STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING

Petition of AES Clean Energy Development, LLC for a Declaratory Ruling from the Executive Director of the Office of Renewable Energy Siting Whether its Proposed Repowering of the Bliss and Wethersfield Windparks in Wyoming County, the Alton, Clinton and Ellenburg Windparks in Clinton County, and the Chateaugay Windpark in Franklin County Require Review and Approval by ORES pursuant to Executive Law § 94-c	Application No. 22-00032

INITIAL POST-ARGUMENT BRIEF OF PETITIONER
AES CLEAN ENERGY DEVELOPMENT, LLC

James A. Muscato II
YOUNG/SOMMER LLC
Attorneys for the Petitioner
Executive Woods
Five Palisades Drive
Albany, New York 12205
Phone: (518) 438-9907
jmuscato@youngsommer.com

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I. INTRODUCTION

By letter dated September 28, 2022, AES Clean Energy Development, LLC ("AES CED" or "Petitioner") submitted a request to the New York State Office of Renewable Energy Siting ("ORES") for a declaratory ruling that recognizes New York State Executive Law Section 94-c does not require an existing wind generation facility to obtain a siting permit to maintain, repair, and replace blades and certain components on existing wind turbines that were sited and have been in commercial operation for approximately 15 years.[1] AES CED acquired Cogentrix Valcour Intermediate Holdings, LLC ("CV Intermediate Holdings") on November 29, 2021. CV Intermediate Holdings wholly owns Cogentrix Valcour Wind Energy Holdings II, LLC, which in turn owns Valcour Wind Energy, LLC ("Valcour Wind"). Valcour Wind wholly owns the project

[1] *See* "*Declaratory Ruling Request*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (September 28, 2022, DMM Item Number 172).

companies that operate the Bliss and Wethersfield Windparks in Wyoming County, Altona, Clinton, and Ellenburg Windparks in Clinton County, and Chateaugay Windpark in Franklin County.[2] AES CED owns and operates the Windparks as competitive wholesale generators in the NYISO-administered wholesale markets.

The scope of the proposed work is limited. AES CED proposes to refurbish existing generators and replace turbine drivetrains, hubs, and blades ("Proposed Replacements"). AES CED is not constructing any new wind turbines Proposed Replacements. The Proposed Replacements will not involve any changes in the location of turbines or number of generators or the generators themselves, will involve strengthening of foundations where necessary. Access roads and electrical support systems will only be modified where necessary. While these replacements will result in an upgrade in turbine equipment allowing for an uprated capacity for existing turbines from 1.5 megawatts to 1.62 megawatts, the nameplate capacity of turbine generators will remain the same, and there will be no increase in the overall nameplate capacity of the each of the Windparks.

The Petitioner respectfully requests that the Executive Director issue a declaratory ruling that the Proposed Repower Work is exempt from Executive Law Section 94-c for three reasons. First, repair and replacement of existing facilities required for the Proposed Repower Work is not construction or expansion of a major renewable energy facility that requires a siting permit under Executive Law §94-c(4)(a). Second, Executive Law §94-c(4)(e)(ii) provides an exemption for repairs and replacements of existing facilities performed in the ordinary course of business. Third, Executive Law §94-c(4)(e)(iii) expressly exempts projects that were permitted prior to the

[2] The Windparks are operated in the Towns of Eagle, Wethersfield, Altona, Clinton, Ellenburg and Chateaugay, New York. When referred to collectively, the host municipalities will be referred to herein as the "Towns".

enactment of the statute. As authorized by Hon. Judge James T. McClymonds, the Petitioner hereby submits this initial post-hearing brief, along with the factual affidavit of Jimmy Fleenor, Director of Wind Engineering for AES CED, and Logan Winston, Director of Development – Eastern US for AES CED, Logan Winston, sworn to January 13, 2022 ("Winston Aff"), sworn to Jimmy Flennor, P.E., sworn to January 13, 2022 ("Fleenor Aff") submitted herewith, in further support of the Petitioner's request for declaratory ruling.

II. BACKGROUND

A. Overview of the Windparks

On November 29, 2021, AES CED acquired Cogentrix Valcour Intermediate Holdings, LLC ("CV Intermediate Holdings"). CV Intermediate Holdings wholly owns Cogentrix Valcour Wind Energy Holdings II, LLC, which in turn wholly owns Valcour Wind Energy, LLC ("Valcour Wind"). Valcour Wind owns the six project companies that operate the Windparks.[3] The Windparks have a total nameplate capacity of 612 MW and are further described below.

<u>Altona Windpark</u>

The Altona Windpark is a 97.5 MW wind-powered generating facility located in the Town of Altona, Clinton County, New York, consisting of 65 turbines and supporting infrastructure. The Altona facility is interconnected with transmission facilities that are owned and operated by the

[3] The New York State Public Service Commission ruled that the transfer of ownership interest in CV Intermediate Holdings to AES CED did not require PSC review under Section 70 of the New York State Public Service Law because AES CED purchased upstream ownership interests of the operating Windparks. *See* Case No. 21-E-0434, *Joint Application of Cogentrix Valcour Wind Energy Holdings, LLC and AES Clean Energy Development, LLC for a Declaratory Ruling that No Further Review is Required of Upstream Ownership Transfer, or in the Alternative, for Approval of the Proposed Transaction Pursuant to Section 70 of the PSL*, Declaratory Ruling on Upstream Transfer Transaction (issued November 23, 2021).

New York Power Authority ("NYPA") and are under the operational control of the New York Independent System Operator ("NYISO").[4]

Bliss Windpark

The Bliss Windpark is a 100.5 MW wind-powered generating facility located in the Town of Eagle, Wyoming County, New York, consisting of 67 turbines and supporting infrastructure. The Bliss facility is interconnected with transmission facilities that are owned by the Village of Arcade, New York.[5]

Clinton Windpark

The Clinton Windpark is a 100.5 MW wind-powered generating facility located in the Town of Clinton, Clinton County, New York, consisting of 67 turbines and supporting infrastructure. The Clinton facility is interconnected with transmission facilities that are owned by NYPA and are under the operational control of the NYISO.[6]

Ellenburg Windpark

Ellenburg Windpark is an 81 MW wind-powered generating facility located in the Town of Ellenburg, Clinton County, New York, consisting of 54 turbines and supporting infrastructure. The Ellenburg Windpark is interconnect with transmission facilities that are owned by NYPA and are under the operational control of the NYISO.[7]

Chateaugay Windpark

[4] Winston Aff, ¶ 5(i).
[5] Winston Aff, ¶ 5(ii).
[6] Winston Aff, ¶5(iii)
[7] Winston Aff, ¶5(iv).

The Chateaugay Windpark is a 106.5 MW, wind-powered generating facility located in the Town of Chateaugay, Franklin County, New York, consisting of 71 turbines and associated infrastructure. It interconnects with transmission facilities that are owned by NYPA and are under the operational control of the NYISO.[8]

Wethersfield Windpark

The Wethersfield Windpark is a 126 MW, wind-powered generating facility located in the Towns of Eagle and Wethersfield, Wyoming County, New York, consisting of 84 wind turbines and associate infrastructure. It interconnects with transmission facilities that are owned by NYSEG and under the operational control of the NYISO.[9]

The Proposed Repower Work will extend the useful life of the existing projects and without significant changes to the project sites or environmental resources in the area. Specifically, it will involve the replacement of existing General Electric ("GE") 1.5-77 turbine equipment with new 1.62-97 equipment. New blades are approximately 10 meters longer than the existing blades. Where appropriate, GE 1.62-91 equipment may be used, which has a slightly smaller rotor diameter. The maximum height of turbines is currently 389 +/- feet and with the installation of the new blades, the maximum height will be 422 +/- feet.[10]

B. Applicable Local Law

Each of the Towns where the Windparks are located have enacted local laws that regulate wind energy facilities. As demonstrated by the general descriptions of each of these local laws, the Towns have comprehensive regulatory frameworks in place to ensure a thorough

[8] Winston Aff, ¶5(v).
[9] Winston Aff, ¶5(vi).
[10] Fleenor Aff, ¶7.

environmental impact review of the Proposed Replacements, particularly when combined with SEQRA requirements, and state law and regulations, as applicable, including but not limited to ECL Articles 11, 15, 24 and New York Agriculture and Markets Law.

Town of Altona

In 2006, the Town of Altona adopted Local Law No. 1 of 2006, amending Local Law No. 1 of 2004 to create a new Article 12 entitled "Wind Energy Facilities" regulating the construction, reconstruction and modification of Wind Energy Conversion Systems ("WECS") within the Town. Pursuant to Local Law No. 1 of 2006, special use permit approval is required by the Town Board for the construction, reconstruction and modification of a WECS. The Town of Altona has also established a Wind Overlay Zone within the Town, which was created pursuant to Local Law No. 2 of 2006. Local Law No. 1 of 2006 includes a number of substantive requirements regulating WECS, including but not limited to, minimum setbacks from right-of-way of public roads, non-participating property lines, aboveground utilities, non-WECS structures, and non-participating residences, turbine height restriction, noise limit, landscaping plan, lighting plan, decommissioning plan, complaint resolution plan/process, visual impact assessment, shadow flicker study, noise analysis, fire protection and emergency response plan, and an assessment of potential electromagnetic interference with various communication systems.

Town of Chateaugay

The Town of Chateaugay adopted its Wind Energy Facilities Law as Local Law No. 7 of 2006, which was later amended by Local Law No. 2 of 2020. Pursuant to the Town's Wind Energy Facilities Law, construction, reconstruction, modification and operation of WECS is subject to permit approval by the Town Board. WECS are subject to certain substantive local law requirements, including but not limited to, a turbine height limit, noise limit/standard, setbacks from site perimeter, right-of-way of public roads, participating residences, non-participating residences, property lines of schools, nursing facilities, and churches, non-WECS structures, and aboveground utilities, landscaping plan, lighting plan, decommissioning plan, complaint resolution plan, shadow flicker study, visual impact assessment, noise analysis, fire protection and emergency response plan, and an assessment of potential electromagnetic interference with certain communication systems.

<u>Town of Clinton</u>

The Town of Clinton initially adopted a Wind Energy Facility Law, Local Law No. 1 of 2005, which was later amended pursuant to Local Law No. 1 of 2012 and Local Law No. 2 of 2018. Pursuant to Local Law No. 2 of 2018, the construction, reconstruction, modification or operation of a WECS requires Town Board approval. The Town's Wind Energy Facility Law regulates various aspects of WECS, and including but not limited requirements pertaining to setbacks from right-of-way of public roads, non-participating property lines, aboveground utilities, non-WECS structures, non-participating residences, and school, church, hospital, and nursing home property lines, turbine height limit, noise limit, landscaping plan, lighting plan, decommissioning plan, complaint resolution plan, visual impact assessment, shadow flicker study, noise analysis, fire protection and emergency response plan, and an assessment of electromagnetic interference with certain communication systems.

<u>Town of Eagle</u>

In 2005, the Town of Eagle adopted Local Law No. 3 of 2005, the Town of Eagle Wind Energy Conversion Facilities Siting Law, which rescinded and supplanted the Town's prior wind law Local law No. 2 of 2005. Pursuant to Local Law No. 3 of 2005, the alteration of a Wind Energy Conversion Facility ("WECF") requires site plan review by the Town Planning Board and its designated expert, as well as Town Board review following advisory recommendation(s) from the Town Planning Board. The Town's WECF Siting Law contains a number of substantive requirements applicable to WECFs, including but not limited to a turbine height limit, minimum setback requirements from right-of-way of public roads, non-participating property lines, aboveground utilities, non-WECF structures, and non-participating residences, a noise limit/standard, visual assessment including mitigation analysis, and an avian analysis.

Town of Ellenburg

The Town of Ellenburg has adopted a Wind Energy Facility Local Law, Local Law No. 4 of 2005, which requires a special use permit approved by the Town Board for the construction, reconstruction and modification of a WECS. Local Law No. 4 of 2005 also required the creation of a Wind Overlay Zone and pursuant to Local Law No. 3 of 2006, the Town of Ellenburg established a Wind Overlay District in response to an application for such district made by the original project developers of the Ellenburg Windpark, Noble Ellenburg Windpark, LLC. The Town's Wind Energy Facility Law contains a number of substantive requirements applicable to WECS, including but not limited to, a turbine height limit, noise limit, setbacks from right-of-way of public roads, facility property line, aboveground utilities, non-WECS structures, and non-participating residences, setback from State wetlands, landscaping plan, lighting plan, decommissioning plan, complaint resolution plan, visual impact assessment, shadow flicker study, noise analysis, fire protection and emergency response plan, and an assessment of potential electromagnetic interference with various communication systems.

Town of Wethersfield

Local Law No. 1 of 2006 established the Town of Wethersfield's Wind Energy Conversion Device/Farm Licensing, Siting and Design Regulations and Requirements Law, pursuant to which Wind Energy Conversion Devices/Farms ("Wind Farms") cannot be constructed, erected, located, altered or used without site plan review and approval by the Town Board. The Town's Wind Farms Law requires facility compliance with certain substantive requirements, including but not limited to a turbine height limit, blade clearance requirement, shadow flicker requirement, noise limit, setbacks from right-of-way of public roads, non-participating property lines, non-participating residences, and certain buildings for public congregation, spacing between turbines, stormwater management plan, agricultural impacts mitigation, mitigation of electromagnetic interference with certain communications, and an avian analysis.

C. Permitting History of the Windparks

1. SEQRA Review Process

All of the Windparks were subject to an extensive town local review and approval processes, underwent State Environmental Quality Review Act ("SEQRA") review, were issued the required local permits upon completion of the SEQRA review process, and obtained certain State and Federal permits as applicable.[11] The Altona, Clinton and Ellenburg Windparks were reviewed under one joint SEQRA review process, with the Town of Clinton acting as lead agency, and the Towns of Ellenburg and Altona acting collaboratively in the acceptance of an overall Final Environmental Impact Statement ("FEIS") which included information regarding all three

[11] *See* Winston Aff, ¶4.

windparks, and the issuance of a Joint Statement of Findings.[12] The Wethersfield, Chateaugay and Bliss Windparks each underwent SEQRA review separately, with the Towns of Wethersfield, Chateaugay and Eagle acting as lead agencies, respectively, and with an FEIS and Statement of Findings issued for each windpark.[13]

The DEISs and FEISs analyzed potential environmental impacts on land use and zoning, visual resources, socioeconomic issues, traffic and transportation, air quality, noise, soils, geology, terrestrial and aquatic ecology including threatened and endangered species, effects on communications facilities, stormwater management, and impacts of construction, and proposed general and specific mitigation measures. These general and specific mitigation measures included, among other measures, facility phasing and design that avoided concentrating construction-related impacts in one area, facility layout and location that avoided areas with concentrations of residences or sensitive environmental features, minimum setbacks to limit noise, visual and public safety impacts, employment of environmental monitors to assure compliance with all environmental commitments and permit requirements, as well as general measures such as compliance with conditions and any mitigation required by any federal, state, and local permits and approvals and the implementation of such mitigation measures.

2. Local Permits

The permits, approvals, and licenses issued to each windpark contained permit conditions requiring a range of mitigation measures, dispute resolution procedures, adherence to New York

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[12] *See* "*Clinton Statement of Findings No Co Al CL EL",* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 44); *see also* DMM Item Numbers 12, and 147.

[13] *See "Bliss Stmt of Findings",* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 104; *see* "Wethersifled Stmet of Findings", in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number ___.

State Department of Agriculture and Markets ("NYSDAM") guidance, adherence to New York State Department of Environmental Conservation ("NYSDEC") and United States Army Corps of Engineers ("USACE") permit conditions. The permitting of each of the Windparks is further discussed below. In addition to the permits, approvals and licenses described below, the Windparks also entered into Host Community Agreements and Road Use Agreements with the municipalities.

<u>Altona, Clinton, and Ellenburg Windparks</u>

The Towns of Altona and Ellenburg issued the required special use permits, including site plan review, to the Altona and Ellenburg Windparks on August 21, 2006.[14] The Town of Clinton also issued a wind energy permit on the same date.[15] These permits contained a number of general permit conditions, as well as special conditions which were the same across all three windpark permits. Notably, these permit conditions included, but were not limited to, requirements for (1) post-construction site specific shadow flicker mitigation measures for each home where shadow flicker is identified an issue of and reported through the complaint resolution process, (2) compliance with local noise standards, (3) a three-year post-construction bird and bat mortality study and AnaBat studies, or studies as directed by DEC, (3) environmental monitor survey of work areas suitable for threatened or endangered bird nests, with restrictions on construction activity in event of siting (4) preparation of SWPPP in conformity with NYS DEC SPDES General Permit for Stormwater Discharges from Construction Activity, (5) adherence to NYSDAM

[14] *See* "*Ellenburg Special Use Permit"* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 13; "*Altona Special Use Permit with Conditions"* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 148.

[15] *See* "*Clinton Special Use Permit"* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 45.

guidelines for construction and restoration in all agricultural areas, (6) pre-construction geologic and groundwater investigations to ensure minimization of potential impacts, and (7) wetland mitigation as required by state and federal wetland permits.

Bliss Windpark

On October 12, 2006, the Town of Eagle granted Noble Bliss Windpark, LLC site plan approval along with a license to operate the facility.[16] A number of mitigation measures were incorporated within the FEIS, and included compliance with setbacks to limit noise impacts on residences, visual and public safety impacts, employment of environmental monitors, measures to mitigate impacts to soils in agricultural fields, project-wide soil erosion and sediment control pursuant to a SWPPP, a mitigation measures to address visual impacts including turbine siting and landscape plantings for affected viewsheds.

Chateaugay Windpark

The Town of Chateaugay issued a wind energy permit authorizing 71 wind turbines on October 22, 2007 to Noble Chateaugay Windpark, LLC.[17] The Wind Energy Permit included typical general permit conditions similar to those included in the permits issued for the windparks in Clinton County, as well as some additional special conditions including the requirement of (1) a visual impact memorandum agreement between the State Historic Preservation Office ("SHPO") a Chateaugay Windpark to mitigate visual impacts on National Register of Historic Places, (2) a post-construction noise study in the event three resident complaints are made through the formal

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[16] *See* "*Bliss Town of Eagle License Agreement*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 104; "*Bliss Amendment to License Agreement*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 128.

[17] *See* "*Chateaugay Wind Energy Permit*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number 92.

complaint resolution process that was established for the windpark, (3) a similar requirement for shadow flicker mitigation measures in the event three resident complaints are made, and (4) a three-year post construction bird and bad mortality study and ANABat studies as set forth in the FEIS and approved by NYS DEC.

Wethersfield Windpark

As noted above, the Wethersfield Windpark is located within the Towns of Eagle and Wethersfield. The Town of Wethersfield assumed lead agency role for SEQRA review of the windpark. A wind energy license was issued to the windpark by the Town of Wethersfield on October 23, 2007 for the construction of 59 turbines.[18] The Wethersfield wind energy license contained a number of typical conditions and special conditions specifically applicable to the windpark, which included but were not limited to the requirement of (1) a visual impact memorandum of agreement between SHPO and Noble Wethersfield Windpark, LLC to mitigate visual impacts on National Register of Historic Places, (2) a complaint resolution to be implemented in accordance with the license, (3) mitigation of shadow flicker for affected residences and businesses, in the event shadow flicker exceeds maximum levels as verified by the Town's designated engineer, (4) noise mitigation for affected residences and businesses, in the event sound pressure levels exceed maximum levels as verified by the Town's designated engineer, (5) post-construction noise study in event noise levels in more than three noise complaints exceed the local law noise levels, as determined by the Town's designated engineer, and (6) a three-year post-construction bird and bad mortality study.

[18] *See* "*Wethersfield Wind Energy License"* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number ___.

On December 6, 2007, the Town of Eagle issued a site plan approval and wind energy license for 26 turbines.[19] The site plan approval and wind energy license contain typical permit conditions as well as certain special conditions, similar to those identified above contained in the Wethersfield wind energy license.

3. State and Federal Permits

In terms of Federal permits and approvals, the Windparks obtained CWA 404 Nation Wide Permit (NWP) 51, Land-Based Renewable Energy Generation Facilities authorizations from USACE. The Windparks also obtained No Hazard Determinations from the Federal Aviation Administration ("FAA").[20]

With respect to State permits and approvals, the projects all had SWPPPs as required for authorization under SPDES GP-01-20 General Permit for Stormwater Discharge from Construction Activity. The Windparks also obtained the necessary stream disturbance and freshwater wetlands permits pursuant to Environmental Conservation Law ("ECL") Articles 15 and 24, and Section 401 Water Quality Certifications, where applicable. Based on the statutory and regulatory scheme of ECL Article 11 at the time the Windparks were approved, no permits pursuant to Article 11 were required.[21] The Windparks also obtained work permits from New York State Department of Transportation ("NYS DOT") for road/highway work requiring such authorization from NYSDOT.[22]

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[19] *See* "*Wethersfield Town of Eagle License"* in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (December 14, 2022, DMM Item Number ___.

[20] *See* Winston Aff, ¶9

[21] *See* Winston Aff, ¶ 8.

[22] *Id.*

The Petitioner has had discussed with the NYSDEC permitting relating to the Replacement Projects including potential impacts and proposed temporary areas of disturbance, and potential permits and authorizations that would be required including a State Discharge Elimination System (SPDES) General Permit for Stormwater Discharge from Construction Activity (GP-0-20-001) and preparation of a Stormwater Pollution Prevention Plan (SWPPP).[23] Under direction of NYSDEC, the office is currently reviewing the Altona, Bliss, and Wethersfield Projects and will review the Clinton, Chateaugay, and Ellenburg Projects together. The office is currently reviewing the wetland and waterbodies delineation reports for the Altona, Bliss, and Wethersfield Projects. To date, no comments have been received on these reports from NYSDEC.[24] AES CED is also coordinating with NYSDEC on potential impacts to threatened and endangered species for the Projects and has determined that there is a potential to impact the northern long-eared bat (Myotis septentrionalis, NLEB). AES CED has implemented a mitigation Project for the NLEB as well as shared a draft Net Conservation Benefit Plan (NCBP) as part of a Part 182 Permit with the NYSDEC.[25] Additionally, AES CED has coordinated with the New York State Office Parks, Recreation, and Historical Preservation (NYS OPRHP) and the New York State Historic Office(r) (SHPO). AES CED has shared project details with the SHPO and has received a finding of no effect from the SHPO on three of the six projects. The remaining three are still under consideration with the SHPO with a finding expected within the next 30 days.[26]

[23] Winston Aff ¶13.
[24] *Id.*
[25] *Id.*
[26] *Id.*

The Petitioner has also had meetings with the Federal Government on permitting under the Clean Water Act for potential federal wetland impacts associated with changes in the access road design and the U.S. Fish and Wildlife Service.[27]

III. LEGAL ANALYSIS SUPPORTING LOCAL JURISDICTION FOR PROPOSED REPLACEMENTS

A. New York Executive Law Section 94-c(4) ("Applicability")

One of the State's primary objectives in adopting New York State Executive Law Section 94-c, and the creation of ORES, was to streamline and expedite the siting of renewable energy projects.[28] Based on the plain statutory language of several sections of New York State Executive Law Section 94-c ("Executive Law Section 94-c" or "Section 94-c"), it is clear that the legislative intent in adopting Section 94-c was that changes to existing major facilities that do not result in an increase in a facility's nameplate generating capacity are not subject to Section 94-c.

1. Section 94-c Applies to Construction or Increase in Capacity of Major Renewable Energy Facilities

Executive Law Section 94-c(4)(a) states in relevant part "no person shall commence construction of a major renewable energy facility or *increase the capacity of an existing major renewable energy facility* without first having obtained a siting permit" from ORES. (Emphasis added). While the term "capacity" is not defined in Section 94-c, it is commonly understood within the context of electricity generation to be the total rated nameplate capacity of a facility. The term "capacity" is understood to mean "nameplate capacity" within the context of the NYISO Market Administration and Control Area Services ("MST") and Open Access Transmission ("OATT") Tariffs, as well as within the context of Public Service Law ("PSL") Article 10. In both the NYISO

[27] *Id.* at ¶14.

[28] *See* Executive Law §94-c(1) "Purpose"; *see also,* New York State Climate Action Council. 2022. "New York State Climate Action Council Scoping Plan", p. 231.

MST and OATT, the term "capacity" is defined as "the capability to generate or transmit electrical power, or the ability to reduce demand at the direction of the ISO, measured in megawatts ("MW")."[29] Within the context of PSL Article 10, while "nameplate capacity" is not defined, the term "nameplate" is defined as "manufacturer's designation, generally as affixed to the generator unit, which states the total output of such generating facility as originally designed according to the manufacturer's original design specifications."[30] Furthermore, pursuant to the implementing regulations of Article 10, when considering modifications within the context of PSL §165(4)(b), the relevant consideration is with respect to alterations that increase, by a certain MW amount, the base nameplate generating capacity of an existing electric generating facility.[31]

For the purposes of determining if a facility is considered a "major" renewable facility, Section 94-c relies on a facility's "nameplate capacity," as the term "major renewable energy facility" is defined as "any renewable energy system . . . with a nameplate generating capacity of twenty-five thousand kilowatts or more. . ."[32] Furthermore, Section 94-c implementing regulations at 19 NYCRR § 900-1.2(an) define "nameplate generating capacity to mean "starting from the initial installation of a major renewable energy facility the maximum electrical generating output that the facility is capable of production on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings) as specified by the manufacture of the generating units."

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[29] *See* ISO MST, Section 2.3 (1/3/2023); ISO OATT, Section 1.3 (1/3/2023).

[30] PSL § 160.

[31] *See* 16 NYCRR § 1000.2(y) (defining the term "Modify" when used in the context of PSL § 165(4)(b) as "alterations that increase by more than 25 MW the Base Nameplate Generating Capacity of an existing electric generating facility already having a nameplate generating capacity of 25 MW or more").

[32] Executive Law Section 94-c(2)(h); *see also* 19 NYCRR § 900-1.2(ag).

Since the overall nameplate generating capacity of the Windparks will not be increasing as result of the Proposed Replacements, Section 94-c does not apply and review under of the Proposed Replacements is not required. While the Proposed Replacement Project will include replacement of existing GE 1.5-77 turbine equipment with new GE 1.62-97, these replacements will not include a change in generators. While the individual generating capacity of each turbine will be reprogrammed from 1.5 MW to 1.62 MW, this remains within the existing capability of the existing generator. For clarity, no physical modification or new equipment is required to reprogram the generator. It is uncommon for all wind turbines in a Windpark to operate simultaneously at their rated capacity. The existing powerplant control system ensures that coordinated operation of each turbine does not exceed the aggregate net output of the project delivered at the point of interconnection. During installation, the control system will be upgraded to allow for the Windparks to operate more efficiently and reliably.[33]

2. Executive Law Section 94-c(4)(e)(ii) Expressly Exempts Replacements Performed in the Ordinary Course of Business.

Pursuant to Section 94-c(4)(e)(ii), which expressly states that Section 94-c does not apply to "normal repairs, maintenance, replacements, non-material modifications and improvements of a major renewable energy facility, whenever built, which are performed in the ordinary course of business . . ." the Proposed Replacements should be considered exempt from Section 94-c review and approval. The terms "replacement," "non-material modification," or "improvement" are not defined within Executive Law Section 94-c, nor are they defined within its implementing regulations. The Merriam-Webster Dictionary defines the term "replacement" as the "action or

[33] Fleenor Aff, ¶12.

process of replacing"[34] and the term "replace" as "to take the place of especially as a substitute" and "to put something new in the place of."[35] AES CED is simply proposing to replace and refurbish outdated and aged wind turbine components to extend the turbines' useful life.[36] As described in more detail in the supporting Affidavit of James Fleenor, the only turbine components that are being replaced are blades, drivetrains, and hubs.[37] The existing generators will be refurbished and re-used and the existing towers, foundations, and electrical infrastructure will remain.[38]

These replacements should be considered non-material, as they will only result in a nominal increase in the overall tip height of each turbine (from approximately 387 feet to 422 feet)[39], and will not require a change in turbine locations, result in any significant impacts[40] or otherwise result in a modification of facility operations in a manner that is materially different from current facility operations. Furthermore, the facility component replacements proposed as part of the Proposed Replacements are being conducted in the "ordinary course of business." These

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34 Merriam-Webster. (n.d.). Replacement. In Merriam-Webster.com dictionary. Retrieved January 4, 2023, from https://www.merriam-webster.com/dictionary/replacement.

35 Merriam-Webster. (n.d.). Replace. In Merriam-Webster.com dictionary. Retrieved January 4, 2023, from https://www.merriam-webster.com/dictionary/replace.

36 *See* Flennor Aff, ¶4.

37 *See Id.* at ¶8.

38 *Id.* at ¶¶8, 10.

39 *Id.* at ¶7

40 *See e.g.* Case No. 15-F-0122, *Application of Baron Winds, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Art. 10 to Construct a Wind Energy Facility,* Order Approving Amendment (issued May 6, 2020) (Determining that a proposed change in turbine height from 500 ft to 650 ft would not result in a significant adverse increase to environmental impacts, and determination that the change of turbine height proposed did not constitute a "revision").

types of replacements are typical in the wind industry and are part of normal operations of a windpark, as is demonstrated by similar recent repower projects across New York State.

The Windparks have been operating successfully for nearly 15 years, and considering that the typical useful lifespan of wind turbines is between 20 to 25 years, it is within the ordinary course of business for such replacements to be made due to the age of the equipment and the technological advancements that have been made in this industry since this equipment was originally installed.[41] These replacements made in the ordinary course of business also ensure that the equipment is efficient and functional for the expected lifespan of the facility, rather than having to resort to decommissioning of outdated turbines.[42] Allowing these types of replacements to occur in the ordinary course of business ensures that renewable energy facilities, such as the Windparks in this case, are able to continue to efficiently and effectively operate over the course of their expected facility lifespans, and potentially allow for an extension of useful facility life, which in turn ensures the State can continue to gain climate benefits achieved by these renewable energy facilities.

3. <u>Executive Law Section 94-c(4)(e)(iii) Expressly Exempts Facilities that were issued local permits prior to April 3, 2020, the effective date of Executive Law 94-c.</u>

Section 94-c also expressly exempts from review facilities, like the Windparks in this case, that were issued local permits prior to April 3, 2020. Section 94c(4)(e)(iii) states in relevant part that Section 94-c does not apply to "a major facility if, on or before the effective date of this section [April 3, 2020], an application has been made *or granted* for a license, permit, certificate, consent or approval from any federal, state, or local commission, agency, board or regulatory body . . ."

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[41] *See* Fleenor Aff, ¶4.

[42] *Id.*

(Emphasis added). As outlined above in Section II. C. of this brief, the Windparks were granted local permits, approvals and licenses as well as applicable state and federal permits between 2006 through 2008. Since the permits, approvals and licenses pursuant to which these Windparks were constructed and currently operate precede the effective date of Section 94-c, Section 94-c does not apply and review and approval by ORES pursuant to Section 94-c should not be required for the Proposed Replacements.

It is also worth noting that while PSL Article 10 contained substantially similar statutory language regarding the applicability of Article 10, it did not include language exempting facilities that had been "granted permits" from review.[43] This change in statutory language with respect to this exemption between Article 10 and Section 94-c clearly evidences a conscious intent of the legislature to not only exempt projects that had applied for approvals from local municipal boards and the Siting Board prior to the enactment of Section 94-c, but also to facilities that had already been granted such permits, such as these Windparks.

The Windparks have been in continuous operation since their construction pursuant to permits issued between 2006 and 2007, permits that remain valid and in full force and effect. The enactment of Section 94-c does not expressly preempt the applicability of these permits, particularly within the context of the Proposed Replacements being considered here. Through the local permitting process, in order to conduct the Proposed Replacements, AES CED has and will continue to engage with local permitting authorities and will seek amendments to the permits, approvals and licenses for each of the windparks as required by applicable local law. Since its acquisition of CV Intermediate Holdings, AES CED has been engaging with local authorities and

[43] *See* PSL § 162(4)(d).

host communities on the Proposed Replacements, and has worked to provide local authorities and host communities with educational information regarding the Proposed Replacements through a number of outreach efforts, open houses and other similar public forums.[44] As noted in letters from the town supervisors of the host communities that were filed as part of this proceeding, local authorities have an understanding of the scope of the Proposed Replacements and are prepared to review the projects within the existing local permitting structure for each of the Windparks and pursuant to applicable local and state law, including SEQRA.[45]

Assuming AES CED is granted the Declaratory Ruling requested, AES CED will proceed through the local permitting process and will be required to submit applications to each of the involved municipalities for amendments to the existing special use permits, site plan approvals, and licenses for the Windparks. As part of these amendment applications, AES CED would provide local permitting authorities with certain application materials as required by local law as well as supporting/supplemental studies addressing any potential impacts of the Proposed Replacements.[46] Supporting studies would likely include visual impact analysis, shadow flicker studies, noise analysis, avian studies, and other environmental studies as may be required to assess the potential impact of the incremental facility changes as a result of the Proposed Replacements

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[44] *See* Winston Aff ¶18.

[45] *See* "*Ltr to NYS ORES re Bliss and Eagle Windparks*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 167); "*Ltr from Town of Altona Town Supervisor L. Ross*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 166); "*Ltr fr D LaClair Clinton Town Supervisor*", in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 165); "*Ltr from D Bilow Chateaugay Town Supervisor*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 164); "*Ltrs fr Ellengurg Town Supervisor & Council Members*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 163); *and* "*Ltr fr M. Roche Eagle Town Supervisor*" in ORES Matter No. 22-00032, Matter of A Request for Declaratory Ruling (November 18, 2022, DMM Item Number 161).

[46] *See e.g.,* Winston Aff, ¶ 15 (discussing application that has already been submitted to the Town of Altona).

as compared to the existing facility conditions. AES CED would also update existing plans, including but not limited to fire protection and emergency response plans, lighting plans, landscaping plans, decommissioning plans, and complaint resolution plans to the extent necessary to adjust for the proposed facility equipment replacements.

In reviewing these amendment applications, the local permitting authorities would be required to comply with local permitting standards, which include substantive requirements applicable to the Windparks, as well as SEQRA review requirements. Assuming the local permitting authorities classify the Proposed Replacements as Type I actions under SEQRA, it is anticipated that the local town boards would declare lead agency status and initiate coordinated SEQRA review with all involved agencies, including Clinton, Wyoming and Franklin Counties, NYS DEC, NYSDAM, OPRHP, SHPO, USACE and FAA. AES CED will also continue to engage with each of these state and federal agencies individually to ensure that it obtains any permits, approvals or authorizations that may be required from these agencies for the Proposed Replacements. In addition to the consultations required through the SEQRA review process, the amendment applications would also likely require referral to County Planning Boards pursuant to New York General Municipal Law § 239-m, notice to adjoining municipalities pursuant to New York General Municipal Law §239-nn, and compliance with the New York Agriculture and Markets Law § 305-b requirements where applicable. Public hearings on the applications would be held before the applicable local permitting authorities as required by local law. The local permit and SEQRA review framework that is already in place is more than sufficient to ensure diligent review of any potential impacts associated with the Proposed Replacements.

4. <u>The 94-c Regulations Do Not Have Provisions To Address The Requirements For Issuing A Siting Permit for the Repowering Projects</u>

The pathway to achieving the CLCPA's ambitious and aggressive targets, including the 70 by 30 and 2040 Zero Emission Targets for the electricity sector, requires an efficiency and urgency in permitting of new major renewable energy facilities in a manner that the Legislature recognized Article 10 had not been well suited for because it was a process for fossil fueled electricity generation. Following the enactment of the CLCPA, it was evident that an overhaul of the Article 10 process was critical to create a process specific to the siting and construction of new major renewable energy facilities to achieve the decarbonization of New York's electricity sector at the pace required by the CLCPA.

To achieve the CLCPA targets, the Accelerated Renewable Energy Growth and Community Benefit Act ("AREGCBA" or the "Act") was enacted in April 2020. The Act was designed to improve and streamline the process of introducing new renewable energy facilities in the State, and in enacting it the New York State Legislature found that the interest of the public would be well served by "expediting the regulatory review of the *siting of major renewable energy facilities* and transmission infrastructure necessary to meet the CLCPA targets, in recognition of the importance of these facilities and their ability to lower carbon emissions."[47] In the Legislative findings and statement of purpose of the Act, the Legislature also found that in order to achieve the CLCPA targets, the New York State needed to take the appropriate action to ensure that "*new renewable energy generation projects can be sited* in a timely and cost-effective manner that includes consideration of local laws concerning zoning, the environment or public health and

[47] AREGCBA, Section 1, §2(4)(a) (emphasis added); *see also* ORES Combined Assessment of Public Comments 19 NYCRR Part 900, p. 4-5 (noting the intent of New York State Legislature as stated in the AREGCBA).

safety and avoids or minimizes, to the maximum extent practicable, adverse environmental impacts."[48]

Pursuant to the Act, the State enacted Section 94-c and established ORES, the first office in the nation specifically dedicated to the siting of renewable energy facilities.[49] In doing so, it made the purpose of Section 94-c and the ORES mandate quite clear, that being 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 . . ." [50]Absent any discussion within the AREGCBA of renewable energy repower projects, it is reasonable to assume that it was not the Legislature's intent that the new Section 94-c permitting framework, designed to facilitate the siting of new major renewable energy facilities, apply in the same manner to projects proposed for the replacement of aging infrastructure at renewable energy facilities already in operation. It should be noted that the Act, and Executive Law §94-c are to expire and be repealed December 31, 2030, from which a Legislative intent can reasonably inferred that the purpose of §94-c is limited in duration to ensure efficient and timely permitting of new major renewable energy facilities to ensure that the State is on track to meet the CLCPA targets and not to review permitting applications for repower projects that will be required throughout the life of operating renewable energy facilities well beyond the timeline for the achievement of CLCPA targets.

[48] *Id.* at Section 1, §2(2)(a) (emphasis added).

[49] *Id.* at Section 1, §4.

[50] Executive Law §94-c(1).

In fact, the Legislative intent is clear that 94-c is tailored to speed up the permitting of new renewable projects needed to meet the CLCPA and the resulting regulations to implement 94-c are focused on the necessary information, details and content for the Office to perform this comprehensive review of new proposed facilities. The 94-c regulations are devoid of *any* procedures for issuing new siting permits to facilities with pre-existing local zoning approvals. The Section 94-c pre-application and application requirements, including the various pre-application studies required and application exhibits to be submitted along with a siting permit application are not at all relevant nor would they make sense in the context of the permitting of a repower project. For example, the requirement contained in 19 NYCRR §900-2.22, the preparation of Exhibit 21: Electric System Effects and Interconnect, requiring items such as an SRIS, clearly indicates that this application process is designed to apply to new renewable energy facilities. The application review and processing approach under 94-c do not provide for any review processes that would be appropriate considering that repower projects involve amendments to already existing local zoning approvals. Furthermore, the Uniform Standards and Conditions included in the 94-c regulations are largely tailored to regulation of design and construction of new major renewable energy facilities.

Therefore, in the spirit of the Legislative enactment of 94-c to speed the review of new renewables, it is consistent for ORES to refrain from exercising jurisdiction over projects that have already been permitted under local zoning laws and SEQRA and are now proposing minor replacements to better achieve the CLCPA's purpose. As demonstrated in this brief, allowing replacement projects, such as the one proposed by AES CED in this case, to proceed through the local permitting and SEQRA review process to seek necessary amendments of their pre-Section

94-c local permits is the most suitable approach in light of the Legislature's intent in enacting the AREGCBA.

B. Consistency with CLCPA and State Climate Policy

By adopting the Climate Leadership and Community Protection Act ("CLCPA"), New York State has committed itself to achieving one of the most ambitious renewable energy targets in the nation. To ensure the achievement of the CLCPA's ambitious objectives, the State has set forth an aggressive pathway to equitably achieving avoidance of the most severe projected climate change impacts by setting the State on a path to reach a 45% reduction in statewide greenhouse gas ("GHG") emissions from 1990 levels by 2030, an 85% reduction by 250 and zero emissions across all sectors of the economy by 2050. At the core of ensuring achievement of these GHG emission reduction targets is a mandate in the CLCPA requiring the Public Service Commission ("PSC") to establish a program that requires load serving entities to secure, by 2030, a minimum of 70% of New York's end-use energy consumption from renewable energy systems (70 by 30 Target) and that the electricity sector be zero emissions by 2040 (2040 Zero Emission Target). The CLCPA also requires all state agencies to consider whether their decisions regarding permits, licenses and other approvals are inconsistent with or will interfere with the attainment of the state's GHG emission limits.[51]

As is evident throughout the final Scoping Plan recently issued by the Climate Action Council, achieving the 70 by 30 Target and 2040 Zero Emission Target will require the accelerated growth of large-scale renewable energy generation to help transition New York from a fossil fuel

[51] CLCPA §7(2).

economy to a robust clean energy economy.[52] The Scoping Plan also highlights the efficiency in project review that is required to achieve the level of large-scale renewable energy generation at the pace necessary to achieve the CLCPA targets. On component of the strategy outlined in the Scoping Plan for the acceleration of large-scale renewable energy generation recognizes the importance of ensuring that policies are evaluated and adjusted as necessary in order to achieve CLCPA requirements and goals to deploy and *maintain* existing renewable energy systems including land-based wind.[53] The strategy also notes the importance of continuing to support successful programs with the primary objective of ensuring a rigorous but *efficient and timely* procurement and permitting processes.[54]

The Windparks currently represent approximately 25% of New York's existing renewable energy fleet, and ensuring they are maintained by allowing the necessary infrastructure replacements made ensures their continued efficient operation over the course of their useful lives and potentially even extends the life of these facilities is critical to the achievement of the CLCPA targets.[55] Interpreting Section 94-c in a manner that gives effect to the State's clear intent to ensure rigorous yet efficient and timely permitting process is also critical to ensuring that facilities like these Windparks, are able to continue to provide safe, reliable, renewable energy that the State needs to achieve the 70 by 30 and Zero Emission by 2040 Targets.

Replacement projects for aging renewable energy infrastructure, such as the one proposed by AES CED for the Windparks in this case, is the most efficient and effective way of ensuring

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[52] New York State Climate Action Council. 2022. "New York State Climate Action Council Scoping Plan."

[53] *Id.* at p. 231-232.

[54] *Id.* at p. 232.

[55] *See* Fleenor Aff, ¶ 4.

the State remains on the path to achieving these targets at the pace necessary to do so. If the projects are able to proceed through the local permitting and SEQRA review process, construction of the Proposed Replacements is anticipated to commence as early as CY 2023, which would enable the projects to participate in the Tier 1 solicitation. However, if the projects are required to proceed through the Section 94-c application and permit review process, approval would very likely take 2 years or more, based on the average timeframe for projects permitted under Section 94-c. This would result in a significant delay in commencement of construction, which would be pushed out until CY 2025 at the earliest. Allowing the Windparks to proceed through the local permitting and SEQRA review process to seek the permit amendments required for the Proposed Replacements is the most efficient and timely approach, while still being sufficiently rigorous to address any potential impacts appropriately and would be a decision consistent with the attainment of the CLCPA.

C. Support of Local Authorities for Continued Local Jurisdiction Over Proposed Replacements

As demonstrated by the letters from the Towns that have been submitted in this proceeding, the local permitting authorities support maintaining their continued jurisdiction over these projects.[56] The local permitting authorities were engaged in the extensive permit review process for the initial siting and construction of the Windparks, and along with the other relevant agencies which were consulted during the SEQRA review process, have provided continued oversight of the Windparks and diligently worked with facility operators to ensure compliance with the issued permits, approvals and licenses.

[56] *See* Letters referenced at FN 45, supra.

The already existing local permitting framework for the Windparks, and the partnerships developed between the Windparks and the host Towns as a result of continued communication, engagement, and consultation between the entities for over 15 years has been successful. Allowing continued review under this structure will more be efficient and effective than requiring review of the Proposed Replacements under Section 94-c, in light of the Town's long history with and detailed understanding of the existing permits and prior SEQRA review. This approach will contribute to enhancing the continued strong level of host community engagement these facilities already have with Towns, and will further encourage a level of strong communication, engagement and public outreach that is not only critical for the siting and deployment of new renewable facilities, but also to the continued success of renewable facilities already in operation, such as these Windparks.[57]

IV. CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that Executive Director of ORES issue a declaratory ruling that the Proposed Replacements for the Bliss and Wethersfield Windparks in Wyoming County, Altona, Clinton, and Ellenburg Windparks in Clinton County, and the Chateaugay Windpark in Franklin County are exempt from review and approval by ORES pursuant to New York State Executive Law Section 94-c, allowing the Proposed Replacements to undergo review and seek the required permits, approvals and licenses through the local permitting and SEQRA review process.

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Respectfully submitted,

[57] *See generally, Id.* at p. 236-237.

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James A. Muscato II
YOUNG/SOMMER LLC
Attorneys for Petitioner, *AES CED*
Executive Woods
Five Palisades Drive
Albany, New York 12205
Phone: (518) 438-9907