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Heritage Wind Virtual PIM Live Q&A Session
December 10, 2020
6:00 PM – 7:30 PM
Moderator: Jane Rice; EDR
Panelists: (Partner Team) Carmen O'Keefe, Apex Clean Energy; Mark Lyons, Apex Clean Energy; Jessica Walsh, Apex Clean Energy; Brian O'Shea, Apex Clean Energy; Anna Mathes, Apex Clean Energy; Jim Muscato, Young/Sommer LLC; Laura Darling, Young/Sommer LLC; Lindsay Donahoe, EDR; Jane Rice, EDR.

This Q&A Session was a voluntary meeting held by Heritage Wind to inform the public on its transition permitting from Article 10 of the Public Service Law to Article 94-c of the Executive Law. During this virtual session the project team, including the panelists listed above, delivered a presentation containing information about the Heritage Wind Project, specifically related to the transition from the Article 10 application process to the 94-c application process. Following the presentation, virtual attendees were able to ask questions, which were answered by the panelists. The questions related to Section 94-c and paraphrased responses are listed below.

Question 1
I have been granted Party Status under Article 10. How does your switching to the new review process under Section 94-C affect my participation?

Answer: (Jim Muscato, Young/Sommer LLC) The proposed Section 94-c regulations lay out participation and they identify three categories of parties that can formally participate in the proceeding – mandatory parties, full parties and amicus parties. Mandatory parties include entities like the host Town and state agencies who must be included in the process by law. Full party status is awarded to a party who the Administrative Law Judge (ALJ) has determined has raised substantive and significant issues and is entitled to adjudicate those issues with experts in the adjudicatory hearing process. Amicus parties are not full parties, but they are nevertheless able to submit briefs to the examiners on issues that are raised for adjudication. It is important to note that party status is not required in order to submit public comments – any member of the public is able to submit comments during the available public comment periods.

With regard to what is required to become a party, that process is set forth in the proposed Section 94-c regulations as well. When the public comment period is commenced after the draft permit is issued, ORES will be taking submissions from interested people seeking to become parties in the proceeding. That will come after the draft permit is issued, and the public comment period is started. As far as I understand the State's proposed process, it's not an automatic transfer of party status from Article 10. It's still something from a process standpoint that would have to be requested. However, you should direct questions about the ORES process to ORES to be sure.

Question 2
Who is the Executive Director of ORES?

Answer: (Jim Muscato, Young/Sommer LLC) The Executive Director for ORES is a position that has not been filled yet. There is a Deputy Executive Director, and some of the folks in the session may recognize the name, Houtan Moavani.

He attended the Section 94-c public hearings on the Uniform Standards and Conditions and said a few remarks before the judges began receiving public comments.

Question 3
Who specifically was involved in development of standards and regulations?

Answer: (Jim Muscato, Young/Sommer LLC) The legislature enacted Section 94-c, so that became a component of statutory law codified in the New York Executive Law. The statutory authorization created this new Office of Renewable Energy Siting (ORES). The law gave ORES the authority to promulgate regulations and it specifically tasked them with drafting regulations and going through the regulation promulgation process, in a manner that's consistent with the New York State Administrative Procedures Act (SAPA), which is the State process that governs all regulatory rulemaking and regulation promulgation. ORES created the proposed Section 94-c uniform standards. If you're familiar with any of the Article 10 certificates that have been issued to date, many of the Uniform Standards and Conditions resemble the existing permit conditions or certificate conditions in the existing Article 10 facilities certificates. Really, that's where they came from, from the projects that had gone through years and years of cases under Article 10.

Question 4

Under currently proposed regs and standard, are intervenor funds to community action and environmental groups reduced? If so, to what extent?

Answer: (Jim Muscato, Young/Sommer LLC) The draft Regulations require that 75% of intervenor funds be distributed to the local agencies participating in the process. Awards of that intervenor funding money are made by Administrative Law Judges and are at the judges' discretion. The Article 10 statute and regulations used a different formula for allocation of funding.

Question 5
How will municipalities be notified of the transfer to the 94-C process?

Answer: (Carmen O'Keefe, Apex Clean Energy) During Article 10, we had mailed our notifications to all of the residents in Barre as well as the stakeholder list. Now with the new 94-c regulations, the notice must be sent out to all residents within five miles of the project boundary, which is a significantly larger area than just the town of Barre residents. In addition, there will be a notice letter to the Town Supervisor and board, and when the transfer application is filed, a copy will be served to the town of Barre and the local document repositories. Our repositories include the Hoag Library, Haxton Memorial Library, Holley Community Free Library, Lee-Whedon Memorial Library, and the Barre town hall. Notices will be added to the Project Website and posted to the Siting Board website as well.

Question 6
Has the Director of ORES been selected? What are his/her qualifications, and does he/she have any political connections?

Answer: (Jim Muscato, Young/Sommer LLC) The executive director has not been selected yet.

Question 7
What becomes of the public comments and filed documents filed under Article 10 when the switch is made to 94-C?

Answer: (Jim Muscato, Young/Sommer LLC) The materials that are maintained on the current DMM page will be maintained going forward under Section 94-c and will be incorporated into the record and the process going forward under 94-c.

Question 8
Does the transition to 94-C mean there is less work (fewer than 8 volumes) and a loosening of environmental and community protections?

Answer: (Jim Muscato, Young/Sommer LLC) For the Heritage Wind Project, specifically, it certainly hasn't been less work in preparing the application, the exhibits, the studies, and all the information that have gone into the environmental impact assessment for the project. In terms of the regulatory standards and the legislative standard for review, and the findings and determinations that must be made by the office with respect to the potential for environmental impacts, that standard remains the same. Environmental impact review is intensive and requires assessment over several topics, and will ultimately result in the minimization of those impacts to the conditions that are imposed. Whether or not those conditions come through an individual Article 10 certificate, as compared with Uniform Standards and Conditions, which require the same level of strict and stringent standards to monitor construction and operation as required under Article 10.

Question 9
Does public comment period at all mean that public comments will be considered, or just read?

Answer: (Jim Muscato, Young/Sommer LLC) All public comments will be considered, and they must be included in the record. There is a response summary document that is prepared in response to public comments and that will be part of either a hearing report if there are adjudicatory hearings that are held, or it may be a standalone responsiveness summary. Either way, those comments would be tracked and included in the record.

Question 10
What is meant by the Siting Office must "consider any applicable local law"

Answer: (Jim Muscato, Young/Sommer LLC) Under Section 94-c, one of the findings or determinations the Office must make is that the project has been designed to be compliant with applicable local laws. It's my understanding that in terms of that phrase, it requires the Office to consider the applicable local laws and make that determination in instances where the local laws are potentially burdensome. Very similar to Article 10, those laws can be set aside, and the Siting Board exercised that authority on a number of Article 10 cases.

Question 11

If ORES standards are not issued until April, won't your proposed time frame change?

Answer: (Jim Muscato, Young/Sommer LLC) It may end up being that the Uniform Standards and Conditions aren't formally promulgated until April, but the statute authorizes the Office to issue siting permits immediately. While a permit is not anticipated to be issued before the regulations are finalized, ORES has the authority to do so.

Question 12
You indicated that you plan to transfer to the 94-C process in December with draft permit in February. How is this schedule impacted if the regulations aren't issued until March or April?

Answer: (Jim Muscato, Young/Sommer LLC) Ultimately, ORES would decide this. But those procedural steps that I mentioned are all steps that are identified as part of the legislation. They are not steps that are specific to the regulations. Therefore, those steps will all occur before the regulations are finally promulgated and at the point in time in which the regulations are finally adopted, that will align with the steps in the Section 94-c process.

Question 13
Has any wind or solar project been denied under Article 10?

Answer: (Jim Muscato, Young/Sommer LLC) Certificates have been issued for eight other projects: seven wind projects and one solar project. The question is a complex one because denial can mean a lot of different things. There have been conditions that have been imposed that the developers were not seeking. There have been conditions that were imposed that the state agencies proposed, or local host municipalities proposed, and those conditions were imposed as part of the order and must be complied with. Whether or not, and to what extent projects proceeded to the process and then have had conditions included as part of a Certificate, I think that's really the more meaningful thing to look at, rather than just a straight denial or acceptance or approval.

Question 14
Intervenor funding has already been awarded in the Art. 10 process to a few parties and some parties have already sought reimbursement of some of those funds. How will the new process deal with the already awarded funds and with those funds for which reimbursement has been sought?

Answer: (Carmen O'Keefe, Apex Clean Energy) All of the groups that are currently getting intervenor funding from Article 10 will continue to access that funding until Heritage files and notices the formal transition to Section 94-c. If the intervenors are putting in invoices for the days prior to that notice, they will get that funding from the Article10 round of intervenor funds. Heritage will have to issue a new round of intervenor funding for 94-c once the formal transition is made. The parties will have to apply for those new funds. Any excess money that wasn't spent from the Article 10 intervenor funding will be reimbursed to the applicant, and then, going forward, the intervenors apply for and have access to the new round of intervenor funding for 94-c.

Question 15

Will the Town of Barre automatically be given party status, or does it have to apply?

Answer: (Jim Muscato, Young/Sommer LLC) One of the other categories of parties is something called a mandatory party and the regulations appear to give mandatory party status to host municipalities as a default. This is something that should be confirmed with ORES, but it's my understanding that in that situation, the mandatory parties (like the Town of Barre) are going to be parties regardless.

Question 16

Given the communication difficulties brought on by the COVID pandemic, will this accelerated schedule be adjusted so that the public, especially those without decent access to the internet, can have meaningful participation?

Answer: (Carmen O'Keefe, Apex Clean Energy) Both Article 10 and Section 94-c have a one-year review period once a project is deemed complete, so this isn't an accelerated schedule. Regarding internet access, there are hard copies of all the application documents at the Hoag Library, our project office at 18 N. Main St in Albion, the Barre Town Hall, the library in Holley, the library in Oakfield, and the library in Medina. Additionally, we are always available by phone. If you need anything, like if you need us to mail you certain things, we are available. If you need certain sections of the application or need help getting to certain sections, we can help.

Question 17

Will 94-C documents be available on New York ORES web site, or will a FOIL process request be necessary to get a copy?

Answer: (Jim Muscato, Young Sommer LLC) This will be a question that ORES ultimately has to answer. But I can tell you that it's my understanding that the DMM will be maintained for at least some period of time. So, documents will be available from the DMM. The transition documents, when they're filed, and other materials that the applicant will submit to ORES will certainly be available or have already been available on the DMM and will be available on the Heritage Wind website. Paper copies will be kept in the repositories as well. There should be access to the information without FOIL requests. But, FOIL is another avenue as well.

Question 18
How will this impact the community benefits that have negotiations in process like the HCA and the pilot?

Answer: (Carmen O'Keefe, Apex Clean Energy) Those negotiations and those benefits packages and agreements will not change when we make the switch to 94-c. Everything that the town has been working on will stay in place.

Question 19
Why is the 94-C process taking away home rule?

Answer: (Jim Muscato, Young Sommer LLC) That's a common misperception. It's something that has been heard, even going back to when Article 10 was promulgated in 2011 and the regulations in 2012. Both Article 10 and Section 94-c are State siting processes that the Legislature has authorized. A legislative act, such as the creation of a comprehensive State siting process, is not removal of a home rule. The towns and municipalities have the authority that's been granted to them by the Legislature, but that authority is already limited to actions which are consistent with State statutes—like a comprehensive siting law—and that authority is something that the Legislature can change, modify or otherwise amend. There are other statutory schemes where this has come up, as it did in Article 10, and these have been upheld as consistent with home rule. Article 10 and Section 94-c both require assessment and findings related to local laws. Local laws remain important pieces to both processes and the Siting Board will look at applicable local laws and make determinations with respect to those local laws. The notion about the removal of home rule suggests it's ignoring local laws and that's not what either Article 10 or Section 94-c will do.

Question 20

How much faster will the process be under 94-C?

Answer: (Jim Muscato, Young Sommer LLC) In terms of estimation of the process, in relation to Heritage Wind specifically, the Article 10 certificate would have been issued around 12 months from the date that the project was deemed complete, which was December 8. Under Section 94-c the Office has to issue the siting permit within 12 months of the transition. That's going to be a day, likely in December. In terms of speeding up the process or how expedient one will be over the other, I think for the Heritage Wind Project, as you can tell by the timelines that are in the law, it would result in a certificate or a siting permit around the same time.

Question 21
What involvement did Apex or other developers have with the State of New York in developing the 94-C process?

Answer: (Carmen O'Keefe, Apex Clean Energy) We saw the draft regulations at the same time the rest of the public did, on September 16th. Once we saw those, we started digesting and came up with our own questions and comments. We sat and listened to the hearings and listened to other developers and members of the public, and in addition to that, we drafted our own comments as a company, and we submitted them electronically.

Question 22

If a majority of residents are against the project, will 94-C abide by public opinion?

Answer: (Jim Muscato, Young Sommer LLC) Like Article 10, 94-c has requirements that must be met, and the standards in the Uniform Standards and Conditions or any site-specific standards also require consideration of public comment.

Question 23
Will the town of Barre be given party status automatically or does it need to re-apply?

Answer: (Jim Muscato, Young Sommer LLC) It's my understanding that the regulations give mandatory party status to the host municipalities as a default, like other mandatory parties such as the state agents that are involved. It would be best to confirm that with ORES to make sure that the towns or the town would be considered automatically a mandatory party.

Question 24
How will any comments ever be heard if the article 94-C leaves it to the direction of the Executive Director to deem what is substantive or significant? Other language also deems any comments that may hinder the project. Whose standards would it be burdensome?

Answer: (Jim Muscato, Young Sommer LLC) The question seems to be conflating three different issues – the question of what issues are sufficiently "substantive and significant" that litigation will be required in the proceeding, the question of whether ORES will choose not to apply a substantive requirement of local law because it is unreasonably burdensome, and the issue of public comments. If the question is, by which standard is the question of "substantive and significant" measured, that standard has been used in other contexts before other agencies, such as the New York State Department of Environmental Conservation, and there is established case law on what that standard means. It would be up to the assigned Administrative Law Judges in an ORES proceeding to determine whether an issue raised was "substantive and significant."

With respect to the public comments that would be submitted, there are several opportunities in both Article 10 and in 94-c for comments to be submitted to the record and to be heard by the Siting Board or the Office. Public comments are permitted broadly – they are not subject to the "substantive and significant" standard for purposes of being included in the record of public comment.

In terms of the unreasonably burdensome standard, Article 10 has a slightly different wording with respect to what is considered and how to measure unreasonably burdensome. It looks at things like the cost associated with the imposition of the applicable local law, the technology limitations regarding that, and the interests of ratepayers. Under Article 10, application of the unreasonably burdensome also required the Siting Board to consider the State's climate legislation, which are mandatory laws. Section 94-c is the same, but makes it more explicit that the consideration of the Climate Leadership and Community Protection Act (CLCPA) is required. Unreasonably burdensome is a metric that looks at the potential environmental benefits of the project and whether the project furthers the interests of the CLCPA in making that determination, in addition to those other factors that I mentioned before, which were carried over from Article 10.

Question 25 Part 1
Has Article 10 been done away with completely?

Answer: (Jim Muscato, Young Sommer LLC) New renewable energy projects that are proposed and greater than 25 megawatts will be required to go through Section 94-c, however, fossil fuel projects that have been proposed will remain in Article 10. There are also certificates that have been issued for renewable and non-renewable projects under Article 10, which will continue to be administered through Article 10 in the Public Service Law. It hasn't been done away with completely.

Question 25 Part 2
If Article 10 is still available, why has Apex chosen to switch to the 94-C process?

Answer: (Carmen O'Keefe, Apex Clean Energy) Section 94-C was enacted by the legislature for uniform siting and consistent construction and operational standards, specifically for renewable energy projects like Heritage. Those reasons are why we transitioned into this process.

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