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INDEPENDENT POWER PRODUCERS OF NEW YORK

December 7, 2020

Via email to General@Ores.ny.gov

Houtan Moaveni
Deputy Executive Director
New York State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

Re: Proposed Chapter XVIII, Title 19 of NYCRR Part 900 - Office of Renewable Energy Siting and Subpart 900-6 - Uniform Standards and Conditions

Dear Mr. Moaveni:

Pursuant to the September 16, 2020 issue of the New York State Register, the New York Office of Renewable Energy Siting ("ORES") is seeking comments on draft Part 900, which addresses the operations of ORES and provides details for the renewable energy siting process under Section 94-c of the Executive Law; on November 13, 2020, the comment deadline was extended on ORES' website from November 16 until December 7, 2020. ORES also is requesting comments on its draft Subpart 900-6, which would establish Uniform Standards and Conditions that are common to projects and are intended to streamline the siting and permitting process, reflect the environmental benefits of renewable energy facilities, and minimize impacts to the surrounding community and environment.

The Independent Power Producers of New York ("IPPNY") offers the following comments in support of these draft regulations and offers recommendations to clarify some of their provisions to further improve the process for siting renewable energy facilities to meet the goals of the Climate Leadership and Community Protection Act ("CLCPA"). On draft Part 900, our comments pertain to suggested improvements, in the areas of: compliance filings; further date certainty for completeness of applications; applicability of local laws; the size and content of the study area; notice provisions; refund of unused fee monies; jurisdiction over wetlands mitigation; consistency with precedent; decision timeframe for non-controversial projects; information on interconnection; safety plans; and avoiding a couple of duplicative requirements. Regarding draft Subpart 900-6, our comments offer suggestions to resolve duplicative requirements related to environmental and agricultural monitoring and construction guidelines, given the role of the Department of Public Service ("DPS") and requirements for mitigation payments through Index REC contracts with the New York State Energy Research and Development Authority ("NYSERDA").

IPPNY supports the siting of renewable energy facilities in this state to meet the goals of the CLCPA. We also supported the development of Section 94-c of the Executive Law and offered helpmate improvements. Our Member companies operate wind, solar and energy storage facilities, among other highly efficient and low- or non-emitting technologies. IPPNY Members currently are undergoing the review of their solar and wind projects under the Article 10 siting law. Our Members have received more than half of the contract awards for the purchase of renewable energy credits ("RECs") by NYSERDA and will continue to make investments to meet the State's goals.

Draft Part 900: Office of Renewable Energy Siting

Compliance Filings

Draft Subpart 900-10, dealing with Compliance Filings, should allow one or more filings to be submitted at any time before permit issuance, including with the application itself, and to be approved in stages, at the same time ORES issues a permit for the facility, or shortly thereafter. This flexibility would allow an applicant to commence clearing, grading, and construction on the portion of the site covered by the approved compliance filing, as allowed under Article 10 currently, in order to expedite meeting the CLCPA's goals. ORES should begin its review of the filings as soon as they are submitted.

Between the fall of 2018 and spring of 2019, agencies involved in the Article 10 siting process led the way to identify administrative improvements to make the siting process more effective and worked with IPPNY to host two symposiums to discuss possible adjustments to the siting process. Suggestions from those forums for compliance filings are applicable to the siting of renewable energy projects under the draft rule. IPPNY urges the inclusion of the following recommendations on compliance filings:

- Model conditions for compliance filings at the permit stage should be provided.
- The number of post-permit filings should be reduced.
- Agency staff should be encouraged to respond within a 21-day period for comments and share comments with the applicant to allow for discussion on disagreement on compliance filings and for expeditious review of compliance filings, taking into consideration any comments from the applicant on agency staff comments.
- The review period for compliance filings should be reduced from 60 to 30 days.
- Agency staff should be discouraged from attempting to change language and requirements that were in an application and/or permit approval.
- Applications should be allowed to include final design information and other filings.

Application Completeness

In the spirit of the expedited siting process, ORES should have 21 days to determine if an updated application, which contains additional requested information by ORES, is complete. This 21-day period is consistent with one of the recommendations identified by the Article 10 State agency forums, and IPPNY urges its inclusion within Subpart 900-4 on the Processing of Applications.

The draft rule contains provisions that ORES will make its determination of completeness or incompleteness, on or before 60 days of receipt of the application, and request from applicants information to address a listing of all identified areas of incompleteness and a description of the specific deficiencies. The draft regulation states that ORES would notify the applicant of the application status "within sixty (60) days *of receipt of all requested material*." This additional 60-day period extends the original 60-day decision-making period from ORES' receipt of the application.

Instead, IPPNY urges that, *within 21 days of ORES receiving a revised application that contains the information requested by ORES* for the application to be deemed complete, ORES should notify the applicant that the application now has been deemed to be complete; this 21-day period would be within the 60 days that ORES has to decide if an application is complete, and ORES should not start another 60-day clock to review submitted material it requested for completion.

Local Laws

Section 900-2.25, which addresses Exhibit 24: Local Laws and Ordinances, should better conform to the standard under Section 94-c of the Executive Law regarding the applicability of law laws. Specifically, the text of 900-2.25(c) should be replaced with the language from 94-c(5)(e), which notably states that ORES may issue a permit, upon its finding that the project and permit would comply with applicable laws and regulations and based upon this statutory authority to decide not to apply local laws that are "unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility."

Additionally, the draft rule should clarify that, once ORES' jurisdiction has attached to a major renewable energy facility (which is no later than the date by which an application has been served and filed and properly noticed), local governments would participate in the hearing process pursuant to Subpart 900-8, including filing the statement of compliance with local laws prescribed in Section 900-8.4(d), and should not seek to enforce new laws enacted after that point. Also, a presumption should be created that standards set by the Uniform Standards and Conditions Rule override inconsistent local laws.

Furthermore, the ability of ORES to decide to waive unreasonably burdensome local laws should not be limited to those laws that apply to *interconnection* in public rights-of-way, and, instead, that ability should apply to the *placement* of electric collection, water, sewer, and telecommunication lines in public rights-of-way. The limitation to interconnection is unnecessarily restrictive, as Section 94-c of the Executive Law allows ORES to decide whether to waive *any* unreasonably burdensome local law or ordinance.

Given that ORES has the jurisdiction to decide that only local laws that are not unreasonably burdensome would be applied, additional provisions of the draft rule need to be tailored to be consistent in regards to applicability of "substantive" local laws with others provisions of the draft rule, in order to avoid unnecessary delays and costs. For example, the following sections of the draft rule specifically refer to *substantive* aspects of local laws. §900-1.3 Pre-Application Procedures requires the applicant to provide "a summary of the *substantive* provisions of local laws applicable to the construction, operation and maintenance of the proposed facility" and "an explanation of all efforts by the applicant to comply with such *substantive* local law provisions through the consideration of design changes to the proposed facility, or otherwise." Also, §900-2.25 Exhibit 24: Local Laws and Ordinances requires the exhibit to contain a "summary table of all local *substantive* requirements."

As a result and to ensure consistency and specificity and to avoid unnecessary costs and delays, Section 900-2.9(b)(4)(v), which requires the viewshed analysis component of the Visual Impact Assessment (as part of Exhibit 8: Visual Impacts) to include an "[a]ssessment of visual impacts pursuant to the requirements of adopted local laws or ordinances," should be narrowed to only include "consideration" of "substantive" requirements of local laws. Similarly, Section 900-2.9(d)(9)(iii)(b) requires exterior lighting design plans, as part of the Visual Impacts Minimization and Mitigation Plan, to include full cutoff fixtures consistent with OSHA requirements and adopted local laws or ordinances, and the word "substantive" should be inserted before "local." Also, Section 900-8.4(d), involving hearing participation, includes a requirement of a Statement of Compliance with Local Laws and Regulations, and this provision should be amended to require that any statement filed by a municipality address the proposed facility's compliance with "substantive" applicable local laws and regulations.

Study Area

In relation to Section 900-1.2(bv), IPPNY recommends that the study area for solar facilities should be explicitly defined at 1 mile, with a 2-mile visual study area; this 1 mile distance is consistent with other areas of the proposed regulations that mention distances for solar projects, such as: Section 900-2.4(l) providing that existing and proposed land uses within 1 mile of the project site will be assessed for compatibility; Section 900-1.6(c)(3) stating that a notice of the filing of an application must be provided "to all persons residing within one (1) mile of the proposed solar facility;" and 900-2.9(b)(1) defining the visual study area for solar facilities as 2 miles. This clarification will create certainty for developers and eliminate the potential for unnecessary disagreements over the study area and associated confusion, needless work and costs.

Section 900-2.16(b), involving Exhibit 15: Agricultural Resources, requires maps to include a field verification of active agriculture land use within the study area. The study area from the proposed facility (as contemplated by the draft regulation) could require field verification of over 50,000 acres of land, which is extremely burdensome and unnecessary. In the alternative, the draft rule could include a provision for information obtained from NYS Department of Agriculture and Markets ("Ag & Markets") on active agriculture land use within agricultural districts within the one mile study area for solar facilities. For example, the website of Ag & Markets contains information about how Ag & Markets partners with Cornell University to actively maintain and update geospatial map data, including agricultural activities.

Notice Provisions

Section 900-1.6(c)(3) should be clarified to state that written notice should be provided to all "mailing addresses" or "property owners, based on County tax rolls" (instead of "all persons") residing within one mile of the proposed solar facility or within five miles of the proposed wind facility. Positive identification of "all persons" residing in a certain area is practically impossible for a developer, and this alternative approach would achieve the goal of the section without creating an unreasonable burden on developers.

Refund of Unused Fee Monies

The amount of fees under the draft Siting Rule is higher than under Article 10. Under §900-1.4 on General Requirements for Applications, an applicant is required to submit the following fees: an application fee of $1,000 per MW; and a local agency account fee in the same amount.

Article 10 (paragraph (a) of subdivision 6 of Section 164) states that: "Any moneys remaining in the intervenor account after the board's jurisdiction over an application has ceased shall be returned to the applicant." IPPNY suggests that the draft rule be updated similarly to allow unused amounts from the local agency account fee to be returned to the applicant.

The renewable energy siting law (paragraph (d) of subdivision 7 of Section 94-c of the Executive Law) does not specify the amount of the application review fee. The law allows ORES to recover the *costs it incurs* related to reviewing and processing an application. It may be the case that not all applications would require ORES to use the entire amount of the application review fee. IPPNY suggests that ORES keep track of its *actual costs* to review the application and return any unused amount back to the applicant.

Wetlands Mitigation Jurisdiction

Section 900-2.15, involving Exhibit 14: Wetlands, includes Table 1on Wetland Mitigation Requirements, within which the last column indicates that Class III & IV Unmapped >12.4 Acres Wetlands require mitigation. This provision assumes that all wetlands >12.4 acres are state jurisdictional and, therefore, is inconsistent with Article 24 of the Environmental Conservation Law ("ECL"). A wetland must proceed through the regulatory mapping process to be subject to state jurisdiction under the ECL. The last column of the Table should be changed to "mapped" wetlands or deleted in its entirety.

Consistency with Precedent

Section 900-10.2(e)(7)(vi) requires a Complaint Management Plan to include mediation of unresolved complaints. Retaining a third-party mediator can be a cumbersome process, whereas the DPS already has a consumer dispute resolution process detailed in its regulations. Consistent with several Article 10 proceedings, this DPS process can be employed in the event the complaint remains unresolved following the procedures in the Complaint Management Plan. At the very least, an applicant should be given the choice of including one or the other process.

Section 900-2.9(d)(7) requires the avoidance or minimization of solar glare exposure, so as to not result in complaints; however, it is impossible to guarantee that all complaints will be avoided. The "no complaints" standard should be replaced with the mitigation or avoidance of red glare, as determined through use of the Sandia National Laboratories Solar Glare Hazard Analysis Tool analysis or its equivalent, and with the limitation of green or yellow glare to a 60 hour annual standard. This approach has been proposed in an Article 10 proceeding and supported by DPS.

Decision Timeframe for Non-Controversial Projects

A provision should be added to Section 900-9.1 on Final Determination on Applications to require ORES to issue its final determination on a permit within eight months of an application completeness determination, if no adjudicatory hearing is held and all permit conditions have been agreed to by the applicant.

Information on Interconnection

Section 900-2.22, involving Exhibit 21: Electric System Effects and Interconnection, requires information from the interconnecting Transmission Owner on the proposed interconnection at a level of detail that is unlikely to be available at the application stage. The information is developed in the New York Independent System Operator's ("NYISO") interconnection process, typically takes many months to develop and is not within the control of the applicant.

Instead, IPPNY recommends that the required information for interconnection mirror that of the Article 10 process. Article 10's regulations (1001.34 Exhibit 34: electric interconnection) include substantively identical provisions to those of the draft rule (§900-2.22 (a)), but the Article 10 rule recognizes that the information is a preliminary description of the proposed electric interconnection and that the final design will be available at the conclusion of the NYISO interconnection process.

Safety Plans

Section 900-2.7(c)(7), involving the contents of Exhibit 6: Public Health, Safety and Security, requires a Safety Response Plan to include "[a] requirement to conduct training drills with emergency responders at least once per year." This language should be revised to state that the applicant will "offer" to

conduct training drills with emergency responders at least once per year, since an applicant cannot require emergency responders to participate.

Duplicative Requirements

Unintended duplicative requirements for documents, their content, and meetings should be avoided or minimized. Ensuring the most efficient use of time and resources would be beneficial, in order to meet the State's goals.

For example, within §900-1.3 on Pre-Application Procedures, an applicant is required to publish a notice of intent to file an application; however, the applicant already is required to conduct pre-application meetings in which information that would be contained in the notice is being discussed. The applicant also is required to conduct pre-application meetings for transfer applications other than those under Article 10 that have been deemed complete; yet, pre-application meetings also may have occurred already under Article 10 and under SEQRA before applications are transferred to ORES. Transferred applications could be required to include information learned from those meetings, without the need to conduct additional meetings.

Draft Subpart 900-6: Uniform Standards and Conditions

Environmental and Agricultural Monitoring

Section 900-6.4 on Facility Construction and Maintenance contains provisions, within paragraph (b), on Environmental and Agricultural Monitoring, which would require the permit applicant to: hire an independent, third-party environmental monitor (and also potentially an agriculture-specific environmental monitor) to inspect construction work sites and to oversee compliance with siting permit requirements, in consultation with DPS; and to issue regular reporting and compliance audits and provide them to the host town(s) upon request. The draft rule also would allow the environmental monitor to have stop-work authority over the facility.

These provisions are unnecessarily duplicative and expensive, as the DPS already is accorded stop-work authority, under paragraph (k) of Section 900-6.1 on Facility Authorization, and is allowed to issue a stop-work order on specific construction or maintenance activities that contravene requirements of the siting permit and compliance filings. Additionally, paragraph (d) of Section 900-6.4 already would require the permit applicant to report, every two weeks, to DPS, ORES, and the host municipalities on the status, schedule, and location of construction activities for the next two weeks.

Ag & Markets Construction Guidelines

The provisions of paragraph (s) of Section 900-6.4 are onerous and more expensive than traditional construction practice. Applicants already are providing mitigation payments through Index REC contracts to address compliance with construction guidelines. NYSERDA's website states that, under its 2020 solicitation, contract "awardees may be responsible for making an agricultural mitigation payment to a designated fund based on the extent to which the solar project footprint overlaps with New York's highest quality agricultural soils." The fund would be administered by NYSERDA, in consultation with Ag & Markets, to "support ongoing regional agricultural practices."

Thank you in advance for your consideration and inclusion of these helpmate improvements to the draft regulations. We appreciate the work of ORES in developing the draft rules and providing them for timely public review. IPPNY and our Members look forward to continuing to work with you on further enabling private sector renewable energy investment to meet the State's goals and on realizing the

environmental and economic benefits that investment will bring. If you have any questions or need additional information, please feel free to contact me.

Sincerely,

/s/Radmila P. Miletich

Radmila P. Miletich
Legislative & Environmental Policy Director