STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING

ORES DMM Matter Number 21-02553 – Application of HECATE ENERGY COLUMBIA COUNTY 1 LLC for a Major Renewable Energy Facility Siting Permit Pursuant to Section 94-c of the New York State Executive Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 60 Megawatt (MW) Solar Energy Facility Known As the Shepherd's Run Solar Farm Located in the Town of Copake, Columbia County.

DECISION OF THE EXECUTIVE DIRECTOR

(Issued February 6, 2024)

HOUTAN MOAVENI, Executive Director:

The Town of Copake appeals from a ruling of the assigned Administrative Law Judge (ALJ) Maureen F. Leary denying its motion to dismiss the siting permit application of Hecate Energy Columbia County 1 LLC (applicant or Hecate) for a major renewable energy facility siting permit pursuant to Executive Law § 94-c on the ground that applicant has lost property rights to a parcel of property on which facility components are proposed to be located, thereby necessitating an amendment of the application that is not allowed at this stage of the proceeding. For the reasons that follow, and based upon the record as supplemented on appeal, the ALJ's ruling is reversed, the Town's motion to dismiss is granted, and the application is denied without prejudice to applicant submitting a new application for a modified facility pursuant to Executive Law § 94-c and its implementing regulations.

Proceedings

Background

Hecate applied to the New York State Office of Renewable Energy Siting (Office or ORES) for a siting permit pursuant to Executive Law § 94-c and its implementing regulations (19 NYCRR part 900 [Part 900]) to develop, design, construct, operate, maintain, and decommission a solar energy facility (facility or project) with a nameplate generating capacity of up to 60-megawatts (MW) known as the Shepherd's Run Solar Farm located in the Town of Copake, Columbia County. The facility would include, among other components, solar photovoltaic (PV) modules and their racking systems; direct current (DC) collection lines and communications cables; the inverters with their support platforms, control electronics, and step-up transformers; buried alternating current (AC) medium voltage collection lines; security fencing and gates around each array of PV modules; landscape plantings; gravel access roads; temporary laydown areas; a new collection substation; and interconnection into the existing 115 kilovolt (kV) Craryville Substation designated point of interconnect (POI), which is owned and operated by New York State Electric and Gas (NYSEG).

On January 31, 2020, applicant commenced proceedings for the Shepherd's Run Solar Farm pursuant to Public Service Law (PSL) article 10 by filing a public involvement program plan with the New York State Board on Electric Generation Siting and the Environment (NYS Siting Board) (DPS Case 20-F-0048). On May 4, 2021, applicant filed with the NYS Siting Board a notice of

election and transfer of the proposed project to ORES for review pursuant to Executive Law § 94-c.[1]

Applicant thereafter filed its Executive Law § 94-c application with the Office on March 8, 2022. ORES staff issued notices of incomplete application on May 9, 2022, September 27, 2022, and March 28, 2023, respectively,[2] in response to which applicant filed application supplements. ORES staff subsequently issued a notice of complete application (NOCA) on August 25, 2023.[3] Thereafter, ORES staff issued draft siting permit conditions on October 24, 2023.[4]

Also on October 24, 2023, the ORES Office of Hearings issued (1) a combined notice of availability of draft permit conditions, public comment period and in-person public comment hearings, and commencement of issues determination procedure, and (2) a notice of virtual public comment hearings.[5] The notices

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[1] See DPS Case 20-F-0048, Matter of Hecate Energy Columbia County 1 LLC, DMM Item No. 67, notice of election and transfer for the Shepherd's Run Solar Farm proposed by Hecate Energy Columbia County 1, LLC, May 4, 2021.

[2] See ORES DMM Matter No. 21-02553, DMM Item No. 42, notice of incomplete application, May 9, 2022; DMM Item No. 55, notice of incomplete application, Sept. 27, 2022; DMM Item No. 83, notice of incomplete application, March 28, 2023.

[3] See DMM Item No. 115, notice of complete application, Aug. 25, 2023.

[4] See DMM Item No. 119, draft siting permit.

[5] See DMM Item No. 120, combined notice of availability of draft permit conditions, public comment period and in-person public comment hearings, and commencement of issues determination

scheduled in-person public comment hearings for January 9 and 10, 2024, and virtual public comment hearings for January 11, 2024. The notices also established January 12, 2024, as the deadline for filing written public comments; January 16, 2024, as the deadline for filing petitions for party status, municipal statements of local law compliance, and applicant's statement of issues; and February 15, 2024, as the deadline for filing ORES staff's and applicant's responses to any petitions for party status and municipal statement of compliance with local laws and regulations, ORES staff's response to any statement of issues by applicant, and applicant's response to public comments received during the public comment period.

Town of Copake Motion to Dismiss

On January 2, 2024, the Town of Copake filed a motion to dismiss the application.[6] The Town's motion included documents indicating that as of November 7, 2023, an almost 60-acre parcel of property previously owned by Main Farm LLC (Main parcel), which comprised about 20 percent of the facility's footprint,[7] was under

procedure, and notice of virtual public comment hearings, as corrected DMM Item No. 122 (hearing notices).

[6] See DMM Item No. 127, Town of Copake motion to dismiss application or adjourn public comment hearing and issues procedure pending major revision to application (Town motion to dismiss).

[7] The Town asserted that in the application, applicant identified 59.73 acres of vacant land with tax parcel identification number 155.-1-56.120 previously owned by Main Farm LLC (the Main parcel) as participating in the Shepherd's Run Solar project. Town motion to dismiss at 2. See also DMM Item No.

contract to be sold to Craryville Farms LLC, with a closing scheduled for January 2, 2024; that Main Farm's prior contract and option agreement with Hecate had expired on September 17, 2023, and that Hecate no longer had a binding contract or option to obtain title to or a leasehold interest in the property; that the property purchaser, Craryville Farms, "will not be entering into any Property Interest Agreement with Hecate, or any of its parents, subsidiaries, or affiliates after the Closing" and would use the property for purposes other than hosting a solar energy facility; and that the property should "not be considered as a potential site for any aspect of Hecate's proposed Shepherd's Run Solar Facility."[8] The Town's motion demonstrated that part of the project area was no longer under applicant's control and was not available for inclusion in the project. The Town noted that the Main parcel was proposed to host about 20% of the entire facility's components, including solar panels, a laydown area, ingress and egress access to public roads, and the sole access road for adjacent facility parcels.[9]

In support of its motion, the Town alleged that applicant's own assertions in the application demonstrate that the current layout of the facility without the Main parcel is not viable. The Town further alleged that the loss of the property

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96, application exhibit 24 revised June 2023, table 24-3, at 114.

[8] Town motion to dismiss, Exhibit 2, letter from Craryville Farms LLC attorneys, Guterman, Shallo & Alford, PLLC, to Copake attorney, Benjamin E. Wisniewski, Dec. 19, 2023; id., Exhibit 3, executed deed of sale by Main Farm LLC, Jan. 2, 2024.

[9] See id., Exhibit 1.

requires Hecate to redesign the project in a manner that uses new, previously unidentified parcels, or redistributes project components across parcels that have already been optimized for reducing impacts. The Town argued that because Part 900 prohibits application amendments after the issuance of the NOCA, dismissal of the application is required. The Town further argued that applicant's failure to disclose the expiration of the lease option, if intentional, justifies dismissal of the application based on applicant's corporate character alone. In any event, the Town asserted that, because applicant cannot obtain the property rights necessary for the currently proposed facility, the application should be dismissed with prejudice. In the alternative, the Town argued that because a major redesign of the project is now required, the public comment hearings scheduled for this proceeding should be canceled, the issues identification process should be adjourned, the August 25, 2023, NOCA should be withdrawn, and a notice of incomplete application should be issued requiring applicant to submit the required major revisions to its application.[10]

On January 4, 2024, during a pre-public comment hearing procedural conference with the parties, the assigned ALJ orally denied the Town's motion and indicated that the issues raised in the Town's motion would be considered as part of the Town's issues statement subject to the established procedural schedule. The ALJ also denied the Town's request to adjourn the public comment hearings scheduled for January 9 through January 11, 2024. The ALJ strongly suggested that Hecate inform ORES staff "sooner than

[10] See Town motion to dismiss at 18.

later" about how it intended to proceed on the application in light of the circumstances described in the Town's motion. The ALJ maintained the procedural schedule established in the public notice that required Hecate's response to the issues raised in the Town's motion by February 15, 2024.

Town of Copake Appeal

Later on January 4, 2024, the Town served and filed a motion pursuant to 19 NYCRR 900-8.7(d)(2)(ii) seeking permission to file an expedited appeal from the ALJ's January 4, 2024, oral ruling issued during the procedural conference that morning. Pursuant to 19 NYCRR 900-8.7(d)(7), the Town also requested adjournment of this proceeding, including cancelation or postponement of the public hearings and issues filing deadlines, pending review of its request for permission to file an expedited appeal.[11]

After the filing of responses by applicant, ORES staff, Sensible Solar for Rural New York, and Birch Hill Road Neighbors Association, Inc., the Town's motion for permission to appeal on an expedited basis was granted in a January 9, 2024, ruling of the Executive Director.[12] In the ruling, the Executive Director also established a briefing schedule, adjourned the public comment hearings and procedural schedule pending decision on the appeal, and extended without date the deadline for filing written public

[11] See DMM Item No. 130, Town request for expedited appeal to Executive Director and appeal.

[12] See DMM Item No. 138, Ruling of the Executive Director on Motion for Permission to File an Expedited Appeal.

comments. The Executive Director also authorized both the Town and applicant to supplement the record with any additional factual showings they deemed appropriate in support of or opposition to the Town's motion to dismiss.

The Town served and filed its appeal brief and supporting affidavits and exhibits on January 16, 2024.[13] In its appeal, the Town reiterates its request that the application be dismissed with prejudice because applicant is not able to obtain property rights necessary for the project, because the current design is no longer feasible, and because a major amendment to the application is now required but cannot be entertained due to the issuance of the August 25, 2023, NOCA. In the alternative, given that a major redesign of the project is now required, the Town requests that the public comment hearings scheduled for this proceeding be permanently canceled, the issues identification process adjourned, the NOCA reversed and withdrawn, and a notice of incomplete application issued requiring applicant to submit the required major revisions to its application.[14]

In support of its motion to dismiss, the Town supplemented the record with a technical review memorandum and sworn affidavits of the environmental engineering firm of Barton and Loguidice, D.P.C., detailing the project modifications

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[13] See DMM Item No. 140, Town brief in support of appeal and motion to dismiss application or adjourn public comment hearing and issues procedure pending major revision to application (Town appeal).

[14] See id. at 3-4, 25.

necessitated by the loss of control of the Main parcel.[15] The Town also filed affidavits and an offer of proof of Wendel – WD Architecture, Engineering, Surveying & Landscape Architecture, P.C., opining that the necessary modifications to the project require major amendments to the application and, therefore, would constitute a major modification to the project under Executive Law § 94-c.[16]

Timely responses to the Town's appeal were filed by ORES staff and applicant. In its response, ORES staff argues that it may be appropriate to grant the Town's motion to dismiss, at least in part. However, whether such a course is warranted depends on further information from applicant regarding "whether and how it can provide sufficient evidence of site control over the Facility site as necessary to obtain a final siting permit."[17] ORES staff notes that without the applicant providing additional information to address the substantive issues presented by its loss of site control of the Main parcel, "it may be appropriate to grant the Town's motion in part."[18] Accordingly, ORES staff requests further opportunity to respond to the Town's appeal based on any

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[15] See id., Exhibit 4.

[16] See id., Exhibit 5.

[17] See DMM Item No. 144, ORES staff response to Town of Copake appeal of ruling denying its motion to dismiss the application at 3-4 (ORES staff response).

[18] Id.

substantive information that may be provided by applicant in its response to the appeal.[19]

ORES staff further argues that the ALJ properly determined that the issues determination procedure is the appropriate venue to resolve the issues the Town raises. ORES staff notes that one of the purposes of the issues determination procedure is to decide whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute, and to receive argument on the merits of those issues. ORES staff contends that the Town has raised serious concerns about the ability of applicant to meet the statutory and regulatory requirements to receive a final siting permit and to proceed with the proposed project without changes to the facility's design. In particular, ORES staff notes that the Town has offered proof that applicant lacks property site control of the entire facility site as required by 19 NYCRR 900-2.5(c) and 900-10.2(h), and that such deficiency, if not meaningfully rebutted by applicant, may require denial of the application without prejudice to the submission of a new modified project application. However, ORES staff argues that absent further information from applicant as to how it intends to address the purported site control issues, the record lacks sufficient information to determine the ultimate merits of the application at this stage, and that the appropriate venue for developing the record is through the issues determination process.[20]

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[19] See id.

[20] See id. at 4-6, 8.

With respect to the alternative relief requested by the Town – namely, the vacatur of the August 23, 2023, NOCA and the issuance of a notice of incomplete application requiring applicant to revise its application – ORES staff argues such relief is not authorized by the applicable regulations.[21] ORES staff notes that pursuant to 19 NYCRR 900-7.1(a), "[p]ending applications may only be amended prior to issuance of a notice of complete application." ORES staff further notes that in response to comments on the Part 900 rulemaking that advocated for a more permissive post-NOCA procedure, ORES had explained that the limitation to amending a pending application after the NOCA is issued is intentionally firm and that if changes are required to an application after a NOCA is issued, two distinct options are available. First, "[i]f the applicant decides that it must make changes to the proposed facility after [issuance of a complete application], it may withdraw its application and resubmit."[22] Second, ORES staff explains that, through the subpart 900-8 hearing process, the Office could respond to issues raised in public comments or by the parties to the proceeding and the ALJ by modifying the draft siting permit. ORES staff further explained that it also may consider whether significant design changes to the proposed facility would

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[21] See id. at 7-8.

[22] See id., quoting Office of Renewable Energy Siting, Chapter XVIII, Title 19 of NYCRR Part 900, Assessment of Public Comments at 146, available at https://ores.ny.gov/system/files/documents/2021/03/assessment-of-public-comments_chapter-xviii-title-19-of-nycrr-part-900-subparts-900-1-through-900-15.pdf.

be required in order to issue a final permit and, if so, ORES may deny the permit.[23]

ORES staff concludes that because the NOCA was issued on August 25, 2023, applicant's amendment of the application after that date is expressly prohibited by19 NYCRR 900-7.1(a). Instead, in accordance with the regulations and applicable agency guidance, ORES staff contends that applicant may withdraw its application and resubmit, or ORES may consider the scope of the proposed changes and either incorporate any required changes in the final siting permit or deny the permit.

In its response to the Town's appeal, applicant requests that the Executive Director uphold the ALJ's denial of the Town's motion to dismiss.[24] Applicant argues that the ALJ's denial of the Town's motion should be upheld because such a motion is not provided for in the ORES regulations and is inconsistent with the efficient administration of the proceeding. In addition, applicant argues the Town's motion is now moot, because it assents to the Town's appeal and motion to the extent that the Town requests, in the alternative to application dismissal, that the Office issue a new notice of incomplete application and that the applicant be allowed, pursuant to 19 NYCRR 900-4.1(f)(1), to supplement its application to reflect a revised project proposal addressing the loss of property making up part of the project area. Applicant contends that after the Office considers the

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[23] See id.

[24] See DMM Item No. 142, Hecate partial opposition to the Town of Copake's appeal and motion to dismiss application or adjourn public comment hearings and issues procedure pending major revision to application (Hecate response).

supplemented application and issues a new notice of complete application, the Office would issue a new draft permit, whereupon public hearings and an issues determination phase would follow pursuant to the procedures and timeframes dictated by Part 900. Applicant asserts that the remainder of the Town's alternative relief request should be denied as unnecessary and rendered moot by the Executive Director's ruling granting the Town's request for leave to file an expedited appeal.[25]

In support of its argument that the denial of the Town's motion to dismiss with prejudice should be affirmed, applicant argues that the motion is procedurally flawed because it inappropriately seeks a decision from the ALJ, and now the Executive Director, whether a major amendment or modification to the application is required before applicant has proposed any changes to the project. Applicant also calls speculative the Town's assertions that the loss of the Main parcel constitutes a major modification to the project and that a major application amendment is now necessary and claims the Town's assertions lack any technical bases or calculations. To the contrary, applicant asserts that it has been analyzing the impact of the loss of the subject parcel to the project, and is developing an updated layout and plan for construction reflecting a reduced project footprint with decreased identified adverse environmental impacts.

In support of these assertions, applicant offers an affidavit from Diane Sullivan, Senior Vice President of

[25] See id. at 2-3.

Environmental & Permitting at Hecate Energy, applicant's affiliate.[26] Notably, the Sullivan affidavit states:

> "[u]ntil January 2, 2024, Hecate had understood that it had been engaging in good faith negotiations with the landowner of the Main Parcel regarding the lease option on the parcel before and since the expiration of the option in September 2023. . . . Hecate was unaware that the Main Parcel was under contract to be sold to another party, or that a sale of the Main Parcel had occurred, until it received the Town of Copake's Motion on January 2, 2024.[27]

Finally, applicant takes issue with the Town's assertion that its failure to disclose the expiration of the lease option may have been intentional, warranting dismissal of the application on the basis of applicant's corporate character.

With respect to the Town's alternative request for relief, applicant agrees that the Office should be directed to issue a notice of incomplete application so that it may supplement the application "to reflect a revised project proposal" followed by a NOCA and new draft permit.[28] Applicant confirms that it intends to supplement the application, and that the Office has the authority to issue new notices of incomplete application, even at this stage of the proceeding. Applicant argues that this would allow "an otherwise complete Project important to the State's renewable energy and climate objectives to proceed with necessary supplements – such supplements to reflect fewer adverse environmental impacts than originally proposed. This is

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[26] See id., Exhibit 1.

[27] Id. at 2.

[28] Hecate response at 2.

consistent with the definition of a 'complete application or completeness of an application.'"[29] Applicant also asserts that this approach is consistent with precedent from the NYS Siting Board under PSL article 10.[30]

In the alternative, applicant argues that should the Executive Director determine that the Office may not issue a new notice of incomplete application at this time, applicant requests abeyance of the proceeding pending preparation of the necessary "updates" to the application. Applicant further submits that in such case, it would agree to an extension of the one-year statutory deadline for a final permit decision, pursuant to 19 NYCRR 900-9.1(b), to the extent necessary and appropriate for the Office to consider the updated application and complete the otherwise applicable procedural requirements of Part 900.[31]

On January 25, 2024, applicant requested leave to file a reply to ORES staff's appeal response, attaching its proposed reply. In its reply, applicant responds to ORES staff's legal argument regarding the Executive Director's discretion to withdraw the NOCA, issue a new notice of incomplete application, and allow Hecate to submit further application supplements. Hecate also challenges the dismissal of the application requested by the parties.[32] Hecate submits a second affidavit of Diane Sullivan

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[29] See id. at 13-14, quoting 19 NYCRR 900-1.2(l).

[30] See id. at 14, citing DPS Case 16-F-0328, Matter of Number Three Wind LLC, Recommended Decision, Aug. 22, 2019 (NYS Siting Board).

[31] See id. at 14-15.

[32] See DMM Item No. 145, Hecate reply to ORES staff's response to the Town of Copake's appeal and motion to dismiss application

indicating that within the next 60 days it anticipates submitting a supplement to its application to remove the Main parcel "from the Project footprint, and make associated and necessary adjustments to the Project proposal, maps, figures, impacts and benefits."[33] Hecate indicates that its supplement will include a new project layout that does not "relocate the panels or other Project components that have been proposed on the Main Parcel, or otherwise change the layout on existing Project parcels, except for the use of an existing farm drive and security fence on the parcel adjacent to the Main parcel as necessary to exclude the former Main Parcel from the Project."[34] The second Sullivan affidavit states that as a result of these "minor changes," the facility's generating capacity would be reduced from 60 MW to approximately 42 MW, the project footprint would be reduced from 267 acres to approximately 215 acres, new access roads would be reduced from 2.5 to approximately 2 miles, and project impacts to forest and agricultural lands, and visual impact are anticipated to decrease. Instead of two new access roads, one existing farm drive of approximately 0.16 miles would be used to access the southern portion of the project. The second Sullivan affidavit notes that while the existing farm drive is located within approximately 6,758 square feet of the 100-foot buffer of a State regulated wetland, no new or additional impacts are anticipated to delineated wetlands or streams. Finally, the second Sullivan

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or adjourn public comment hearing and issues procedure pending major revision to application (Hecate reply).

[33] Id., Exhibit 1, second Sullivan affidavit at 1.

[34] Id. at 1.

affidavit states that no portion of the revised project is proposed to be located outside of the original project study area that was analyzed for the proposed 60 MW facility.[35]

With respect to ORES staff's arguments regarding the Executive Director's discretion at this post-NOCA stage of the proceeding, Hecate argues that the Executive Director has greater discretion beyond the options offered by ORES staff. Citing various provisions of subpart 900-8, applicant reasserts that the Executive Director can order issuance of a new notice of incomplete application. In the alternative, applicant reasserts that the Executive Director has the authority to direct that the proceedings be held in abeyance until applicant can submit its supplement to the application. Applicant concludes that:

> "[a]t bottom, a direction that the Applicant must withdraw its current application and resubmit a new, full application, is unnecessary and inappropriate. Hecate has not had the opportunity to complete the work needed to provide its supplementary Project plans to the Office for consideration, which may enable the process to continue unabated. Indeed, such a decision at this stage of the proceeding would be wholly inconsistent with both the efficient administration of this proceeding and the spirit of both Executive Law § 94-c and the ORES regulations, i.e., to appropriately facilitate renewable energy projects' contribution to the State's important climate and energy mandates."[36]

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[35] See second Sullivan affidavit at 1-3; Hecate reply at 8-10.

[36] Hecate reply at 2-3.

The Executive Director granted applicant's request to file a reply and accepted the proposed reply as filed.[37] The Executive Director also authorized the other parties to file sur-replies to applicant's reply. Timely sur-replies were filed by ORES staff, the Town, and Sensible Solar on January 30, 2024.

In its sur-reply, ORES staff takes issue with applicant's assertions regarding Executive Law § 94-c's statutory and regulatory authority governing post-NOCA application amendments. ORES staff reasserts that the Executive Law § 94-c application amendment procedures are intentionally strict, reflecting an important legislative and regulatory policy choice that favors stringent and expedited regulatory timelines over a more permissive amendment procedure, as reflected in other statutory and regulatory schemes such as the PSL article 10 siting process. ORES staff also takes issue with applicant's assertion that the relief available under Executive Law § 94-c and Part 900 improperly deprives applicant of an opportunity to make necessary changes to its application and is otherwise unduly prejudicial. ORES staff contends that by withdrawing its current application and resubmitting a modified project application, applicant could make the exact changes to its application materials it contemplates.

In the alternative, ORES staff argues that applicant could proceed with the issues determination process, as the ALJ had directed, to adjudicate whether the proposed changes to the facility could be effectuated in the final siting permit or are so

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[37] See DMM Item No. 147, memorandum to parties regarding Hecate's request for leave to file reply, Jan. 26, 2024.

significant as to require permit denial. Instead, ORES staff notes, applicant seeks to proceed in ways that are not authorized by Executive Law § 94-c or Part 900. Finally, ORES staff argues applicant is not prejudiced by application withdrawal and resubmittal, stating "it is not clear why the Applicant cannot obtain the exact 60-day delay that it seeks by withdrawing its application and simultaneously filing a new 60-day notice of intent to file a new application."[38]

In its sur-reply, the Town contends that applicant misrepresents its position regarding the possible issuance of a notice of incomplete application in this matter. The Town clarifies that it does not support the issuance of a notice of incomplete application to applicant, and agrees with ORES staff that such alternative relief is not authorized by the applicable regulations. The Town reasserts its argument that the application must be dismissed because applicant proposes to amend its application contrary to 19 NYCRR 900-7.1(a) without having to withdraw and resubmit it. The Town argues that Hecate essentially is asking ORES (1) to enact a new rule allowing for issuance of a notice of incomplete application, and (2) to violate Executive Law § 94-c(5)(f) by holding in "abeyance" the one-year timeframe for a permit decision, thereby allowing Hecate to violate 19 NYCRR 900-7.1(a), which prohibits application amendments after ORES issues a NOCA.

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[38] DMM Item No. 150, ORES staff sur-reply to Town of Copake's expedited appeal and motion to dismiss application at unnumbered sixth page.

The Town also takes issue with ORES staff's suggestion that applicant's request for amendment of the application could be treated as a request to modify the draft permit and reviewed through the issues determination process because it would deprive the Town of the protections and procedures afforded by the pre-NOCA application amendment procedures at 19 NYCRR 7.1(b) and (c). The Town further argues that applicant's proposed alternative relief – extension of the one-year deadline for decision and submission of application amendments within the next 60 days – is not authorized by Executive Law § 94-c or Part 900. Finally, the Town reasserts that ORES should dismiss the application with prejudice because applicant has engaged in "a pattern of misconduct" demonstrating bad corporate character.[39] In support of this assertion, the Town raises claims of applicant's improper withholding of important application information and failure to disclose the loss of the Main parcel.

In its sur-reply, Sensible Solar objects to applicant's reply, arguing that because applicant does not like ORES staff's conclusions, it is asking the Executive Director "to override his own staff and ORES's own regulations, and essentially provide Hecate with a life raft out of the problem they find themselves in, one of their own doing."[40] In addition, Sensible Solar argues

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[39] DMM Item No. 149, Town sur-reply in support of appeal and motion to dismiss application or adjourn public comment hearing and issues procedure pending major revision to application at 11.

[40] DMM Item No. 151, Sensible Solar letter sur-reply in support of appeal and motion to dismiss application or adjourn public comment hearing and issues procedure pending major revision to application at first unnumbered page (emphasis in original).

that applicant's claim that a redesigned project will have decreased adverse impacts should not be trusted based on applicant's alleged failure to inform ORES staff or the parties about its loss of the Main parcel. Sensible Solar points to applicant's claims regarding the avoidance, minimization, and mitigation measures it made when it sought local law waivers for the project and asserts that the proposal to relocate the access road would violate the 100-foot State wetlands buffer.[41] Sensible Solar asks "[w]hy should the Executive Director reward this behavior by bending the 94-c rules for Hecate, in contravention of his own staff's clear recommendation to dismiss the Application?"[42]

Standard of Review

The Town's Motion to Dismiss; Applicant's Procedural Objections

As an initial procedural objection, applicant argues that the Executive Director should uphold the ALJ's denial of the Town's motion to dismiss because such a motion is not provided for in the Part 900 regulations, is unprecedented, and is inconsistent with the administration of the proceeding.[43] Applicant's argument is rejected. The subpart 900-8 hearing procedures' general rules of practice at 19 NYCRR 900-8.5(c) authorize motion practice. Those rules expressly provide that "[w]here a standard of review applicable to a motion or request is otherwise not provided for in

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[41] See id. at second unnumbered page.

[42] Id.

[43] See Hecate appeal response at 5.

[Part 900], other sources of standards, including statutory law such as [the State Administrative Procedure Act (SAPA)] and the [Civil Practice Law and Rules (CPLR)], case law, and administrative precedent, may be consulted."[44]

Here, citing precedent under both Executive Law § 94-c and PSL former article X, the Town's motion seeks relief in the nature of summary judgment because there is no issue of material fact that Hecate lost control of the Main parcel, which is a part of the project under both the application and the draft permit.[45] Because the relief sought in the motion would be available, if established, through application of the standards governing the issues determination procedures at 19 NYCRR 900-8.3(b), I agree with both ORES staff and the ALJ that the Town's motion should be addressed applying those standards. To issue a siting permit, the Office must make a finding that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary site- specific conditions, and applicable compliance filings:

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[44] 19 NYCRR 900-8.5(c)(5).

[45] See Town motion to dismiss at 7-9, citing ORES DMM Matter No. 21-02104, Matter of Bear Ridge Solar LLC, Decision of the Executive Director, July 31, 2023, at 9-10; DPS Case 01-F-0761, Matter of KeySpan Energy, Procedural Ruling, June 5, 2022, at 2-3 (NYS Siting Board) (the Siting Board's regulations at 16 NYCRR former 1000.13 [now 1000.14] provide that an application may be dismissed "upon the motion of any party" if "it shall appear in the absence of any genuine issue as to any material fact that the statutory requirements for a certificate cannot be met"); and DPS Case 99-F-1835, Matter of Glenville Energy Park, LLC, Ruling on Motion to Dismiss, Aug. 27, 2004, at 17 (NYS Siting Board); see also CPLR 3212.

1) complies with Executive Law § 94-c and applicable provisions of Part 900;

2) complies with substantive provisions of applicable State laws and regulations;

3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the facility;

4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and

5) achieves a net conservation benefit with respect to any impacted threatened or endangered species.

In making the required finding, the Office is directed to consider the CLCPA targets and environmental benefits of the proposed major renewable energy facility.[46]

An initial step in the 19 NYCRR subpart 900-8 hearing process on an application and draft siting permit is the issues determination procedure.[47] As provided at 19 NYCRR 900-8.3(b)(2), among the purposes of the issues determination procedure is to

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[46] See Bear Ridge Solar, Decision at 9-10; ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar Energy, LLC, Decision of the Executive Director, Dec. 9, 2022, at 8, citing ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 13, 2022, at 8-9, citing Executive Law § 94-c(3)(b)-(d), (5)(e); see also Climate Leadership and Community Protection Act (CLCPA), L 2019, ch 106, § 7.

[47] See Bear Ridge Solar, Decision at 10.

determine whether substantive and significant issues of fact related to the findings that the Office must make on an application require adjudication and, if not, to resolve legal issues related to those findings.

As has been previously held, the procedure under 19 NYCRR 900-8.3(b) is a form of summary judgment.[48] The initial inquiry is whether a party challenging an application or draft siting permit is seeking to raise a substantive and significant factual issue requiring adjudication. A party seeking to litigate a factual dispute must demonstrate the existence of a triable issue of fact through a sufficient offer of proof.[49] If the ALJ determines that a party has raised a triable issue of fact requiring adjudication, the ALJ will in a ruling define the issue as precisely as possible, set the matter down for an evidentiary hearing, and determine which parties are granted party status for the hearing.[50] If, on the other hand, the ALJ determines that no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are then resolved.[51]

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[48] See e.g. id., Decision at 11.

[49] See 19 NYCRR 900-8.4(c)(2)(ii); Bear Ridge Solar, Decision at 11; ORES DMM Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Decision of the Executive Director, July 25, 2022, at 8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 5.

[50] See 19 NYCRR 900-8.3(b)(5)(i), (ii).

[51] See 19 NYCRR 900-8.3(b)(5)(iii); Bear Ridge Solar, Decision at 12; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6 (citing Matter of

With respect to an issue sought to be raised by a potential party, the issue is adjudicable if it is both substantive and significant.[52] An issue is substantive if there is sufficient doubt about the applicant's ability to meet the statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.[53] An issue is significant if it has the potential to result in the denial of a siting permit, a major modification to the proposed project, or the imposition of significant siting permit conditions in addition to those proposed in the draft siting permit, including uniform standards and conditions.[54] In situations such as here, where ORES staff has reviewed an application and finds that the applicant's project, as proposed or as conditioned by the draft siting permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to the applicant or draft siting permit to demonstrate that it is both substantive and significant.[55]

Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979]).

[52] See 19 NYCRR 900-8.3(c)(1)(iv).

[53] See 19 NYCRR 900-8.3(c)(2).

[54] See 19 NYCRR 900-8.3(c)(3).

[55] See 19 NYCRR 900-8.3(c)(4); Bear Ridge Solar, Decision at 13; Horseshoe Solar, Decision at 11; Cider Solar, Decision at 27-28. A potential party's burden of persuasion at the issues determination stage of the proceeding is only temporary. If a potential party's issue is joined for adjudication, the burden of proof shifts back to the applicant, who bears the ultimate

In sum, because the summary relief the Town seeks in its motion to dismiss is similar to relief that would be afforded under the section 900-8.3(b) issues determination procedure, which had commenced with the issuance of the draft permit and combined notice in this case and was on-going at the time of the Town's motion, it is appropriate to apply the standards under 900-8.3(b) to resolve the Town's motion without the need to resort to standards outside Part 900. Thus, while the Town's motion may be unprecedented, use of the subpart 900-8 issues determination standards to resolve the Town's motion is not inconsistent with Part 900 or the efficient administration of this proceeding.

Standard on Administrative Appeal

On administrative appeal from an ALJ's ruling, the Executive Director reviews the ruling for any errors of law or fact, or abuses of the ALJ's discretion.[56]

Discussion

A. Town's Burden of Raising a Substantive and Significant Issue

Based on my review of the record as supplemented on appeal, I conclude that the Town has carried its burden of persuasion by raising substantive and significant factual issues that are unrebutted and intertwined with related legal issues, requiring denial of the application. The Town has made a prima

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burden of persuasion at the hearing. See 19 NYCRR 900-8.8(b)(1).

[56] See e.g. Bear Ridge Solar, Decision at 16.

facie showing that applicant has irrevocably lost control of the Main parcel, which comprised approximately 20 percent of the project footprint and on which many facility components were proposed to be located. Those facility components include solar panels, a laydown area, and the sole access road for not only the Main parcel, but also for two adjacent facility parcels on which solar panels are proposed to be located. Moreover, the Town has made a prima facie showing that the loss of the Main parcel necessitates amendments to the application that are not authorized at this point in the proceeding, after issuance of the NOCA.[57]

To issue an Executive Law § 94-c final siting permit, the Office must conclude, among other findings, that the application would meet all statutory and regulatory requirements, including that applicant has obtained, or is under a binding contract to obtain, title to or a leasehold interest in all properties comprising the facility site, including those providing ingress and egress access to a public street.[58] Here, as a result of the Town's prima facie showing that applicant cannot obtain the necessary property rights for the Main parcel, the Town has established that applicant cannot satisfy these regulatory requirements for issuance of a final siting permit. Accordingly, applicant's inability to obtain the necessary property rights for the Main parcel warrants denial of the application.[59]

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[57] See 19 NYCRR 900-7.1(a).

[58] See 19 NYCRR 900-2.5(c); 900-10.2(h)(1).

[59] See DPS Case 01-F-1276, Matter of TransGas Energy Systems LLC, Opinion and Order Dismissing and Denying Application, March 21, 2008, at 23 (NYS Siting Board) ("[w]hereas [applicant] has not demonstrated any possibility that it can obtain the

In addition, 19 NYCRR 900-7.1(a) provides that pending applications may only be amended prior to the issuance of a NOCA. Here, the Town has provided evidence that the project cannot proceed without amendments to the pending application to address the loss of the Main parcel. Because the NOCA in this proceeding was issued on August 25, 2023, any amendments applicant proposes at this time are barred and may not be entertained.[60] Notably, Hecate was on notice that its option for the Main parcel was to expire on September 17, 2023, well before ORES staff issued the October 28, 2023, draft permit. Hecate did not communicate the option's expiration to ORES or the parties. It also did not seek to pause the procedural schedule for a project that had changed. Accordingly, the Town has identified substantive and significant factual and legal issues that require denial of the siting permit.[61]

While the Town has made a prima facie showing that the application should be denied, it has not demonstrated that the denial should be with prejudice. The Town has made no sufficient offer of proof establishing that the project cannot be approved if modified to exclude the Main parcel. Accordingly, the application should be denied without prejudice to allow Hecate's submission of a new application, which may propose a similar but modified facility.

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property rights necessary to construct the facility pursuant to the Underground Proposal, the statutory requirements for a certificate cannot be met and we may now dismiss it").

[60] See Bear Ridge Solar, Decision at 32-33.

[61] See 19 NYCRR 900-8.3(c)(2) and (3).

In addition, the Town has not made a prima facie showing that applicant's failure to disclose the expiration of its lease option for the Main parcel, if intentional, justifies denial of the application on the basis of applicant's corporate character alone. In support of its argument, the Town cites an ALJ ruling in a New York State Public Service Commission (NYS PSC) transmission siting case, Matter of Empire Offshore Wind LLC. In that ruling, the ALJs admonished the applicant that its failure to follow rules established in the ALJs' protective order could be considered by the Commission in determining whether the applicant was fit to own and operate a facility in New York.[62] The ALJs, however, did not deny the application in their ruling. Similarly here, the Town makes no sufficient offer of proof of any intentional conduct related to the loss of the Main parcel that would warrant application denial on this ground. Nevertheless, as discussed below, applicant's lack of transparency regarding the Main parcel is relevant to any discretion to be exercised in this matter.[63]

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[62] See DPS Case 22-T-0346, Matter of Empire Offshore Wind LLC, Ruling Addressing Violations of Protective Order, Nov. 15, 2023, at 6 (NYS PSC); see also DPS Case 15-F-0327, Matter of Galloo Island Wind LLC, Ruling Denying Motion to Dismiss and Granting Motion to Postpone Proceeding, Oct. 26, 2018, at 9-13 (NYS Siting Board) (applicant's unilateral decision not to report the presence of the nest of the threatened bald eagle in the project area, while not a basis to dismiss the application, warranted granting a motion to postpone proceedings and directing applicant to amend its application).

[63] The Town raises for the first time in its sur-reply additional allegations of corporate misconduct to support dismissal on that ground. Raising new factual allegations for the first

B. Applicant's Rebuttal

Given my conclusion that the Town has satisfied its burden of persuasion to identify substantive and significant issues that warrant denial of the application,[64] I further conclude that applicant has failed to carry its burden of rebutting the factual and legal issues raised. In its submissions on appeal, applicant does not dispute the loss of control over the Main parcel, and the necessity of "supplementing" and amending its application in order to proceed with a changed project that excludes that parcel. Indeed, based on its appeal response and reply, Hecate clearly expresses its intention to amend the application to take the loss of the Main parcel into account.

Applicant's assertion that only minor application amendments are required is unsubstantiated and misses the point. While 19 NYCRR 900-7.1(b) provides expedited procedures for ORES staff's review of minor application amendments prior to the issuance of a NOCA, section 900-7.1(a) does not allow application amendments after the NOCA is issued regardless of whether the amendments are considered major or minor. Accordingly, applicant has failed to raise a triable issue rebutting the Town's factual showing.

C. Applicant's Request for Alternative Relief

Instead of joining issue with the factual assertions made by the Town, applicant proposes the following two options.

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time in its sur-reply on appeal is improper and, accordingly, such allegations will not be entertained.

[64] See 19 NYCRR 900-8.3(c)(4).

1. Vacate NOCA and Consider Post-NOCA Application Amendments

First, applicant requests that the August 25, 2023, NOCA be vacated, a new notice of incomplete application be issued, and the matter be remanded to ORES staff for proceedings pursuant to 19 NYCRR 900-4.1. As an initial matter, section 900-4.1 does not authorize those actions or a remand to ORES staff. Here, applicant has not otherwise identified any express statutory or regulatory authority for the Executive Director to vacate the NOCA. Executive Law § 94-c(3)(a) and (h), which give ORES rulemaking authority and the power to conduct adjudicatory hearings and dispute resolution proceedings, do not expressly authorize vacatur of a NOCA.[65] In addition, the regulatory provisions cited by applicant authorizing reopening of an evidentiary hearing record, modification of the Part 900 rules of practice by the Executive Director, and issuance of notices of incomplete application by ORES staff similarly do not address or authorize the vacatur of a NOCA at this point in the proceeding.[66]

Applicant's reliance on PSL article 10 precedent is unavailing. Applicant argues that in the Matter of Number Three Wind LLC, months after the NYS Siting Board Chair determined that the application was complete but before the deadline for testimony, the applicant was allowed to supplement its application to reflect a reduction in the number of wind turbines from 43 to 31 turbines

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[65] See e.g. Hecate reply at 6, citing Executive Law § 94-c(3)(a), (h).

[66] See id., citing 19 NYCRR 900-4.1(c)-(e); 900-8.5(g); 900-8.12(d).

pursuant to a revised procedural schedule set by the Hearing Examiners.[67] Neither the Siting Board nor the Hearing Examiners vacated the Chair's completeness determination in that case, however. More importantly, in Number Three Wind, both PSL article 10 and the implementing regulations authorize amendments to an application even after a completeness determination such as the NOCA here.[68] That option is not available under Executive Law § 94-c and is expressly prohibited by 19 NYCRR 900-7.1(a).

In sum, applicant has failed to establish that the Office has the discretion, whether express or implied, to allow an application to be amended after a NOCA is issued, or to vacate a NOCA and allow the proceeding to continue. Even assuming without deciding that the Executive Director has the discretion to vacate the NOCA,[69] applicant has not demonstrated that such an exercise of discretion is warranted here. Applicant knew or reasonably should have known about the September 17, 2023, expiration of the Main parcel lease option before ORES staff issued the August 25, 2023, NOCA. Applicant did not timely advise ORES of that possibility or that negotiations with the property owner were ongoing. Applicant also did not inform ORES staff about the option's expiration on September 17, 2023, prior to issuance of the draft permit on October 24, 2023. ORES staff became aware of

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[67] See DPS Case 16-F-0328, Number Three Wind LLC, Recommended Decision, Aug. 22, 2019, at 9-19.

[68] See Public Service Law §§ 164(6)(a), 165(4)(a); 16 NYCRR 1000.13 (amendment of an application).

[69] See Bear Ridge Solar, Decision at 32-33 (absent compelling circumstances, an applicant's post-NOCA application amendments are not reviewable).

Hecate's loss of site control for the first time when the Town's motion was filed on January 2, 2024. Had applicant informed ORES staff of the option expiration prior to issuance of the NOCA, amending the application to address exclusion of the Main parcel would have been available. And had applicant informed ORES staff of this information, at the latest, prior to issuance of the draft siting permit, ORES staff would have had the opportunity to consult with applicant and the other parties on the best way to go forward. Applicant's failure to take timely action to inform ORES staff, however, foreclosed these opportunities. Although applicant's lack of transparency and timely action, without more, is not a basis for denying the application on corporate character grounds at this time, it nevertheless weighs against exercising discretion to vacate the NOCA now,[70] even assuming there is such discretion, an issue on which I make no determination.

Applicant also argues that because the Town agreed to vacatur of the NOCA as an alternative to application denial, its request should be granted. The fact that the Town suggested this alternative relief does not vitiate the fact that neither Executive Law § 94-c nor Part 900 authorize that relief. Moreover, in its sur-reply, the Town narrows its position, expressly stating that is does not support the issuance of a notice of incomplete application and is in agreement with ORES staff that such alternative relief is not authorized by Part 900.[71]

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[70] See Galloo Island Wind LLC, Ruling at 9-13.

[71] See e.g. Town sur-reply at 2.

2. Hold Proceedings in Abeyance and Authorize 60-days for Application Supplement

In the alternative to vacatur of the NOCA, applicant requests that ORES extend the regulatory one-year deadline for decision and give it 60 days to submit its application supplement. Applicant argues that such a course is authorized by Executive Law § 94-c and would be consistent with PSL former article X precedent.[72] This request is rejected because it is not authorized by the statute or regulations. Except in circumstances not applicable here, both Executive Law § 94-c and Part 900 require the Office to make a final decision on a siting permit within one year from the date an application is deemed complete and allow only a mutually-agreed 30-day extension of that deadline.[73] Applicant does not identify any express statutory or regulatory authority for the Executive Director to extend the statutory one-year deadline beyond 30 days.

Even if the authorized 30-day extension is mutually agreed to by ORES and Hecate, and applicant is afforded its requested 60 days to submit application amendments, the review process could not be completed in the time remaining. The one-year deadline for issuance of a final permit is August 25, 2024 (or one-year from issuance of the NOCA). Adding 30 days would move that deadline to September 24, 2024. Under ordinary circumstances, ORES staff would have 60 days to undertake a

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[72] See Hecate reply at 7-8, citing DPS Case 01-F-1276, Matter of TransGas Energy Systems LLC, Order Concerning Further Proceedings, June 25, 2007 (NYS Siting Board).

[73] See Executive Law § 94-c(5)(f); 19 NYCRR 900-9.1(a)(2), (b).

completeness review and issue a new NOCA or determine the application to be incomplete. Assuming the application amendments are complete, ORES staff would then have an additional 60 days to issue a revised draft permit. The public is thereafter entitled to at least 60 days to comment on the amended application and revised draft permit. This alone totals eight months from today, or until October 2024, which is past the September 2024 deadline. Moreover, it does not account for the additional process that is necessary before a final decision can be issued. The parties are entitled to seek party status and submit petitions and issues statements, which then would be subject to responses by ORES staff and applicant. Further, the ALJ would have to schedule an issues conference, finalize an issues ruling, and conduct adjudicatory hearings if triable factual issues are identified, potentially resulting in a final decision in early 2025.

As ORES staff indicated, applicant could have obtained the exact 60-day delay it seeks by withdrawing its application and simultaneously filing a new 60-day notice of intent to file a new application. However, applicant has expressly declined that option.

Applicant's reliance on PSL former article X precedent is unpersuasive. As noted above with respect to the current PSL article 10, PSL former article X contained statutory and regulatory provisions governing application amendments that are not available under Executive Law § 94-c and Part 900, including express provisions authorizing extensions of the one-year decision deadline to allow for the review of application amendments.[74]

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[74] See PSL former § 165(4); see also PSL current § 165(4)(a).

D. Consistency with the Goals of Executive Law § 94-c and the CLCPA, and Claims of Prejudice to Applicant

Applicant argues that to deny the application without prejudice to submission of a new modified project application is inconsistent with the efficient administration of this proceeding and the spirit of Executive Law § 94-c and Part 900. This argument is unpersuasive, particularly because the loss of the Main parcel from the project was Hecate's responsibility alone and it failed to act transparently at a critical point in the process. Executive Law § 94-c and Part 900 is an efficient, equitable, and predictable process for expeditious application review and issuance of major renewable energy siting permits, which are critical to attaining the CLCPA goals,[75] while assuring environmental protection and municipal and community involvement. A key feature of the Executive Law § 94-c process is the orderly development of a detailed application before issuance of a NOCA, and the development of a record for decision after issuance. The Executive Law § 94-c process is subject to strict statutory and regulatory timelines for ORES staff and public review, public comment, adjudicatory proceedings, and Executive Director determinations and final permit issuance in a one-year timeframe. These timelines are the

[75] Among the CLCPA goals are the requirements that a minimum of 70 percent of the Statewide electric generation be produced by renewable energy by 2030, and that by the year 2040 the Statewide electrical demand system will generate zero emissions. In addition, the CLCPA requires the procurement of at least nine gigawatts of off-shore wind electricity generation by 2035, the procurement of six gigawatts of photovoltaic solar generation by 2025, and the support of three gigawatts of Statewide energy storage capacity by 2030. See Executive Law § 94-c(2)(b).

minimum necessary to administer a workable process. Hecate has provided no reasonable basis for departing from this process to address its own mistake. More importantly, to depart from the process to accommodate applicant's own error would set a precedent that would compromise the integrity of the process and be inconsistent with the purposes of Executive Law § 94-c.[76]

Hecate further asserts that denial of the application without prejudice to resubmit is inconsistent with the CLCPA.[77] This position is also rejected. Denial of the application now would afford applicant sufficient time to reasonably consider necessary project changes and to submit a revised application that has the potential to be reviewed expeditiously, given the time and resources expended thus far. Following this process for review of any revised project fosters the CLCPA's goals without undermining the Executive Law § 94-c and Part 900 program. Following this process also affords a level of fairness to ORES staff, and to the Town and other interested parties who are entitled to participate in a measured review of the revised application and modified facility within an established and predictable permitting process.

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[76] See Executive Law § 94-c(1) ("[i]t is the purpose of this section to consolidate the environmental review and permitting of major renewable energy facilities in this state and to provide a single forum in which the office of renewable energy siting created by this section may undertake a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities").

[77] See CLCPA § 7(2) (directing agencies to consider consistency with the CLCPA in permitting decisions).

As noted above, new application completeness and draft permit review for a modified facility would be expected to proceed expeditiously and focus primarily on proposed project changes if Hecate provides comprehensive detailed information about the modifications in the first instance. In a revised application, applicant may use materials filed with the current application upon a showing that the materials remain representative of conditions at and in the vicinity of the facility site despite the passage of time and change of circumstances.[78] Applicant is strongly encouraged to consult with ORES staff to determine those application materials that might require revision in order to avoid any unnecessary delays in staff's review.

Finally, applicant has not established any undue harm if the current application is denied without prejudice to applicant filing a new application for a modified project. Subjecting a new application to the Executive Law § 94-c and Part 900 binding timelines is not unduly prejudicial to applicant, particularly in light of the responsibility it bears for the loss of the Main parcel option. I recognize that for a new application, Hecate would be required to provide a new application review fee and local agency account funding consistent with Executive Law § 94-c and Part 900. This requirement does not rise to the level of undue prejudice either. The Town's motion and appeal, and this decision are the result of applicant's own error. Principles of fundamental fairness dictate that Hecate provide such funding to account for

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[78] This is without prejudice to any revised studies, delineations, or application materials ORES staff deems appropriate in light of any project modifications proposed by applicant.

the administrative resources ORES staff would again have to devote to reviewing a modified application, and to allow the Town and other community interveners to effectively participate in the review of the modified project.

Conclusion

In sum, Executive Law § 94-c and Part 900 establish an efficient, equitable, and predictable process for the expeditious review of major renewable energy facilities to assist the State in attaining the CLCPA goals without compromising environmental protection and community participation. Departing from that process to address Hecate's own mistake is unsupportable as a matter of law, and would adversely impact the integrity of the Executive Law § 94-c and Part 900 process.

Accordingly, based on the record before me, the ALJ's January 4, 2024, oral ruling is reversed, the Town's motion to dismiss the application is granted, and the application is denied without prejudice to Hecate's submission of a new application for a modified project, with appropriate application fees and local agency account funding. Further proceedings on this application are hereby canceled.

Houtan Moaveni

Houtan Moaveni
Executive Director
New York State Office of Renewable Energy Siting

Dated: February 6, 2024

cc: Party List – ORES DMM Matter No. 21-02553