

NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

CASE 15-F-0122 – Application of BARON WINDS LLC for a Certificate of Environmental
Compatibility and Public Need Pursuant to Article 10 of the New York State
Public Service Law for the Baron Winds Project

**BRIEF ON EXCEPTIONS OF BARON WINDS LLC
IN RESPONSE TO EXAMINERS' RECOMMENDED DECISION**

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Appendix A

Applicant's Proposed Certificate Conditions

Appendix B

Exhibit A – Guidance for the Development of Site Engineering and Environmental Plan Compliance Filings for the Baron Winds Facility (Case No. 15-F-0122 (SEEP Specifications Guidance)

Appendix C

Proposed Certificate Condition Change Chart

I. INTRODUCTION

In accordance with the May 24, 2019 Notice of Schedule for Filing Exceptions issued by the Secretary to the New York State Board on Electric Generation Siting and the Environment (“Siting Board” or “Board”), Baron Winds LLC (“Baron Winds” or “Applicant”), by its counsel, hereby submits its Brief on Exceptions to the Recommended Decision (“Recommended Decision” or “RD”) issued by the Hearing Examiners in this proceeding, which was also issued on May 24, 2019.

Overall, the Applicant agrees with the Examiners’ recommendation that a Certificate of Environmental Compatibility and Public Need (“Certificate” or “CECPN”) be granted authorizing Baron Winds to proceed with the construction and operation of the Facility (as defined below) proposed by the Applicant. Except as discussed below and in the accompanying Appendix A, the Applicant also agrees with the Certificate Conditions proposed for the Baron Winds Project. The Hearing Examiners have distilled an extensive record in this proceeding and the Recommended Decision provides a thorough discussion of the record support for the required Siting Board findings and determinations under each provision of New York Public Service Law (PSL) §168.

However, the Applicant takes exception to the items in the Recommended Decision identified below and requests that the Siting Board not adopt the determinations and Certificate Conditions relating to these matters because the Recommended Decision fails to take into account specific facts and law that establish the Applicant’s position. Specifically, the Applicant takes exception with the Recommended Decision’s Findings and Determinations with respect to:

- The incorporation of the Site Engineering and Environmental Plan (SEEP) Specifications document included as Appendix B of the RD into the Certificate Conditions and the scope, content and enforceability of the SEEP document.
- Certain Certificate Conditions relating to wetlands;
- Bat minimization and mitigation and the recommendation that the Applicant curtail turbines to DEC’s recommended avoidance level of 6.9 m/s;

- The analysis and conclusions with respect to the Facility's impact on bald eagles;
- Certain sound and vibration recommendations;
- Certain aspects of the Certificate Conditions relating to shadow flicker and landscaping;
- The recommendation against allowing the Applicant to consider salvage value as an offset to decommissioning costs for financial assurance purposes; and
- Certain other certificate conditions relating to various subjects.

The Applicant has proposed modifications to the Examiners' proposed Certificate Conditions related to some of the above exceptions which are attached hereto as **Appendix A**. The Applicant also has proposed modifications to the Requirements for the Development of Site Engineering and Environmental Plan Compliance Filings included as Appendix B to the RD. The Applicant's suggested changes are attached hereto as **Appendix B**.

In addition, the Applicant submits that the Recommended Decision deviates from previous Siting Board orders under the prior Article X by not placing enough emphasis on the impact of costs to an Applicant when considering whether effects have been minimized to the maximum extent practicable.

II. BACKGROUND

A. Description of Project

The basic description of the Baron Winds Facility ("Facility" or "Project") is set forth in the February 1, 2019 update to the original November 2017 Application (the "February 2019 Application Update"). However, several modifications to the Project description made after submission of the February 1 Application Update to address issues identified by the parties to this proceeding during their direct and rebuttal testimony are not fully reflected in the Project Description contained in the Recommended Decision. Accordingly, the Applicant has proposed a revised Project description that fully reflects these changes.

Baron Winds proposes to construct a utility-scale wind project in Steuben County, New York with a maximum generating capacity of 242 MW. The Project will consist of a maximum of 68 turbines located in the Town of Cohocton (23 turbines), Dansville (3 turbines), Fremont (33 turbines) and Wayland (9 turbines).¹ (Hearing Exhibit 9, Application Update Exhibit 3(c), Figure 3-1; TI P737 L8). Baron Winds proposes to use two turbine models for the Project, the Gamesa G114 2.625 MW (11 turbines) and the Nordex N117 3.675 MW (57 turbines). The total height of both turbine models is approximately 492 feet, as measured from the tower base at ground surface to the tip of the blade at its highest position (Hearing Exhibit 9, Application Update, Exhibit 6, P2).

The Project would include the construction of approximately 16.5 miles of roads to access the turbine locations. 31 miles of underground collection lines, a collection substation, a point of interconnection with the electric grid through the existing 230 kilovolt (kV) Canandaigua Switching Station owned and operated by the New York State Electric and Gas Company (NYSEG), up to four permanent meteorological (met) towers each approximately 100 meters tall, up to two temporary staging/laydown yards for construction, and a 4,000 to 6,000 square foot operation and maintenance (O&M) building. (Hearing Exhibit 9, Application Update, Figures 3-1, 3-2) The Facility will be located on privately leased rural land that can continue to be used for farming, forestry, and other comparable uses.

¹ At the time the Applicant submitted the February 2019 Application Update, the Project consisted of at most 69 turbines. However, in response to concerns raised by the New York State Department of Agriculture and Markets about the presence of turbine T66 in a golden nematode quarantine area located in the Town of Fremont, the Applicant agreed in its Rebuttal Testimony submitted on February 22, 2019 to drop the turbine from the Project, reducing the maximum number of turbines to 68 (TI P18). In addition, in response to testimony from the Towns of Cohocton and Wayland, the Applicant confirmed that a turbine T74, previously identified as located in the Town of Wayland was, in fact, located in the Town of Cohocton, decreasing the maximum number of turbines located in the Town of Wayland from 10 to 9 and increasing the maximum number of turbines in the Town of Cohocton from 22 to 23) (TI P737).

There are 44 existing wind turbines within five miles of the Facility. Thirteen of the turbines are from the 35-turbine Cohocton Wind Project, sixteen are from the 16-turbine Dutch Hill Wind Project, and fifteen are from the 27-turbine Howard Wind Project. (Hearing Exhibit 9, Application Update, Exhibit 4, P4).

B. Procedural History

The Applicant's post hearing briefs and the Recommended Decision include a comprehensive review of the procedural history of this proceeding. The Applicant does not take exception to the procedural history as outlined in the Recommended Decision and incorporates the procedural history herein as referenced.

III. FINDINGS AND DETERMINATIONS

A. Site Engineering and Environmental Plan

A major point of contention between the Applicant and New York State Department of Public Service (DPS) Staff is the need for (and scope of) the Requirements for the Development of Site Engineering and Environmental Plan Compliance Filings document (hereinafter the "SEEP Specifications document"). The most recent version of the SEEP Specifications document, included as Appendix B to the Recommended Decision,

Addresses the minimum requirements for development of facility final engineering details; site plans for construction, restoration, and environmental control measures applicable; plan and profile drawings of the development site and all facility components; and maps of facilities sites and the overall facilities settings as appropriate to demonstrate compliance with applicable regulations and conditions of a Certificate of Environmental Compatibility and Public Need. (RD, Appendix B, p.1)

The SEEP Specifications document also addresses the "the description and statement of objectives, techniques, procedures, and requirements, i.e., the narrative portion of the SEEP compliance filing(s)" encompassing 16 NYCRR § 1002.3. *Id.*

In its testimony before the Examiners, the Applicant argued that SEEP process, as contemplated by the DPS, would unnecessarily delay final review and approval of the Project post-certification, potentially threatening the Applicant's ability to meet key Project milestones including those related to the Production Tax Credit. The Applicant also objected that the SEEP Specification document created by DPS, while providing valuable guidance concerning the specifications for certain key compliance filings, also requires information and analyses that either should have been contemplated in the Application phase or require unnecessary, irrelevant or duplicative information. In place of the formal SEEP Specifications document proposed by DPS Staff, the Applicant proposed to work with DPS to develop a SEEP or equivalent document as an informational report after Certification. (TI P735, 764) This approach would allow the parties to tailor the SEEP to the actual Certificate Conditions ordered in the proceeding and eliminate the potential for inconsistent, contradictory or duplicative requirements (TI P735).

During the hearing, DPS Staff expressed concern that the SEEP Specification document included with its proposed Certificate Conditions identified key plans and other documents not referenced in the Certificate Conditions and that these plans/documents would not be properly addressed without the SEEP Specifications document. In response to this concern, the Applicant agreed at the hearing to modify the Certificate Conditions to reference these documents. The necessary additions were made to the Certificate Conditions included as Appendix A to the Applicant's Reply Brief. *See* Applicant's Reply Brief, Appendix A, Certificate Conditions 44 (Stormwater Pollution Prevention Plan), 52 (Site Security Plan, Health and Safety Plan, and Quality Assurance and Quality Control Plan), 65 (Inadvertent Return Plan), 66 (Invasive Species Control Plan), 69 (Spill Containment, Control and Countermeasures Plan), and 70 (Fugitive Dust Control Plan). In addition, the Applicant included a general condition—set forth at Certificate Condition 45—that committed the applicant to submit a SEEP or equivalent documents “which

shall describe in detail the final Facility design and the environmental protection measures to be implemented during each phase of construction of the Facility.”

DPS Staff also contended that the Applicant agreed at the hearing to a two-step SEEP submission process under which the Applicant would first submit a SEEP specifications document outlining the requirements of the SEEP for submission as a compliance filing after acceptance by DPS Staff. This step would then be followed by submission of the specific SEEP documents, also as compliance filings. The Applicant objected strenuously that it had not agreed to submit and obtain approval of a formal SEEP specification document, although such a document could be developed with DPS to serve as guidance during the compliance certification process.

As envisioned by the Applicant, all key compliance filings would be identified in the Certificate Conditions. Instructions concerning the preparation of specific submissions (such as directions on the size and formatting of maps and drawings) and other useful information would be provided by the SEEP Specifications document. However, the SEEP Specifications document would not be “enforceable” in the same way as the Certificate Conditions but would instead guide the Applicant in preparing its submissions. In addition, the Applicant would call upon its experience with the Cassadaga Wind Project (which is currently in the compliance filing phase), to inform its decisions regarding what is required for specific compliance filings. This more flexible approach will ensure that the Applicant’s compliance filings conform to DPS requirements without unnecessarily binding the Applicant and DPS to dictates that may not be appropriate to this particular project.

In the Recommended Decision, the Examiners agreed that the Applicant should not be required to file a formal SEEP Specifications document as a compliance filing. The Examiners also agreed that the Applicant “should be allowed to submit required compliance filings as necessary for each phase of construction and operation of the Facility” and that DPS staff had

acknowledged that such a phased submission approach is acceptable (RD 25). The Applicant agrees with these findings.

While declining to require formal approval of the SEEP Specifications document as a separate step, the Examiners nevertheless recommended that the Applicant follow the SEEP Specifications document. In particular, the Recommended Decision states that “to ensure that minimum requirements are met, we believe that the Siting Board should require Baron to follow all applicable requirements of the SEEP specifications document in preparing its compliance filings” (RD 25). It goes on to list the Certificate Conditions referencing the SEEP, several of which specifically identify the SEEP Specifications document included as Attachment B to the Recommended Decision.

As a preliminary matter, the Recommended Decision is somewhat unclear concerning whether the SEEP Specifications document, as included as Appendix B, is intended to be final. As noted above, the general recommendations regarding the SEEP Specification document suggests that the Applicant should be required “to follow all applicable requirements of the SEEP specifications document in preparing its compliance filings,” a copy of which is included as an Appendix B to the Recommended Decision. This language suggests that the Applicant is expected to comply with the SEEP Specifications document included as Appendix B and that this document is intended to be final.

By comparison, in Section III.4.a. of the Recommended Decision, the Examiners recommend with regard to wetlands that “DEC Staff’s proposed [wetland] conditions be considered during development of the Site Engineering and Environmental Plan (“SEEP”) or equivalent documents” (RD 49). This recommendation implies that the SEEP Specifications document included as Appendix B is not final or complete and the DPS can modify the SEEP specifications at any time. To the extent the Examiners intend the SEEP Specifications document

to be included with the Certificate Conditions and essentially made enforceable, this recommendation is inconsistent with that goal. To the extent the Examiners intend the SEEP Specifications document to function essentially as guidance (and thus readily modified during the review process), it is neither necessary nor appropriate to append it to the Certificate Conditions and make it enforceable.

If the Siting Board concludes that a SEEP Specifications document, such as that included as Attachment B to the Recommended Decision, must be included with the Certificate Conditions, the Applicant believes that significant changes to the document are essential. First, the SEEP Specifications document and related Certificate Condition 52 (which contains the general provision relating to the SEEPs) should be revised to make clear that the SEEP Specifications document is guidance. Given the complexity of the Article 10 compliance process, DPS cannot hope to embody in a single document all of the requirements necessary for a SEEP submission for all projects. Assuming the SEEP Specifications document is necessary at all, it should provide basic guidance to the Applicant concerning what DPS expects to see in the various drawings and plans that are requisite submissions for a project. However, the criteria in the SEEP Specifications document should not be considered mandatory and the Applicant should be permitted deviate from them to accommodate the specifics of the Project. This approach will relieve the Applicant of the requirement to comply with unnecessary, burdensome or duplicative requirements without compromising the compliance filing process, since all compliance filings must ultimately be approved by the Siting Board. The Applicant will consult with DPS as it develops its compliance filings to ensure its submissions will meet DPS criteria and DPS retains its authority under the regulations to approve each filing, thus ensuring that DPS' concerns regarding the format and content of the compliance filings are addressed.

Second, the Applicant should not be required to submit information as a compliance filing that has already been supplied during the Application process. The current SEEP Specifications document contains numerous provisions that require environmental and other analyses/submissions that duplicate information included in the original Application or elsewhere. For example, Sections B(5) and (6) of the SEEP Specifications document require the Applicant to provide extensive information about the measures to be taken to protect streams and wetlands. This information was thoroughly discussed in the Article 10 Application for the Project and was also covered in the Joint Application for Permit submitted to the U.S Army Corps of Engineers (USACE) and DPS in support of the Section 404 permit and 401 Water Quality Certification permitting process and should not have to be duplicated in the form of a SEEP submission. Similarly, Section B(8)(c) asks the Applicant to describe the geologic, historic, and scenic or park resources that may be affected by construction of the Project. Again, this information was already provided in the Application, and there is no reason the Applicant should be required to provide it again as part of a SEEP. To the extent information sought in SEEPs documents has already been provided as part of the Application, the Applicant should be allowed either to omit the information altogether or to refer to that information in lieu of preparing a separate document in fulfillment of its SEEP obligations.

More generally, the SEEP Specifications document suffers from various organizational and other problems. For example, requirements relating to erosion and sediment control concerns are addressed in multiple places in the document, significantly complicating efforts to determine the Applicant's compliance obligations. Also, requirements relating to drawings are found throughout the document rather than being confined to Section A. Certain specific information demands are unclear.

To address these concerns, the Applicant has prepared a revised SEEP Specifications document that is included as Appendix B to this brief. The document proposes revisions to specific provisions of the SEEP Specifications document and includes an explanation of the Applicant's concerns, where additional explanation is needed. The goal of this exercise is to ensure that the SEEP Specifications document achieves its stated goal of "[a]ddress[ing] the minimum requirements for development of facility final engineering details; site plans for construction, restoration, and environmental control measures applicable; plan and profile drawings of the development site and all facility components; and maps of facilities sites" and providing guidance on the content of specific compliance filings without exceeding the scope of the Application certified by the Siting Board.

In summary, the Applicant proposes the following recommendations relating to the SEEP Specifications document:

1. Assuming the Siting Board concludes that the SEEP Specifications document is necessary at all, it should be treated as guidance. If appended to the Certificate Conditions, it should be clearly identified as guidance.
2. If the SEEP Specifications document is appended to the Certificate Conditions, it should be revised consistent with the recommendations set forth in Appendix B to this brief.

D. Environmental Impacts – PSL §168(2) and 168(3)(c) and (e)

4. Surface Water (Wetlands and Streams)

a. Wetlands

As set forth in the Applicant's Initial Brief in this matter, the construction of Facility described in the February 1, 2019 Application Update would result in only 0.65 acres of temporary wetland impacts and 0.12 acre of permanent wetland impacts. In fact, however, the impacts would

be less because the Update includes optional/alternate locations and thus overestimates total impacts.

With respect to State-regulated wetlands, small portions of three DEC wetlands have been identified on the Facility Site, only one of which (HK-3) is potentially impacted by the Project. The layout described in the February 2019 Application Update would have resulted in 0.34 acres of permanent forest conversion within a State-regulated wetland adjacent area associated with the installation of collection lines between turbines T81 and T46. (Hearing Exhibit 9, Application Update Exhibit 22(m), P9). After the Application Update was submitted, additional engineering and impact avoidance/minimization was undertaken, which reduced the impacts to the wetland adjacent area to 0.07 acre of permanent forest conversion (TII P124 L1-8). To minimize potential impacts, the Application calls for using horizontal directional drilling (HDD) technology to install buried interconnection lines across forested wetlands. An alternative route exists, which would install the collection lines from turbine T78 northeast to the collection station and thus avoid crossing wetland HK-3 altogether. Per the Applicant, additional investigation is necessary before a final route can be selected. (TII P157).

The testimony submitted in this matter, by any measure, shows that the wetland impacts associated with this 68-turbine/242-MW wind energy project are minimal. Nevertheless, DEC Staff requested that Baron be required to submit various deliverables and comply with specific wetland-related Certificate Conditions, many of which duplicate conditions already included in DPS' draft Certificate Conditions. Based on this request, the Examiners "recommend[ed] that DEC Staff's proposed conditions be considered during the development of the . . . SEEP or equivalent documents" (RD 49). If the Applicant routes the collection line through wetland HK-3, the Examiners recommend that the SEEP include DEC Staff's proposed site-specific conditions with respect to that route as compliance filings. (RD 50).

The Applicant has several concerns with this recommendation. First as discussed in Section III. B. above, the request that DEC's wetland-specific conditions be incorporated into the SEEP appears to contradict the apparent mandate that the Applicant comply with the SEEP Specifications document included as Appendix B to the Recommended Decision, which does not include the additional wetland conditions. If the SEEP Specifications document is a fluid document that is subject to significant change to accommodate changes to the Project, it should be treated as guidance and not made an enforceable part of the Certificate Conditions for the Project.

Also, the Examiners have provided no grounds for requiring the Applicant to comply with DEC's stricter wetland-related Certificate Conditions. Both the Applicant and DPS opposed the DEC conditions as duplicative and unnecessary. While DEC argues in favor of its stricter conditions it does not explain why they are necessary, particularly given (1) the small quantity of DEC-regulated wetland on the Facility Site; and (2) the extremely small section of DEC-regulated wetland adjacent area potentially affected by the Project.

The Examiners also recommended that the Applicant implement a Final Wetlands Mitigation Plan in the event of permanent impacts to federal and State wetlands (as well as a possible Wetland Mitigation Remediation Plan). The Applicant agrees with this recommendation subject to the changes set forth in Appendix A, Certificate Condition 65 attached to this brief. The changes clarify (1) that the Applicant must submit a Wetlands Mitigation Plan only if the extent of wetland impacts justify preparation of such a plan and (2) that the plan shall provide for "state regulated" wetland mitigation in the same watershed to the maximum extent practicable. The latter change is required to clarify that the "same watershed" restriction is applicable only to State-regulated wetlands since DEC has no authority to dictate mitigation of federally regulated wetlands.

Finally, in incorporating the DEC's proposed wetland conditions into the Proposed Certificate Conditions contained in the Recommended Decision, the Examiners require the Applicant to submit "for review by DEC prior to filing as a compliance filing" a number of additional details regarding wetland impacts. (See Examiners' Proposed Certificate Condition 52(ix)). By imposing this requirement *prior* to the process for filing compliance filings pursuant to 16 NYCRR 1000.2, the Hearing Examiners' have added a layer of review not intended by the Article 10 statute or regulations. Pursuant to 1000.2, DEC has the opportunity to comment on compliance filings in the same manner as any other party within the 21day comment process. There is no basis to mandate that DEC have a unique role in reviewing plans prior to their public filing with the Secretary as compliance filings. Moreover, unlike the regulation which establishes a time period for review, the Proposed Certificate Condition does not identify how long DEC has to review the proposed compliance filing prior to its filing with the Secretary. Given the Applicant's experience in this process, this has the potential to create long, protracted timeframes for review of information that is not necessary to be submitted to DEC in advance. Although the Applicant has not emphasized the Project's critical schedule, it is worth noting that the Applicant intends to deliver electricity to the New York electric grid by the end of 2020, making efficient and timely review of compliance filings necessary for the commencement of certain phases of construction. The condition requiring DEC review would add an unnecessary layer of review on an already tight process to achieve the Project's schedule. The Applicant requests that the Siting Board consider that even if these conditions are adopted, that the requirement for DEC review prior to submission of the compliance filing be removed.

5. Wildlife and Habitat

b. Bats

Just last month, the United Nations (U.N.) warned the world of a global extinction crisis.² The U.N. found that of an estimated 8 million plant and animal species, about 1 million are on the brink of extinction because of the damage humans are inflicting on the Earth through global carbon emissions and other activities. The U.N. report was compiled by 145 expert authors from 50 countries who found about a quarter of species are currently threatened and could disappear within decades, and the global rate of extinction is accelerating. The U.N. recognizes in this report that replacing fossil fuels with renewable energy sources like wind is one of the measures needed to slow down climate change to save the planet.³ According to the Environmental Defense Fund “47% of threatened mammals such as bats have already seen population declines due to climate change.”⁴ A recent study of bat diversity in the Amazon suggested that bat diversity in the area could decline by 28–36% by 2070 due to climate change.⁵ Scientist have documented alarming bat behaviors linked to the changing climate throughout the world.⁶

Similar findings underlay New York’s bold clean energy vision laid out and adopted by the Public Service Commission in the Clean Energy Standard (Case 15-E-0302; TI 301-302). To address the impending environmental and climate disaster, New York has established aggressive Clean Energy goals that will not be met if New York State imposes unreasonable curtailment making investment in wind energy unattractive in the State.

² <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>

³ <https://www.un.org/en/sections/issues-depth/climate-change/>

⁴ <https://www.edf.org/blog/2019/05/22/humans-are-causing-1-million-species-go-extinct-here-are-3-ways-still-save-them>

⁵ <https://www.sciencedirect.com/science/article/abs/pii/S0006320717314489>

⁶ <https://www.bbc.com/news/science-environment-43812484>; <https://futurism.com/bat-migration-climate-change>

Despite the well-recognized climate crisis, the Hearing Examiners, DEC and DPS argue in this proceeding that wind farms should curtail clean renewable energy production where it has been established by record evidence to, at best, only nominally reduce impacts to bats. The curtailment sought by the Recommended Decision would impose a substantial loss of clean energy generation and result in significant financial constraints making renewable energy investment in the state of New York less attractive for commercial developers. Further, by not allowing approved wind projects to operate at their full capacity the parties are requiring the development of additional renewable energy projects across the landscape to meet New York's aggressive clean energy goals. The level of curtailment proposed by the Recommended Decision is counter to Governor Cuomo's Clean Energy goals. In adopting the recommendations of DPS and DEC Staff the Hearing Examiners have unfairly and without justification demanded that commercial wind developers prove a project is uneconomic to avoid implementing high energy reducing curtailment regimes under the guise of protecting bats, even though the evidence fully supports that lower curtailment regimes than those advocated by the agencies are protective. It also ignores the fact that any estimated take of NLEB that would occur above a lower curtailment regime would be mitigated for by the Net Conservation Benefit Plan prescribed in the recommended Certificate Conditions. Further, it should be noted that the likelihood of bat mortality has merely been estimated, and allowance for operation at lower wind speeds does not result in certainty of increased mortality.

i. DPS and DEC Are Engaging in Improper Rule Making

In their recommendations to the Hearing Examiners and Siting Board, DPS and DEC Staff have determined that all land-based wind projects should implement energy reducing curtailment regimes to avoid and minimize impacts to bats. (T1 P 325–327, and 470) Each agency recommends specific curtailment regimes, DEC staff recommends 6.9 m/s for full avoidance of

impacts to northern long-eared bats (NLEB) but is willing to consider 5.0 m/s if 6.9 m/s is “economically infeasible”, and DPS Staff recommends between “6.0 m/s and 6.9 m/s” for protection to migratory tree bats. (TI 332 and 472) The final level of curtailment, according to the agencies and the Recommended Decision should be determined by associated “revenue losses” and whether the curtailment renders the project uneconomic. (TI 477, RD 65, 67)

These recommendations are not based on any unique or specific environmental factors related to individual projects but are recommendations applicable to all land-based wind energy development in the state. In fact, DEC explicitly states in their testimony, that their recommendations apply to all of New York State, stating “[b]ased on the widespread nature of the distribution of NLEB in New York State during both winter and summer and demonstrated susceptibility of the species to be taken at wind turbine facilities, we conclude that all on-shore wind turbine facilities in New York State pose a threat to the species.” Similarly, DPS Staff does not point to any project specific information in their testimony but relies upon generic data from wind farms generally in making their recommendations. (TI 469) . Neither the DEC nor the DPS have proposed management objectives for bats such as target reductions in overall fatality rates or benchmark population metrics. Instead, both agencies have proposed relatively arbitrary cut-in speeds that can severely limit the economic viability of individual projects, are not based on site-specific risk factors, and result in substantial energy loss with minimal additional benefit to bats when compared to the Applicant’s proposal. While it is true that higher cut-in speeds will incrementally reduce risk to bats, they come with substantially higher cost in terms of energy loss when cut-in speeds exceed ~5 m/s.

In addition to recommending general curtailment regimes, more troubling is the recommendation by the Agencies, and the adoption by the Examiners, of an economic test to determine the final level of curtailment to be adopted. DPS Staff requested that the Applicant

provide an economic analysis of curtailment costs at speeds of 5.0, 5.5, 6.0 and 6.9 meter per second. (TI 453-454) When the Applicant provided a detailed analysis of energy loss, DPS responded by conducting a desktop estimate of project economics and testifying that “revenue losses support the adoption of a curtailment regime with a cut-in speed at a minimum of 6.0 m/s”. (TI 457) In response to this testimony, the Applicant provided a detailed Net Present Value Analysis to refute DPS Staff. (Hearing Exhibit 299)

The Recommended Decision used the Applicant’s rebuttal to justify the imposition of an economic test, claiming that the “the Applicant has opened the door into an inquiry as to the Project’s economics”. However, this ignores that it was DPS and DEC who are requiring a showing of economic impacts, and the Applicant has only responded to the Agencies’ demands.

The recommendation by the Agencies and the Hearing Examiners to adopt a curtailment regime dependent upon project economics constitutes a rule which is subject to the State Administrative Procedure Act's rule-making procedures. A rule is defined as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to an agency or the procedure or practice requirements of any agency" (State Administrative Procedure Act § 102 [2] [a] [i]). The definition excludes "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (State Administrative Procedure Act § 102 [2] [b] [iv]). Blanket requirements and fixed standards that are to be generally applied in the future, regardless of individual circumstances, are rules subject to the State Administrative Procedure Act's rule-making procedures (*see Matter of Homestead Funding Corp. v State of N.Y. Banking Dept.*, 95 A.D.3d 1410, 1413 [2012]). “When an agency engages in a course of regulatory action that amounts to formal rulemaking but does not comply with the procedural requirements of State

Administrative Procedure Act article 2, that regulatory action must be annulled.” (*Entergy Nuclear Indian Point 2, LLC v. New York State Dep’t of State*, 130 AD3d 1190, 1195 (3d Dept 2015)).

Notably, neither DPS Staff nor DEC Staff have stated what “uneconomic” means or what percent loss a project would have to demonstrate to meet such a standard. On face value their analysis of the level of revenue loss that is “acceptable” is arbitrary. The Hearing Examiners and Siting Board have also not provided any guidance on what such a standard could entail. State agencies have an obligation to provide the standard so that an applicant can properly evaluate the project and curtailment options. This is especially true where the minimization required by the agencies has questionable value and no basis in science.

In not articulating the standard, the Agencies have caused a situation where projects have varying levels of curtailment with no guidance on why one project with not obvious difference in risk to bat species is operating at 5.0 m/s, while another is operating at 5.5 m/s and yet others at 6.0 or 6.9m/s. This is exactly why there are rule making procedures. To avoid a situation where an unsupported and arbitrary “rule” is made through the regulatory process. The application of a curtailment standard on all wind projects that do not meet the undefined, ambiguous and arbitrary “uneconomic” standard, amounts to improper rule making. Pursuant to State Administrative Procedure Act § 202(8), each rule or regulation proposed by an agency must be promulgated ‘in substantial compliance’ with State Administrative Procedure Act §§ 202 (setting forth general procedures for rulemaking), 202–a (requiring consideration of the regulatory impact of the proposed rule), and 202–b (requiring consideration of regulatory flexibility for small businesses).” *Med. Soc’y of State v. Serio*, 100 NY2d 854, 869 (2003). No such process has been followed here.

The Applicant has met its burden of proof required under PSL § 168(c) and has demonstrated that requiring higher curtailment results in incrementally reduced risk to bats with substantially higher energy loss, therefore the Applicant’s proposed cut-in speed minimizes and

avoids impacts to bats to the maximum extent practicable. The adoption of a higher curtailment standard based on project economics would be arbitrary and capricious.

ii. Specific Points on Exception

The Applicant takes exception with the Recommended Decision's analysis and conclusions with respect to the Facility's impact on NLEB and on bats generally. As set forth in greater detail below, the recommendations of the Hearing Examiners with respect to bats should be rejected because: (1) the record and the Recommended Decision do not adequately explain why the 5.0 m/s cut-in speed approved for the Cassadaga Wind Project (Case No. 14-F-0490), which is expected to reduce overall bat fatality rates by 50% to 70% and reduce risk to NLEB by at least 80%, is not appropriate for the Baron Winds Project (2) the record does not support the calculation method used by DEC Staff to assess the potential impacts of the Project on NLEB (3) the record evidence does not support DPS Staff's recommendation that curtailment above 5.0 m/s is needed to sufficiently minimize impacts to bats; and (4) the Examiners improperly dismissed the information provided by the Applicant concerning the financial impact of DEC and DPS's recommended cut-in speeds on the financial viability of the Project.

(1) The Recommended Decision Does Not Adequately Explain Why the 5.0 m/s Cut-In Speed Approved for The Cassadaga Wind Project (Case No. 14-F-0490) is Not Appropriate for The Baron Winds Project

The Applicant has agreed to implement a curtailment plan consistent with the curtailment adopted by the Siting Board in the *Cassadaga Wind* proceeding and DEC's suggestion of 5.0 m/s from July 1 through September 30, there is nothing in the Record or studies to support the contention that higher curtailment beyond 5.0 m/s is justified. DEC has not provided evidence to support a certain percent reduction in bat fatality rates across the state, and a 50% to 70% reduction in total bat fatality rate and at least 80% reduction in NLEB risk is substantial. The Siting Board in *Cassadaga* examined the exact same evidence with respect to impacts to all bats and concluded

that a curtailment regime of 5.0 m/s together with a Net Conservation Benefit Plan designed for NLEB minimized and avoided impacts to all bats to the maximum extent practicable. (Case 14-F-0490, *Application of Cassadaga Wind*, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, (issued January 17, 2018), pg 55). There is nothing in this proceeding which would necessitate that the Siting Board deviate from that determination.

Moreover, Baron Winds submitted substantially more record evidence in this proceeding on economic impacts due to curtailment than was presented in Cassadaga. This was largely due to the Siting Board's directive that "[g]iven the importance of a full record examination on the issues of the economic impact of any required curtailment and the expected benefit from clearly defined mitigation proposals, such information should be included in future applications with as much specificity as possible, particularly where a threatened or endangered species is a concern". (Cassadaga Order, P 54, Footnote 96) As outlined in the record and in this brief, the Applicant has demonstrated that implementing any curtailment regime will have a negative impact on Project economics and that curtailment over 5.0 m/s presents diminishing protections for bats while substantially increasing loss energy and placing the Facility at financial risk.

It should be noted that DPS and DEC Staff have agreed to curtailment below 6.0 m/s in at least three other proceedings currently pending before the Siting Board, Eight Point Wind (Case 16-F-0062), Bluestone Wind (16-F-0559) and Number Three Wind (Case 16-F-0328). DPS has agreed to lower curtailment as part of settlement in those proceedings, as those applicants have agreed to evaluate curtailment. However, Baron Winds has also proposed and accepted Certification Condition 62 which required a regular review of curtailment, which is very similar to the conditions contained in these other proceedings. (See Condition 62). The Applicant has only taken issue with the requirement that this review occur every five years, as it is an arbitrary

timeframe and if technologies or methodologies arise that would allow for the Applicant to decrease curtailment while also decreasing the risk to bats, it would be in their best interest to analyze that technology sooner than every five years. What DPS is requesting in this condition is simply an ongoing requirement for an applicant to provide them with a research paper on the state of current technologies. Notably, the science surrounding methods to optimize curtailment by focusing on conditions of highest risk is advancing rapidly and requiring arbitrarily higher cut-in speeds as opposed to setting target reductions and allowing flexibility in achieving those goals simply limits the ability of the wind industry to operate profitably while providing diminishing benefit to bats.

If the Siting Board accepts the settlement in these other proceedings and accepts the Hearing Examiner's recommendation in this proceeding, Baron Winds would have the highest level of curtailment of any project in the State of New York with no corresponding justification or project specific impact assessment.

(2) The Record Does Not Support DEC's NLEB Take Calculation

The Record contains extensive information and numerous studies to quantify the potential impact of the Project on bats. The Record recognizes that collision risk from operating wind projects represents a potential impact to bats including NLEB. Thus, the Applicant does not take issue with the Recommended Decision finding that the Project may have impacts on bats species found in New York or the determination that Article 11 take permit requirements apply to the Project for NLEB. However, the Applicant disagrees with the approach used by DEC Staff (and accepted by the Examiners) to calculate potential NLEB take from the Project which is based on DEC's generic state-wide approach.

DEC's species composition number and per MW multiplier are far too conservative particularly in light of the evidence of take at wind projects and the overall low risk, resulting in

an inappropriately high take number. Using DEC's take rate to determine the total number of NLEB fatalities in New York per year, would result in an estimate of 51.3 NLEB fatalities by all wind projects annually just in New York State (1899.4 MW of installed wind capacity in New York x the rate of 0.027 NLEB/MW/yr⁷). (TI 593) By contrast, studies estimate that 106 to 221 NLEB fatalities occur annually at all projects in the United States and Canada combined. (TI 593) The evidence in the Record supports that the Project is unlikely to take 7 NLEB let alone DEC's proposed take calculation of 40 NLEB over the life of the Project, and there is no evidence that a "conservative approach" is warranted, especially considering the mitigation the Applicant is proposing to off-set the take of NLEB.

On top of this over-conservatism, DEC's data set, which is a small sample size to begin with, includes the Wethersfield project that appears to have had an anomalous event that skews the predicted take. As compared with DEC's limited dataset, which contains a statistical outlier, the Applicant's take estimate includes a larger dataset from other nearby states with similar NLEB habitat. The Applicant's witness testified that a statistical take prediction is likely to be more accurate if it either (1) omit outliers or (2) reduce the effect of outliers with a sufficiently sized dataset and DEC's data set does neither making it statistically invalid. While it is acknowledged that this dataset includes very little NLEB mortality, this fact is treated by DEC as a flaw and not a recognition that the overall likelihood of NLEB mortality is low.

Despite this, the Recommended Decision defers to DEC's calculation "given the uncertainties with respect to the actual number of bats killed compared to the number of carcasses found". (RD P 60) However, there was no testimony from DEC or the Applicant in the Record that supports this statement. The Applicant's expert testified that post construction monitoring is

⁷ As explained the Applicant disagrees with the MW rate, however, for illustration and comparison purposes, this rate is used for the calculation.

based on sample sizes that extrapolate data, there is no testimony stating that this extrapolation is uncertain or not representative of actual take. (T1 647) Moreover, there is no information in the record to suggest that NLEB are proportionally harder to find than other bat species, including those that are found regularly during carcass searches. Regardless, even if the Record established that NLEB are harder to find, DEC's take estimate is based on the assumption that NLEB are *two times* more likely to be killed in New York than in other states (based on the smaller species composition dataset), while they indicated that they had no reason to think NLEB were proportionally at greater risk in New York than other states. (TI 636) Thus, the testimony does not support such a conservative calculation that assumes a greater risk than actually exists.

DEC's method of calculating take is further skewed by DEC's per MW approach. For the Baron project, which has been updated from the original Application to propose fewer turbines (a reduction from 76 to up to 69 turbines), the per-MW method would predict no change in mortality risk, whereas the per-turbine method accurately reflects the likely reduction in overall risk associated with construction and operation of fewer turbines. (Hearing Exhibit 9, February 1, 2019 Application Update, Appendix XX) It also ignores the fact that a turbine with the exact same equipment and dimensions may be rated at higher or lower MW output based on changes to software operating parameters.

Separate and apart from the concerns identified above about the Recommended Decision's reliance on DEC's take approach, the Recommended Decision also ignores the Applicant's willingness to implement a phased mitigation approach to address DEC's concerns regarding the Applicant's take calculation. Should post construction monitoring indicate that take of NLEB will be higher than the Applicant's proposed "compromise" estimate, which uses the Applicant's wider data set with DEC's per MW approach (13.41 NLEB) the Applicant has proposed a Certificate Condition requiring it to implement additional mitigation to ensure a net conservation benefit to

NLEB. Take estimates made before project construction are inevitably based on major assumptions and are subject to substantial uncertainty. This is particularly true as turbine technology advances and moves in the direction of fewer, larger turbines. There are simply no data to evaluate whether risk to bats in general, let alone individual species, increase proportionally with turbine size when considering turbines in the 3 – 4 MW size. For this reason alone, a phased approach to mitigation, which will incorporate site-specific fatality data to directly test the underlying assumptions of take estimates, makes far more sense than requiring highly restrictive and costly curtailment programs that may not be warranted.

Over estimating NLEB take places an undue and unfair burden on applicants to bear the cost of over mitigation and places a constraint on mitigation options for future projects. There are limited options to mitigate for the take of NLEB given their relative scarcity on the landscape due to White Nose Syndrome (WNS). (TI 336-339). Requiring Applicants to over mitigate take will reduce the mitigation options for subsequent projects while placing an undue financial burden on current projects.

(3) The Applicant's Proposed Curtailment at 5.0 m/s Minimizes and Avoids Impacts to the Maximum Extent Practicable

To ensure that the adverse environmental effects of the construction and operation of the Facility relating to bats “will be minimized or avoided to the maximum extent practicable” consistent with PSL § 168 the Applicant has proposed a curtailment regime (i.e., a program to start up the turbines at higher wind speeds during months when bats are most active) which includes a cut-in speed of 5.0 m/s. The curtailment regime proposed by the Applicant conservatively avoids and minimizes potential impacts to NLEB by at least 80% and all bats by at least 50%.⁸ DEC cited

⁸ These are conservative estimates; this curtailment regime could potentially reduce impacts to NLEB up to 95% and migratory tree bats by 70%.

studies indicating that overall bat fatalities can be reduced by approximately 50% to 70% when wind turbines are curtailed at wind speeds below 5.5 m/s (TI P326).

Despite the ample Record evidence that 5.0 m/s is protective for all bats, the Examiners accepted DPS's analysis with respect to migratory tree bats and recommended that the Siting Board:

require the Project to adopt a curtailment speed between 6.0 m/s and 6.9 m/s. Migratory tree bats should receive a greater level of protection than a 5.0 m/s cut-in speed will provide. If the Siting Board elects to impose a curtailment speed lower than 6.9 m/s a Certificate Condition requiring a . . . [Net Conservation Benefit Plan] for NLEB, as well as other potential mitigation options and the Certificate Conditions proposed by DEC Staff, should be adopted. . . . (RD 68)

However, there is no evidence in the Record that migratory tree bats should receive a greater level of protection than a 5.0 m/s cut-in speed will provide (anticipated 50% to 70% reduction), DPS's assertions regarding the level of impact reduction required are speculative and not supported by the record. There is one paper relied upon by DPS Staff to assert curtailment for migratory tree bats (Frick, W.F. et al, 2017). However, this paper only suggests that some level of curtailment should be implemented, it does not provide a recommendation of a specific curtailment regime necessary to minimize impacts.

Simply by feathering the turbine blades (pitching them parallel to the wind so they are moving slowly) below the turbine's cut-in speed (generally 3.0 m/s), bat fatalities can be reduced by an average of 35 percent without any energy loss, and this is a supported best management practice by the American Wind Energy Association (AWEA) to reduce bat mortality. There is undeniably no evidence in the record that the Applicant's proposed curtailment regime, which would reduce potential impacts by between 50% and 70%, is not protective of migratory tree bats. The Recommended Decision's conclusion that "[m]igratory tree bats should receive a greater level of protection than a 5.0 m/s cut-in speed will provide" is not supported by any evidence in the

record, or any report or study. Given the potential impact associated with higher level of curtailment on renewable energy generation, far more evidentiary support is needed than this conclusory statement. At best, this specific recommendation appears to be based solely on DPS Staff's unqualified preferences regarding curtailment and the Project's economics.

As explained in the record and more fully below, implementing curtailment above 5.0 m/s provides marginally more protection to bats while considerably increasing energy loss. The reason for this is that most bat activity at nacelle height tends to occur at very low wind speeds (e.g. less than 5 m/s) whereas potential energy loss increases exponentially as a function of wind speed. This energy loss in turn reduces project economics but also reduces the amount of clean renewable energy produced by the Facility and reduces the benefits associated with that clean renewable energy. In summary, the minimal increase in protection to bats due to higher curtailment does not outweigh the substantial decrease in energy production and is therefore impracticable and not needed to avoid and minimize impacts to bats.

(4) The Examiners Improperly Dismissed the Information Provided by the Applicant Concerning the Financial Impact of DEC and DPS's Recommended Cut-In Speed on the Financial Viability of The Project

In support of its argument for a 6.0 m/s cut-in speed, DPS Staff argued that the Applicant failed to provide sufficient information to evaluate the cost of curtailment relative to revenues. (TI 453-457). DEC Staff similarly argued that the Applicant failed to show that a high seasonal cut-in speed of 6.0 m/s or 6.9 m/s was not practicable from an economic perspective, while acknowledging that they would consider a lower speed if the Applicant could make such a showing. (T1 334) The Examiners appear to have accepted the argument that the Applicant needed to prove such a standard and failed to submit sufficient information regarding economic impacts and so could not justify its argument that the higher cut-in speeds should not be required.

The Recommended Decision's conclusion ignores the extensive economic information provided by the Applicant during the discovery and hearing phases of the Project. The Applicant submitted a detailed analysis regarding the net present value for the Project as a basis to support the statements on the impacts to the Project of curtailment. (Hearing Exhibit 299) This analysis detailed the significant capital costs a wind development project has to incur in order to go through the Article 10 permitting process and implement the various recommendations of the state agencies and intervenors in addition to the operational costs associated with various mitigation and monitoring programs agreed to or required as part of the Article 10 process. These costs can only be made up by energy production. Requiring the Facility to implement a curtailment level that jeopardizes the Project's ability to be profitable and recoup investment, while offering only marginally more protection to bats, is extremely burdensome and impractical.

Moreover, the Project was not bid into NYSERDA's competitive bid solicitation process for renewable energy credits (RECs) with an assumption of 6.9 m/s for curtailment. The bid-REC price would have been higher if the State required curtailment at 6.9 m/s. Simply put, curtailment above 5.0 m/s results in a loss of renewable energy generation not supported by the minimal increase in protection to bats and the resulting economic impacts to the Facility. (Hearing Exhibit 299)

c. Bald Eagles

The Applicant takes exception with the Recommended Decision's analysis and conclusions with respect to the Facility's impact on bald eagles. In sum, the Recommended Decision fails to provide any explanation or analysis justifying the adoption of DEC's position that the Facility poses an increase risk to bald eagles, simply as a result of the identification of proximate nests. The Record is devoid of any justification for why the presence of nests near the Facility, which is designed and sited in accordance with DEC's guidelines for wind turbines and nesting bald eagles,

triggers need for a take permit. The past and ongoing observations of bald eagles in the Facility Area are low and similar, or less than, other similarly situated projects. Notably, the Eight Point Wind project, a nearby project in Steuben County, was not required to obtain a take permit despite having significantly higher observed bald eagle use (Case No. 16-F-0062). Yet, because of the existence of bald eagles' nests around the Facility Area, the Hearing Examiners have recommended the Applicant obtain a take permit without any evidence supporting an increased risk. This risk is presumed solely on DEC's speculation that bald eagles from the nest might fly over the Facility Area to forage, but the Record establishes that the eagles are just as likely to remain within the nearby foraging corridors which border the Project and will not fly through the Facility Area. Unlike the Applicant's assessment of eagle use, the DEC's presumptions are not based on site specific observation data. Moreover, DEC's take estimate relies almost exclusively on a presumed 100% fatality estimate of fledgling bald eagles, which is an exaggeration and inconsistent with known fledging risk from turbines. The evidence in this case does not support the likelihood of take of bald eagles and the application of Article 11 of the Environmental Conservation Law (ECL Article 11), and its implementing regulations set forth in Part 182 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 182).

i. Risk to Bald Eagles is Low

In general, bald eagles are not susceptible to turbine collisions. Only one bald eagle fatality has been reported at a wind farm in New York, despite 20 years of wind farms operating in the State and an increasing bald eagle population. The Record evidence establishes that eagle mortality at wind facilities in the northeast is rare and, therefore, the presence of eagles in the vicinity of the Facility area does not mean that the project is likely to "take" eagles. This is true even where nests are present in or near a facility, as evidenced by the examples in the Record of projects operating

with bald eagle nests in the project area (Hearing Exhibits 15, 16, 17). Juvenile bald eagle fatalities, which would include the age class of a fledged eagle from a nest, make up only 19% of all documented fatalities (Hearing Exhibit 131, DEC-BA-3 [Kritz et al. 2018]). Risk to nesting eagles appears lower than that for transient nonnesting eagles or migrants, which is already very low (n=1 in NY). In nearly 400 hours of bald eagle and other bird surveys in the Project and surrounding areas less than 20 observations of bald eagles were noted in the current Project area. A review of similar reports submitted in other Article 10 Proceedings shows that bald eagles have been recorded at every project, and the eagle minutes recorded at Baron Winds are among the lowest, including nearby projects in Steuben County (TII P310).

The reliance by the Hearing Examiners on the presence of nests in the vicinity of the Project area to determine a likelihood of take is misplaced. It is the use of the Facility by bald eagles that presents the risk not the presence of a nest in proximity to the Facility. If bald eagles are not flying in areas where turbines are proposed, the risk of collision is low or nonexistent. This is highlighted by the USFWS's conservative collision risk model, which is used by USFWS to estimate the potential for take at wind projects. This model does not consider any nest information, whether active or not. Instead, the model predicts fatalities based on exposure minutes in the turbine areas.⁹

There is simply no record evidence in this proceeding supporting DEC's assumptions of risk to bald eagles or the Hearing Examiner's recommendations. DEC's take calculation is based solely on speculation and DEC could not point to any study or report to support their presumption of take. (TII P 260)

Instead, DEC offered theories and speculation to support their claims of risk, which the Hearing Examiners have adopted. These theories include that the adult bald eagles from the nest would need to cross turbines to access the Cohocton or Canisteo rivers to forage and that every

⁹ <https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf>.

single fledgling bald eagle from a nest 0.7 miles from the closest turbine would be killed or the nest would fail every single year for the life of the Project due to disturbance from the Facility.

DEC's theories and speculation are wholly unsupported by actual evidence from the Facility Site and other operating projects with nests located within a mile of operating turbines. (Hearing Exhibits 15-17) Moreover, DEC's theory regarding projected flight paths of adult bald eagles, is belied by the actual eagle use surveys from the Project area and the fact that "new" nests have been identified in the corridor the Applicant's expert suggested is just as likely to provide foraging habitat for bald eagles as the Cohocton or Canisteo rivers. (TII 343) The nests are located close to food sources and therefore the eagles do not need to traverse the Facility to forage. This is consistent with DEC's own testimony that eagles are not expected to travel longer distances during the breeding season (TII P207) Unlike the corridor identified by the Applicant's expert, the area where turbines are proposed has not had any new nests discoveries. Importantly, the Hearing Examiner's recommendation and DEC's theories defy DEC's own guidance. (Hearing Exhibit 13)

ii. The Facility Complies with DEC's Conservation Plan for Bald Eagles and Therefore Avoids and Minimizes Risk to Eagles

The Recommended Decision states that "both construction and operation of the Facility may result in adverse impacts to bald eagles". This statement is unsupported in the Record given that Facility components are sited in accordance with DEC's Conservation Plan for Bald Eagles in New York State (Conservation Plan; NYSDEC 2016), which recommends no construction of new structures within 1,320 feet of an eagle nest absent a visual buffer (or 660 feet if a visual buffer exist), to avoid and minimize impacts to nesting bald eagles. (Hearing Exhibit 13). The closest turbine is located over two and a half times this distance from the nearest bald eagle nest. Moreover, collection lines are proposed to be underground and the Applicant's preferred route is located more than 1 miles from the closest nest. When a project complies with DEC's own

guidance for avoiding and minimizing impacts to nesting bald eagles, it would be arbitrary and capricious to find otherwise.

A fledgling bald eagle's range during the nesting period may only extend up to 0.25 miles from the nest site (according to USFWS National Bald Eagle Management Guidelines, dated May 2007). Juvenile bald eagles, once fledged, typically range up to ¼ mile from the nest site, or 1320 feet, according to USFWS National Bald Eagle Management Guidelines. (Hearing Exhibit 1, Application Appendix PP) With the nearest proposed turbine over 3,600 feet from the nearest nest, the Project turbines are outside of the generally expected range of fledglings and juveniles, and therefore the Facility presents minimal risk to bald eagles.

Furthermore, the Applicant submitted multiple post construction studies from operating wind farms with bald eagles' nests within one mile of turbines. (Hearing Exhibits 15-17; TII 355) One of those studies have 6 nests within 4 miles of the project with foraging areas on either side of the turbines, and the other had 3 nests within 4 miles of the turbines. (TII 353) The evidence from those studies confirmed that turbines do not appear to affect nesting activities by bald eagles and no collision impacts occurred. In addition, evidence was presented during the hearings regarding the current monitoring occurring at the closest identified nest location, which confirms that the adult eagles are not crossing the turbine locations, just as the Applicant predicted. (TII 344) Despite DEC's contentions, the Record demonstrates that bald eagles are not using the areas where turbines are proposed, nor is it likely that fledglings or juveniles will navigate the areas where turbines are proposed. Instead, it is much more likely that young bald eagles will stay close to the nest and the food sources in proximity to the nest, and that the adult bald eagles will use the closest foraging areas to the nest which are not located across the Facility area.

iii. Adequate Measures Have Been Proposed to Avoid or Mitigate Impacts

The Recommended Decision incorrectly states “impacts to the most recently documented nest have not yet been incorporated into the Applicant’s assessment, and adequate measures have not yet been proposed to avoid or mitigate impacts.” (Recommended Decision P 76)

This is simply not the case. To clarify, DEC identified 4 nests, three of those nests were incorporated into the Applicant’s previous surveys. (TII 346). In addition, the Applicant is currently conducting monitoring both within the Facility Site and at the nests identified in the record since the filing of the Application and has agreed to develop an Eagle Management Plan as part of the Applicant’s Bird and Bat Conservation Strategy (BBCS). (Applicant’s Proposed Certificate Condition 43) The BBCS will be submitted prior to Facility operation and will include avoidance and minimization measures, post-construction monitoring, on-going risk assessment, and adaptive management measures to address any increased risk to bald eagles based on additional information from the on-going monitoring. (Hearing Exhibit 10, Application Update [new Appendix 22-1, Eagle Memo]). The BBCS will consider actual monitoring results and incorporate measures to address any risk presented by the Facility should they exist. This is compared with the current recommendation which speculatively assumes risk and requires upfront mitigation for an impact that is very unlikely to occur, especially to the magnitude suggested by DEC.

Moreover, the Applicant has agreed to a certificate condition that require the Applicant to report any new bald eagle nest within 48 hours of discovery to DEC Region 8. In addition, a six-hundred-and-sixty-foot radius from any nest will be posted and avoided, and the nest or nest tree will not be approached under any circumstances unless authorized by Region 8. This is consistent with DEC’s Conservation Plan and will prevent disturbance at any nest site. The Applicant has also agreed to reporting any bald eagle mortality to DEC within 48 hours.

iv. The Evidence Does Not Support DEC's Take Estimate

As outlined above, there is no support in the record that the Facility will cause nest failure or will result in the take of bald eagles from the nest, and therefore there is no basis to apply Article 11 and Part 182. Even if take were likely, which it is not, DEC's take estimate is a baseless, gross overestimate of any potential take. For DEC's take estimate to be accurate, the Facility will have to be the sole cause of mortality or nest failure for every year the Project is in operation or the nest will have to be successful in raising 1.3 chicks every year, and every single one of those chicks must be killed by a turbine. However, DEC admits that bald eagle survival is only 50% regardless of whether the Facility is constructed or not. (TII P 260) Bald eagle nests also fail for a variety of reasons¹⁰ including, as DEC's Conservation Plan points out, due to climate change. If you assume an average nest failure rate of 25% and that 50% of the offspring from the nest would not survive regardless of the Facility, and still assume each of those eagles collides with a turbine the estimate is closer to 15 bald eagles $\{1.3 \times 30 \times ((1 - 0.25) * 0.5) = 14.6\}$. Even if the Siting Board were to find some risk which must be addressed under Part 182, the "net conservation benefit" mitigated for should be 15 bald eagles, not 41 as claimed by DEC.

v. The Siting Board Should Not Adopt the Recommended Decision on Bald Eagles

Despite all of the actual evidence indicating low bald eagle risk at the Facility Site as indicated above, the Recommended Decision states "In light of the evolving data regarding eagle use and nesting in the area, a more conservative approach is warranted" and recommends that the Applicant prepare a Net Conservation Benefit Plan for the take of bald eagles. (Recommended Decision P 76-77)

¹⁰ State of New York Heritage Program (<https://guides.nynhp.org/bald-eagle/>). 34/122 active nest sites failed in 2007 (28% failure rate).

In making this recommendation the Hearing Examiners rely on the fact that there are four documented nests¹¹ within a ten-mile buffer of the Facility, as well as a new, active nest approximately 0.7 miles from the nearest turbine. The recommendation ignores the evidence presented by the Applicant which includes actual data from the Facility Site and operational wind farms that confirms nest proximity does not automatically equate with risk or take.

The Record evidence in this case supports a finding that risk to bald eagles from the operation of the Project remains low. Turbines are not proposed to be located in areas where large numbers of bald eagles have been observed foraging, flying or migrating; there are no habitat features near turbines like lakes and rivers which could attract bald eagles; and although there are nests present near the Facility, there is no evidence that bald eagles from those nests are flying or have to fly through areas where turbines are proposed. The closest nest to turbines is located far enough away to avoid and minimize impacts to the nest and nesting bald eagles, the Facility complies with DEC's Conservation Plan for Bald Eagles, and the Applicant has proposed on-going monitoring and will incorporate measures to address any future risk presented by the Facility based on the Applicant's on-going monitoring efforts. The adaptive management provided within the BBCS would allow for future mitigation measures, including compensatory mitigation as required by a Net Conservation Benefit Plan. As such, there is no need to speculatively burden the project with mitigation that, based on the evidence in the record, is unwarranted. As explained above the evidence in this proceeding does not support the recommendations made by the Hearing Examiners and the Siting Board should find that the Facility as designed avoids and minimizes impacts to bald eagles and that take of bald eagles is unlikely, to find otherwise would be highly speculative.

¹¹ The Recommended Decision incorrectly states the Applicant did not assess these four previously documented nests. (Recommended Decision P 75) However, as outlined in detail in the Applicant's eagle use surveys and briefs, these nests were assessed in coordination with DEC.

vi. Recommended Condition 98 is Repetitive and Conflicts with Recommended Condition 100

The Recommended Certificate Conditions contain two separate conditions related to the reporting of bald eagle nests if discovered during project construction or operation. These two recommended conditions contain conflicting reporting requirements and avoidance distances. Recommended condition 98 states nest in the Project area shall be reported within twenty-four hours and contains two different distances for avoiding nest trees (0.25 miles and 660). Condition 100 states nest within the Facility Site will be reported within 48 hours and a 660-foot radius will be avoided.

The Applicant recommends that the following condition replace recommended conditions 98 and 100 to be consistent with testimony and conditions adopted in other proceeding:

“If any time during construction or operation of the Project, a nest of a bald eagle is located, or if bald eagles are observed in the Facility area exhibiting breeding behavior, the DPS Staff and DEC Regional Office shall be notified within forty-eight (48) hours of discovery or observation, and prior to any disturbance of the nest or immediate area around the nest or where eagles were seen exhibiting breeding behavior. An area of 1,320 feet in radius if there is no visual buffer or 660 feet in radius if there is a visual buffer, from the bald eagle nest tree shall be posted and avoided to the maximum extent practicable until notice to continue construction, ground clearing, grading, maintenance or restoration activities at the site is granted by DPS Staff and the Region 8 Natural Resource Supervisor”

The Applicant’s revised condition accurately reflects the area of concern, the Facility Site, versus the wider Project Area which does not include areas where turbines and construction are proposed, accurately reflects the avoidance area as indicated in DEC’s Guidelines, and provides for a 48 hour reporting period to which is a more reasonable reporting timeline and is consistent with the report timeframes adopted at Cassadaga and recommended in other proceedings.

E. Public Health and Safety

3. Shadow Flicker

The Applicant conducted a detailed shadow flicker analysis of its original 76-turbine configuration and then updated it as part of the February 2019 Application Update to reflect the reduction in the number of turbines to 69 and the selection of the two turbine models for the Project. Consistent with other wind energy projects, the Applicant evaluated shadow flicker impacts based on a 30 hour per year standard outside the Town of Fremont. Within the Town of Fremont, the Applicant applied a 20 hour per year shadow flicker standard consistent with Town law. Based on these standards, the Applicant found that only four non-participating residential receptors could experience more than 30 hours of shadow flicker per year; an additional five non-participating receptors located in the Town of Fremont could experience between 20 and 30 hours per year of shadow flicker (Hearing Exhibit 9, Application Update, Exhibit 15(a)(4)).

To implement these standards and ensure that shadow flicker impacts exceeding these thresholds are properly mitigated, the Applicant and DPS Staff have generally agreed on a proposed Certificate Condition that would require the Applicant to provide a Shadow Flicker Impacts Analysis, Control, Minimization and Mitigation Plan (hereinafter “Shadow Flicker Plan”). This condition, which is set forth at Appendix A to this Brief in Certificate Condition 57, requires the Applicant to update its shadow flicker analysis based on the final design; establish a monitoring protocol; describe shadow flicker detection and prevention technology or operational measures; address potential turbine shutdowns; and assess shielding or blocking measures. The Applicant and DPS Staff disagree concerning certain aspects of this condition and the Examiners have recommended implementing DPS’s proposed Certificate Condition. The Applicant takes exception to this finding.

First, with regard to the requirements for the Shadow Flicker Plan, the Applicant proposed to require the details of shadow detection and prevention technology or operational measures as part of its plan “if available and determined by the Certificate Holder to be feasible” As noted in the Recommended Decision, DPS Staff have objected to this additional language on the ground that “dilutes the effectiveness” of its recommendations (RD 89). After analyzing the arguments of the various parties, the Examiners concluded that the change does not comport with Article 10, which requires the Siting Board to determine that the Applicant has avoided or minimized adverse impacts to the extent practicable *before* granting the Certificate (RD 90). As the Examiners are well aware, however, not every decision regarding an Article 10 project can be made before the Certificate is issued. In this case, the Applicant is merely suggesting that the decision regarding whether to require shadow detection and prevention technology and operational measures be postponed until after the Certificate is issued and be determined based on the specific conditions in the field. The determination regarding the feasibility of shadow detection and prevention technology and operational measures will be included in the Shadow Flicker Plan which will be submitted to DPS as a compliance filing. If DPS finds that the Applicant’s determination is incorrect, the agency can address that determination then as they would any aspect of a compliance filing with which they disagree.

In addition, the Examiners recommended against the inclusion of language potentially requiring turbine shutdowns only if shadow flicker exceeds the 20/30 hour annual threshold for two consecutive years “agree[ing] with DPS staff that delaying mitigation measures for two years is excessive” (RD 91). In support of its recommendation, the Examiners note that the Applicant has identified only nine receptors that would potentially experience shadow flicker above the relevant annual limits, and that “requiring curtailment when complaints regarding exceedances of thresholds cannot be resolved appears reasonable and practicable.” (RD 91). While the financial

and related impacts of curtailment to address shadow flicker may appear minor, they must be considered in the context of the project as a whole. The Recommended Decision includes numerous recommendations that call for curtailment to address an environmental impact and/or seek to impose equipment, operational or other requirements that will increase the cost of constructing and/or operating the Facility. While the costs of these measures individually may not appear significant, they collectively impact the potential economic viability of the Project.

Moreover, the Applicant is not proposing to delay all mitigation measures for two years. As the Examiners note in their recommended decision, the Applicant has committed to immediately implementing mitigation measures, like blocking and shielding, for any receptor that submits a shadow flicker complaint. The Applicant is simply requesting two years to assess its available options before being required to implement the drastic remedy of curtailment. The addition time will allow the Applicant to evaluate the impact of the mitigation measures implemented and/or negotiate with affected landowners concerning the possible signing of a “good neighbor agreement” and the payment of compensation.

i. Noise

Certain Noise Conditions Should be Revised for Clarity

The Recommended Decision has thoughtfully considered the arguments made by DPS Staff, DOH Staff, the Town of Fremont, and Intervenor Sokolow, to reach conclusions largely consistent with the Applicant’s analysis in the pre-construction sound impact analysis (PNIA), supplement PNIA, updated sound modeling and the Applicant’s proposed Certificate Conditions. Overall, from a substantive standpoint, the Applicant agrees that the record supports the determinations in the Recommended Decision, and that the Applicant’s modeling is sufficiently conservative to accurately predict the noise and vibration impacts of the Facility. The Applicant agrees with the Recommended Decision’s analysis and conclusions with respect to the short-term

regulatory limits, the long-term design limits, and the recommendation that the Siting Board adopt design and regulatory limits for infrasound¹². However, the Applicant does have a few points on exceptions to ensure that certificate conditions, the implementation of monitoring and minimization, and the responsibilities of the Applicant and DPS Staff are appropriately defined.

With respect to exceptions, the Applicant submits the following points on exception:

1. The Record does not support the need for sound power limits and Condition 68(d)(ii) should be deleted or at a minimum revised to clarify the scope of sound power limits.
2. Additional clarification is needed regarding the recommended design goals for property lines in condition 68(e)¹³(iii).
3. The Record does not support the use of two different ANSI standards during compliance monitoring. In addition, recommended Condition 69 requires clarification regarding the procedures to be followed during any monitoring or tests performed by DPS Staff.

Each of these points of exception are discussed in detail below.

1. Sound power limits are not needed to minimize impacts, however if such limits are adopted by the Siting Board recommended Condition 68 should be revised to clarify the scope of such limits

Recommended Condition 68(d) sets sound power limits for the turbines to be installed and operated at the Facility. However, setting a limit for sound power levels is not necessary to

¹² The Recommended Decision states on page 126, "We recommend that the Siting Board adopt design and regulatory limits of 65 dBA Leq-1-hour for the 1/1 octave band sound levels for the 31.5 Hz and 63 Hz (low frequency) and a design goal of 65 dBA Leq-1-hour for the 1/1 octave band sound level of 16 Hz." The Applicant does not disagree with the recommendations but only notes that the Recommended Decision references "dBA" when it should reference "dBZ", which is the correct weighting. Certificate Condition 68(d)(ii) uses the correct dBZ weighting.

¹³ Note, the (e) appears to have been inadvertently omitted from the proposed conditions in the Recommended Decision.

minimize impacts to receptors. What is important, is that the sound pressure levels at the receptors meet the design goals and noise standards imposed by the Board. If the Applicant, for example, decides to use fewer wind turbines in the final design with higher sound power levels, which could potentially reduce overall impacts, this should be something encouraged by the Certificate not discouraged. The Applicant recommends that the Siting Board not adopt sound power limits as such limits are not required to minimize impacts and unnecessarily restricts turbine models which could have the unintended consequence of discouraging further design changes that may reduce sound impacts.

While the Applicant maintains a sound power limit is unnecessary, given the regulatory limits recommended by the Examiners, if the Siting Board were to set sound power limits, Condition 68(d)(ii) contains language that requires clarification. The condition as currently written in the recommended Condition states: “Apparent Sound Power levels from the turbines *at any wind speed* at hub height shall not exceed the final overall broadband (dBA)...” This could be taken to mean that the overall level can’t be higher for any wind speed, even if the wind speed is well below where the maximum sound power is produced. The Applicant does not believe that is what the Examiners intended with this language. The Applicant suggests deleting “at any wind speed” from the Condition. This would still set a shall not exceed standard but would avoid confusion.

Recommended Condition 68(d)(ii) also requires data obtained using an IEC 61400-11 test, and states “the final overall broadband (dBA) and the 16 Hz, 31.5 Hz, and 63 Hz full octave band levels (linear) presented in the Application or any subsequent supplement, as measured by following the IEC 61400-11 Standard.” There does not appear to be any alternative if an IEC 61400-11 test isn’t available. IEC tests are performed by the turbine manufacturers, not the Applicant, so the Applicant has little control over whether an IEC test is performed. Typically,

turbine manufacturers use either the IEC 61400-11 standard or IEC 61400-14 standard when certifying the sound power levels of their turbines. Part 14 of IEC 61400 gives guidelines for declaring the apparent sound power level and tonality of a batch of wind turbines. Part 11 presents measurement procedures that enable noise emissions of a wind turbine to be characterized. The Applicant does not believe the Hearing Examiners meant to limit the type of test performed and recommends that the following language be used “...as measured following the International Electrotechnical Commission (IEC) TS 61400-14 standard or IEC 61400-11 standard, if available.” This is consistent with industry practice and the conditions adopted in the Cassadaga proceeding.

The Applicant also recommends adding the following to condition 68(d)(ii) if adopted by the Siting Board, “If a higher sound power wind turbine is chosen, then sound modeling must be done to show similar or lower impacts.” As discussed above, setting a limit for sound power levels is not necessary to minimize impacts to receptors, adding this sentence would afford the Applicant the opportunity to reduce impacts while not being restricted to turbines of a certain sound power level.

2. Additional clarification is needed regarding the recommended design goals for property lines in condition 68(e)¹⁴(iii)

Recommended Certificate Condition 68 includes the following design goal, “50 dBA L(night-outside), annual equivalent continuous average nighttime sound level from the Facility across any portion of a nonparticipating property except for portions delineated as wetlands.”

This will be difficult to show, since the long-term modeling is done at discrete points and doesn’t allow for generation of iso-dB contours across a property. In the PNIA (and elsewhere), the Applicant addresses property line levels by modeling individual worst-case locations, but this

¹⁴ Note, the (e) appears to have been inadvertently omitted from the proposed conditions in the Recommended Decision.

doesn't show sound levels for "any location." The Applicant recommends adding a clarification sentence to Condition 68(e)(iii) as follows: "This will be done by modeling the sound pressure level at the worst-case location within any property, as determined using the Certificate Holder's sound contour figure, or as updated with the final turbine layout."

3. There is no basis in the Record to apply separate ANSI standards during post construction monitoring

At the hearings, one of the significant disagreements between the Applicant and DPS Staff was the use of ANSI S12.9 Part 3 Clause 7.3 during the post construction monitoring of the Facility. ANSI S12.9 Part 3 Clause 7.3 contains two standards one for determining "compliance" and one for determining "violations". As explained at the hearings, (TIII P136-138) ANSI 12.9 Part 3 includes a provision that takes into account that background sound level measurements measured during project shutdowns include some uncertainty, since they are measured at a different time relative to the measurements that include both background sound and project sound. The standard specifies that if measurements are being used to assess compliance with a standard, this uncertainty should be debited against the Project. If the measurements are being used to show a violation, this uncertainty should be credited to the Project. This is done to acknowledge the seriousness of a violation with a sound level limit, requiring greater certainty in results for that determination to be made.

DPS Staff's protocol recommended the ANSI compliance standard instead of the violation standard in order to determine if the sound limits are over the regulatory limit (TII P64 L12-19). While, the Applicant's protocol recommended the use of the ANSI violation standard.

The Recommended Decision recommends the use of both standards and states "During the Applicant's post-construction compliance monitoring regime, the uncertainty should be applied against the Facility in order to ensure an appropriate level of certainty that the regulatory limits are being met. If the results indicate the Facility is not in compliance, operational adjustments will be

required until compliance can be demonstrated. Once compliance monitoring is complete, if additional monitoring is performed in response to a complaint, the uncertainty should be applied in favor of the Facility. This approach recognizes the importance of full compliance as demonstrated through post-construction monitoring but will appropriately assign the uncertainty such that the Facility is not subject to undue risk of the consequences of violation.”

The recommended Certificate Conditions provide further explanation. Recommended Condition 69 states: “During the Sound Compliance Tests described in Certificate Condition 70, the uncertainty factor in ANSI S12.9 Part 3 Clause 7.3 should be applied against the Facility. During Violation Tests performed by DPS, or any test performed in response to complaints, as described in Certificate Condition 71, the uncertainty factor in ANSI S12.9 Part 3 Clause 7.3 should be applied in favor of the Facility.”

While the Applicant appreciates the distinction the Recommended Decision attempts to make, the application of two different standards has the potential to lead to confusion and litigation on this issue. For example, it is possible under the proposed language that a facility may not be able to show compliance, but also does not violate the sound standard. In this case, the Board would require mitigation without demonstrating a violation of the sound standard. The most straightforward method to remediate this issue is to acknowledge that the “compliance” test conducted by the Applicant’s consultant is really a “violation” test, in that the results are used by the Board to determine whether the Project violates its noise conditions. Alternatively, the initial compliance test can report the results using both methods, and have mitigation conducted only if the Project “violates” the noise limit.

Furthermore, the Recommended Decision and Certificate Conditions indicate that DPS Staff may perform their own sound monitoring at the Facility, but the Recommended Decision and the recommended Certificate Conditions do not provide guidance as to how DPS will perform their

sound monitoring. If DPS Staff uses a different method than the Applicant's Protocol this could lead to confusion and protracted post construction litigation on alleged sound impacts. What if the Applicant's monitoring and DPS's monitoring come to two different conclusions? Is DPS Staff going to follow their recommended protocol when performing post construction monitoring, or is DPS Staff required to follow the Applicant's protocol to ensure conformity with results?

The Applicant recommends the Siting Board clarify that DPS Staff must follow the same post construction monitoring protocols as the Applicant when performing any testing or monitoring at the Facility to reduce the likelihood of discrepancies in monitoring results, and that if the Applicant and DPS Staff disagree with the final results of the monitoring that the Applicant and DPS Staff will engage in the non-binding mediation services of the Commission to aid resolution of any disagreement and that if such disagreement cannot be resolved by non-binding mediation that the Applicant may petition the Siting Board or Commission, as the case may be, upon reasonable notice to DPS Staff, to seek a determination regarding the results of any monitoring and whether mitigation is required. Additionally, the Siting Board should ensure that those conducting or supervising any monitoring of the Facility have the required expertise and certifications to perform such testing. The Applicant's sound monitors and DPS Staff monitors should be members of relevant acoustical societies such as the Acoustical Society of America (ASA) or the Institute of Noise Control Engineering (INCE-USA). The monitoring should be conducted by or under the supervision of an individual Board Certified through INCE.

The above process is necessary to ensure a fair and orderly process for post construction monitoring. If DPS Staff is permitted to follow their own post construction monitoring protocol and force the Applicant to implement minimization based upon DPS Staff's calculations this would effectively nullify the Hearing Examiner's determinations. If unqualified monitors are used it can also lead to inconsistent and inaccurate results.

F. Cultural, Historic and Visual Impacts

1. Visual Impacts

The Recommended Decision reflects a disagreement between the Applicant and DPS Staff concerning the appropriate mechanism for implementing landscaping improvements for screening purposes. The Applicant has agreed to submit a landscaping plan for the operation and maintenance (O&M) building and the Recommended Decision agrees with the Applicant that “the landscaping requirements are unnecessary with respect to the point of interconnection substation” (RD 141). However, DPS staff expressed concern that Baron’s proposed language would eliminate other vegetation planting for shadow flicker and historic resource mitigation. In light of this concern, the Examiners “agree[d] with DPS Staff that Baron also should be required to assess the need for landscape improvements to address shadow flicker and visual impacts on historic properties” and recommended that the Siting Board adopt proposed Certificate Condition 58 as set forth in Appendix A to the Recommended Decision (RD 142).

As a preliminary matter, the proposed language in Certificate Condition 58 requires assessment of the need for landscape improvements for “the Project.” Since the “Project” includes the POI substation, this provision does not reflect the Recommended Decision, which specifically excluded the substation from landscaping requirements.

More generally, the Recommended Decision and Certificate Condition reflect a fundamental disconnect between the Applicant and DPS concerning how landscaping concerns will be addressed. In the Applicant’s view, the landscaping plan addressed in Certificate Condition 58 is intended to address conventional landscaping concerns (the screening of comparatively low level structures from view at ground level) and not broader visual impacts. The planting of vegetation for shadow flicker screening, to the extent necessary, will be addressed in the Shadow Flicker Impacts Analysis, Control, Minimization, and Mitigation Plan (Certificate Condition 57).

The Cultural Resources Mitigation and Offset Plan (Certificate Condition 59), as implemented by the New York State Office of Parks, Recreation and Historic Preservation, is intended to provide mitigation and offsets for any visual impacts that may occur to historic properties. This mitigation is based on a per MW value and, generally, does not account for the significance, or lack thereof, of any potential impacts that may result from the addition of turbines to the viewshed. Consistent with that arrangement, the Applicant has proposed to revise the Examiners' Certificate Condition 58 to cover only landscaping for the O&M building. (See Appendix A, Certificate Condition 58.) Other screening-related concerns identified by DPS and referenced in the Recommended Decision will be addressed, to the extent necessary, in the appropriate plan (See Appendix A, Certificate Conditions 57 and 59).

J. Decommissioning and Restoration – 16 NYCRR §1001.29

As part of its February 2019 Application Update, the Applicant submitted a detailed decommissioning plan that outlined the specific steps for decommissioning the Facility and included a cost estimate for decommissioning and restoration work. In testimony, DPS Staff stated that Baron's total estimate of \$9,763,500 was reasonable and recommended that it be considered as the total decommissioning and site restoration cost for the Project, assuming there were no material changes that would affect the estimate. The Applicant also agreed to file an updated estimate prior to construction, one year after Facility operation and every five years thereafter. The Examiners recommended—and the Applicant agrees—that it should be required to file updated decommissioning and restoration costs rather than establishing a specific decommissioning figure now as part of the Certificate (RD 168).

The primary area of disagreement regarding decommissioning is whether the Applicant should be allowed to offset the decommissioning cost based on the salvage value of the steel, copper and other valuable metals contained in the turbines and certain other Project components.

DPS argued (and the Examiners agreed) that requiring the Applicant to obtain financial security for the full cost of decommissioning and site restoration without offsets for scrap value is the only means of ensuring that the Towns will not be required to assume all or part of the costs of decommissioning. The Applicant takes exception to this finding.

As a preliminary matter, the Applicant noted in its Brief that the Article 10 regulations at 16 NYCRR §1001.29(a)(4) specifically require the Applicant to provide information about “salvage and recycling.” According to the Examiners, this provision simply means that salvage value “ha[s] to be addressed in an Article 10 application” but is “not required to be adopted by the Siting Board in approving a decommissioning and site restoration plan” (RD 171). However, the Examiners fail to explain why the regulations would request information about “salvage and recycling” if that information is utterly irrelevant to the final determinations required to be made by the Siting Board. The primary purpose of Exhibit 29 as set forth in the Article 10 regulations is to assemble the information needed to address decommissioning and site restoration concerns, including data about salvage and recycling. The only logical reason to ask for information about salvage and recycling is to evaluate whether the decommissioned facility has value that should be considered in determining how much financial assurance is required. By refusing to allow an offset for salvage value, the Examiners have effectively rendered 16 NYCRR § 1001.29(a)(4) a nullity.

In declining to allow an offset for salvage value, the Examiners are driven by concerns that sufficient funds will not be available for decommissioning if the Facility is abandoned. As set forth in its testimony, however, the Applicant has adopted an extremely conservative approach to calculating the value of scrap metal offsets: (1) the Applicant considered only the scrap metal value of those components/metals with obvious value (most notably the turbines); (2) in establishing the value of the scrap metal for purposes of calculating decommissioning costs for financial assurance purposes, the Applicant proposes to use the lowest scrap metal value for steel recorded in the five

years preceding preparation of the estimate; (3) the Applicant added a contingency of 10% of the total estimated project decommissioning/restoration cost to further ensure that sufficient funds are available. (Hearing Exhibit 9, Appendix RRR-Update P11) These measures together will ensure that the financial assurance provide for the Project will provide sufficient funds to cover the costs of decommissioning and site restoration.

Also, other states and a federal agency allow scrap value to offset decommissioning and site restoration costs (TN P72), a fact dismissed by the Examiners without explanation. These governments are confronted with the same issue facing DPS—how to ensure that municipalities with wind farms have the funds necessary to decommission them if the owner abandons the project or goes bankrupt. They analyzed the issue and concluded that scrap metal value could be considered in establishing financial assurance amounts for wind projects. The Examiners have not explained why New York should treat salvage differently than other states.

Finally, in deciding not to allow offsets for salvage value, Examiners declare that the risks of ensuring sufficient decommissioning funds should not be borne by the Towns and that “the host towns should not be required to obtain salvage value for decommissioning if Baron were to abandon the Project,” citing in a footnote a statement by the Town of Fremont that it is not in the business of decommissioning or salvaging wind energy facilities (RD 171). However, in the very unlikely event that the Project is abandoned, the Town would like retain a third party to manage the decommissioning so considering the salvage of the equipment will not increase the burden on the Town. Moreover, given the millions of dollars of steel and copper in the parts, salvage is an inevitable part of any facility decommissioning. Thus, the Town—through the third party retained to manage the decommissioning—will “be in the businesses of decommissioning and salvage” should decommissioning be required.

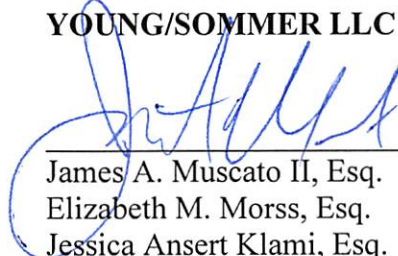
For the foregoing reasons, the Applicant believes that the Recommended Decision incorrectly determined that the salvage value cannot be used to offset decommissioning costs. Consistent with that conclusion, the Applicant has proposed to revise Certificate Condition 44 to allow such an offset.

L. Miscellaneous

3. Additional Certificate Conditions

Exceptions to Certificate Conditions associated with topics covered above are addressed in the appropriate section. A chart summarizing proposed changes to other, miscellaneous Certificate Conditions is attached as **Appendix C**.

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