

# The Power NY Act of 2011



New York State Association  
of Counties

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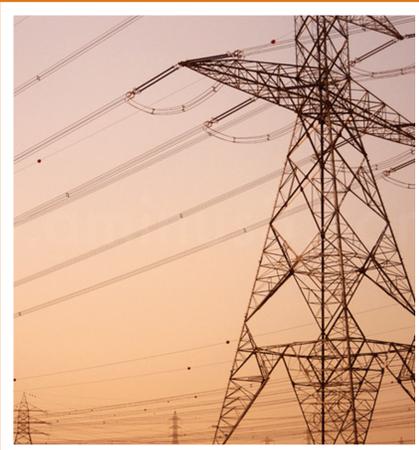


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# THE POWER NY ACT OF 2011

The Power NY Act of 2011 was enacted to reauthorize the State's electricity generating facility siting law that expired January 1, 2003. The Power NY Act of 2011 was designed to expedite the issuance of certificates of environmental compatibility and public need, as a way to authorize construction of power plants with a capacity of 25 megawatts (MW) or more. The Act also directs the New York State Energy Research and Development Authority (NYSERDA) to create an on-bill financing program for residential energy efficiency investments, and to explore ways to increase solar energy generation.

## HOW LOCAL GOVERNMENTS ARE IMPACTED

Local government leaders have expressed concerns that provisions of the Power NY Act will undermine home rule authority, exclude local officials from negotiating PILOT agreements, and prevent local government involvement in siting decisions.

Ultimately the courts may decide the constitutionality of the new law. In the meantime, NYSAC will continue to closely monitor the actions of Siting Boards (see Siting Board structure) to ensure local governments are engaged in siting decisions and that local home rule authority is preserved. We urge the State to be mindful of impacts to local governments as this new law is implemented.

## POWER NY ACT OF 2011—OVERVIEW

### APPLICATION AND REVIEW PROCESS

The application and review process begins with a pre-application to the Public Service Commission (PSC) of a preliminary scoping statement and associated fees to establish an intervenor fund. An "intervenor" in a siting case represents various local interests, and/or may be an expert or consultant with information to add to the siting of a particular plant. In many cases, an intervenor can be a county or municipality itself. The costs of involving intervenors will be offset by intervenor account funds designated in this legislation. These funds require appropriation by the State Legislature. Once the requisite pre-application conditions have been met, the agreement is still subject to public comments.

Power projects involving water supply and potential air pollution are required to contain information that enables the New York State Department of Environmental Conservation (DEC) to issue permits pursuant to applicable federal and State environmental laws. As the State Environmental Quality Review Act (SEQRA) does not apply to these projects, the application must include an analysis of alternatives to the project as extensive as is required under SEQRA. The legislation also requires analysis of potential impacts on energy generation markets and compatibility with the State Energy Plan.

## The New Siting Board Structure

Each board will be comprised of seven members. One standing member will be selected from each the PSC, NYS Department of Health (DOH), DEC, NYSEERDA, NYS Department of Economic Development for a total of five standing members. The other two members are ad hoc members unique to each project, to be selected by the State Legislature based on recommendations of local elected officials from each host municipality. Candidates may not be State or local officials, nor hold any interest for the previous ten years in any “electric utility corporation” or its affiliate.

## PUBLIC NOTIFICATION AND PARTICIPATION

The application must be provided to each Siting Board member, the NYS Department of Agriculture and Markets, the Secretary of State, the Attorney General, the Department of Transportation, the Office of Parks Recreation and Historic Preservation, a local library. The Adirondack Park Agency must also receive an application if the proposed project is located with the Adirondack Park. Notice of the application must also be served on each host municipality, each State Legislator in the host district, and other persons who have elected to receive such notices. The Siting Board and the DEC are required to determine whether the application is sufficient within 60 days of receipt. A public hearing on the application is then to be scheduled by the Siting Board. This will provide residents of the affected area with an opportunity to hear direct evidence and rebuttal evidence regarding the proposed power facility.

## JUDICIAL REVIEW

The new process provides that an application for rehearing may be made to the Siting Board within 30 days after a decision. The Board must then decide whether to rehear the matter within 90 days. Judicial review may be obtained within 30 days after the Board’s decision by petition to the Appellate Division, thus bypassing the county Supreme Court.

## Power Plant Siting and the Environment

Prior to Siting Board action on an application for a Certificate, the DEC must promulgate regulations regarding environmental justice, and cumulative air quality impacts, including requirements for emissions of carbon dioxide. SEQRA would not then apply to projects subject to a Certificate. The Adirondack Park Agency is precluded from holding hearings on a project subject to a Certificate. These new provisions do not apply to projects for which a state or local application has been made prior to issuance of NYSDEC regulations.

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## LOCAL GOVERNMENT ROLE IN SITING BOARDS

The 2 of the 7 seats on the siting board representing affected communities cannot be chosen from among the elected representatives of those communities. It is unclear who the State will select to fill these 2 seats if unable to select from among the official representatives of the people of the community. Despite the fact that local government officials will have the most intimate understanding of the local issues, they are precluded from representing their communities on the siting board. This may hamper the Siting Board's ability to achieve the decisions that will best serve all parties.

### Regulatory Implications for Local Governments

The DEC and the PSC have one year to promulgate regulations on the new siting process. Local government officials and residents can be heard during the regulation promulgation process by providing written comment on all drafts of the regulations. The regulations will further determine the extent to which Power NY impacts local governments.

### Implications for Local Home Rule Authority

A controversial part of the new law allows the Siting Board to disregard, in whole or in part, any local ordinance, law, resolution or other action or any regulation if it finds that, as applied to the proposed facility, such is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers. This includes zoning or planning restrictions enacted locally. The abovementioned provisions of Power NY are considered by some to be legally questionable under local government's current Home Rule authority granted under Article 9 of New York's Constitution.

Since the enactment of Power NY, many local governments have called into question whether it unconstitutionally diminishes the home rule authority of local governments by giving the State, through the powers of the Siting Board, the authority to overrule local laws. The State maintains that local governments are given ample opportunities under this new law to be involved in the Siting Board process. For example, the municipality has an opportunity to present evidence in support of local ordinances, laws, resolutions, regulations or other local action prior to the Siting Board's ruling.

NYSAC continues to oppose the provisions of Power NY that diminish local government home rule authority. We urge the State to be mindful of impacts to local governments as this new law is implemented. As each siting board is formed, and local siting decisions are made, NYSAC will be watching closely to ensure local home rule authority is respected during this new process.

## LOCAL ROLE IN WIND ENERGY PROJECT NEGOTIATIONS

After the previous electric generating facility siting law expired on January 1, 2003, local governments began negotiating directly with wind companies for the siting of wind energy generating projects. Under the new 2011 law, local governments will maintain this jurisdiction over any proposed project that is below the 25 megawatt threshold. For projects above the threshold, local government officials will be able to provide testimony at local hearings pertaining to the project. Local interests will also be represented by 2 of the 7 seats on the siting board. However, because decisions about siting all facilities over 25 megawatts will be made by the siting board, and not the local legislative body, local government officials will have a reduced role in negotiations with wind energy companies.

## FISCAL IMPLICATIONS FOR LOCAL GOVERNMENTS

The Power NY Act of 2011 is silent on matters relating to property taxes and Payments in Lieu of Taxes (PILOTs). Once a siting board has made a determination on the location of a facility, this may reduce a local government's bargaining power in the negotiation of a PILOT agreement. However, the law does not prevent the negotiation of PILOT agreements, nor does it outline the local tax rate. Sited projects will be subject to all applicable local taxes. NYSAC will continue to advocate for full local government involvement in decisions by siting boards that pose significant impacts on local government finances.

## OTHER PROVISIONS OF POWER NY

### On-bill Financing Program

This legislation amends the Public Service Law to create a Green Jobs Green New York (GJ-GNY) on-bill financing program for residential energy efficiency investments. This will allow homeowners to pay for energy efficiency retrofits on their property through a monthly charge on their utility bill. This legislation further authorizes the New York State Energy and Research Development Authority (NYSERDA) to establish an on-bill recovery program for the billing and collection of charges incurred through participation in the GJ-GNY program. For each loan, NYSEDA would be required to file a mortgage that would be subordinate to any other existing or future mortgages and would be without right of foreclosure. Any seller of real property that is subject to the GJ-GNY on-bill charge will be required to provide written notice of the loan to a prospective purchaser.

### New Solar Energy Study

Lastly, the legislation directs NYSEDA, in consultation with the PSC, to conduct a study exploring ways to increase generation of energy from photovoltaic devices. Within this study they are to identify policy that will help achieve 2500 MW of generation in New York by 2020 and 5000 MW by 2025. The study is to include the costs of achieving such a goal, net economic benefit (including job creation), and environmental benefits of achieving the above goals. NYSEDA is required to submit this report to the State Legislature by January 31, 2012.



*The New York State Association of Counties is a bipartisan municipal association serving the counties of New York State including the City of New York. Organized in 1925, NYSAC mission is to represent, educate and advocate for member counties and the thousands of elected and appointed county officials who serve the public.*

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