

Getting State Approvals For Energy Storage Siting

By **Andy Flavin**

Many states are setting increasingly aggressive mandates to transition away from fossil fuel-based electric generation. Wind and solar are popular candidates to replace traditional coal- and gas-fired turbines, but on their own are generally intermittent and nondispatchable resources.

Utility-scale energy storage facilities will be a critical component of any plan to facilitate this transition. Energy storage developers should carefully assess whether their project requires approval from state siting regulators.



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States normally require utilities and other developers to obtain siting approval before beginning construction of traditional utility infrastructure like power plants and electric transmission lines. Depending on the state, these approvals may be known as "certificates of public convenience and necessity," "certificates of public good" or some variation thereof.

Many state siting laws were implemented decades ago, but few have been sufficiently updated to reflect recent technological developments and public policy priorities. This raises an important question: Are energy storage facilities subject to state siting requirements as generation or transmission facilities?

Where to Start?

Developers should start with state siting statutes and regulations, which usually define the types of projects requiring approval. For example, in my home state of Virginia, utilities are required to obtain approval from the [Virginia State Corporation Commission](#) before constructing "electrical transmission lines of 138 kilovolts or more" and "associated facilities."^[1]

In Rhode Island, the Rhode Island Energy Facility Siting Board, or EFSB, has siting jurisdiction over "major energy facilities," which include, in relevant part, "facilities for the generation of electricity designed or capable of operating at a gross capacity of forty (40) megawatts or more [and] transmission lines of sixty-nine (69) kV or over."^[2]

Unfortunately, few state siting laws explicitly address energy storage facilities. In 2019, the Vermont Legislature passed Act 31, modifying its siting laws to require a certificate of public good before constructing an "electric generation facility, energy storage facility, or transmission facility" in the state.^[3] Connecticut's law is likewise clear that the Connecticut Siting Council regulates the siting of several kinds of "facilities," including "any electric generating or storage facility using any fuel."^[4]

But what happens when the relevant statutes and regulations are silent? Can energy storage facilities be regulated as generation or transmission facilities?^[5]

State Siting Laws Don't Address Energy Storage: Now What?

If not addressed in state siting laws, developers should consider asking the regulator if it will assert jurisdiction. Constructing any jurisdictional facility without obtaining the proper approval(s) is risky, and if the regulator finds out, the developer may be subject to significant consequences, including hefty fines and a mandate to tear down or modify the facility.

Moreover, securing necessary state siting approvals may be a lengthy and expensive endeavor, potentially lasting multiple years (not including appeals). Where required, developers' budgets and schedules should prospectively account for the expected time and costs.

Recently, developers in New England followed this approach. In January 2019, Cranberry Point Energy Storage LLC petitioned the Massachusetts Energy Facility Siting Board for a determination that it does not have siting jurisdiction over a proposed 150-megawatt battery storage facility.

Massachusetts law gives the state EFSB jurisdiction over "any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more,"[6] but does not define "generating unit." Cranberry's main argument against jurisdiction is that its proposed energy storage facility does not generate electricity.[7] This docket is still pending.

Similarly, Energy Storage Resources LLC petitioned the Rhode Island EFSB in May 2019 for a declaration that its proposed 180-megawatt battery storage facility is not jurisdictional. The EFSB regulates, in relevant part, "any facility for the generation of electricity capable of operating at a gross capacity of 40 megawatts or more," but Rhode Island law does not define "generation of electricity."

The developers likewise argued that the proposed facility will not generate electricity.[8] At a Dec. 17, 2019, meeting, the Rhode Island EFSB voted 2-1 in favor of not asserting jurisdiction. A written order is expected soon.

To be sure, in these and future dockets, intricacies of state law are important, including prior regulatory and judicial interpretations of the statutes and regulations at issue, state canons of statutory and regulatory construction, and the interplay with related state laws. But the technical differences between energy storage and traditional electric generation are universal, and form the core of any argument differentiating between the two for siting purposes.

New York siting regulators characterized these distinctions well. In 2013, AES Energy Storage LLC petitioned the New York Board on Electric Generation Siting and Environment for a declaratory ruling that standalone battery energy storage facilities are not regulated as generation facilities.

AES proposed to install multiple large energy storage facilities, each between 50 and 100 MW. In its order finding that the proposed systems were not subject to its jurisdiction as "major electric generating facilities," the siting board reasoned that: Although electrical generation and storage facilities may both be capable of providing capacity, energy and/or ancillary services, the terms "generation" and "storage," as they are commonly used and within the electric power industry are distinct concepts. Generation involves the creation or production of something. Storage involves the deposition or

accumulation of an existing product for future use. Moreover, to the extent electrical energy storage involves the reconversion of another form of energy back to electricity, it is still distinguished from electrical generation by the fact that the energy stored was previously electric energy generated elsewhere.[9]

In other words, even though electric generation and energy storage facilities both transform another type of energy (e.g., chemical, mechanical, etc.) into electric energy, energy storage facilities are unique because the electricity they store was produced elsewhere. This highlights another important distinction: Both energy storage facilities and generation facilities can export electricity, but only the former can withdraw or absorb electricity from the grid.

Developers should be cautious, however, because these important technical distinctions may be irrelevant if energy storage facilities are proposed in conjunction with another jurisdictional project, like a large solar photovoltaic system or electric transmission line. State siting regulators may be able to regulate otherwise nonjurisdictional facilities if those facilities are ancillary to, associated with or integral to the jurisdictional facility.

For example, the New York siting board regulates the siting of “major electric generating facilities” which are “electric generating facilit[ies] with a nameplate generating capacity of 25 megawatts or more ... including ancillary features located on the facility site such as ... energy storage or regulation facilities.”[10]

Similarly, the Rhode Island EFSB previously asserted jurisdiction over a power plant “to include not only actual generating facilities but also ancillary facilities integral and dedicated to the energy generating process.”[11] Using the same reasoning, the EFSB later asserted jurisdiction over new and upgraded electric substations which it viewed as “‘ancillary facilities integral and dedicated’ to the transmission of electricity at 115 kilovolts.”[12]

The takeaway here is that an otherwise nonjurisdictional energy storage facility may become jurisdictional if it is co-located or integrated with a jurisdictional electric generation or transmission facility.

Should States Regulate Siting of Energy Storage Facilities?

On the surface, most developers would probably prefer to avoid the state siting process altogether. As discussed above, it can be cost-prohibitive and time-consuming. But one potential benefit of state regulation is that it may preempt any conflicting local government siting decisions and ordinances.

If unregulated by the states, the locality in which the project is proposed might wield significant power over projects necessary to support the state’s electric system and achieve state public policy goals. Indeed, most state siting laws were designed (in part) to limit the influence of local politics on infrastructure projects of state and regional importance. State siting would also eliminate the likely patchwork of siting requirements from different localities.[13]

Legislatures should ultimately determine if states will regulate the siting of energy storage facilities to avoid contorting the commonly understood definitions of “generation” or “transmission.” But both legislators and regulators must recognize that subjecting energy storage facilities to a siting process that can last multiple years and cost millions of dollars is antithetical to achieving current public policy priorities.

Energy storage facilities lack most of the environmental impacts inherent in fossil-fuel generation, such as emissions and wastewater discharges. They also use a fraction of the land of solar and wind generation facilities.

Indeed, most solar and wind generation facilities require several acres per megawatt, but the 50-100 MW energy storage facilities proposed by AES in 2013 ranged in size from 0.75 acres to 5.0 acres.[14] Likewise, the 180 MW facility recently approved for Rhode Island will occupy 7.44 acres[15] and the 150 MW facility pending before the Massachusetts EFSB will need approximately five acres.[16]

Developers should proactively engage state legislatures and regulators to ensure that if states regulate the siting of energy storage facilities, such regulation occurs through an abbreviated process that recognizes their minimal impacts and importance in achieving public policy mandates.

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[1] Va. Code § 56-265.2(A). Other statutes and regulations govern the siting of electric generation facilities.

[2] R.I. Gen. Laws §§ 42-98-4, 42-98-3(d).

[3] See Vt. Stat. tit. 30, § 248(a)(2)(A).

[4] Conn. Gen. Stat. § 16-50i(a)(3).

[5] FERC has already recognized that energy storage facilities can function as both transmission and generation assets, but such determinations are limited to their participation in wholesale markets and do not impact potential state siting jurisdiction. See, e.g., FERC Order No. 845, Reform of Generator Interconnection Procedures and Agreements, 163 FERC ¶ 61,043, at P 278 (April 19, 2018) (“[FERC] previously has found that, in certain situations, electric storage resources can function as a generating facility, a transmission asset, or both”) (internal citations omitted).

[6] Mass. Gen. Laws ch. 164, § 69G.

[7] Petition of Cranberry Point Energy Storage LLC for a Jurisdictional Determination Pursuant to 980 C.M.R. § 2.09, EFSB 19-01, Petition, 2-3 (Jan. 4, 2019).

[8] In re Petition of Energy Storage Resources LLC for a Jurisdictional Determination Pursuant to R.I. Gen. Laws § 42-35-8, Docket No. SB-2019-02, Petition, 2-3 (May 22, 2019).

[9] Petition of AES Energy Storage LLC for a Declaratory Ruling that Battery-Based Energy Storage Facilities are not Subject to Article 10 of the PSL, Case 13-F-0287, Order at 7 (Jan. 24, 2014).

[10] N.Y. Comp. Codes R. & Regs. tit.16, § 1000.2(v).

[11] In re The Narragansett Electric Co. and New England Power Co.(Manchester Street Station Repower Project), Docket No. SB-89-1, Final Report and Order, p. 14 (Order No. 12, Dec. 17, 1990).

[12] In re The Narragansett Electric Co. (Southern Rhode Island Transmission Project), Docket No. SB-2005-01, Decision and Order, p. 5 (Order No. 59, March 13, 2007).

[13] Developers still may need to obtain separate approvals from federal, state and/or local environmental regulators.

[14] Petition of AES Energy Storage LLC, for a Declaratory Ruling that Battery-Based Energy Storage Facilities are not Subject to Article 10 of the PSL, Case 13-F-0287, Order at 2 (issued Jan. 24, 2014).

[15] In re Petition of Energy Storage Resources LLC for a Jurisdictional Determination Pursuant to R.I. Gen. Laws § 42-35-8, Docket No. SB-2019-02, Energy Storage Resources LLC's Responses to the Energy Facility Siting Board's First Set of Data Requests, Attachment 1-8(A) at 3 (Aug. 1, 2019).

[16] Petition of Cranberry Point Energy Storage LLC for a Jurisdictional Determination Pursuant to 980 C.M.R. § 2.09, EFSB 19-01, Memorandum of Law, 2 (Jan. 4, 2019).