agriculture and markets law, considering the state of available technology and the nature and economics of various alternatives"). This article does not discuss this provision further because, due to the timing of its introduction to the Article VII statute (it became effective December 11, 2015), the PSC has not cited it when granting a CECPN to a submarine transmission line. See generally *infra* notes 45-49, 51. But it could be applicable. Agriculture and Markets Law § 301 states that "crops, livestock, and livestock products" include "aquaculture products, including fish, fish products, water plants, and shellfish." N.Y. AG. & MKTS. LAW § 301(2)(h).

⁴² N.Y. PUB. SERV. LAW § 126(1)(e)(2). This provision also requires a determination of "what part, if any, of the line shall be located underground." N.Y. PUB. SERV. LAW § 126(1)(e)(1).

⁴³ N.Y. PUB. SERV. LAW § 126(1)(g).

⁴⁴ N.Y. PUB. SERV. LAW § 126(1)(h).

⁴⁵ PSC Case 00 T 1831, Cross Sound Cable Co., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need, at 2 (June 27, 2001) [hereinafter Cross Sound Order], <http://on.ny.gov/2sA0sbJ>.

⁴⁶ PSC Case 02 T 0036, Neptune Reg'l Transmission Sys., LLC, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need, at 4 (Jan. 23, 2004) [hereinafter Neptune Order], <http://on.ny.gov/2qU6Zwy>.

⁴⁷ Northport Order, *supra* note 31, at 1.

⁴⁸ PSC Case 08 T 1245, Bayonne Energy Ctr., LLC, Order Adopting the Terms of a Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need, at 2 (Nov. 12, 2009) [hereinafter Bayonne Order], <http://on.ny.gov/2r2DtnF>.

⁴⁹ PSC Case 08 T 0034, Hudson Transmission Partners, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, at 3 (Sept. 15, 2010) [hereinafter Hudson Transmission Order], <http://on.ny.gov/2sdbaHZ>.

⁵⁰ As of the writing of this article, New York's first proposed offshore wind facility has yet to file an Article VII application.

⁵¹ PSC Case 10 T 0139, Champlain Hudson Power Express, Inc., Order Granting Certificate of Environmental Compatibility and Public Need, at 2 (Apr. 18, 2013) [hereinafter Champlain Hudson Order], <http://on.ny.gov/2r2sM4J>.

⁵² N.Y. PUB. SERV. LAW § 126(1)(a).

⁵³ Cross Sound Order, *supra* note 45, at 4; Neptune Order, *supra* note 46, at 5.

⁵⁴ Bayonne Order, *supra* note 48, at 16; Hudson Transmission Order, *supra* note 49, at 43-44.

⁵⁵ Cross Sound Order, *supra* note 45, at 5; Northport Order, *supra* note 31, at 4-5; Champlain Hudson Order, *supra* note 51, at 23.

⁵⁶ Bayonne Order, *supra* note 48, at 16; Hudson Transmission Order, *supra* note 49, at 43-44; Champlain Hudson Order, *supra* note 51, at 52.

⁵⁷ Neptune Order, *supra* note 46, at 5.

⁵⁸ Bayonne Order, *supra* note 48, at 16.

⁵⁹ Champlain Hudson Order, *supra* note 51, at 23.

⁶⁰ Neptune Order, *supra* note 46, at 6.

impacts to commercial finfish and shellfish.⁶¹ The PSC has also considered impacts to specific species of concern, such as sturgeon in the Hudson River.⁶²

The PSC has recognized that many of the environmental impacts of submarine transmission lines can be minimized by installing the line with jet plowing.⁶³ Jet plowing is a unique construction method that plows a trough in the waterbed using water jets to “fluidize” sediment while simultaneously laying the line.⁶⁴ Sediment then resettles quickly, minimizing effects on the benthic community.⁶⁵ Where the line cannot be buried with a jet plow, developers often cover it with concrete mats.⁶⁶ The PSC has agreed with developer arguments that the benthic communities affected by these mats quickly recover, similar to jet plowing.⁶⁷ Environmental impacts also can be minimized by limiting construction to seasons when aquatic organisms are less likely to be negatively affected.⁶⁸

The PSC must also determine that the transmission line’s environmental impacts have been minimized in light of available alternatives.⁶⁹ In submarine transmission line cases where the line was importing power from another state, rather than from a new generation facility, the PSC has considered in the past whether New York State demand side management, distributed generation, or a combination of both could afford the same benefits as the proposed transmission project.⁷⁰ But where a new out of state generation facility required a transmission line to interconnect into New York’s transmission grid, the PSC did not examine alternatives to the power plant.⁷¹ Similarly, where the PSC already approved an in state power plant, alternatives for the proposed line (other than possible routing adjustments or types of transmission towers) were not at issue.⁷² Thus, with a federally approved offshore wind facility, the alternatives inquiry

in the Article VII proceeding should be limited to route or technology alternatives.

If an offshore wind project has been selected as the result of a request for proposals (RFP) or other competitive bidding process, that process most likely examined a wide array of alternatives to address the underlying need for the wind facility. As the transmission line could be viewed simply as the extension cord for interconnecting the wind facility, an RFP’s analysis should go a long way in addressing the Article VII alternatives, need, and public interest requirements.

As to the Article VII statutory finding that the proposed transmission line is consistent with a long range plan, the PSC recently cited the New York Independent System Operator’s (NYISO’s) interconnection process, including the System Reliability Impact Study required for entry into a Class Year,⁷³ as a source of long range transmission planning in the state.⁷⁴ A long range plan could also be the genesis of an RFP that awarded the proposed project a power purchase contract.

The PSC often cites the State Energy Plan when granting CECPNs for submarine transmission lines.⁷⁵ The transmission line for an offshore wind facility would have a strong argument because the facility would help meet New York’s greenhouse gas emissions and renewable energy production goals.⁷⁶ The PSC’s recent adoption of these goals in the CES should further bolster such an argument.⁷⁷ And RECs from offshore wind facilities would be available to help load serving entities comply with the CES.⁷⁸ Furthermore, NYSERDA’s blueprint recognizes that “[o]ffshore wind will play a critical role in turning [these] aggressive goal[s] into a reality.”⁷⁹ New York City’s commitment to reducing its greenhouse gas emissions 80% by 2050 and

⁶¹ Cross Sound Order, *supra* note 45, at 7–8; Neptune Order, *supra* note 46, at 6–7; Northport Order, *supra* note 31, at 16.

⁶² Champlain Hudson Order, *supra* note 51, at 57–58.

⁶³ Neptune Order, *supra* note 46, at 6 n.8; Northport Order, *supra* note 31, at 7–8; Bayonne Order, *supra* note 48, at 16; Hudson Transmission Order, *supra* note 49, at 47–48.

⁶⁴ See *Technical Info*, HUDSON PROJECT, [http://hudsonproject.com/project/technical info/](http://hudsonproject.com/project/technical%20info/) (last visited June 6, 2017).

⁶⁵ See *Technical Info*, HUDSON PROJECT, [http://hudsonproject.com/project/technical info/](http://hudsonproject.com/project/technical%20info/) (last visited June 6, 2017).

⁶⁶ See, e.g., Champlain Hudson Order, *supra* note 51, at 55; Mark Harrington, *Deepwater holds hearing on planned wind farm off Rhode Island*, NEWSDAY (Mar. 9, 2017, 9:33 PM), <http://www.newsday.com/long-island/deepwater-holds-hearing-on-planned-wind-farm-off-rhode-island-1.13234808>.

⁶⁷ Champlain Hudson Order, *supra* note 51, at 57–60.

⁶⁸ See, e.g., Champlain Hudson Order, *supra* note 51, at 60.

⁶⁹ N.Y. PUB. SERV. LAW § 126(1)(c).

⁷⁰ Cross Sound Order, *supra* note 45, at 6; Northport Order, *supra* note 31, at 7.

⁷¹ See Bayonne Order, *supra* note 48, at 17–18.

⁷² PSC Case 13 T 0585, Cricket Valley Energy Ctr., LLC, Order Granting Certificate of Environmental Compatibility and Public Need, at 9–10 (Apr. 20, 2016) [hereinafter Cricket Valley Order], <http://on.ny.gov/2rxDy6e>.

⁷³ A System Reliability Impact Study confirms that a proposed facility will comply with electric system reliability standards and assesses its impacts on the existing electric system. See *System Reliability Impact Study Criteria and Procedures*, NYISO (May 23, 2001), [http://www.nyiso.com/public/webdocs/markets-operations/services/planning/Documents and Resources/Interconnection Studies/Other Interconnection Documents/ARCHIVE/sris criteria and procedures revised 052301.pdf](http://www.nyiso.com/public/webdocs/markets-operations/services/planning/Documents%20and%20Resources/Interconnection%20Studies/Other%20Interconnection%20Documents/ARCHIVE/sris-criteria-and-procedures-revised-052301.pdf). A Class Year is the group of generation and transmission projects whose interconnections the NYISO studies together in a given year. See NYISO Open Access Transmission Tariff § 25.1.2.

⁷⁴ Cricket Valley Order, *supra* note 72, at 24.

⁷⁵ See, e.g., Cross Sound Order, *supra* note 45, at 6; Neptune Order, *supra* note 46, at 16; Champlain Hudson Order, *supra* note 51, at 76.

⁷⁶ STATE ENERGY PLAN, *supra* note 2, at 112.

⁷⁷ See generally CES Order, *supra* note 5.

⁷⁸ See CES Order, *supra* note 5, at 155.

⁷⁹ OFFSHORE WIND BLUEPRINT, *supra* note 10, at 2.

powering the City government with 100% renewable energy may also be cited in some cases.⁸⁰

As explained in more detail below, an Article VII application must also demonstrate compliance with the substantive provisions of municipal codes and other local requirements. In Article VII cases, the PSC has taken the position that it does not have the authority to grant, at least in the first instance, rights to cross municipal real property such as roads. A private applicant must secure those rights from the pertinent municipality if a transmission line will cross or occupy municipal property. A private applicant must also file a petition with the PSC under Section 68 of the PSL⁸¹ seeking the PSC's permission to exercise the grants of those municipal rights.⁸² It is advisable to file this petition with sufficient time left in the Article VII process so that it may be decided at the same PSC session as the Article VII application. The Section 68 requirement would not be applicable to an Article VII applicant, such as a regulated investor owned distribution utility or public authority, that already possesses the right to install its lines under municipal roads.⁸³

Title to lands under water in New York's territory is held by the State in trust on behalf of its citizens.⁸⁴ Separate and apart from the Article VII process, the New York State Office of General Services (OGS) has the authority akin to BOEM's authority at the federal level to grant leases and easements for the State's underwater lands.⁸⁵ An offshore wind developer must obtain an easement from OGS to lay the transmission lines necessary to move the facility's electricity ashore. OGS's Bureau of Land Management provides a specific application for submarine transmission lines on State owned underwater lands.⁸⁶ The PSC will typically condition an Article VII CECPN for a submarine transmission line on acquiring all required real property rights, including OGS easements.⁸⁷

C. Local Jurisdiction

As noted above, local procedural requirements, such as site plan review or obtaining zoning variances or special permits, are preempted under Article VII's one stop shopping regime. Article VII, however, requires the applicant to demonstrate, and eventually the PSC to determine, that the project will comply with the substantive requirements of the applicable local requirements.⁸⁸ If, however, the applicant can demonstrate that a local requirement is unreasonably restrictive, the PSC is authorized to refuse to apply it.⁸⁹ For example, in submarine line cases, the PSC has refused to apply prohibitions on night construction and deliveries where some construction elements required 24 hour work.⁹⁰ The PSC also overrode a building height limit because the technology available for direct current converter stations made compliance unduly restrictive.⁹¹ In addition, the PSC has waived local laws aimed at controlling other impacts such as dust, vibration, vehicle idling, glare, fumes, and heat due to the construction necessary to install the line.⁹² In non submarine line Article VII cases, there are many examples where the PSC has refused to apply local requirements.⁹³

Conclusion

Siting a transmission line to interconnect an offshore wind project with the New York transmission grid is certainly doable, and project developers will not be starting with a blank slate. The PSC has established sufficient Article VII precedent in other transmission line certifications that can be adapted to the expected set of facts an offshore wind project may raise.

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⁸⁰ Press Release, N.Y.C. Office of the Mayor, De Blasio Administration Moves to Power 100 Percent of City Government from Renewable Sources of Energy (July 10, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/478-15/de-blasio-administration-moves-power-100-percent-city-government-renewable-sources-of>.

⁸¹ PSL § 68 requires electric and gas corporations to obtain a certificate of public convenience and necessity (CPCN) from the PSC (1) before constructing electric or gas facilities and (2) before exercising franchises (i.e., rights to use municipal property). N.Y. PUB. SERV. LAW § 68(1). While an Article VII certificate supplants the first prong of PSL § 68, an applicant must still obtain a CPCN if it needs to exercise a franchise. See PSC Case 15 M 0365, Proceeding on Motion of the Commission Regarding Policies, Procedures and Filing Standards under Lightened Ratemaking Regulation, Staff Whitepaper on Implementing Lightened Ratemaking Regulation, at 13 (Nov. 4, 2015).

⁸² N.Y. PUB. SERV. LAW § 68(1).

⁸³ See N.Y. PUB. SERV. LAW § 68(1).

⁸⁴ *Land Management*, N.Y. STATE OFFICE OF GEN. SERVS., <https://ogs.ny.gov/BU/RE/LM/EGLP.asp> (last visited June 6, 2017).

⁸⁵ N.Y. PUB. LANDS LAW § 75.

⁸⁶ N.Y. State Office of Gen. Servs., Application for Use of Land Underwater (Oct. 5, 2010), <https://ogs.ny.gov/BU/RE/LM/Docs/EasementPipeline.pdf>.

⁸⁷ See, e.g., Hudson Transmission Order, *supra* note 49, attachment 1, at 1.

⁸⁸ N.Y. PUB. SERV. LAW § 126(1)(g).

⁸⁹ N.Y. PUB. SERV. LAW § 126(1)(g).

⁹⁰ Neptune Order, *supra* note 46, at 12; Northport Order, *supra* note 31, at 17.

⁹¹ Neptune Order, *supra* note 46, at 12.

⁹² See, e.g., Champlain Hudson Order, *supra* note 51, at 99-100.

⁹³ See, e.g., Cricket Valley Order, *supra* note 72, at 24-26.

Article VIII (generation) and Article VII (transmission) siting proceedings, utility rate cases, and various other proceedings. In private practice, Read and Laniado, LLP represents clients before the State Siting Board, the PSC, the New York State Department of Conservation, NYISO, the Federal Energy Regulatory Commission, and municipal boards on, inter alia, power plant and transmission line certification, utility rates, State Environmental Quality Review Act renewable generation siting, wholesale markets, and eminent domain issues. Mr. Laniado represented Cricket Valley Energy Center, LLC (CVE) before the PSC in its Section 68 petition seeking approval for the construction of the CVE combined cycle generating station in Dover, New York and in its Article VII application seeking approval to construct the necessary transmission line to inter connect the plant to the electric grid. Tyler Wolcott is an associate at Read and Laniado, LLP.

LEGAL DEVELOPMENTS

ASBESTOS

Owners of Asbestos Abatement and Environmental Consulting Companies Pleaded Guilty to Violations in Connection with Asbestos Removal at Buffalo Park

The owner of an asbestos abatement company, the owner of an environmental consulting company, and the consulting company pleaded guilty to asbestos related violations in the federal district court for the Western District of New York. The owner of the asbestos company admitted that between December 2009 and January 2010 employees of his company moved asbestos containing material from the Roosevelt Park Shelter in Buffalo and transported it to a waste container leased by the environmental consulting company; the owner later signed a waste manifest indicating that the asbestos containing material had been transported on March 11, 2010. An inspection in April 2011 revealed that asbestos containing material had improperly been left at the shelter. The asbestos abatement company owner pleaded guilty to one count of violating the Clean Air Act by making a false statement, the maximum sentence for which is two years imprisonment and a \$250,000 fine, as well as a \$100 special assessment and a one year term of supervised release. The environmental consulting company also pleaded guilty to making a false statement under the Clean Air Act, for which the company may be fined up to \$500,000 and given a probation term of up to five years. The owner of the consulting company pleaded guilty to one count of accessory after the fact to a false statement under the Clean Air Act, punishable by up to one year in prison, a \$125,000 fine, a \$25 special assessment, and a one year term of supervised release. *United States v. Doctor*, No. 1:12 cr 00308 (W.D.N.Y. May 17, 2017).

CLIMATE

State Supreme Court Awarded Attorney Fees to Competitive Enterprise Institute in FOIL Lawsuit Against Attorney General Connected to Climate Change Investigations

The Supreme Court, Albany County, awarded more than \$20,000 in attorney fees and litigation costs to the Competitive Enterprise Institute (CEI), which brought a lawsuit against the New York Attorney General under the New York Freedom of Information Law (FOIL). CEI filed the proceeding after the Attorney General denied its FOIL request for common interest agreements with private parties and other state attorneys general regarding climate change investigations. In awarding fees to CEI, the court cited a November 2016 decision in favor of CEI and said that law of the case precluded further examination of the Attorney General's arguments that CEI had not substantially prevailed or had not met statutory requirements for eligibility for fees. The court said that the Attorney General had "stonewalled" rather than provide the "straightforward response" to which CEI was entitled and that an award of substantial attorney fees was "particularly appropriate" to promote FOIL's purpose and policy. *Competitive Enterprise Institute v. Attorney General of New York*, 2017 N.Y. Misc. LEXIS 1542 (Sup. Ct. Albany County Apr. 19, 2017).

HAZARDOUS SUBSTANCES

Second Circuit Affirmed That Former Lessees at Long Island Site Were Not "De Facto" Owners or Liable Under "Single Enterprise Theory"

The Second Circuit Court of Appeals affirmed the dismissal of defendants from a response costs action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in connection with perchloroethylene contamination at a site in the Village of Westbury on Long Island. In a summary order, the Second Circuit held that companies that leased the property and sublet it to companies that conducted textile manufacturing activities (including one sublessee that was an affiliated company) were not liable either as "de facto" owners or based on a "single enterprise theory." The Second Circuit rejected the plaintiffs appellants' request that it overrule its 2000 opinion, *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 329 (2d Cir. 2000), which "laid out the circumstances under which a lessee is deemed an owner under CERCLA." The court said it did not have authority to overturn the precedent and that the lease in this case was a typical commercial lease that did not confer owner status on the lessee pursuant to *Commander Oil*. The court also rejected the use of a "site control test" to determine liability, saying that *Commander Oil* foreclosed use of such a test. With respect to the plaintiffs' argument that defendants were liable as owners because they