STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 16-F-0328 Application of Number Three Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Project Located in Lewis County.

PUBLIC COMMENTS ON RECOMMENDED DECISION

PROVIDED BY

ALLIANCE FOR CLEAN ENERGY NEW YORK

September 12, 2019

I. INTRODUCTION

On August 22, 2019, the New York State Board on Electric Generation Siting and the Environment issued a *Notice Seeking Comments on Recommended Decision* pertaining to the Recommended Decision (RD) of Presiding Examiner Maureen F. Leary, Administrative Law Judge of the

Department of Public Service, and Associate Examiner Molly T. McBride, Administrative Law Judge of the Department of Environmental Conservation.

The RD recommends that the Siting Board issue a Certificate of Environmental Compatibility and Public Need (Certificate) to Number Three Wind LLC (NTW) allowing the construction and operation of a 105.8 megawatt wind generating facility in the Towns of Lowville and Harrisburg in Lewis County, consisting of up to 31 turbines, eight alternate turbine locations, and associated facilities, with numerous conditions designed to minimize the impacts on the local community. This Notice requested that public comments be submitted by September 12, 2019.

Accordingly, these Comments are submitted by the Alliance for Clean Energy New York (ACE NY). ACE NY is a member-based organization with a mission of promoting the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution. ACE NY has members engaged in the wind power, solar energy, hydropower, fuel cell, biomass, offshore wind, transmission, and energy efficiency industries. Our members also include environmental organizations and consultants and suppliers to the clean energy industry.

ACE NY support New York's existing 50% Renewable Energy Standard and the legislative mandate to reach 70% renewable electricity by 2030 as included in the recently enacted Climate Leadership and Community Protection Act. Achievement of these goals will provide numerous and diverse benefits to New Yorkers: driving private investment from renewable energy companies to New York State; modernizing electric generation facilities to replace some of the State's aging fleet of power plants as they gradually are retired and decommissioned; diversifying the types of power generation technologies that are collectively meeting New York's electricity demand so that the State is not overly reliant on one fuel type; reducing the emission of air pollutants that contribute to smog and other public health risks; and reducing carbon emissions from the power generation sector in New York, and thus helping to meet the States greenhouse gas emissions reductions mandate and take action against impacts of global climate change.

For these and other reasons, New York's ambitious Renewable Energy Standard is a wise and forward-thinking public policy that will benefit New Yorkers. Achieving this standard will require

the achievement of energy efficiency and a flourishing of the distributed generation markets, like rooftop and community solar. But most directly and critically, it will require the construction and operation of new utility-scale renewable energy projects, such as the proposed Number Three Wind Project, each of which will be reviewed by the Siting Board. The Siting Board therefore has a critical role in New York's achievement of its Renewable Energy Standard mandate. Further, as there are so few projects that have completed the Article 10 siting process, this RD will have an important role in setting the precedent for new generation permitting in New York for the foreseeable future.

II. Summary

These comments of ACE NY focus on the State's interpretation and implementation of the Article 10 siting process and how it could affect all types of renewable energy projects. The specific decisions made in this proceeding will have a critical impact on the ability of New York to make progress towards its 70% renewable energy goal and the goals of the State Energy Plan. As detailed in these Comments, we respectfully recommend that the Siting Board take each opportunity to make decisions that will facilitate the ability of New York to achieve its clean energy goals, and craft a more efficient, timely, and affordable Article 10 process, while still ensuring both environmental protection and public participation. We respectfully ask the Siting Board to carefully consider conditions that will reduce the power output of this and future renewable energy projects, and appropriately balance those decisions with the need to minimize impacts. For example, conditions that reduce the number of turbines via setback or noise restrictions, or that curtail the operations of turbines will all reduce the projects output of clean, pollution-free power. We recognize that this will require a careful balancing of potential impacts and benefits so as to fairly decide the specific conditions in this case while protecting the needs and interests of ratepayers and all New Yorkers.

We raise the following specific points in these comments:

- Approving renewable energy projects furthers State policies to achieve a 70% Renewable Energy Standard and reduce economy-wide carbon emissions and is a beneficial addition to the electric generation capacity of the State.

- All mitigation conditions should be examined by weighing the specific avoided impacts with the incremental costs to the applicant and thereby, to ratepayers. This is especially relevant to conditions that will reduce the amount of clean energy that can be produced by this and future projects.
- Renewable energy projects have local impacts, local benefits, and statewide benefits to be considered and balanced. The statewide benefits are important and should be considered when devising conditions that will reduce clean power production.
- Sound conditions should be reasonable and reflect well-established norms and standards.
- Renewable energy projects can support New York's agriculture sector. This should be considered in balancing impacts. Wind farms on agricultural lands provide a revenue source to farmers that can allow them to continue operating their farm rather than subdivide and sell land for other development.
- The Siting Board should not uniformly require full avoidance of impacts to bats in all cases. Renewable energy projects are the foundation for the State's effort to fight climate change, and climate change is having a negative impact on species health. The only way to achieve the significant emissions reductions necessary to mitigate climate change is to construct carbon-free electricity generation facilities, like wind and solar. This inter-relationship has to be taken into account.
- The Siting Board does not need to issue waivers of local law if the municipality has already waived the local law.

III. Discussion

A. The Recommended Decision Raises Issues Associated with Balancing Conditions that reduce Clean Power Generation with Climate Protection.

In the RD, there are several issues for which the Administrative Law Judge (ALJ) needs to assess divergent opinions from the experts at State agencies, such as the Department of Public Service (DPS) or the Department of Environmental Conservation (DEC), with the opinions of the experts put forward by the Applicant. These issues include, for example, conditions related to sound standards, bats, and grassland birds. Embedded within the task of assessing and weighing these divergent opinions is the need to recognize that there are numerous subjective opinions and assumptions put forward by stakeholders. One example is the DPS decision to rely on a broad World Health Organization (WHO) report that includes a section on wind turbines with a conditional recommendation versus a more recent Health Canada Report focused on the topic titled "Wind Turbine Noise and Health Study." Another example is the DEC's

assumption/determination that "all on-shore wind turbine facilities in New York pose a threat to NLEBs" even though the "Applicant conducted bat mist-netting in the Project and found no federally or State-listed threatened or endangered bat species." In a third example, the RD states that, "Grassland birds have been declining faster than any other habitat-species suite in the northeastern United States primarily due to abandonment of agricultural lands, causing habitat loss, or due to sprawl development," but the decision-making process did not recognize that a wind farm, by providing an additional revenue source for a farm under a long-term lease, can conserve that farm from subdivision and abandonment of agricultural lands as well as a conservation easement, thus protecting grassland bird habitat.

ACE NY is not insisting that each of these three examples of decisions are unequivocally wrong. Instead, these three examples are put forward to demonstrate that a differing opinion could have been put forward that would have been equally or more correct, and would have had a significant outcome on the conditions in the RD. This illustrates that the task of the Siting Board to balance and assess divergent experts' views is both complex and subjective. It also illustrates the importance of the Siting Board considering the issue from all perspectives, particularly the critical perspective of the State's ambitious climate and clean energy goals, as articulated by the Public Service Commission, in the State Energy Plan, and in the Climate Leadership and Community Protection Act. In other words, if there is a close judgement call to be made on conditions in the operation of a renewable energy facility, the decision should be made that will facilitate New York's achievement of its very clear legislative and administrative mandates, mandates that have been enacted to tackle climate change, the most important environmental challenge of our time.

In contrast, the testimony from agency staff tends to be narrowly focused on specific individual issues (e.g. sound, bats, grassland birds) without any balancing consideration of the relevant environmental benefits of the proposed project. Similarly, the RD does not appear to consider whether the agency staffs' positions considered either the State's clean energy goals or the impacts of unmitigated climate change. While this is the traditional approach that has been followed in environmental review, whether under the State Environmental Quality Review Act or Article 10, it falls short of what is needed in today's world. The DEC has a Commissioner's Policy directing all agency decisions to consider climate change issues, including the climate benefits of actions

undergoing environmental review. The Climate Leadership and Community Protection Act includes provisions directing that all state agency actions and decisions be consistent with the greenhouse gas emissions goals in the Act. This updated lens needs to be applied in Article 10 cases.

This is especially relevant when a proposed condition will reduce clean power production. When a condition reduces the power production from a wind or solar project, it reduces the statewide benefits in terms of the growth of renewable generation (which would contribute to the 70% goal); it reduces the Statewide benefits related to the extent to which the projects will displace fossil fuel generation elsewhere in the State and thus reduce air pollution emissions; and it reduces New York's ability to meet its ambitious greenhouse gas emissions reductions goals, as included in the Climate Leadership and Community Protection Act. Based on our reading of the RD, it appears that when DEC, DPS, and Department of Agriculture and Markets formed their policy positions on the narrow issues of sound standards, bats, and grassland birds, among others, they did not consider how these conditions would affect power production, attainment of state renewable energy goals, avoided impacts due to climate change mitigation; or reductions in the displacement of fossil fuel emissions and the resultant health benefits.

As a core issue, Article 10 applications for wind and solar energy projects are put forward to advance New York's goals of building clean energy and combatting climate change by reducing the State's dependence on fossil fuels. To ignore these benefits in balancing divergent opinions on conditions that affect clean power production would be a grave oversight by the Siting Board.

B. Approving Renewable Energy Projects Furthers State Policies to Achieve the 70% Renewable electricity and Reduce Economy-wide Carbon Emissions and is a Beneficial Addition to the Electric Generation Capacity of the State.

As described in the RD, under PSL §168(3)(a), in order to issue a certificate, the Siting Board must first find that the project will be a beneficial addition to the electric generation capacity of the State. To make this required finding, the Board is required to consider, among other things, whether the proposals are consistent with the State's energy policy and planning objectives, particularly the State Energy Plan (SEP).

The RD rightly recognizes that large-scale wind projects are consistent with the State's Clean Energy Standard (CES) policy and with the SEP. As stated in the SEP and elsewhere, New York has complementary goals of increasing electricity generation from renewable energy sources, as now embodied in the 70% by 2030 mandate for renewable electricity and the 40% by 2030 economy-wide carbon emissions reduction mandate. Both of these goals will clearly require the construction of large-scale, grid-connected renewable energy projects in New York. Neither of these goals are possible to attain *without* the construction of new utility-scale renewable energy projects in New York. For this reason, a finding that a proposed utility-scale renewable energy project is consistent with the SEP and CES is correct.

Any new utility-scale renewable energy project will be a beneficial addition to New York's renewable energy generation fleet capacity; will diversify New York's overall generation fleet capacity; will modernize New York's grid infrastructure; and will be consistent with the CES and SEP. For these reasons, any new utility-scale renewable energy project should be viewed by the Siting Board as a beneficial addition to the electric generation capacity of the State as required by PSL §168(3)(a).

C. Mitigation Conditions Related to Grassland Birds are Inappropriate.

Because the Article 10 regulations require that identified impacts be "adequately minimized or avoided to the maximum extent practicable," we contend that it is appropriate that the assessment of "maximum extent practicable" consider costs balanced with the particular impacts that would be mitigated. We are concerned that the basis for the mitigation measures discussed above does not properly balance the costs associated with impact minimization, and the actual benefits of the mitigation. The regulations also state that the decisions should be "supported by a consideration of the state of available technology, nature, and economics of reasonable alternatives." The fact that the regulations specifically include "economics of reasonable alternatives" demonstrates that cost has to be factor that is considered by the Siting Board.

An important example concerns the conditions related to grassland birds in this case. The DEC states that a taking of grassland birds will occur. In contrast, the applicant contends that Number

Three Wind will enable the continuation of farming in an area that supports habitat and rather than representing a "take" of occupied habitat, the facility will promote and protect habitat. Maintaining the land in agricultural use, which is supported by the wind farm, should be viewed as a conservation benefit. If the farm was to be abandoned, it would mostly likely be either subdivided and developed, or it would gradually return to a forested state. In either case, grassland bird habitat would be decreased. The potential impacts to habitat resulting from the turbines being in place is offset by the conservation benefit of the turbines being in place. The RD acknowledges "DEC Staff and the Applicant agree that the issue of impacts to grassland birds by wind facilities is understudied" and "[s]tudies have also shown evidence of grassland birds nesting close to operating wind turbines". Still, the RD accepted an aggressive DEC position with respect to takings and mitigation, and does not seem to resolve either the uncertainty in whether the turbines would have a permanent impact on habitat, or the fact that land that is kept in farming can, in fact, support grassland bird habitat. Further, the DEC's recommended mitigation would be to create or conserve grassland bird habitat. How? This would ostensibly be achieved by buying or leasing land (or easements) and either removing it from active farmland (to mow it) or deforesting it to create grassland bird habitat. This is illogical. It creates as much environmental impact as it mitigates. And again, it fails to consider the urgent need to act on climate change by building renewable energy projects and the fact that the environmental impacts of climate change – like damages to grassland bird habitat -- are mitigated by projects like this one.

The fact is, many of the pending applications for renewable energy projects, including both wind and solar, may be proposed on land that could be habitat for grassland birds. This is especially true because developers actively avoid wetlands, forested land, or active prime farmland (for solar). Requiring developers to limit construction activities to specific months and to acquire and maintain conservation easements of otherwise agricultural land at a three-to-one ratio will create new costs for developing renewable energy facilities. Also, more grassland would need to be used for a solar project with the same power output as Number Three Wind, and if the Siting Board utilizes the DEC-recommended three-to-one ratio, then even more farmland would be required to be removed from agricultural production as mitigation. This approach is not internally consistent with the need to meet state clean energy goals nor the Department of Agriculture and Markets desires to maintain lands in agricultural use. This approach should be rejected.

D. Sound Considerations Should be Reasonable and Reflect Widely Established Norms and Standards.

Our member companies report that sound standards and sound modelling has been one of the more contentious issues in ongoing Article 10 proceedings, although it would, on its face, seem to be a relatively objective, data-driven decision based on widely-use and commonly applied standards and protocols. We respectfully suggest that the decision-making process for sound standards should strive to be based on widely-accepted sound standards, and protocols for monitoring compliance with these standards, that are fair, reasonable, widely-accepted, and widely used.

Previously, the Siting Board established, in the Cassadaga Wind Farm certification process, a sound standard of 45 A-weighted decibels (dBA) equivalent continuous sound level (Leq) for 8-hours at non-participant residences and 55 dBA Leq (8-hour) for any participant residence. This limit is consistent with Health Canada's 2016 Wind Turbine Noise and Health Study[1] which found no association between wind turbine noise and any adverse health impact for wind turbine noise levels up to 46 dBA outside a residence. We note here that the health impact in question is "annoyance". This limit is also consistent with recommendations from the National Association of Regulatory Utility Commissioners (NARUC), which recommends a 45 dBA regulatory limit outside non-participating residences to limit annoyance. It is worth noting that this standard is more strict than what has been applied in New York for all 1,900+ MW of currently operating wind power.

In 2018, the World Health Organization (WHO) released a report, *Environmental Noise Guidelines for the European Region,* which for the first time made recommendations related to wind turbine sound.[2] In the report, WHO identified "annoyance" as the only symptom having any cause-effect

[1] Wind Turbine Noise and Health Study: Summary of Results, 2016 https://www.canada.ca/en/health-canada/services/environmental-workplace-health/noise/wind-turbine-noise/wind-turbine-noise-health-study-summary-results.html

[2] World Health Organization (WHO), *Environmental Noise Guidelines for the European Region*, 2018, http://www.euro.who.int/__data/assets/pdf_file/0008/383921/noise-guidelines-eng.pdf?ua=1

connection to wind turbine noise.[3] However, WHO found that the evidence of the connection between turbine sound and annoyance is not clear, resulting in a "conditional" recommended noise level limit: annual average 45 decibels (dB) day-evening-night level (Lden). However, the WHO report then concluded that the acoustical description of wind turbine noise by means of Lden may be a poor characterization of wind turbine noise and may limit the ability to observe associations between wind turbine noise and health outcomes. Notably, the WHO 2018 report, due to timing limitations, was unable to include the Health Canada Study in its review, a shortcoming it points out. We also note another recent study published by Lawrence Berkeley National Laboratory, which found if a person was opposed to the project during the development phase, that person was more likely to report being able to hear the turbines and be "annoyed" by the noise.[4]

The issues of a sound standard applied at the appropriate location and an appropriate methodology for ensuring compliance with that sound standard are both critical issues for wind power development. The setbacks that result from these policy decisions determine whether a project is economically viable and can move forward. It also affects other companies' decisions to invest in project development in New York.

E. Renewable Energy Projects Can Support New York's Agriculture Industry, and this Should be Considered in Balancing Costs and Benefits.

Renewable energy projects are compatible with agricultural operations. The majority of large-scale wind projects operating in New York and across the United States are completely compatible with agricultural uses and are co-located with farms. Not only do they allow farming to continue, they provide a certain revenue stream to farmers to help them weather the inevitable uncertainty of the agricultural business. The wind and solar industries are proud of the millions of dollars of landowner payments that help to keep American land as working farm landscapes. Furthermore, renewable energy projects need to located where there is available space for projects, and the space

[3] The other symptoms studied, including cardiovascular disease, hearing loss, hypertension, heart disease, and sleep disturbance, were found to have inadequate scientific evidence of a causal relationship.
[4] Lawrence Berkeley National Laboratory, *National Survey of Attitudes of Wind Power Project Neighbors Data, 2018, https://emp.lbl.gov/projects/wind-neighbor-survey*

that is available may be agricultural land. In pursuit of 70% renewable electricity, it is likely that renewable energy proposals will impact agricultural lands, but can do so in a manner that balances the interests of private landowners, Statewide policy goals, and agriculture.

F. The Siting Board Should Not Uniformly Require Full Avoidance of Impacts to Bats.

Perhaps the most troublesome application of the RD's treatment of "minimizing or avoiding…to the maximum extent practicable" concerns the proposed mitigation for impacts to bats, particularly the Northern Long Ear Bat (NLEB). The conditions related to bat protection in the RD are deemed necessary to achieve "full avoidance of direct impacts to the NLEB." The Department of Environmental Conservation (DEC) has taken, and the RD incorporates, the position that Article 11 mandates avoidance of any potential "take" of individual NLEB. This position is not supported by the relevant regulations, as neither 6 NYCRR § 182.11(c) nor ECL §1-0101 require the Applicant to first prove that full avoidance is impracticable.

The Applicant concedes that the project has a potential to "take" NLEB, although the risk is low. As such, the Applicant has conceded to seek coverage under Article 11 for potential take of a threatened species. However, Article 11 contains no provisions that requires the applicant to first show that complete avoidance is not possible. The Siting Board should reject this interpretation and consider the full minimization and mitigation programs proposed by the Applicant. It should be recognized that the Applicant's proposed plan a) would reduce the already low risk of NLEB "take" by at least 80%, b) would include a mitigation plan that will produce a "net benefit" to the species, and c) is appropriate for consideration under Article 11 regulations.

The record in this case provides extensive information about the impacts of wind power projects on bats and their populations, particularly the NLEB. We would point out that minimize and mitigate strategies proposed by the applicant are common in other jurisdictions, and under the federal Endangered Species Act. In no other jurisdiction (state or federal) is there a requirement that projects first show complete avoidance is not practicable. Minimization and mitigation plans, such as the plan proposed by the Applicant, is suitable in that it follows an approach that is

provided under Article 11. It is important that the precedent for addressing threatened and endangered bat species in New York be more consistent with reasonable approaches that are accepted in other states and by the federal ESA, and still consistent with New York law. If established as the precedent for Article 10 projects in New York, full avoidance, defined as it is in the case, will dramatically discourage wind power development in New York, and make wind energy significantly more expensive. As a result, achievement of the 70% renewable energy goals will be far more difficult, if not impossible, and communities across New York will not receive the benefits resulting from increased deployment of renewable energy.

G. The Siting Board Does Not Need to Issue Waivers of Local Law if the Municipality Has Already Waived the Local Law.

One of the purposes of the Article 10 law was to provide the Siting Board with the ability to waive local law, in some circumstances, to allow for the construction and operation of electric generating facilities that were serving to meet the electricity demand of New Yorkers, (or, that are a "beneficial addition to the electric generation capacity of the State" as required by PSL §168(3)(a)). As a countermeasure to this authority, the Siting Board has a wide purview and comprehensive role in assessing the potential impacts of a proposed project and ensuring that those impacts are appropriately mitigated. Also as a countermeasure, Article 10 involves extensive opportunities for municipalities and other stakeholders to weigh in and affect the Siting Board's decision-making, and even provides funding to support the work of these intervenors.

In this context, it is appropriate that if a local law would restrict an Applicant's project and the local community was leveraging that law to oppose a project, the proper role for the Siting Board would be to assess if that law is overly burdensome. As stated in the RD, ". . . the requesting applicant must explain why the particular requirement is "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality." The burden of justifying a waiver request lies with the applicant.

Conversely, it does not seem necessary for the Siting Board to require nor issue a waiver to a local law that the local municipality has waived. If a local town has determined that a local municipal

law no longer applies to an Applicant's project, then that local law no longer applies, and so the Siting Board should not require a waiver of that local law. The Siting Board should recognize that if a municipality makes a judgement about its willingness to accept a project, the Board should not be overly restrictive, but simply needs to assess potential impacts and how they should be mitigated.

Again, the purpose of Article 10 is to allow the Siting Board to respect local judgments regarding a proposed project *unless* it is a local law that is potentially overly burdensome and would restrict a project. In those cases, it is the obligation of the Board to step in and say if it is unduly burdensome based on a request and supporting information from an Applicant. But when a municipality supports a project and has waived any local law that would restrict it, there is no need, nor is it in keeping with the intention of Article 10, for the Board to step in an implement a local law over the objection of the municipality. Where a municipality has waived a local law, the Siting Board should strongly consider and give due deference to the municipality's position.

H. Decommissioning

It is reasonable for the Siting Board to apply decommissioning requirements to protect communities. But again, these requirements need to appropriately balance adequate assurances for the communities with costs to the applicants, and thereby, ratepayers. When developing decommissioning requirements for renewable energy companies, the Siting Board should allow the applicant to account for the salvage value of the turbines or panels at the end of the project's life. The salvage value of the scrap metal will clearly have some value and should therefore not be excluded from the calculation of the costs of decommissioning. Also, the Siting Board should provide some flexibility to project owners for the form in which the decommissioning funds are secured, rather than requiring a letter-of-credit. What is important is to use a method that demonstrates that the owner will have access to the necessary resources, but not to always require a large sum to be completely tied-up for thirty years. This will only increase the costs of the project with a marginal incremental value to the community as compared with other approaches.

IV. Conclusion

ACE NY is commenting on this RD regarding the application of Number Three Wind for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 because the outcome of this proceeding, and the precedent set by the Siting Board's decisions in this case, will have a critical impact on the ability of New York to make progress towards its 70% renewable energy goal and its carbon emission reduction goals, as described in the State Energy Plan and laid out in the Climate Leadership and Community Protection Act. As detailed in these Comments, we respectfully recommend that the Siting Board take each opportunity to make decisions that will facilitate the ability of New York to achieve its clean energy goals, and craft a more efficient, timely, and affordable Article 10 process, while still ensuring both environmental protection and full and fair public participation. Like all aspects of this Article 10 decision, this will require a careful balancing of potential impacts and benefits so as to fairly decide the specific conditions in this case while protecting the needs and interests of ratepayers and all New Yorkers.

Thank you for the opportunity to comment.

/s/ Anne Reynolds
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