Legal Opinion Letter

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# AMBITIOUS ENVIRONMENTAL AND ENERGY GOALS COLLIDE IN NEW YORK

by
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New York's highest court on November 20, 2001, affirmed a July decision that the State's power authority acted illegally in installing mini power plants around New York City without conducting full environmental assessments. *Uprose v. Power Authority of State of New York*, LEXSEE 729 NYS2d 42, aff'd 2001 NY LEXIS 3450 (2001). In doing so, it required the evaluation of small, 2.5 micron, particles that have not been regulated nationally. This decision comes at a time when the nation is seeking ways to address electricity shortages.

***Introduction and Background.*** The siting of large industrial facilities has become increasingly difficult. Layers of Federal and State permitting requirements impose difficult and expensive substantive conditions. The result is a lengthy approval process and delay in implementing projects. Electric generating plants have faced particular difficulties, because of their size and the public scrutiny they have engendered. These siting problems are exacerbated by the electricity shortages and brownouts that have occurred in many parts of the country, especially, in the summer months. The experiences in California last year served as a wake up call. To address these issues, States are considering a variety of reforms and solutions, including alternatives to large electric power generating facilities.

In August 2000 the Power Authority of the State of New York authorized the purchase of eleven gas powered turbine generators for use at various sites, also popularly called mini power plants. After review, the Power Authority decided to site the turbines as follows: three at two locations in Brooklyn, two at a site in Queens, four at two sites in the Bronx, one in Long Island, and one in Staten Island. Each had a capacity of 44 megawatts ("MW"). Subsequently, on November 20, 2000 the Power Authority prepared an environmental assessment for the project, concluding that it would not have any potential significant environmental impacts, and thus that a formal Environmental Impact Statement (EIS) would not have to be prepared. The Power Authority instead issued a negative declaration for the project under the New York Environmental Quality Review Act. *See* 6 NYCRR §617.7.

***The Ensuing Litigation.*** A number of citizen groups challenged the State's decisions to site the turbine generating facilities. The plaintiffs argued that the Power Authority failed to adequately address the environmental impact of particulate matter that would be emitted in the operation of the gas turbines. The mini plants burn natural gas and thus are relatively clean sources of electricity. Moreover, the Power Authority reportedly stated that there would be offsetting emission reductions at other nearby sources so that there would be no net increase of emissions, although it is not clear whether there were commitments to that effect.

***Control of PM 2.5 Emissions.*** The Federal Environmental Protection Agency (EPA) issues national air quality criteria for various air pollutants pursuant to the Clean Air Act. As noted by the New York Supreme Court, particulate matter is a generic term for a variety of substances that exist as discrete particles. Until 1997,

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national standards were established for particulate matter with a diameter of 10 microns, known as PM-10. In 1997, the U.S. EPA established a new standard for PM-2.5. These standards were not immediately effective. From 2005 to 2008, States are required to submit plans to EPA for implementing the new PM-2.5 standards, and States then have up to 12 years, until 2017, to meet the PM 2.5 standards. *See* http://ww.epa.gov.oar/primer/timeline.htm.

Although the new PM-2.5 standards were being challenged by industry groups in Federal Court, *American Trucking Ass'n v. EPA*, 175 F.3d 1027 (D.C. Cir.), *rev'd sub nom Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001), and although there was no Federal requirement for a plan for implementation of a PM-2.5 standard, the Power Authority nonetheless analyzed PM-2.5 emissions in connection with the 11 proposed mini power plants. The Power Authority assumed that all PM-10 emissions were PM-2.5 emissions and concluded that the impacts of the emissions from the proposed mini power plans would be insignificant.

The New York Appellate Division reversed the trial court's dismissal of the suit. The court stated that "there is some possibility of an adverse health impact from particulate matter at any concentration." As a result, the court concluded that an environmental impact statement (EIS) was required. The Power Authority's analysis, based on the assumption that all PM-10 emissions are PM-2.5 emissions, the court added, is not sufficiently detailed and is not a substitute for addressing the health impacts of PM-2.5 emissions. New York's highest court upheld this decision.

Counsel for plaintiffs called the ruling a "huge precedent" because the State would now have to control PM-2.5 emissions for every factory, power plant, or project with traffic impacts, noting that until now, no State has imposed controls on such fine particulates. *Court Upholds Tougher Rules on Pollution*, N.Y. TIMES, Sec. D., Co. 5, Nov. 19, 2001. On the other side of the aisle, counsel for power producers said that applying a PM-2.5 standard could make projects prohibitively expensive, and in any event could delay and impair the ability to develop such projects. *Id*.

***Impact and Implications***. The decision of the Appellate Division is somewhat unsatisfying, if one is looking for a broader perspective on the future of such energy projects and how they will be regulated. As the decision noted, at the time of the negative declaration the national PM-2.5 standards were the subject of a legal challenge in Federal court, and the Federal EPA does not require that PM-2.5 standards be met for many years. The absence of a discussion of the relative health effects of PM-2.5 versus PM-10 is puzzling, given the court's rejection of the Power Authority's treatment of PM-10 as equivalent to PM-2.5. Nor did the court's opinion discuss the Power Authority's reported plan to offset the PM emissions of the mini power plants by reductions at other facilities, so that there would be no net increase of PM. The court does not discuss the adverse consequences to the public of electricity shortages, which can have an impact on health and welfare as well as a financial impact. The court was concerned with procedural issues, namely whether the Power Authority had taken a sufficiently hard look at the potential impacts of PM-2.5 and documented its findings in a written EIS document. In that context, the court's decision is arguably analogous to Federal judicial decisions in which projects have been halted because of a government agency's failure to prepare an adequate EIS pursuant to the National Environmental Policy Act, 42 U.S.C. §4231. *See, e.g. Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

The immediate impact of the court's ruling is to place the New York mini power plant projects in limbo while the Power Authority prepares an environmental impact statement. In the meantime, the plants have been constructed. The EIS is expected to be completed before this summer, when the plants will be needed. It is unclear whether at that point plaintiffs will renew their legal challenge to the plants, seeking to avoid emissions of concern, but also risking brownouts this summer that operation of the mini power plants would have avoided.

***Conclusion***. The landscape of environmental law is marked by the often competing interests of protection of human health and welfare and the economic and social needs of our citizens. We need to find ways to review and permit new sources promptly while providing appropriate assessment of environmental impacts and assuring necessary emission controls are implemented. Power producers, governmental representatives, and members of the public will need to work together to find solutions to energy problems, including price volatility and electric power shortages that confront the Nation.



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