STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 14-F-0490 Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project

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PUBLIC COMMENTS ON RECOMMENDED DECISION

PROVIDED BY

ALLIANCE FOR CLEAN ENERGY NEW YORK and
AMERICAN WIND ENERGY ASSOCIATION

November 28, 2017

I. INTRODUCTION

On November 8, 2017, 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 Dakin D. Lecakes, Administrative Law Judge of the Department of Public Service, and Associate Examiner P. Nicholas Garlick,

Administrative Law Judge of the Department of Environmental Conservation, that was also issued on November 8, 2017. This RD recommends that the New York State Board on Electric Generation Siting and the Environment (the "Siting Board") issue a certificate to Cassadaga Wind LLC allowing the construction and operation of a wind farm in Chautauqua County, New York, with numerous conditions. This Notice requested that public comments be submitted by November 28, 2017.

Accordingly, these Comments are submitted jointly by the Alliance for Clean Energy New York (ACE NY) and the American Wind Energy Association (AWEA). 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, distributed wind, offshore wind, and energy efficiency industries. Our members also include environmental organizations and consultants and suppliers to the clean energy industry. AWEA is the national trade association for the U.S. wind industry. AWEA's members are wind power project developers, owners and operators, manufacturers, construction and logistics companies, utilities, financial, legal and consulting firms, and other companies at the forefront of the wind energy industry.

ACE NY and AWEA support New York's 50% Renewable Energy Standard and believe it can provide numerous and diverse benefits to New Yorkers: it can drive private investment from renewable energy companies in New York State; it can provide modernized electric generation facilities to replace some of the State's aging fleet of power plants as they gradually are retired and decommissioned; it can diversify 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; it can reduce the emission of air pollutants that contribute to smog and other public health risks as well as reduce carbon emissions from the power generation sector, which is the pollutant that contributes to global climate change.

For these and other reasons, New York's ambitious 50% 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 critically, it will require the construction and operation of new utility-scale renewable energy projects, such as the proposed Cassadaga 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 50% Renewable Energy Standard mandate. Further, as the very first RD issued through New York's current Article 10 process, for any technology type, this particular siting decision will set the precedent for new generation permitting in New York for the foreseeable future.

II. Summary

These comments of ACE NY and AWEA 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 50% 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 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:

- The Concurrence raises important procedural questions for the Siting Board's consideration to make the Article 10 process more timely and efficient.
- Approving renewable energy projects furthers State policies to achieve 50% 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.
- Renewable energy projects have local impacts, local benefits, and statewide benefits to be considered and balanced.
- Sound conditions should be reasonable and reflect well-established norms and standards.
- Renewable energy projects can support New York's agriculture industry and this should be considered in balancing impacts.
- The Siting Board should not uniformly require full avoidance of impacts to bats in all cases.
- 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 Concurrence Raises Important Procedural Questions for the Siting Board's Consideration to Make the Article 10 Process More Timely and Efficient.

In his Concurrence to this RD, Associate Examiner P. Nicholas Garlick, Administrative Law Judge of the Department of Environmental Conservation, raises important procedural questions based on observations about how this process has unfolded for the last three years, and requests guidance from the Siting Board. The questions he raises are valid and important. First, he asks when and how agency staff should identify their issues of concern that need to be adjudicated. Second, he asks when and under what circumstances a State agency staff person should engage in settlement discussions with an applicant and/or other parties.

We agree that guidance from the Siting Board on these questions would be helpful. Further, how these questions are answered will potentially have a major impact on how lengthy and expensive the Article 10 process is for both applicants and stakeholders, as well as for agency staff. There are opportunities to make the interpretation and implementation of the Article 10 process more efficient without sacrificing environmental protection and public involvement, and the questions raised by Judge Garlick are examples of these opportunities.

An examination of this case demonstrates that the process is lengthy. The Public Involvement Program (PIP) was submitted on November 5, 2014. Ten months later the Preliminary Scoping Statement (PSS) was submitted on September 3, 2015. After the submittal of the PSS, the parties worked towards negotiating stipulations that were supposed to be the basis for the information contained in the application. Although the majority of the draft stipulations were submitted on March 2, 2016 (except for noise and vibration, which was on a separate track), and those stipulations were executed and filed on April 19, 2016, the process to execute them is more accurately described as seven months, given discussions that occurred prior to the submittal on March 2. In any case, it is a lengthy process. Nine months later the application was submitted (on May 27, 2016), and the application was deemed compliant by letter dated November 28, 2016. The, again, is emblematic of the challenges and uncertainty of the process. Despite the PIP process, PSS and a seven-month stipulation effort, a compliant letter took a full 6 months from the date the application was filed, where the statutory language stipulates that such a determination shall be made within sixty days of the application (Section 165).

Based on discussions with ACE NY and AWEA member companies that have been participating in the Article 10 process, we believe that more open and productive conversations between applicants and agency staff would make the process more efficient. This could help identify and solve issues as they arise, rather than waiting months or years and litigating the issue at the evidentiary hearing. We believe that technical discussions between the applicant and agency staff regarding the issues raised should be encouraged rather than discouraged, which could be used to eliminate unnecessary issues at the evidentiary hearing stage. We agree with Judge Garlick that agency staff should be encouraged to identify issues for adjudication earlier in the process than when it occurred in this case. In fact, a process already exists for this to happen. Article 10, like its predecessor, Article X, provides, in Public Service Law § 165(2), for the presiding examiner to hold a prehearing conference following receipt of a complete application. One of the purposes of that conference is to specify the issues to be adjudicated and to obtain stipulations as to matters not disputed. That process was followed under the old Article X, and resulted in a streamlining of the hearings. [*See, e.g.*, *Application of KeySpan Energy*, Order Specifying Article X Issues (issued March 26, 2001)]. That process is not meant to preclude settlement of issues following discovery. For the reasons set forth in the RD, that process was not followed in this case, and we believe it

should be followed in future cases. We fully support full and fair public participation, but we also believe that open communications between applicants and agency staff does not preclude full and fair public participation. Efforts to narrow the issues that are in dispute and require adjudication can make the process more efficient and fruitful for all stakeholders.

In short, the questions raised by Judge Garlick are worthy of the Siting Board's consideration, and we believe these questions can be answered in a way that produces a fair and more efficient process without sacrificing environmental protection. Further, the 50% RES is going to require an acceleration of development which will, if progress continues, greatly increase the workload of Siting Board staff. For this additional reason, it is necessary to examine ways to make the process as efficient and timely as possible; less resource-intensive for Siting Board Staff, applicants, and stakeholders; and less expensive in general, in order to ensure progress.

B. Approving Renewable Energy Projects Furthers State Policies to Achieve the 50% Renewable Energy Standard 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 embodied in the 50% by 2030 Renewable Energy Standard, and reducing economy-wide carbon emissions, as embodied in the 40% by 2030 carbon emissions reduction goal. 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).

Further, the RD rightly recognizes that even though this particular project will be exporting its renewable energy attributes or credits ("RECs") for a period of time under contract, the project is still a beneficial addition to the electric generation capacity of New York. In addition to the reasons cited in the RD relating to the Athens Generating Case, a project of this type is fully consistent and supportive of New York's goals under the Regional Greenhouse Gas Initiative (RGGI). Also, there are significant local economic benefits associated with a new generation project, including land lease payments, payments in lieu of taxes (PILOTs), temporary construction jobs, ongoing operation jobs, and payments to in-state suppliers and consultants. We support the RD's finding that this project is a beneficial addition to the electric generation capacity of the State and further believe that any proposed renewable energy project would also be a beneficial addition.

C. All Mitigation Conditions Should be Examined by Weighing the Specific Avoided Impacts with the Incremental Costs to the Applicant.

There are several instances where the RD disagrees with the Applicant that an increase in cost for a particular mitigation measure is a demonstration that the mitigation is not practicable. The Siting Board should consider how the RD weighs certain additional costs with the particular impacts that would be avoided and if and how it demonstrates that the proper balance was struck. We respectfully suggest that while it is not true that any additional cost for the applicant makes a mitigation measure impracticable, it is also not true that any mitigation measure should be required, regardless of cost.

For example, on page 125, under the heading "Other Visual Impacts," the RD states, "With respect to other visual impacts, DPS Staff urges the Board to impose certificate conditions addressing the use of non-reflecting, glare-reducing conductors on overhead electric lines . ." In response to the Applicant's disagreement with this proposed mitigation, the RD states, "We do not agree, however, that a showing of cost increases alone, even substantial ones, necessarily indicates that proposed minimization is impracticable. Instead, such concerns must be properly balanced against the public interest …" We agree that it is the balance that is important, and that it is not enough to cite incremental costs. But we do not agree that the balance has been demonstrated on this issue. The record, and the RD, should demonstrate that using non-reflecting, glare-reducing wire, at an estimated additional cost of $75,000 to $100,000 will actually avoid impacts or provide benefits to anyone since a majority of the overhead lines are located on private property.

In a second example, the RD recommends requiring that wires be put underground in Boutwell State Forest. In this case, the RD states, "DPS Staff does not dispute the cost differences but, consistent with its position on costs elsewhere in this case, contests the Applicant's implication that any increase in cost above the lowest cost alternative is not practicable." Perhaps the Applicant's implication was not that any increase in costs is not practicable, but that this increase in costs was not outweighed by the reduction in limited visual impacts. Again, the record and the RD should demonstrate that the estimated additional costs (in this case up to $2,000,000) are balanced by the benefit of undergrounding the wires through the State Forest, however, that is not the case. The RD does state that the DPS staff generally claims that the wires could interfere with recreation in the State Forest but the focus was on the use of guy wires in proximity to the recreational trails. But other than that, there is not a clear demonstration what the incremental enjoyment and use of the State Forest is that would result from the design changes that the DPS Staff recommend, and the RD does not demonstrate how this is balanced with the increased cost. Where the Siting Board believes incremental cost will be justified by the avoided environmental impacts, that benefit of the incremental cost increase should be demonstrated. The RD should not simply rely on a statement that the Applicant's cost estimates are not enough to avoid the mitigation measure.

In a third example, the RD recommends requiring that wires be put underground on private property, on the Boutwell Hill Road Property, despite the fact that the landowner supports the

Applicant's proposal as is. While we discuss this issue in more detail below (Section II.F) we mention the cost aspect here, as it is another example where the RD stated that the Applicant's position is that anything above the lowest cost is not practicable. Specifically, the RD states on page 41, "Given the clear expression of the value ascribed to agricultural land by the legislature, we agree that this value is not outweighed by the Applicant's cost considerations, where the costs are not prohibitive but only not the most cost- effective option." The RD states that the value is not outweighed by the cost, but provides very little description on what the value would be. In this case, the impact is that the farmer may, in the future, stop actively farming this land parcel, due to the potential future compatibility of six poles with mechanized farming. The six poles, each with a ten square feet footprint, will not prohibit active farming now (other than directly on the 60 square feet), nor does the farmer expect to stop farming this land. But Department of Agriculture and Markets (DAM) staff cites another wind farm where poles were placed across prime tillable agricultural land with the result that the farmer now must work around each pole structure, decreasing efficiency. Note that in that case, the land *is* still in agriculture use. But DAM Staff "is concerned" that the owner of the other wind farm property "could eventually convert his prime agricultural land to permanent pasture" and that the same result "could occur on the Boutwell Hill Road property if Cassadaga Wind is allowed to proceed with its current Project design." And even though the farmer may stop actively farming the land for a plethora of other possible reasons (like retirement) or continue farming it forever, the RD states the incremental cost is warranted. While the Siting Board may agree with this balance, it is important that the actual balance of incremental costs and avoided impacts be presented in the RD, and that the imposition of this mitigation not be solely based on what a landowner may or may not do in the future, for reasons that may or may not be related to the wind farm, nor just on the opinion that the Applicant citing their costs is not an adequate rationale.

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.

D. Renewable Energy Projects Have Local Impacts, Local Benefits, and Statewide Benefits to be Considered and Balanced.

In general, the RD strikes the right balance in its review in terms of weighing the range of potential and likely local impacts against both the local benefits and statewide benefits, including provision of additional electric generating capacity in New York; a more diversified fuel mix for electricity generation; a more modernized grid; reduced air pollutant emissions, and reduced carbon emissions. We note, for example, that the RD gives proper consideration to a number of concerns of project opponents, such as the potential for disruptive impacts on communications; the need for the Project; and the propose technology, including whether turbines actually provide clean energy. Opponents also brought forward comments supporting their contention that the Project may adversely impact their health and their property values. We appreciate that the RD recognizes that many opposition arguments are not based on strong data and research, and do not address impacts particular to a specific project and how those impacts could or should be mitigated, but instead highlight generalized opposition to wind power development, which no amount of mitigation would change. For example, the RD states on page 15, "We have reviewed their comments and, in essence, the residents' ultimate position is captured . . . in which it contends that the negative impacts of the Facility cannot be minimized or otherwise mitigated by certificate conditions, and, therefore, the Project should not receive a certificate." We support the RD's further statement that, "[e]ssentially, the ramifications of the comments submitted by the members of Concerned Citizens are such that no wind farm would ever receive approval. The contention is that some of the impacts

of the Project are of such an adverse nature that no measure of minimization or mitigation would make them acceptable. The concerns are often expressed in such general terms that they would apply to any proposed wind farm." The RD rightly recognizes that the Legislature enacted Article 10 and provided a process to ensure that the potential adverse effects are avoided as much as possible, while recognizing the societal need for new power generation facilities.

In the section "Forest Fragmentation and Slopes" beginning on page 29, the RD discusses the removal of turbines from the project based on ecological impacts caused by construction on slopes and forest fragmentation. Without commenting on these specific issues, we note the concluding statement on page 34, "One could always continue to eliminate turbines on the grounds of avoidance. If no project were built, then all impacts would, of course, be avoided. However, no benefits would accrue either." This is an important statement in the RD, related to the issues of balancing project impacts with local and statewide benefits. Absent the sentiment expressed in this statement, it seems like DPS staff would be content to eliminate as many proposed turbines as it could possible rationalize based on any level of ecological impact. But this would be in direct opposition to the State's stated goals of maximizing the amount of electricity generation using renewable, carbon-free and fuel-free technologies. The Siting Board should continue to strive to balance the impacts with this State-level imperative.

E. Sound Considerations Should be Reasonable and Reflected Widely Established Norms and Standards.

In one of the potentially more significant areas in terms of affecting project feasibility, the RD correctly rejected DPS Staff's position that a worst-case scenario concerning sound impacts had to be modeled in a way that did not reflect site conditions and instead adopted a more reasonable approach that the assessment of worst case be based on actual site conditions. We support this decision.

More generally, 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.

F. 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 that is available may be agricultural land. In pursuit of the 50% RES goal, 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.

We disagree with the RD position concerning the requirement to bury wires across agricultural land that is based solely on DAM staff's concern that the poles will interfere with agricultural operations to an extent that may, in the future, cause the farmer to stop farming the land, despite the farmer's support for the Applicant's proposal as is, and despite the that fact that there are transmission and distribution lines crossing agricultural land throughout New York and the United States that have not impacted agricultural practices. The RD states, "DAM Staff contends that the additional expense to bury the collection wires is outweighed by the societal cost associated with permanently removing prime agricultural land from being used to farm cash crops now and in the future," and, "DAM Staff also challenges the Applicant's reliance on the landowner's purported wishes, noting that the landowner is financially motivated to support the proposed project and that he may not fully understand the impact that the proposed construction of the overhead collection system will have on his ability to continue to farm his land." Even recognizing this dynamic, the

RD goes on to decide, "However, we are convinced by DAM Staff's position that the State of New York values the State's agricultural lands even to overrule a landowner's expressed preferences where those wishes conflict with the ability to sustain the state's valuable farm economy and the land base associated with it."

This decision is surprising, potentially far reaching, and a departure from past practice concerning the use of agricultural land in New York. First, the siting of six poles, each with a ten square foot radius, is a minor impact which will, in fact, allow for continued agricultural use. Second, outside of renewable energy siting, there will be many and continuous examples of farmers wanting to modify their land use or change the footprint of structures on their land. Does DAM intend to overrule the farmer's wishes each time this happens, even if the farmer intends to maintain the land in agricultural use or the land use change wouldn't prevent continued agricultural use? In other circumstances, a farmer may expressly wish to modify the land use and *not* continue active agricultural operations. Will DAM "overrule a landowner's expressed preferences" in these cases?

Agriculture and Markets Law Section 305 requires that when any municipality or municipal entity proposes to take ten acres or more of land within an agricultural district out of agricultural production (which is a higher threshold than this case), the municipality must go through a notice of intent process, which is essentially similar to the State Environmental Quality Review Act (SEQRA). In these cases, the Commissioner of Agriculture & Markets must find that the impacts to agricultural lands have been minimized or avoided to the maximum extent practicable. However, the law also allows that a landowner can waive this provision. As an example, a landowner waived this provision for the Dutch Hill Wind Project. In that case, DAM agreed and statutory provision was waived.

This decision will have implications for the siting of utility-scale solar in New York. While utility-scale solar is not yet common in New York, it will increasingly have a role in New York achieving its ambitious renewable energy goals. Solar projects located on or near agricultural land may take actions to incorporate different forms of agricultural activities outside of traditional row crops with solar facilities, such as by using seed mixes of native grasses and pollinator-friendly flowering plants as ground cover for the perimeter of solar facilities, providing habitat for pollinators, which

can be beneficial to nearby farming activity. In some cases, landowners may use grazing animals, normally sheep, to frequent the solar site grounds and control the vegetation and weeds, which also returns organic matter to the soil on site. The grazing of sheep at solar facilities incorporates local farmers into the management of the sites, engaging the local community with solar development. Still, solar projects may make portions of farms not useable for crops, and the position in the RD would affect all of these types of proposals.

We respectfully suggest that the Siting Board should revisit this aspect of the RD, and examine it in light of the likelihood that other renewable energy projects may have similar or additional impacts on operating farms, both wind and utility-scale solar. In these cases, small portions of cropland may be proposed to be used for the siting of renewable energy infrastructure, but the overall project, by virtue of its provision of landowner lease payments, could help the farm stay in agricultural use. The project could prove to be a net benefit to the landowner and to New York's agricultural economy, and should be viewed in this light. In its decision, the Siting Board should allow for a productive path forward that allows renewable energy development to progress in a manner that meets the State's policy goals, protects landowner interests and wishes, and leverages the many advantages renewable energy can bring to agricultural communities.

G. 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 50% 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.

H. 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.

IV. Conclusion

ACE NY and AWEA are commenting on this RD regarding the application of Cassadaga Wind LLC 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 50% renewable energy goal and its carbon emission reduction goals, as described in 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 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.

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