

FREQUENTLY ASKED QUESTIONS
ABOUT INTERVENOR FUNDING - 12/01

- Q.** I am a member of a group that is very interested in a proposal to build an electric generating unit in our community and we may be interested in participating actively in the proceeding under Public Service Law Article X or in the permitting cases before the State Department of Environmental Conservation in which the proposal will be evaluated. We hear there will be funds available for our use. Is this true?
- A.** There will be some intervenor funds available and you might be eligible to get some of them.

When any formal Article X application is filed, it must be accompanied by \$1,000 per MW of electric generating capacity to be built, but no more than \$300,000. Thus, the total fund for an 80 MW facility would be \$80,000, for a 300 MW facility would be \$300,000, and for a 1,000 MW facility would be \$300,000. The \$300,000 level is set by State statute and generally cannot be increased except in one set of narrow circumstances where an application is filed and then changed during a case in a way that warrants substantial additional scrutiny. In that instance, the total amount of the fund can be increased by up to \$100,000.

Parties that participate actively in a case can apply to receive a share of these funds. However, at least one half of the total must be reserved for qualified municipal parties, such as counties, cities, towns, and villages. Other local parties (i.e. non-governmental parties that represent the interests of those in the vicinity of the proposed project) that meet applicable requirements would be eligible to recover all or part of the remainder.

- Q.** What could my group use intervenor funds for?
- A.** Generally, to hire technical consultants or expert witnesses to assist you in the case. Early in the case, such persons might be used to evaluate the substantive information the Applicant presents in support of its request for an Article X certificate or DEC permits and to identify issues that your group believes warrant further scrutiny. Later on in the case, as the most important issues become apparent, they might do original research or evaluations of their own, prepare reports or testimony documenting their findings, and be cross-examined at a hearing. The costs for these services and related incidental expenses of such persons (travel, postage, telephone) could be covered in whole or in part by intervenor funds. The costs for representation of your group by an attorney or any other person, however, do not qualify for intervenor funding.

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Q. So far so good. What do I do next?

A. It really depends on how far the case you are interested has progressed.

If the formal application has not yet been filed you should be giving some preliminary thought to identifying the issues that are most important to you and identifying consultants with credentials, training, and experience that qualify them to take a substantive position on those issues. If there are other groups or individuals you are aware of that might be interested in seeking intervenor funds in the same case, you should discuss your plans with each other so that any funding requests ultimately made do not call for funding for duplicative work. You can also do some preliminary work drafting a request for intervenor funds so all you will have to do is finalize it when the time is right. Finally, you will want to make sure you inform the Applicant in writing that you want to be notified when the application is filed. The time to request funding will generally fall within 75 days of the filing of the Article X application.

If the formal application has already been filed, you must find out immediately whether a notice for the initial prehearing conference has been issued by the Examiner (or Judge) in the case. All requests for intervenor funds are due within 15 days of the day on which such a notice is issued. Thus, if such a notice were issued February 1 for an initial prehearing conference on February 20th, the requests for intervenor funds would all be due 15 days later than the notice, or by February 16th. All such notices are posted on the DPS website [<http://www.dps.state.ny.us>]¹ and this can be checked at anytime.

Q. What if we miss the due date?

A. You can still request funds. However, you would have to get special permission from the Examiner to file a late request, giving the reasons why you are late and explaining why you think it would be fair to accept your late-filed request. The Examiner would then rule on the request.

¹ Once on the website, click on: (1) Current Issues and Session Schedule; (2) Electric Generating Facilities - Article X Siting Board Matters; (3) the case name in question, listed under "Filed Article X Applications," and (4) Access electronic file room documents regarding the case number you are interested in. You will have to scroll down during some of these steps.

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- Q.** Let's assume we can meet the deadline. What information would we have to provide to support our request for intervenor funding?
- A.** There is no form to fill out, but the Siting Board's rule 1000.9 reprinted at the end of this document provides very clear guidance on what you have to provide and who you would have to send copies to. A full set of the Board's rules is posted on the DPS website.²

General information you would have to provide in the request for funds includes:

1. the number of persons in your group and a description of the interests and goals of your group;
2. a statement of funds your organization otherwise has available or has access to for these purposes and of all efforts that have been made to obtain such funds;
3. the location of your members relative to the proposed site or any alternate site identified in the application;
4. if possible, the name and qualifications of each expert to be employed; and
5. if known, the name of any other party who may be intending to employ the same expert.

Q. Most of that seems simple enough, but what if I don't want to address one or more of these points?

A. You run a very high risk that your application for funds will be rejected to the extent it is incomplete in any respect.

Q. Is there anything else we would have to provide?

A. Yes, perhaps the most important information you must provide is a "detailed statement" of who will do the work for you, what amount they will charge per unit of time, and specifying how their services will contribute to the development of information that will help the Siting Board or DEC Commissioner decide the substantive issues presented in the case. In general, this means enough detail is provided so that a reasonably intelligent person could evaluate if the funding request is reasonable in the context of the case as it stands at the time of the request, to make sure others are not proposing to do the same work, and so a firm foundation will exist for evaluating quarterly reports that must be submitted later--

² Use the website address above and follow the first two steps in the previous note.

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discussed below--by all parties that are awarded intervenor funds.

Two other requirements to be met by a funding request are that you (1) describe your efforts to have the Applicant prepare a study on a topic for which you are requesting funding or explain why you believe an independent study is necessary; and (2) provide a copy of any contract or agreement with each expert or consultant you plan to work with.

- Q.** Once we have a complete request for intervenor funds, what do we do with it?
- A.** File the original with the Examiner and send a copy to all the other parties. A list of parties and their addresses will be published after an application is filed, posted on the DPS website, and updated from time to time. Naturally, you will want to keep a copy of your group's request for your records.
- Q.** What happens next?
- A.** The requests for intervenor funds will probably be discussed at the first prehearing conference. The Examiner may have questions or may seek additional information. If there are any objections to any of the pending intervenor funding requests, they would also be discussed. If two or more parties are seeking funds for work to be done on the same or closely related issues, those parties may be asked to work together.
- Q.** When would we get a decision on our request?
- A.** The Examiner might rule orally at the initial prehearing conference if the request for funds is clear and succinct, fully consistent with all requirements, and no issues arise about the request. Technically, the Examiner has up to 15 days after the conference to rule in writing. You would receive a copy of any written ruling.

The specific circumstances of each case and the clarity and comprehensiveness of each funding request has a big effect on how the Examiner will rule. Additionally, a decision on every request for funds will be guided by several fundamental principles set forth in the Board's rule:

1. What is the potential that such an award will make a contribution to the information that will be useful to the ultimate decision-makers?
2. Will the award be equitable?
3. Will the award foster broad public participation?

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These considerations are in addition to evaluating whether:
(1) all requirements are met by the funding request;
(2) the request minimizes or avoids duplication of effort among all who are requesting funding; and (3) the request can be granted consistent with the requirement that at least 50% of the total funds available be reserved for municipal parties.

- Q.** Assuming we follow the rules carefully and make a clear, succinct presentation, is there anything else we can do to increase our chances of getting the funds we request?
- A.** You should consider segmenting your request. Once an application is filed, you might seek a relatively small amount for your consultants to evaluate the Article X or DEC permit applications, identify areas of concern, and identify issues that require greater attention. This is the kind of information that will be helpful at the "issues conference" that will be held sometime after the initial prehearing conference. The issues conference is where you will get a chance to point out what you think are the key issues to be considered at the evidentiary hearings. A supplemental request for funds could be made prior to the issues conference explaining the detailed work you now propose to have your consultant do on the issues you think should be litigated. When the Examiner identifies the issues to be litigated in a ruling in the case, funding awards can be made consistent with his or her decision on what issues will be litigated.

This approach means you will be filing at least two funding requests, which is extra work for you. However, it also helps to ensure that large portions of the total intervenor funds available will not be expended by parties early in the case on issues that ultimately will not be litigated. In other words, this approach maximizes the probability that funds expended will make a substantive contribution to the information the decision-makers will ultimately use.

- Q.** I understand. If the Examiner awards us intervenor funds, how do we get the money?
- A.** Once an award is made, you typically will have to enter into a contract with the State. The contracting process will be described in a letter to you from the Department of Public Service Office of Finance and Budget. The letter is sent out shortly after an award is made. The contract prepared in that process has to be reviewed by the Attorney General and the State Comptroller before it can be finalized. This takes time. This process should be made clear to your consultant or expert as you begin to make arrangements with him or her.

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- Q.** Let us assume our group gets a total award of \$10,000, comprising \$5,000 to study noise impacts and \$5,000 to study impacts on traffic and transportation. As work goes forward, we discover that noise is a much bigger problem from our perspective and we decide we want to spend \$8,000 on it and only \$2,000 on traffic and transportation. Would that be a problem?
- A.** It could be a problem if you simply made the change in your workplan without seeking the Examiner's permission in advance of the change. In this instance, you should advise the Examiner and other parties of your new proposal so the Examiner can consider changing your award. If a change like this is brought up for the first time when you submit vouchers for \$8,000 and \$2,000, it is likely you would only be paid \$5,000 and \$2,000. You should expend funds consistent with the award, which is based on your original request and the terms of the Examiner's ruling on it. Another alternative might be to try to build in some limited flexibility to modify the amount to be expended on various topics within your total award.
- Q.** Let us assume the same basic facts. However, let us also assume that we spend \$6,000 on noise impacts and \$5,000 on traffic and transportation impacts. Is this alright?
- A.** Again, you would be spending an amount inconsistent with the budget you proposed or the amount awarded by the Examiner. The best way to ensure you can recover what you spend is to spend money consistent with your budget as approved or to ask for a change in your award and get a decision on the change before you incur expenditure over the amount awarded.
- Q.** Is there anything else I should be aware of?
- A.** Yes, if you get an award, you have an obligation to file quarterly reports providing an accounting of the work done and the charges incurred on your behalf by consultants and experts. The first three months runs from the date on which the award is made or as the Examiner in your case otherwise directs. These reports must also explain if the purposes for which the award was made have been or are being achieved and summarizing why further expenditures are warranted. These reports are much more effective to the extent budgeted and expended amounts for work done are presented in a way that they can be compared readily. Failure to file quarterly or comparable reports will interfere with your ability to receive timely payment when vouchers are submitted by you. It will also interfere with your ability to receive additional funding in the same case.

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- Q. If I understand you correctly, it sounds like I will have a number of obligations and responsibilities to fulfill, both to receive an award and to receive payment ultimately for the work done on our behalf by consultants or other experts. Is that correct?
- A. Yes. If you think about it, a fund of up to \$300,000 is a large amount of money for most of us. The money in the fund is there for intervenors to use if it will be used effectively, helping to expand the information base the decision-makers will rely on at the end of the case. Procedures are in place to help ensure such funds are expended carefully in a way designed to avoid wasting any of the funds. If intervenor funding is approached with this overall context in mind, I think you will agree the approach is well founded.
- Q. What if we do everything right and we are still denied an award? Do we have any recourse?
- A. There is a process by which you could take what is called an "Interlocutory Appeal" to the Examiner's ruling denying you funds. The Siting Board may provide you relief if you can show that "extraordinary circumstances" exist. This is a very hard burden to meet in most instances. Such an appeal would be filed with the Secretary of the Siting Board within 15 days of the Examiner's ruling and be filed in a format and with the requisite number of copies called for in the Public Service Commission's rules 3.6 and 4.7.
- Q. So where do I go from here?
- A. We have touched on many of the most important points in our discussion and hopefully this has been helpful to you. If you ultimately decide to seek funds, you will certainly want to review carefully the applicable Siting Board rule because ultimately its language governs. If you have additional questions as you prepare to seek intervenor funds, you should consult with the Examiner in the relevant case.

Rule 1000.9 Fund for Municipal and Local Parties.

(a) Any municipality (except an applicant) or other local party may request funds to defray expenses for expert witness and consultant fees. Requests for funds shall be submitted to the presiding examiner not later than 15 days after the issuance of a notice of the initial prehearing conference.

(b) Subject to the availability of funds, the presiding examiner may fix additional dates for submission of fund requests.

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(c) Each request for funds shall be submitted to the presiding examiner, with copies to the other parties to the proceeding, and contain:

(1) the number of persons and the interests and goals the requesting party represents;

(2) a statement of the availability of funds from requesting parties own resources and from other sources and of the efforts which have been made to obtain such funds;

(3) the location of the requesting party with respect to the proposed site and any alternative site listed as reasonable in the application;

(4) to the extent possible, the name and qualifications of each expert to be employed;

(5) if known, the name of any other party who may or is intending to employ such expert;

(6) a detailed statement of the services to be provided by experts and consultants (and the basis for their fees), specifying how such services will contribute to the development of an adequate record;

(7) a statement as to the result of any effort made to encourage the applicant to perform the proposed studies or evaluations or the reason it is believed that an independent study is necessary; and

(8) a copy of any contract or agreement or proposed contract or agreement with each expert and consultant.

(d) At the initial prehearing conference, or at any other conference held to consider fund requests, the presiding examiner shall discuss the award of funds and encourage the consolidation of requests.

(e) Not later than 15 days after the close of the initial prehearing conference, the presiding examiner shall make an initial award, and from time to time thereafter may make additional awards, of funds in relation to the potential for such awards to make a contribution to the development of an adequate record. The presiding examiner shall ensure that the funds are awarded on an equitable basis in a manner which facilitates broad public participation in the proceeding, and that a fair portion is awarded to municipal and other local parties from the area of the applicant's proposed site. At least 50% of the funds deposited in the intervenor account shall be awarded to municipalities and up to 50% to other local parties.

(f) The fee submitted with each application shall be deposited in an intervenor account, established pursuant to Section 97-tt of the State Finance Law.

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(g) On a quarterly basis, unless otherwise required by the presiding examiner, any municipality or other local party receiving an award of funds shall:

(1) provide an accounting of the monies which have been spent; and

(2) submit a report to the presiding examiner showing:

(i) that the purpose for which the funds were awarded has been achieved and the results of any studies conducted using such funds;

(ii) that reasonable progress toward the goal for which the funds were allocated is being achieved; or

(iii) why further expenditures are warranted.

(h) Where it appears warranted, the presiding examiner may incorporate the reports referred to in subdivision (g) of this section into the hearing record as public statements.

(i) Disbursements from the intervenor account to municipal and other local parties shall be made by the DPS upon audit and warrant of the Comptroller of the State on vouchers approved by the Board. Any funds which have not been disbursed shall be returned to the applicant after the time for applying for judicial review of a Board's decision has expired. If an application has been withdrawn or dismissed, any funds remaining shall be returned within a reasonable time.

(j) During the pre-application process, an applicant may agree to defray expenses incurred by a municipality or other local party for expert witness or consultant fees. Such party may agree that it will pay the money advanced by the applicant if it receives a disbursement in accordance with subdivision (i) of this section. Such agreement shall not bind the presiding examiner to award funds in any particular manner.