

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 15-F-0122 - Application of Baron Winds, LLC for a
Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct
a Wind Energy Facility.

ORDER GRANTING AMENDMENT PETITION II, WITH CONDITIONS, AND
GRANTING TRANSFER PETITION, WITH CONDITIONS

Issued and Effective: July 1, 2024

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State
Board on Electric Generation Siting
and the Environment held in the City
of Albany on July 1, 2024

BOARD MEMBERS PRESENT:

Tammy Mitchell, Alternate for
Rory M. Christian, Chair
New York State Public Service Commission

Mark Sanza, Alternate for
Sean Mahar, Interim Commissioner
New York State Department of Environmental Conservation

Kevin Malone, Alternate for
James V. McDonald, M.D., M.P.H., Commissioner
New York State Department of Health

Vincent Ravaschiere, Alternate for
Hope Knight, Commissioner
New York State Department of Economic Development

John Williams, Alternate for
Richard L. Kauffman, Chair
New York State Energy Research and Development Authority

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AND TRANSFER PETITION, WITH CONDITIONS

(Issued and Effective July 1, 2024)

BY THE BOARD:

I. INTRODUCTION

This Order considers separate petitions by Baron Winds, LLC (Baron) to amend (Amendment Petition II) and to transfer in part (Transfer Petition) the September 12, 2019 Certificate of Environmental Compatibility and Public Need (2019 Certificate) issued by the New York State Board on Electric Generation Siting and the Environment (Siting Board) pursuant to Public Service Law (PSL) Article 10. The Siting Board's 2019 Certificate authorized the construction and operation of a 242-megawatt (MW) wind generation facility located in the Towns of Cohocton, Dansville, Fremont, and Wayland.

On May 6, 2020, the Siting Board granted Baron's first petition to amend the 2019 Certificate (Amendment Petition I) and authorized construction of the first phase of the Project (Phase I Project) located in the Towns of Cohocton, Dansville, and Wayland.¹ On September 6, 2022, Baron filed a second petition to amend the second phase of the Project (Phase II Project), located primarily in the Town of Fremont (Fremont), which is at issue in this proceeding. In addition, Baron's Transfer Petition proposes to further amend the 2019 Certificate and authorize the transfer of the Certificate, but only as it relates to the Phase II Project, to affiliate Baron Winds II LLC (Baron II).

This Order grants Amendment Petition II, subject to revised Certificate Conditions designed to avoid or minimize Phase II impacts to the maximum extent practicable during construction and operation. It denies Baron's request to reduce the required decommissioning fund because the record fails to

¹ Order Approving Amendment (issued May 6, 2020) (Phase I Project Order).

support a reduction. With respect to the Transfer Petition, this Order rejects the concept of a partial transfer of the Certificate to Baron II without additional information or assurances, but allows the transfer conditioned on Baron and Baron II's agreement to share responsibility for full compliance with the Certificate's terms and conditions, irrespective of the two geographic areas comprising the Phase I and Phase II Projects.

II. BACKGROUND

A. 2019 Certificate

The Siting Board's 2019 Certificate authorized Baron to construct and operate a 242-megawatt commercial-scale wind facility in the Towns of Cohocton, Dansville, Fremont, and Wayland, in Steuben County (Original Project). After making the required Article 10 findings, the Siting Board approved the Original Project, which included 68 wind turbines of approximately 492 feet in height; 16.5 miles of access roads; 31 miles of underground collection lines; one collection substation; point of interconnection facilities; four permanent, 100-foot tall meteorological towers; two temporary staging/laydown yards for use during construction; a 4,000 to 6,000 square foot operations and maintenance (O&M) building; and other associated Facility components.²

The 2019 Certificate imposed 134 Certificate Conditions and Site Environmental and Engineering Plan (SEEP) related to avoiding or minimizing wildlife, wetlands and streams, noise, shadow flicker, setback, visual, and other

² Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (issued September 12, 2019), pp. 2-3 (citing Hearing Exhibit 9, Updated Application Exhibit 6, p. 2).

impacts to the maximum extent practicable. It waived Fremont's local laws limiting construction hours and days.³ The 2019 Certificate Conditions also imposed the express requirements that Baron (1) establish a minimum decommissioning reserve of at least \$9.76 million, and (2) provide the affected municipalities with irrevocable letters of credit in amounts commensurate with the costs that would be separately incurred by each Town for decommissioning and site restoration.⁴

Pursuant to 16 NYCRR §1000.15(a), on October 11, 2019, Baron filed a verification by its Chief Executive Officer stating its unqualified acceptance of the 2019 Certificate and its terms and conditions.⁵

B. Amendment Petition I

On March 9, 2020, Baron filed Amendment Petition I to construct and operate the Phase I Project.⁶ For the first phase, Amendment Petition I proposed to construct and operate the part of the Original Project located in the Towns of Cohocton, Dansville, and Wayland (Phase I Project).

Among other changes, Amendment Petition I sought approval to increase the size of the turbines approved in the 2019 Certificate from 492 feet to 650 feet with a corresponding reduction in the number of turbines from 35 to 33; and to move the location of turbines and other components, access roads, collection system lines, and the O&M building.

³ 2019 Certificate, pp. 152-155. The Siting Board denied Baron's waiver request for Fremont's local laws requiring well testing and submission of traffic routes. Id., pp. 159-160.

⁴ 2019 Certificate, pp. 160-163, Condition 44.

⁵ Verified Certificate Acceptance, Sworn to by Baron Chief Executive Officer Andrew Young (filed October 11, 2019).

⁶ Amendment Petition I (filed March 9, 2020).

Baron asserted in Amendment Petition I that the Phase I Project impacts had already been assessed in the 2019 Certificate and otherwise will be minimized, mitigated and "not have a significant adverse impact on the environment as compared with the impacts associated with the Certificated facility, and therefore, should not be considered a Certificate 'revision' but instead should be considered a 'modification' of the Certificate."⁷ Baron asserted at the time that granting Amendment Petition I would improve the Project's overall capacity due to the larger turbines and the modifications were necessary "to optimize Facility design and ensure the Facility can remain financially viable."⁸

In an April 27, 2020 letter, the Secretary to the Siting Board determined that Baron's proposed Phase I Project changes did not constitute a "revision" of the 2019 Certificate under 16 NYCRR §1000.16(b), meaning that no adjudicatory process or evidentiary hearing would be required.⁹ The Secretary concluded that Project changes "will not result in a significant adverse increase to environmental impacts as compared to the Certificated Facility."¹⁰ The Secretary noted that nothing in Amendment Petition I alters the 2019 Certificate and its Conditions would apply to any requested changes to ensure that

⁷ Amendment Petition I (filed March 9, 2020), p. 4.

⁸ Id., pp. 7-8. Baron also asserted that it would lose 20 percent of Production Tax Credits in failing to meet the Original Project's 2020 commercial operation date even though that date was not met in view of Amendment Petition I.

⁹ DMM Item No. 494, Secretary's April 27, 2020 Letter Regarding Phase I Project Amendment, pp. 3-6. The Secretary analyzed impacts related to noise limits and long-term design goals, shadow flicker, land use, wildlife, wetlands and surface water, and visual impacts due to increased turbine size.

¹⁰ Id., p. 6.

any environmental impacts have been avoided or mitigated to the maximum extent practicable.¹¹

In a May 5, 2020 Order, the Siting Board approved Amendment Petition I and authorized construction and operation of the Phase I Project in the Towns of Cohocton, Dansville, and Wayland, including the use of 650 foot high turbines, the relocation of Project components, and other proposed changes.¹² The Siting Board's order expressly stated that it was approving only Phase I Project changes, that the 2019 Certificate Conditions remained unchanged, including the required minimization and mitigation requirements and that, if Baron filed a petition for Phase II, the Siting Board would consider the cumulative impacts of both Phases when determining the significance of Phase II.¹³

C. Phase I Compliance Filings and Facility Operations

Following the Siting Board's approval of the Phase I Project, its jurisdiction ceased, and Baron submitted several compliance filings for Commission approval, all of which were approved. The Commission's orders expressly approved the compliance filings for only Phase I.

The Phase I Project became commercially operational on February 7, 2023.

¹¹ Id., pp. 2-3, n. 2. The Secretary made clear that nothing in Amendment Petition I alters the 2019 Certificate and to "ensure there is no misunderstanding of this point, Baron Winds remains obligated to make all of the required filings under 16 NYCRR Part 1002.1, demonstrating compliance with the existing Certificate Conditions" and that "impacts on noise, wetlands, birds and bats, etc., should be considered with and without Phase 2 included."

¹² Order Approving Amendment (issued May 6, 2020).

¹³ Id., pp. 8, 15.

D. PSL Section 68 and Section 70 Petitions

On July 6, 2022, Baron II filed a petition pursuant to PSL §68 seeking Public Service Commission (Commission) approval and issuance of a certificate of public convenience and necessity related to the Phase II (CPCN Petition) for the Phase II Facility. The CPCN Petition also sought approval for Baron II to be treated under a lightened regulatory regime.

Also on July 6, 2022, Baron and Baron II jointly filed a separate petition pursuant to PSL §70 (Section 70 Petition) requesting Commission authorization for the partial transfer from Baron to Baron II of the 2019 Certificate and certain property interests, including agreements, leases, options, and ownership of real property associated with the Phase II Project. On July 11, 2022, intervenor Alice Sokolow filed opposition to both the CPCN and Section 70 Petitions. On July 15, 2022, Fremont filed its response to both Petitions.¹⁴

E. Amendment Petition II

On September 6, 2022, Baron and Baron Winds II jointly filed Amendment Petition II to construct and operate the Phase II Project (Amendment Petition II) located primarily in the Town of Fremont.¹⁵ With Amendment Petition II, Baron filed supporting information associated with the proposed Phase II Project changes, including a comparison with the Original Project approved in the 2019 Certificate. The Phase II Project changes were set forth in Exhibit A to Amendment Petition II and included:

¹⁴ Intervenor Sokolow's opposition was in the form of a motion to suspend the Phase II Project.

¹⁵ Collection lines for the Phase II Project are also located in the Towns of Cohocton and Wayland.

Major Components, Facility Design/Layout

- Increase in Facility size to 5,211.5 acres; and increase from 247.2 acres to 394.5 acres of potential impacts from Facility components (Exhibit A, pp. 2-5, Table 2-2);
- Increase in turbine height from 492 to 650 feet for 26 turbines with greater generating capacity and increase in turbine foundation radius from 200 feet to 350 feet (Exhibit A, §1, pp. 3, 5);
- Addition of ancillary access roads and turbine/contractor staging areas (Exhibit A, §1, pp. 3, 5);
- Change in locations of components, including turbines, collection substation, access roads, collection lines, construction laydown yards, batch plant, and meteorological towers (Exhibit A, §1, pp. 3-4, Table 1-1);
- Increase of underground collection lines (from 31 miles to 32.5 miles), with impacts to an additional 5.7 acres; addition of 5 miles of collector bores (Exhibit A, §4, p. 11 n. 5; §34, p. 57);
- Increase in width of collection line corridors (width increase undefined); and addition of 1.8 miles of bore access roads with impacts of an additional 16.6 acres (Exhibit A, §2, pp. 2 n. 3, p. 5, Table 2-2);
- New collection substation on 0.4 acres (Exhibit A, p. 2);

Land Use:

- Overall increases to the use of residential land (from 833.3 acres to 1242.3 acres); vacant land (from 465.6 acres to 687.7 acres); and unassigned roads (from 0.0 to 59.4 acres) (Exhibit A, §4, pp. 10-12, Table 4-3);

Geology

- Increase of 60 percent to the Project's limits of disturbance, from 247.2 acres to 394.6 acres (Exhibit A, §21, pp. 24-26, Table 21-3);

Agricultural Resources:

- Increase to the use of agricultural land from 2,938.1 acres to 3,221.8 acres; (Exhibit A, §4, pp. 10-12, Table 4-3);
- Increase of agricultural impacts to land located in agricultural districts (from 3,533.9 acres to 3,688.6 acres) (Exhibit A);
- Increases in use of cultivated crop fields (from 108.5 acres to 213.3 acres), hay/pasture fields (from 33.7 acres to 64.4 acres), and mixed forests (from 8.4 acres to 21.8 acres) (Exhibit A, §4, p. 10, Table 4-2; §22, p. 27);
- Increased use of 40 acres of agricultural land in New York State Certified Agricultural District (from 127.7 acres to 167.5 acres) and conversion of an additional 23.1 acres (Exhibit A, §4, p. 9);
- Increase of 121 acres of total agricultural soils impacted (from 207.6 acres to 328.5 acres), 71 percent of which are soils classified as prime farmland, prime farmland if drained, or farmland of statewide importance (Exhibit A, §4, p. 10; §21, p. 24);

Cultural Resources: Historic/Archeological

- Increase of 54 acres within the Area of Potential Effects on archeological resources having "elevated sensitivity" and "elevated sensitivity for historic-period sites" (three 19th to 20th century sites) (Exhibit A, §20, pp. 19-20);
- Addition of 4.63 square miles of visual impacts to historic resources (Exhibit A, §20, p. 20);

Health and Safety: Noise/Shadow Flicker

- Additional residential receptors will receive shadow flicker for more than 20 hours annually and more than 30 hours annually (Exhibit A, §15, pp. 16-17);
- Changes in participating and non-participating receptor locations (Exhibit A, §§15 and 19, pp. 17-18);

Visual Impacts

- Increase in overall Project visibility by 10.3 square mile within the visual study area due to increase to turbine height and turbine location

changes, with a majority of viewpoints identified in the 2017 VIA to experience a perceptible change as a result of the proposed layout revisions (Exhibit A, §24, pp. 48-49);

Terrestrial Ecology and Wetlands/Streams Impacts

- Increase in vegetation disturbance (from 247.2 acres to 394.6 acres) (Exhibit A, §22, pp. 27-29, Table 22-2);
- Addition of 72 streams impacted, eight of which are "protected," i.e., classified under 6 NYCRR Part 701 (six are designated Class A, one is Class A(T), one is Class C(TS) (Exhibit A, §23, pp. 42-47, Table 23-1);

Communications and Air Traffic Impacts

- Disruption to 18 television stations requiring acquisition of "high-gain directional antenna" to be used "outdoors and oriented towards the signal origin" (Exhibit A, §26, p. 53);
- Department of Defense preliminary determination that Phase II will have an adverse impact on radar operations conducted by the North American Aerospace Defense Command (for Dansville Common Air Route Surveillance Radar); no FAA response to request for No Hazard determination for increased turbine height (Exhibit A, §25, p. 54);

Decommissioning

- Modification of Certificate Condition 44 to reduce by 1.25 million the minimum decommissioning amount of \$9.76 million required to be submitted to the Towns in letters of credit (Exhibit A, pp. 7-8);¹⁶

Waiver of Town of Fremont Local Laws

- Request that the Siting Board not apply Town of Fremont's wind law limiting the maximum turbine height to 500 feet (Exhibit A, §31, p. 56).

Baron's Amendment Petition II asserts that "[o]nly those potential effects which are quantifiably relevant to the

¹⁶ Hearing Exhibit 34 (Appendix M).

[Project] modification are presented.”¹⁷ Amendment Petition II notes that it includes application exhibits and analysis of resources and subject areas for the following Article 10 regulatory requirements:¹⁸

- Overview/Public Involvement (16 NYCRR §1001.2)
- Location of Facilities (16 NYCRR §1001.3)
- Land Use (16 NYCRR §1001.4)
- Wind Power Facilities (16 NYCRR §1001.6)
- Preliminary Design Drawings (16 NYCRR §1001.11)
- Real Property (16 NYCRR §1001.13)
- Public Health and Safety (16 NYCRR §1001.15)
- Noise and Vibration (16 NYCRR §1001.19)
- Cultural Resources (16 NYCRR §1001.20)
- Geology, Seismology, and Soils (16 NYCRR §1001.21)
- Terrestrial Ecology/Wetlands (16 NYCRR §1001.22)
- Water Resources/Aquatic Ecology (16 NYCRR §1001.23)
- Visual Impacts (16 NYCRR §1001.24)
- Effect on Transportation (16 NYCRR §1001.25)
- Effect on Communication (16 NYCRR §1001.26)
- Decommissioning/Restoration (16 NYCRR §1001.29)
- Local Laws and Ordinances (16 NYCRR §1001.31)
- Electric Interconnection (16 NYCRR §1001.34)

Amendment Petition II did not analyze or include supporting documentation for resources or subject areas “not

¹⁷ Hearing Exhibit 2 (Amendment Petition II, Exhibit A), pp. 5-6.

¹⁸ Hearing Exhibit 2 (Amendment Petition II, Exhibit A), p. 6.

expected to be affected by Project modifications” that otherwise would be required for an initial application.¹⁹

F. Article 10 Transfer Petition

On September 6, 2022, Baron and Baron II jointly filed the Transfer Petition pursuant to 16 NYCRR §1000.17, seeking the “partial” transfer of the 2019 Certificate exclusive to the Phase II Project. Specifically, the Transfer Petition requests Siting Board approval of the partial transfer of the Certificate, as amended, to Baron II only as to the Phase II Project.²⁰ Because of the procedural posture of the petition, we address it first before getting into greater detail regarding the request for a CPCN for Baron II.

The Transfer Petition proposes that Baron and Baron II would be separate Certificate Holders, with Baron responsible only for the now-operational Phase I Project, and Baron II responsible only for construction and operation of the Phase II Project. Thus, the Transfer Petition proposes that Certificate compliance responsibilities be divided between two entities and two Project Phases located in two adjacent geographic areas.

¹⁹ Hearing Exhibit 2 (Amendment Petition II, Exhibit A), pp. 5-6. Amendment Petition II lists the following resources and subject areas not addressed: General Requirements (16 NYCRR §1001.1); Electric System Effects (16 NYCRR §1001.5); Natural Gas Power Facilities (16 NYCRR §1001.7); Electric System Production Effects (16 NYCRR §1001.8); Alternatives (16 NYCRR §1001.9); Consistency with Energy Planning Objectives (16 NYCRR §1001.10); Construction (16 NYCRR §1001.12); Cost of Facilities (16 NYCRR §1001.14); Pollution Control Facilities (16 NYCRR §1001.16); Air Emissions (16 NYCRR §1001.17); Safety and Security (16 NYCRR §1001.18); Socioeconomic Effects (16 NYCRR §1001.27); Environmental Justice (16 NYCRR §1001.28); Nuclear Facilities (16 NYCRR §1001.30); State Laws and Regulations (16 NYCRR §1001.32); Other Applications and Filings (16 NYCRR §1001.33); Electric and Magnetic Fields (16 NYCRR §1001.35).

²⁰ Transfer Petition, pp. 5-6.

The Transfer Petition claims that the proposed transfer is necessary "to facilitate the tax equity financing" of both Phase I and Phase II, even though Phase I is constructed and fully operational.

The Transfer Petition attaches a description of the Phase II Project to be transferred to Baron II and states that Baron and Baron II "will share the interconnection facilities, and the O&M building, and may also share the aircraft detection lighting system and communication system for Phase I and Phase II." The Transfer Petition asserts that Baron and Baron II "will comply with the terms, limitations and conditions contained in the CECPN," and that "Baron Winds II is qualified to carry out the provisions of the CECPN and any orders issued thereunder with respect to Phase II of the Facility." The Transfer Petition asserts that "there are certain Certificate Conditions that will be or have been satisfied by a single filing applicable to the Facility as a whole," and refers as an example to endangered and threatened species mitigation plans submitted as compliance filings for Phase I, noting that no additional mitigation or plans are required to be submitted for either Phase I or Phase II of the Facility.²¹

The Transfer Petition asserts that the transfer of from Baron to Baron II meets the public interest standard on the grounds that Baron II is an existing, newly named limited liability company intended "to develop, own, construct and

²¹ Transfer Petition, pp. 6-7. Baron asserts that it will that it "will work with DPS Compliance Staff to ensure that all necessary filings and approvals are identified for Phase II prior to proceeding with construction" as the Certificate requires.

operate Phase II of the Project.²² However, the Transfer Petition acknowledges that tax equity investors "have not yet been selected," and otherwise notes that "it is reasonable to assume" that investors different from the Phase I Project investors may be involved with the Phase II Project and that those investors "will require the ownership and structure for each phase to be in place prior to their investment," with each having an ownership interest in either Baron or Baron II.²³ It claims that Baron II's upstream parents have expertise in constructing and operating renewable energy projects, and "that experience will ensure that the Project remains competitive and financially viable throughout its lifespan."²⁴ The Transfer Petition refers the Siting Board to Baron and Baron II's pending PSL Section 68 Petition for a Certificate of Public Convenience and Necessity (CPCN Petition) for further details regarding Baron Winds II's financial qualifications.²⁵

²² Transfer Petition, pp. 4, 7. The Transfer Petition indicates that Baron II was formed in March 2011 as "Kimberly Run LLC" that was renamed Baron II in June 2020. It also indicates that like Baron, Baron II is a wholly owned "subsidiary of RWE," which is a wholly owned "subsidiary of RWERA, a subsidiary of RWE AG." Id., p. 9.

²³ Id., p. 8. As the reason for the Certificate transfer to Baron II, the Transfer Petition indicates that it "is necessary to facilitate tax equity financing of both phases of the Facility."

²⁴ Transfer Petition, pp. 8-9.

²⁵ Id., p. 8; Case 22-E-0400, Petition of Baron Winds II LLC for an Order Granting a Certificate of Public Convenience and Necessity Pursuant to Section 68 of the Public Service Law and for an Order Granting Lightened Regulation (filed July 6, 2022) (CPCN Petition).

Discussion

1. Statutory and Regulatory Requirements for Transfer

An Article 10 Certificate may only be transferred "to a person who agrees to comply with the terms, limitations, and conditions contained therein" and with every subsequent order issued thereunder. The Article 10 regulations require, among other things, that a transfer petition state the reasons supporting the transfer and show that the transferee is "qualified to carry out the provisions of the certificate and any Orders issued thereunder." The Siting Board has exclusive jurisdiction to grant or deny a transfer petition, grant it under appropriate terms and conditions, or conduct any further investigation deemed necessary.

2. Division of Certificate Compliance Responsibilities

The Transfer Petition and the record lack details about how Baron and Baron II will assure Certificate compliance for each Project Phase, particularly as to shared components and overlapping responsibilities, including long-term obligations related to facility maintenance, decommissioning, and site restoration.²⁶

The Transfer Petition's lack of clarity on the issue of compliance has the potential to cause future enforcement and administrative issues for DPS compliance staff. For example, if a violation of a Certificate condition's noise limits occurs,

²⁶ Transfer Petition, p. 6. Phases I and II will share, among other things, interconnection facilities, the Operations and Maintenance Building, the aircraft detection lighting system, the communication system, and the Phase I and Phase II substations will be connected and share underground lines. The Transfer Petition notes that required compliance filings "will be or have been satisfied by a single filing applicable to the Facility as a whole" (Id.), but it fails to state which entity will be responsible for compliance filings or whether they will be jointly responsible.

Baron and Baron II could separately assert a lack of responsibility for turbine curtailment, noise reduction operations, or other necessary mitigation measures to bring the Facility into compliance. Both entities also could dispute their respective decommissioning obligations for shared Project components. Under these and other scenarios, DPS compliance staff and the Commission could be unnecessarily tasked with determining which entity is responsible for Certificate compliance if a dispute between Baron and Baron II arises. Such an administrative burden is not feasible and is not justified given that Baron chose to divide the Project into separate amendment requests, significantly altering the Project after the Siting Board initially approved and then allowed later substantial amendments to it.

In both the 2019 Certificate and the 2020 Amendment Order, the Siting Board assumed Baron's compliance with the Certificate for the entire Project. The Siting Board's 2020 Amendment Order authorized Baron to construct and operate the Project in two phases, starting with Phase I. In its 2020 Amendment Order, the Siting Board did not amend the Certificate to differentiate between the Certificate's compliance obligations for two Project phases. In fact, the 2020 Amendment Order expressly noted Baron's continued obligation to comply with the Certificate with respect to the entire Project.²⁷ Baron did not request Siting Board approval for, or indicate the potential for, a separate entity to construct and operate Phase II.

²⁷ Order Approving Amendment (issued May 6, 2020), p. 15 ("approval of this Amendment Petition does not relieve Baron Winds of the need to comply with the 'terms, conditions, limitations, or modifications of construction and operation of the facility authorized in the certificate...").

The Siting Board did not envision a second Certificate holder with separate Certificate compliance responsibilities for the next phase of the Project. The Transfer Petition's proposal to split Certificate compliance between two entities and two geographically different Phases potentially undermines the Siting Board's prior determinations and its reliance on the record presented in the Amendment Petition I for Phase I.

In addition, the Article 10 regulations governing Certificate transfers do not support the Transfer Petition's proposal. The regulations expressly require a Certificate Holder's agreement to comply with the totality of all Certificate terms, limitations and conditions.²⁸ It does not authorize separate Certificate Holders to limit a Certificate Holder's agreement to only one phase or portion of a project.²⁹ The Transfer Petition therefore lacks a basis for granting it as constructed in the Transfer Petition without further Siting Board action.

Both the Transfer Petition and the underlying record reflect that Baron II desires to limit its agreement to comply with the Certificate's terms, conditions, and limitations as applied only to the Phase II Project, something that we find not approvable. With that said, we find that our concerns would be ameliorated if Baron and Baron II make a showing that they have entered into a written agreement binding each entity to jointly and severally comply with the Certificate's terms, conditions, and limitations, and with any order issued thereunder, without regard to the two Project Phases or the separate corporate

²⁸ 16 NYCRR §1000.17(a).

²⁹ A certificate "may only be transferred to a person who agrees to comply" with it. 16 NYCRR §1000.17(a). The plain language of this regulation appears to prohibit the partial Certificate transfer to a second entity as proposed by Baron.

Certificate Holders.³⁰ This result would protect the local communities and promote administrative efficiency. To the extent that the entities dispute responsibility for any compliance costs, they are free to raise those concerns in an appropriate venue, but the local communities and Siting Board can be assured that while such proceedings are occurring the appropriate efforts will be undertaken to achieve compliance. The Siting Board thus grants the petition to transfer, in part and conditioned upon, the filing of an agreement binding both Baron and Baron II consistent with the discussion herein.

3. Baron II's Financial Qualifications

The Article 10 transfer regulations require a showing that a transferee is "qualified to carry out the provisions of the certificate and any Orders issued thereunder." When considering a transferee's qualifications, the Siting Board looks to factors similar to those reviewed by the Commission when making a public interest finding. In particular, the Commission has jurisdiction over the ability of an electric corporation to exercise its rights pursuant to a grant of franchise under PSL section 68. Likewise, the Commission must approve the transfer of an ownership interest in an electric corporation before it takes place under PSL Section 70.

Here, PSL Section 68, by which the Commission considers requests made under a similar public interest standard, provides some guidance. In the context of Section 68,

³⁰ Case 16-F-0267, Petition of Atlantic Wind LLC for Approval Under Public Service Law Section 70 of the Transfer of the Certificate of Environmental Compatibility and Public Need for the Deer River Wind Farm Project, Letter of Chair New York Board on Electric Generation Siting and the Environment Granting Transfer (issued December 2, 2020) (authorizing transfer from Atlantic Wind to Deer River on the condition of corporate officer's verified statement to comply with Certificate and every order issued thereunder).

the Commission applies the public interest standard by considering an entity's economic feasibility; that is, an ability to finance facility improvements and to otherwise provide safe, adequate, and reliable service at just and reasonable rates.³¹ Given the importance of having the ability to access sufficient capital to construct, operate, and maintain a utility plant in order to provide safe, adequate and reliable service, the focus of PSL Section 68's public interest standard is directed in large part on an electric corporation's financial qualifications, a standard that is readily applicable here in the context of Article 10 which shares the same concern.

Although the Transfer Petition asserts that the transfer to Baron II meets the public interest standard,³² it does not contain evidence of Baron II's financial qualifications to support that assertion. Instead, the Transfer Petition states that Baron II has no investors and that when Baron II does secure such investors they are unlikely to be the same as those investors who have purchased shares in Phase I.³³

³¹ PSL §68(1); Case 21-E-0122, Petition of East River ESS, LLC for an Expedited Order Granting a Certificate of Public Convenience and Necessity Pursuant to Section 68 of the Public Service Law and Establishing a Lightened Regulatory Regime, Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued June 21, 2021), pp. 13-14 (record demonstrated economic feasibility of 400 MW battery storage facility operator and its ability to provide safe, adequate, and reliable service through utility payments and New York City IDA tax incentives); Confirming Order (issued July 20, 2021).

³² Transfer Petition, p. 7.

³³ Id., p. 8. As the reason for the Certificate transfer to Baron II, the Transfer Petition indicates that it "is necessary to facilitate tax equity financing of both phases of the Facility."

Similarly, although the Transfer Petition asserts that Baron II's upstream parents have expertise in constructing and operating renewable energy projects, it does not explain how the upstream parent would impart that expertise to Baron II, including whether it would provide any necessary financing to Baron II for the Phase II Project and/or play a role in constructing, operating, or maintaining Phase II. Merely noting that there is a likelihood that a parent entity will provide financing, as the Transfer Petition states, is insufficient to establish that allowing Baron II to assume control of a portion of the Project is in the public interest.

The Transfer Petition provides no details of the referenced closing with investors or Baron II's resulting financial qualifications after the closing. The record reflects no agreement with investors or between Baron and Baron II. The Transfer Petition essentially claims that potential investors require the Siting Board's approval of the transfer first, before making their investment. Thus, Baron II's financial qualifications as a Certificate Holder will not be in place until after Siting Board approval. Baron II's approach, therefore, would misapply Article 10's requirement that the transferee's qualifications to comply with the Certificate be shown in the first instance.³⁴

The Transfer Petition's reference to Baron and Baron II's pending PSL Section 68 CPCN Petition does not cure the lack of evidence on the record compiled in this proceeding because it does not contain the requisite demonstration of Baron Winds II's financial qualifications to become a Certificate Holder. Like the Transfer Petition, the CPCN Petition indicates that Baron II "does not yet have any assets or direct financing abilities, but

³⁴ 16 NYCRR §1000.17(b)(2).

that "it is anticipated" that Baron II's upstream parent will finance the construction of the Phase II Project from liquidity on its balance sheet."³⁵ The CPCN Petition also indicates that a separate upstream parent "would likely be the source of some or all of the necessary financing for construction of the Facility,"³⁶ but does not explain how such financing arrangement would be effectuated or why such arrangement is in the public interest.

In sum, the Transfer Petition's anticipation of possible financing lacks the requisite certainty to demonstrate Baron II's qualifications or how the Phase II Project will be financed.³⁷ While Baron II's upstream parents may be financially qualified to fund the Phase II Project, neither the Transfer Petition nor the pending CPCN Petition definitively identify the upstream parent or state with certainty that they will, in fact, provide such financing.³⁸ Based on our review of the record, it

³⁵ Case 22-E-0400, Baron Winds II - Section 68 Petition, CPCN Petition, p. 13.

³⁶ Id.

³⁷ Cf. 16 NYCRR §21.3(c), (f) (Section 68 implementing regulations require CPCN petitioner to present evidence of the "manner in which the cost [of the facility] is to be financed" (emphasis added)).

³⁸ Baron and Baron II's pending Section 70 Petition also does not demonstrate Baron II's qualifications. The Section 70 Petition simply states that Baron II's upstream parents are "capable" of financing the Phase II Project and that their "experience will ensure that the Project remains financially viable throughout its lifespan." Case 22- E-0398, Petition of Baron Winds and Baron Winds II LLC for Approval Under Section 70 of the Public Service Law for the Partial Transfer of the Certificate of Environmental Compatibility and Public Need for the Baron Winds Energy Project (filed July 6, 2022), p. 9. An upstream parent's capability to finance and its asserted experience do not demonstrate Baron II's qualifications.

appears that Baron II is requesting that the Siting Board authorize the transfer of an Article 10 Certificate and associated assets to only a paper entity based on inchoate plans to obtain financing sometime after the transfer is approved. In our judgement, the transferee's qualifications need be shown more definitively in the Transfer Petition itself.³⁹

The Transfer Petition and the record lack sufficient evidence of Baron II's own financial qualifications to construct the Phase II Project and to assure compliance with the Certificate's terms, limitations, and conditions. Accordingly, with our grant of the Transfer Petition conditioned on Baron and Baron II's filed agreement, Baron II should file a compliance item explaining the source of Phase II Project financing that confirms Baron II's financial qualifications as required by the Article 10 regulations. This demonstration should include evidence of any financing agreement with investors and/or upstream entities that reflects a commitment to finance the Phase II Project's construction and operation and all aspects of Certificate compliance. Upon such compliance as accepted by the jurisdictional compliance authority, the transfer may become effective.

III. PARTIES TO THE PROCEEDING

In addition to Baron, the parties to the proceeding include trial staff of the Department of Public Service (DPS Staff); staff of the Department of Environmental Conservation (DEC Staff), the Department of Agriculture and Markets (AGM Staff), and the Department of Health (DOH Staff); and

³⁹ 16 NYCRR §1000.17(b)(2). The showing of a petitioner's "qualifications" includes the transferee's economic viability, financing ability, experience, and any other information that would support a finding that the transfer is in the public interest.

intervenors Robert Wagner, Alice Sokolow, Marty Oehlbeck, Nathan Oehlbeck, and Chad Zigenfus.

IV. PROCEDURAL HISTORY

On September 17-18, 2022, Fremont and intervenor Sokolow filed objections to Amendment Petition II, asserting that the Phase II Project would violate the height restriction, setback requirements, and other provisions of Fremont's Wind Law, which the Siting Board should not waive in favor of Home Rule.⁴⁰

On September 20, 2022, the Secretary issued a letter to Baron finding that Amendment Petition II's proposed multiple changes to the Certified Facility, including increasing the turbine height from less than 500 feet to approximately 650 feet, and relocation of access roads, collection lines, O&M Building, and laydown yard, "are likely to result in a significant adverse environmental impacts in comparison to such impacts of the facility as approved, and identify an adverse environmental impact not included in the application."⁴¹ The Secretary also found that the Phase II Project would be inconsistent with Fremont's Wind Law and constitutes a material conflict with a community's current plans or goals as officially approved or adopted.

The Secretary directed Baron to submit an intervenor funding fee of \$75,000 by September 27, 2022. On October 13,

⁴⁰ Fremont Objections (September 17, 2022). Fremont argues that Amendment Petition II constituted a "revision" to the 2019 Certificate, requiring a "hard look." Id., pp. 6-7. Intervenor Sokolow expressed similar objections. Sokolow Objections (September 18, 2022).

⁴¹ Secretary Letter to Baron Determining Phase II to be a "Revision" (September 20, 2022) (citing 16 NYCRR §1000.2(ak) and 6 NYCRR §617.7(c)).

2022, Baron submitted \$75,000 in intervenor funding for Amendment Petition II. On January 24, 2023, the Secretary issued a notice of the availability of intervenor funding and established deadlines for requesting funding and seeking party status.⁴² Fremont was the only party applying for intervenor funding and requested an award of \$70,000. On February 23, 2023, the Presiding Examiner issued a ruling granting Fremont \$70,000 in funding after finding that Fremont's application met the criteria for an award.⁴³ The ruling also granted party status to those on the official Limited Service List established in the February 14, 2023 ruling.

On January 6, 2023, the Presiding Examiner scheduled the first conference and requested that the parties to be prepared to discuss, among other things, service of Amendment Petition II, a proposed schedule for the proceeding, the potential for settlement, party status, and issues related to Amendment Petition II that may be raised requiring adjudication. On January 17, 2023, the Presiding Examiner held a preliminary conference at which the foregoing issues were discussed.

On January 10, 2023, Baron filed affidavits of service of the Amendment Petition II and affidavits of publication of the Notice of Amendment Petition II. On January 31, 2023, Baron filed corrected affidavits of service and publication, which

⁴² Notice of Availability of Intervenor Funding and Deadlines for Submitting Funding Requests for Seeking Party Status (issued January 24, 2023).

⁴³ Ruling Granting Intervenor Funding and Party Status (issued February 23, 2023). In a subsequent ruling, the Presiding Examiner granted Fremont's additional request for the remaining \$5,000 of intervenor funding. Ruling Granting Additional Intervenor Funding (issued August 9, 2023).

reflected Amendment Petition II had not been properly served as required by the Article 10 regulations.⁴⁴

On February 14, 2023, the Presiding Examiner issued a ruling establishing the procedural schedule; adopting and incorporating the April 3, 2018 Protective Order issued in the proceeding for the Original Application; directing use of a defined Limited Service List during the proceeding; and addressing other matters associated with Amendment Petition II.

On March 3, 2023, the Presiding Examiner held a conference for the purpose of inquiring about service of Amendment Petition II, among other things. On March 14, 2023, the Presiding Examiner issued a ruling finding Baron to have failed to comply with the applicable service requirements for Amendment Petition II and directing it to cure the service defects.⁴⁵ The ruling in part was based on Baron's own definition of property owners who would be affected by the Original Project and on its previous failure to properly serve landowners affected during the proceeding for the Original Project. After seeking an extension to the deadline for curing

⁴⁴ Baron was required to file Amendment Petition II with affidavits of service and publication. See 16 NYCRR §1000.16(b)(6) ("petition shall be accompanied by affidavit of publication and service ..."). Affidavits were not filed until January 10, 2023, were corrected on January 31, 2023, and even as corrected, were defective because Baron failed to serve Amendment Petition II on property owners who would be affected by the Phase II Project, as required by 16 NYCRR §1000.16(b)(4) ("a copy of the petition shall be served on ... all property owners affected by the proposed amendment). The affidavit did not identify the affected property owners who had been served, which totaled only 30.

⁴⁵ Ruling Addressing Service Defects and Directing Further Action (issued March 14, 2023), pp. 7-11.

the service defects, on March 31, 2023, and April 4, 2023, Baron filed corrected affidavits of service and publication.⁴⁶

On March 23, 2023, Baron sought confidential protection for discovery responses that included turbine manufacturer performance specifications. Intervenor Zigenfus objected, asserting that the manufacturer's information was publicly available on the internet. Baron's response asserted that the publicly available information was different than the performance specifications it was seeking to assert. The Presiding Examiner found that the publicly available version was different than version Baron sought to protect. In a later oral ruling, the Presiding Examiner found the performance specifications to be entitled to confidential treatment.

On March 24, 2023, DPS Staff, DEC Staff, and Fremont filed direct testimony. DOH filed a letter joining in the position advanced in DPS Staff's noise testimony. On April 21, 2023, Baron filed rebuttal testimony.

On April 18, 2023, the Presiding Examiner issued a ruling revising the procedural schedule and establishing dates for submission of statements of contested issues, pre-hearing motions, corrections to testimony, a draft consensus exhibit list.⁴⁷ The ruling also scheduled a June 5, 2023 evidentiary hearing date to be held in Albany. On April 28, 2023, Fremont moved for reconsideration of the Albany hearing location and requested that it be held in the Town pursuant to PSL §165(3). On May 11, 2023, DPS Staff, DEC Staff, and Baron submitted responses to Fremont's motion, none of which objected to the change in the hearing's location, although DPS Staff requested

⁴⁶ DMM Item Nos. 741-742.

⁴⁷ Ruling Revising Procedural Schedule (issued April 18, 2023).

that the hearing commence one day later. The Presiding Examiner granted Fremont's motion.⁴⁸

On May 10, 2023, the parties submitted Statements of Contested Issues.⁴⁹ DPS Staff's Statement identified noise impacts and mitigation through noise reduction operations as the only contested issued. DEC Staff identified wetlands and waterbody crossings and threatened and endangered species as issues in dispute but noted that they did not require adjudication based on Baron's rebuttal testimony. In its Statement, Fremont identified issues associated with the height restriction in its Wind Law, the setback requirements for public safety, decommissioning costs and financial security, noise level compliance and monitoring, wildlife impacts on threatened and endangered species, and the Transfer Petition's request for partial transfer of the 2019 Certificate. Intervenor Zigenfus' Statement raised noise, public health, and safety issues similar to those presented by Fremont. Intervenor Wagner raised his contract dispute with Baron. Intervenor Sokolow raised 52 issues for adjudication, some of which were duplicative of the issues raised by other parties.

On May 23, 2023, the Presiding Examiner issued a ruling defining the issues that would be adjudicated at the evidentiary hearing, including noise impacts, waiver of local laws governing turbine height, setbacks for public safety, decommissioning and financial security, wildlife impacts on bald eagles, wetlands and waterbody crossing impacts, and transfer of

⁴⁸ Ruling Granting Town of Fremont's Motion to Reconsider Evidentiary Hearing Location (issued May 12, 2023). The Ruling changed the June 5, 2023 hearing date to June 6, 2023, at DPS Staff's request.

⁴⁹ DMM Item Nos. 756, 757, 758, 760, 761, 766, and 773. AGM filed a Statement that it did not have issues to adjudicate in the evidentiary hearing. DMM Item No. 768.

the 2019 Certificate.⁵⁰ The ruling also addressed the witnesses who would be subject to cross-examination.

On May 16, 2023, Baron filed a Notice of Impending Settlement Negotiations, serving all parties and inviting their participation.⁵¹

On May 22, 2023, the Secretary issued a Notice of Evidentiary Hearing to be held at the Fremont Town Hall. On May 30, 2023, the Presiding Examiner issued a ruling governing the procedures for admission of evidence at the hearing and denied Baron's attempt to file new information in the record as "corrections" to its rebuttal testimony and exhibits.⁵² The ruling also rejected Baron's belated attempt to import the entire record of the Original Application proceeding into the record for Amendment Petition II because none of that information had been submitted in support of the Phase II Project to allow the parties to address same during the proceeding.⁵³

⁵⁰ Ruling on Contested Issues Subject to Adjudication and Witnesses Subject to Cross-Examination at the Evidentiary Hearing (issued May 23, 2023).

⁵¹ DMM Item No. 769.

⁵² Ruling Establishing Criteria and Procedures for Admission of Evidence to the Record at the Evidentiary Hearing for the Phase II Project and Denying Admission of Updated Testimony and Exhibit (issued May 30, 2023). The Ruling denied Baron's untimely submission of purported corrections to its rebuttal testimony and exhibits because both contained new information, which the parties had not been given an opportunity to review and address in their testimony, and were not in fact permitted corrections.

⁵³ The record of the Original Application proceeding Baron sought to admit in this proceeding included hundreds of thousands of pages of Application exhibits, figures, maps, reports, testimony, exhibits, hearing transcripts, conference transcripts, and other voluminous documents and information.

On May 31, 2023, the Presiding Examiner held a conference to discuss hearing logistics, the status of settlement, and other matters. She noted that because a settlement agreement had not been submitted by then, the evidentiary hearing would go forward the following week, as scheduled.

In the late afternoon of Friday, June 2, 2023, Baron submitted several documents: a Settlement Proposal, a Stipulation of Settlement, and five appendices (Appendices A to E) (Settlement Proposal), which purported to resolve certain issues, including bald eagle impacts, wetland/water body impacts, and required minimization measures for both impacts. In a June 5, 2023 email to the parties, the Presiding Examiner noted that the Settlement Proposal was filed too late to be reviewed in time for the June 6, 2023 evidentiary hearing and planned witness testimony would not change.

The two-day evidentiary hearing was held on June 6 and June 7, 2023. Numerous witnesses testified and additional information was admitted to the hearing record, including certain documents included in the June 2, 2023 Settlement Proposal. On June 26, 2023, the Presiding Examiner issued a ruling establishing filing dates for post-hearing briefs initial and reply briefs.⁵⁴ On July 17, 2023, the parties filed initial briefs and on August 21, 2023, filed reply briefs.

On June 15, 2023, the Examiners held a post-hearing conference with the parties to discuss an acceptable schedule for filing briefs, motions, additions to the Exhibit List, and other submissions necessary for a complete record, including or U.S. Department of Defense "notice of presumed risk" and Federal

⁵⁴ Ruling Establishing Post-Hearing Briefing Schedule (issued June 26, 2023).

Aviation Administration mitigation agreement resolving Phase II Project air hazard determination; State Office of Historic Preservation approval of mitigation plan; confirmation of Phase II layout; AGM Guidelines for Wind Facility Construction. The Presiding Examiner also requested that Baron report on the status of resolving the Zigenfus noise complaints and the Wagner contract dispute. On July 7, 2023, Baron submitted information responsive to some of items noted above during discussions at the June 15, 2023 conference, including a recitation of its efforts to resolve the disputes with intervenors Wagner, Zigenfus, and Oehlbeck.⁵⁵ Baron also filed corrected testimony and exhibits for one of its noise experts, Per Lundqvist. Final evidentiary hearing transcripts were filed on July 7, 2023.

Following the hearing, intervenors Wagner, Zigenfus, and Oehlbeck submitted various motions, comments, and other requests for relief. On September 14, 2023, Baron filed a response to the motion to strike.

On July 6, 2023, Baron filed several documents that Baron claimed had been admitted to the hearing record, including nominally corrected rebuttal testimony to conform to live witness testimony. Contrary to Baron's representation in the filing letter that the submissions had already been admitted to the hearing record, one of the documents, "Discovery Response to DPS IR 2.4 (including supplemental response)" had not been. On

⁵⁵ DMM Item No. 799. With respect to intervenor Zigenfus, Baron reported that he had filed 130 noise complaints, had refused to sign a participation agreement or to allow noise monitoring on his property, and that monitoring 90 meters from his home showed compliance with the 2019 Certificate's 45 dBA limit. With respect to the Wagner dispute, Baron states that it "has an enforceable real property agreement" with him. For the Oehlbeck dispute, Baron claims that he is really complaining about Phase I noise and is asking the Siting Board to reopen the applicable noise limits.

July 12, 2023, DPS Staff filed an objection to Baron's attempt to add to the hearing record a revised response to DPS IR 2.4 after the hearing because there would be no opportunity to respond to it.⁵⁶

In a July 13, 2023 email, the Presiding Examiner suspended the briefing schedule established in the June 26, 2023 ruling in order to address the numerous pending issues. Baron filed a motion to reconsider the suspension.

On July 17, 2023, Baron filed a revised Settlement Proposal, with Appendices A to E and a request for confidential treatment.⁵⁷ Baron, DPS Staff, and DEC Staff are signatories to the revised Settlement Proposal, but Fremont and the intervenors are not.

On July 24, 2023, the Presiding Examiner issued a ruling denying Baron's attempt after the evidentiary hearing to admit new evidence to the hearing record, namely, the revised response to DPS Staff IR 2.4.⁵⁸ The Presiding Examiner found that Barons response contained "wholly new and far more extensive information, well beyond Baron's initial response," and that Baron had improperly represented that it had already been admitted to the hearing record, had failed to provide other parties with an opportunity to review and cross examine Baron's witnesses about the response, and had been filing numerous

⁵⁶ DMM Item No. 804.

⁵⁷ Appendix A to the Settlement Proposal is a Stipulation of Settlement; Appendix B is a Phase II Substation Figure; Appendix C is a Neil's Creek Crossing map; Appendix D is a Revised Inadvertent Return Plan; and Appendix E is an Updated Bald Eagle Analysis memorandum.

⁵⁸ Ruling Denying Admission of Evidence to the Record and Reconsideration of Suspension of Briefing Schedule (issued July 24, 2023).

documents in the proceeding after the hearing without approval.⁵⁹ The Presiding Examiner also denied Baron's request for reconsideration of the briefing schedule suspension, finding that Baron's own actions had precipitated the suspension and delayed finalizing the hearing record.⁶⁰

On August 1, 2023, the Presiding Examiner issued a ruling admitting additional evidence to the record, including the appendices attached to the July 17, 2023 Settlement Proposal, an affidavit of bald eagle sightings, and a June 2023 Phase I noise complaint report.⁶¹ The ruling also finalized and attached the evidentiary hearing Exhibit List. The ruling noted that the Stipulation attached to the Settlement Proposal would not be admitted to the record because it contained legal arguments and conclusions involving Baron's rights and liabilities and factual findings that Phase II impacts had been avoided and minimized to the maximum extent practicable, which are solely the Siting Board's findings to make.⁶² The Presiding Examiner treated the Stipulation as informational only, reflecting the legal positions of the signatories.

On August 10, 2023, the Examiners held a conference with the parties to discuss lifting the briefing schedule suspension and establishing dates for filing post-hearing brief. All parties agreed to the dates proposed by DPS Staff and on August 11, 2023, the Presiding Examiner issued a ruling

⁵⁹ Id., pp. 6-8 and n. 9.

⁶⁰ Id., pp. 9-10.

⁶¹ Ruling Admitting Evidence to the Record and Issuing Final Exhibit List (issued August 1, 2023).

⁶² Id., p. 4.

requiring initial and reply briefs to be filed by September 12, 2023, and September 29, 2023, respectively.⁶³

On September 7, 2023, Fremont filed a letter and multiple attachments with the Secretary advising of an ongoing dispute the Town had with Baron about required road repairs on Town roads.⁶⁴ Included with Fremont's filing were an inspection report by the Town's consultant, LaBella Associates, and email exchanges with Baron representatives.

Also on September 7, 2023, intervenor Zigenfus filed a motion to strike Baron's explanation of sound complaints in its July 2023 Sound Complaint Report.⁶⁵ Separately, intervenor Zigenfus submitted a request for information pursuant to the Freedom of Information Law (FOIL) for documents related to the Phase I proceeding. On September 14, 2023, Baron filed a response to the motion to strike, asserting that intervenor Zigenfus' noise measurement metrics could not be converted to the metrics provided under the Town of Cohocton local law. Baron also responded to intervenor Zigenfus' FOIL request and asked for copies of any documents produced to him as a result of the request.⁶⁶

On September 12, 2023, Baron, DPS Staff, DEC Staff, Fremont, and Intervenor Sokolow filed initial briefs. In its post-hearing letter brief, DOH noted that it concurred with DPS Staff's technical evaluation of the Phase II Project's noise

⁶³ Ruling Establishing Revised Post-Hearing Briefing Schedule (issued August 11, 2023). The briefing schedule was discussed with and agreed to by the parties at an August 10, 2023 conference.

⁶⁴ DMM Item No. 827, Letter from Fremont Highway Superintendent T. Flansburg to Secretary (September 7, 2023).

⁶⁵ DMM Item No. 828, Letter from C. Zigenfus to Presiding Examiner (September 7, 2023).

⁶⁶ DMM Item No. 836.

impacts, including issues associated with noise modeling and noise reduction operations.⁶⁷ On September 13, 2023, intervenor Zigenfus filed a motion to strike a portion of DPS Staff's brief regarding turbine setbacks for public safety.⁶⁸ On September 29, 2023, Baron, DPS Staff, DEC Staff, and Fremont filed reply briefs.

On October 10, 2023, intervenor Marty Oehlbeck filed a motion to correct the record to reflect that his residence should not be characterized as "participating" for the Phase II Project in Baron's Phase II Sound Study, specifically the new Phase II substation.⁶⁹ He claimed that while portions of his property can be considered participating for Phase I, "the scope of the agreement between the Parties in regard to equipment placement and corresponding noise levels was precisely defined and specifically worded to prevent project scope creep and can't be construed to extend to the proposed Phase 2 substation equipment." He noted that he had asked Baron to make the record correction and requested that the Siting Board review participating agreements and require Baron to confirm Phase II compliance with applicable noise levels. On October 10, 2023, intervenor Zigenfus submitted further filings that essentially reiterated his Phase I noise complaints.⁷⁰

On October 10, 2023, Baron filed a response to the motions by intervenors Oehlbeck and Zigenfus, urging denial of both. Baron argued that intervenor Zigenfus' motions contain unsupported allegations and are an improper and untimely

⁶⁷ DMM Item No. 825, Letter from Senior Attorney W. Sacks to Secretary (August 22, 2023).

⁶⁸ DMM Item No. 835, Letter from C. Zigenfus to Secretary (September 13, 2023).

⁶⁹ DMM Item Nos. 848-849.

⁷⁰ DMM Item No. 850.

attempts to admit new evidence to the record.⁷¹ With respect to intervenor Oehlbeck's motion to strike and related issues associated with noise impacts from the substation on his property, Baron asserted that it was an improper attempt to have the Siting Board rehear the established sound limits and reconsider its finding of consistency with Cohocton's local law. Baron asserted that the Phase II sound modeling demonstrates compliance with applicable noise limits, including at the new Phase II substation near intervenor Oehlbeck's property.

On November 1, 2023, the Examiners held a status conference with the parties to discuss the pending Zigenfus/Oehlbeck motions and other disputes, including Fremont's road repair dispute and intervenor Wagner's contract dispute.

In late 2023, Baron cancelled its renewable energy contracts (RECs) with the New York State Energy Research and Development Authority for the Phase I Facility and the Phase II Project proposed in Amendment Petition II.

V. PUBLIC NOTICE AND COMMENT

On March 10, 2023, the Secretary issued a notice inviting the public to comment on Amendment Petition II and scheduling afternoon and evening public statement hearings on April 12, 2023, at the Fremont Town Hall in Arkport, New York. On April 12, 2023, the Presiding Examiner oversaw an hour-long information session at which Baron representatives responded to

⁷¹ DMM Item No. 852.

questions.⁷² The Presiding Examiner thereafter conducted the public statement hearings. Approximately 62 area residents attended the afternoon session and, of those, 16 provided comments. Approximately 55 area residents attended the evening session and, of those, 7 provided comments.

Nearly all commenters expressed opposition to the Phase II Project, although one speaker expressed satisfaction in his dealings with the Company as a participating landowner. Some residents expressed concerns about noise, shadow flicker, safety, and environmental impacts associated with the Phase II Project. Two speakers raised safety issues posed by shadow flicker along County Route 21. Speakers also questioned the noise impacts of taller turbines of 650 feet (rather than the 500-foot turbines initially approved by the Siting Board and as agreed to by the Town) and the adverse impacts and likely fatalities on the protected bald eagle and northern long-eared bat species from taller turbines. Several participants raised the recent disappearance of a bald eagle nest.

Several residents who live in the Phase I Facility area expressed frustration with Baron Winds' lack of responsiveness to noise complaints during operations. Fremont residents expressed concerns that noise complaints will extend to Phase II. Several participants complained that they can hear the Phase I turbines from far away, both at night and during the day.

⁷² At the 6:00 p.m. information session, Baron representatives responded to a noise-related question, indicating that the Phase II Project turbines would have serrated-edged blades to address noise impacts in addition to noise reduction operations. PSH 6 PM Info. Tr. 43-44. Baron representatives also recited the terms of the existing PILOT agreement with the Town. PSH 6 PM Info. Tr. 64-65.

Participating landowners in both Phase I and Phase II complained about the "bait and switch" that occurred between the time they signed their lease agreements with Baron and when actual turbine locations and other Project components were placed for Phase I or proposed to be built for Phase II. One commenter indicated that had he known what would happen, he would never have signed the agreement.

One Phase II participating landowner expressed frustration that the location of the Phase II turbine on his property had changed to the degree that it would have more significant noise and visual impacts on both his and his neighbor's property. Two commenters questioned whether local labor union members would be used during construction of Phase II when they were not used for Phase I.

The Fremont Town Supervisor questioned Baron about noise impacts and the Company's responsiveness to noise complaints. The Fremont Highway Superintendent expressed frustration with Baron's failure to comply with the road use agreement with the Town during the construction of Phase I and the unauthorized use of certain Town roads by heavy construction and delivery vehicles, which were extensively damaged. He indicated that Baron has refused to repair these roads and expressed the view that Baron has not complied with the Certificate's Conditions or the rules in place for the Phase I Project. He presented Application Exhibit 9 from Baron's Original Application and discussed the Town's setback requirements, which would be violated with the proposed 650 foot turbines for Phase II.

Several speakers questioned whether the Company intended to comply with the Payment in Lieu of Taxes (PILOT) agreement with the Town in light of the Governor's Budget Bill

that significantly reduces the appraised value of municipal property being used for renewable facilities.

VI. STATUTORY AND REGULATORY FRAMEWORK

The Siting Board "shall retain jurisdiction with respect to the amendment, suspension or revocation of a certificate."⁷³ A petition to amend a Certificate must describe the changes/amendments to the Facility proposed, including relevant engineering design, performance and operational changes, with supporting documentation describing the nature of the changes; data and information otherwise necessary to support the application; a description of the amended project and the reasons for the amendment; a statement of those who wish to participate in the proceeding; and statement of any comments on the petition.⁷⁴ If the Secretary determines that the proposed amendment is a "revision" within the meaning of the State Environmental Quality Review Act, an evidentiary hearing is required to determine the amended project's environmental, public health and safety, and other impacts.⁷⁵

An amendment to a Certificate should include, as appropriate, the same information that is required for an initial application.⁷⁶ A Certificate amendment that constitutes a "revision" is likely to result in a significant adverse environmental impacts in comparison to the impacts initially evaluated under the Certificate.⁷⁷ An amendment petition must identify environmental and public health and safety impacts that may result from the amendment and the Siting Board must find

⁷³ PSL §168(7).

⁷⁴ 16 NYCRR §1000.16(a)-(b).

⁷⁵ 16 NYCRR §1000.16(c).

⁷⁶ 16 NYCRR §1000.16(b)(2).

⁷⁷ 16 NYCRR §1000.2(ak); 6 NYCRR §617.7(c).

that such impacts will be avoided or minimized to the maximum extent practicable.⁷⁸

The Siting Board may grant a Certificate or an amendment only after determining not only that the proposed facility's adverse environmental impacts will be minimized or avoided to the maximum extent practicable, but that the facility is designed to operate in compliance with the applicable State and local laws and regulations relating to the environment and public health and safety and will serve the public interest.⁷⁹

Like an applicant for an Article 10 Certificate, a party proposing to amend a Certificate has the burden of proof to demonstrate that the Siting Board can make all required findings and determinations under PSL Section 168 by a preponderance of the evidence when factual matters are involved.⁸⁰

VII. PUBLIC HEALTH AND SAFETY IMPACTS

A. Noise/Vibration

1. Article 10 Application Requirements for Noise Impacts

The Article 10 regulations require an applicant to provide, among other things, computer noise modeling values used to estimate noise impacts and "software input parameters, assumptions, and associated data used for the computer

⁷⁸ PSL 168(2)(a)-(d) ("board shall not grant certificate or amendment thereof for the construction or operation of a facility ... without making explicit findings regarding the nature of probable environmental impacts ... including the cumulative environmental impacts ... on ecology, public health and safety, cultural, historic, and recreational resources, including aesthetic and scenic values; and transportation, communication, utilities and other infrastructure) (emphasis added).

⁷⁹ PSL §168(3)(b)-(c), (e).

⁸⁰ 16 NYCRR §1000.12(b)(1), (c).

modeling.”⁸¹ An understanding of the Phase II Project noise impacts and the disputed issues is best understood in the context of Baron’s initial noise Application materials (Application Exhibit 19), the Siting Board’s findings and determinations in the 2019 Certificate and its Conditions, the Phase I Amendment Order, and the subsequent noise-related compliance filings.

2. 2019 Certificate Requirements

The 2019 Certificate considered DPS Staff’s multiple objections to Baron’s noise modeling procedures, noise limits, and compliance protocols, including Staff’s objection that the actual noise impacts of the Project would be greater than the levels Baron modeled because of improper “corrections” being applied.⁸² DPS Staff also disputed Baron’s modeling protocols, claiming that the modeling, which included noise reduction operations (NROs) did not accurately reflect the Facility’s actual noise impacts once operational.⁸³ DPS Staff argued that Baron’s sound modelling should not incorporate NROs because it reduced the actual noise levels.⁸⁴ The Siting Board noted that, in its exceptions to the Recommended Decision, DPS Staff had identified “misstatements” made by Baron with respect to its

⁸¹ 16 NYCRR §1001.19(n). This regulation identifies the overall mandatory contents of noise and vibration application materials.

⁸² 2019 Certificate, p. 110. The Siting Board recognized that DOH, Fremont, and Intervenor Sokolow advanced similar noise objections.

⁸³ 2019 Certificate, p. 131.

⁸⁴ Id.

noise modeling. DPS Staff also proposed stricter noise limits than those Baron had proposed.⁸⁵

The Siting Board rejected DPS Staff's objections related to noise modeling, the use of NROs, and lower noise limits. The Siting Board largely adopted the Recommended Decision's noise limit of 45 dBA Leq (8-hour) and long-term design goal of 40 dBA Lnight at non-participating homes. The Siting Board thoroughly discussed the parties' respective positions and analyzed Baron's Application materials, as supplemented, including its revised/updated "Pre-Construction Noise Impact Analysis" reflecting noise modeling for the overall Project.⁸⁶ To support its finding that noise impacts had been adequately avoided or minimized to the maximum extent practicable, as required by PSL §168(3), the Siting Board imposed Certificate Conditions requiring, among other things, submission of revised post-Certificate noise modeling and post-operational seasonal monitoring that demonstrated compliance with the established noise limits.⁸⁷

With respect to Baron's inclusion of NROs in modeled results, the Siting Board rejected the Recommended Decision's proposed Condition that would prohibit same and agreed with Baron's assertion that it was a "drafting error."⁸⁸ In so doing,

⁸⁵ 2019 Certificate, pp. 115-116. Specifically, DPS Staff proposed noise limits of 42 dBA Leq 8 hour for non-participating homes and 52 Leq 8 hour for participating homes, in accordance with the World Health Organization's recommendations.

⁸⁶ 2019 Certificate, pp. 108-109. The Siting Board refused to establish a long-term regulatory limit, finding it too difficult to monitor and enforce, but adopted a long-term design goal of 40 dBA Lnight outdoors. Id., pp. 122-123.

⁸⁷ 2019 Certificate, Conditions 68-70.

⁸⁸ 2019 Certificate, p. 133.

the Siting Board accepted Baron's use of NROs in the modeling as "reasonable" and an "accepted, reliable measure to manage noise impacts"⁸⁹ and rejected DPS Staff's objection that the modeling would not reflect actual Facility noise levels. The Siting Board concluded that the noise modeling would be "adequately conservative" and accurately predict noise and vibration impacts ensuring compliance with the established noise limits.⁹⁰

The Siting Board also found that the cumulative noise impacts of Baron's Facility, when viewed with the neighboring Cohocton/Dutch Hill Wind facility noise, would "not contribute significantly to the cumulative noise levels modeled."⁹¹

The Siting Board concluded that nothing in the record indicates that imposing more conservative modeling (without NROs), lower noise limits, or stricter compliance protocols "would result in a measurable diminution" to noise impacts.⁹² The Siting Board also concluded that, with the appropriate Certificate Conditions in place, noise impacts would be avoided or minimized to the maximum extent practicable. The Siting Board adopted Certificate Conditions 68 - 75 to support its PSL

⁸⁹ 2019 Certificate, pp. 133-134.

⁹⁰ 2019 Certificate, p. 105.

⁹¹ 2019 Certificate, pp. 107-108, 114.

⁹² 2019 Certificate, p. 105.

168 findings that the Project's noise impacts would be avoided or minimized to the maximum extent practicable.⁹³

3. Phase I Amendment Petition and Siting Board Order

On March 9, 2020, Baron filed Amendment Petition I for the Phase I Project, which sought approval to increase wind turbine height from 500 feet to 650 feet, relocate turbines and other Project components, and make certain other Project changes. Baron claimed that the Project "modifications will not result in a significant adverse increase to environmental impacts" when compared to the original Project.⁹⁴ Amendment Petition I did not request Siting Board approval to change any previously approved noise-related Certificate Conditions or the established noise modeling protocols and procedures.

In Appendix A to Amendment Petition I, Baron addressed the potential noise-related impacts of the Phase I Project and claimed that "all design goals and regulatory limits are met" and that it "would have no greater sound level impacts" than the originally approved Project.⁹⁵ In support of the Petition's claims, Baron included a 343-page updated Supplemental Sound

⁹³ Certificate Condition 68 requires pre-construction submission of turbine specifications, locations, sound power levels, and revised noise modeling showing compliance with noise limits; Condition 69 requires a post-construction demonstration of compliance with noise limits through monitoring; Condition 70 requires seasonal (leaf-on and leaf-off) compliance testing; Condition 71 requires presentation of noise minimization options if testing shows non-compliance with noise limits; Condition 72 establishes allowable noise levels; Condition 73 details noise complaint procedures; Condition 74 requires maintenance of an operational log with conditions affecting noise levels, including wind velocity and direction; and Condition 75 limits construction noise and response to noise complaints in compliance with the Certificate's Complaint Protocols. 2019 Certificate, Appendix A, pp. 29-36.

⁹⁴ Amendment Petition I, p. 6.

⁹⁵ Amendment Petition I, Appendix A, p. 13.

Modeling Report, also referred to as Pre-Construction Noise Impact Assessment (PNIA) for the Phase I Project that evaluated the noise impacts of relocated taller turbines (Phase I PNIA).⁹⁶

In its Order approving Amendment Petition I (Phase I Amendment Order), the Siting Board found that the Project's changes would not result in a significant increase in environmental impacts and that such impacts had already been evaluated in the original 2019 Certificate.⁹⁷ It noted that all the Phase I Project was required to comply with the 2019 Certificate's Conditions and recited Baron's updated noise information, which stated that Project noise would still meet all design goals and regulatory limits.⁹⁸

The Phase I Amendment Order noted that Baron had not requested any changes to the noise-related Certificate Conditions and reiterated the 2019 Certificate's regulatory noise limits: for non-participating residential property owners of 45 dBA Leq 8-hour and long-term design goal of 40 dBA Lnight; and for participating residential property owners, a regulatory limit of 55 dBA L8-Hour and a long-term design goal of 50 Lnight.⁹⁹ The Phase I Amendment Order further noted that, even when viewed cumulatively with the Cohocton/Dutch Hill Wind facility, noise levels are not expected to exceed the 2019 Certificate's regulatory and long-term design sound limits, assuming adherence to the relevant Certificate Conditions

⁹⁶ Amendment Petition I, Appendix C, March 3, 2020 Phase I PNIA.

⁹⁷ Phase I Amendment Order (issued May 6, 2020), p. 15.

⁹⁸ Phase I Amendment Order, pp. 10-11. See also Baron's Phase I Amendment Petition (p. 13): "Therefore, Phase I would have no greater sound level impacts as compared to the Certificated Project and does not result in a significant increase in adverse effect as compared to the Certificated Project".

⁹⁹ Id., pp. 10-11.

governing noise.¹⁰⁰ The Siting Board expressly noted that its approval of Amendment Petition I does not relieve Baron of compliance with the Certificate and its terms, conditions, limitations, or modifications.¹⁰¹

The Siting Board expressly approved only the changes Baron had proposed in its Amendment Petition I for the Phase I Project,¹⁰² noting that when Baron was ready to commence the Phase II Project, it should file a separate amendment petition, which would be considered within the context of the cumulative impacts of both Phase I and Phase II.¹⁰³

a. Phase I Noise Compliance Filings

On August 9, 2021, and October 15, 2021, Baron submitted noise-related compliance filings (Noise Compliance Filing) as required by Certificate Condition 68, which were later supplemented and/or corrected on April 15, 2022, September 26, 2022, November 8, 2022, and November 9, 2022.¹⁰⁴ The filings included noise modeling for the Phase I Project turbines, the Pre-Construction Noise Impact Assessment (Phase I PNIA) and the NRO Plan covering both Phase I and Phase II. The Phase I PNIA assessed the Phase I Project's noise impacts assuming the implementation of NROs. Baron asserted in the PNIA that the noise modeling undertaken for Phase I was consistent

¹⁰⁰ Id., p. 11.

¹⁰¹ Id., p. 15.

¹⁰² Phase I Amendment Order, p. 8.

¹⁰³ Id., p. 15. The Siting Board reiterated Baron's need to comply with the terms, conditions, limitations or modifications" for the construction and operation of the facility authorized under the certificate, including compliance filings and notice requirements.

¹⁰⁴ Phase I Compliance Filing, Certificate Condition 68.

with the modeling previously approved by the Siting Board in the initial Application.¹⁰⁵

The Phase I PNIA noted the following change to the previous modeling protocol to establish NROs and the reason for the change:

In previous modeling (before March 2020 supplemental modeling) if NROs [noise reduction operations] were necessary, then they were applied to a specific turbine for all wind speeds and all wind directions. This is unnecessarily conservative, since turbine sound powers will be well below the specified maximum for lower wind speeds (6m/s for example), meaning that NRO will not be necessary. The same applies to wind directions. If a receptor is upwind of the closest turbine(s), then the same NRO may not be necessary as is required during downwind conditions.¹⁰⁶

Thus, Baron changed the previous noise modeling protocol, which it had previously performed, as reflected in its Application materials approved by the Siting Board in the 2019 Certificate, by eliminating applying NRO mitigation modes for all wind speeds and for all wind directions because of its opinion that such inclusion was unnecessarily conservative.¹⁰⁷

In approving Baron's Noise Compliance Filing, the Commission,¹⁰⁸ applied a standard of review that requires the Filing to "reasonably assure compliance with the Certificate" (Noise Compliance Order).¹⁰⁹ The Noise Compliance Order recited

¹⁰⁵ Hearing Exhibit 137, Appendix C, March 9, 2020 PNIA - Supplemental Sound Modeling, p. 9.

¹⁰⁶ Id.

¹⁰⁷ Appendix C.

¹⁰⁸ 16 NYCRR §1002.2.

¹⁰⁹ Order Approving Noise Compliance Filing 68(a-e) Subject to Conditions (issued December 29, 2022), pp. 9-10 (citing 16 NYCRR §1002.2(g) and (i)).

the facts associated with the Phase I Amendment Petition and the Siting Board's Phase I Amendment Order approving it, stating that Baron's 343-page Phase I PNIA to assess pre-construction noise impacts did not clearly identify the changes made to the sound modeling protocol.¹¹⁰ Specifically, the Commission's Noise Compliance Order stated that Baron's "change in the NRO's modeling procedure, as well as its implications, were not clearly presented, discussed, or highlighted in the Amendment Petition and was only briefly mentioned" in an Appendix to Amendment Petition I.¹¹¹ The Commission noted that the Phase I PNIA states that NRO modes would "be applied only in certain wind speeds and directions," but that previously NRO modes were "applied in all wind speeds and directions" as a part of the initial proceeding.¹¹² Although the Commission recited the Phase I PNIA's claim that "the sound modeling was consistent with the approved modeling adopted by the Siting Board," at the same time the Commission noted that "[i]t should not be assumed that everything that is contained in an exhibit or appendix is automatically approved if an amendment petition is approved."¹¹³

The Commission's Phase I Noise Compliance Order stated that DPS Staff had reviewed Baron's noise-related compliance filing materials submitted pursuant to Certificate Condition 68(a-e) over a 14-month time-frame and that Staff's position was that NROs should be applied at all wind speeds and all wind directions in an NRO Plan, using the turbines' maximum sound power levels to comply with Certificate Condition 68(a-e).¹¹⁴

¹¹⁰ Noise Compliance Order, p. 5.

¹¹¹ Id., p. 5.

¹¹² Phase I Noise Compliance Order, p. 5.

¹¹³ Id., p. 11.

¹¹⁴ Id., pp. 12-13.

DPS Staff objected to Baron's change to the previously approved modeling protocol because all wind directions and wind speeds should be used in modeling for purposes of NRO activation.

The Commission noted that no other Article 10 project had proposed to modify modeling protocols as Baron had, including use of NROs based only on certain wind directions and wind speeds. To "ensure that there are no misunderstandings," the Commission reiterated that "Baron is required to comply with Certificate Conditions on noise at all times, including any wind magnitude and wind direction conditions" and to disclose all noise data and testing results to DPS Staff.¹¹⁵ The Commission concluded that the Certificate Conditions and noise minimization measures are protective "and reasonably assures compliance," but stated that the Noise Compliance Order for Phase I should not be indicative of any future approval for the Phase II Project.¹¹⁶

b. Phase I Facility Noise Complaints

Construction of the Phase I Project was completed in or around December 2022 and the Facility became commercially operational on February 7, 2023.¹¹⁷ Beginning with Phase I Facility testing and operations in December 2022, numerous noise complaints were filed in DMM's Public Comments section by non-participating residential property owners, with more than 127 noise complaints filed over an eight-month timeframe from December 9, 2022, to July 24, 2023.¹¹⁸ Although approximately

¹¹⁵ Id., pp. 13-14.

¹¹⁶ Id., p. 13-14.

¹¹⁷ Baron Leaf Off Report, p. 44.

¹¹⁸ See DMM Public Comments Section, Item Nos. 95 to 249. In addition to noise complaints, other complaints were filed in DMM related to Phase I dust, shadow flicker, and road damage.

six complaining property owners filed noise complaints,¹¹⁹ Intervenor Zigenfus filed most of them.¹²⁰

Intervenor Zigenfus is a non-participating property owner who is surrounded by participating landowners¹²¹ who are subject to a 55 dBA L_{8h}, which is substantially higher than the 45 L_{8h} dBA limit applicable to non-participating landowners like Intervenor Zigenfus.¹²² Intervenor Zigenfus repeatedly complained about excessive noise from Phase I turbines T1, T8, T18, T19, T43, T59, and T60. Using his own noise level detection equipment, identified as a Wesn WS1361 Digital Sound Level Meter having a 30 dB to 130 dB range (Wesn Meter), Intervenor Zigenfus documented turbine noise on multiple dates, in multiple locations, and at multiple times over several hours during day times and evenings. Intervenor Zigenfus alleged that the levels detected were in excess of the 2019 Certificate's 45 dBA Leq 8-hour limit, at times as high as 60-63 dB, but most often between 50 and 55 dB.

In our view, because the Wesn Meter measures and reports noise levels in dB, rather than the dBA (A-weighted) noise levels included in the 2019 Certificate, it does not comply with the approved Sound Monitoring Compliance Protocol. That Protocol establishes instrumentation requirements,

¹¹⁹ Tr. 353-356.

¹²⁰ After July 24, 2023, no noise complaints were filed in DMM until March 2024, just after a winter storm and icing event. The reason for the cessation in most complaints is unclear but presumably is due to operational changes Baron implemented.

¹²¹ DMM Item No. 481, Phase I Sound Propagation Modeling, Figure 19-1, Map 10 of 19 (March 9, 2020).

¹²² 2019 Certificate, Appendix A, Certificate Condition 72(a). The L_{8h} noise descriptor means an 8-hour continuous A-weighted average sound pressure level in decibels.

selection of locations tested, weather conditions, data collection, analysis, and reporting, among other requirements.¹²³ Consequently, the Wesn Meter results cannot be relied on as an accurate measure of whether Baron's Phase I operations have violated the noise limits in the 2019 Certificate.

On January 24, 2023, the Cohocton Town Supervisor submitted a request to the Secretary to address "an increasing number of noise complaints from town residents" associated with the Phase I Project.¹²⁴ Cohocton expressed concerns about the residential complaints and asked DPS to require immediate noise measurements with oversight by the Town's Environmental Consultant and its Code Officer. The Supervisor stated that she did not believe that turbine noise "can be measured accurately by a computer model" and that "now is the time to insure" that the Siting Board's noise parameters for the Facility "will be upheld for the protection of the residents of Cohocton."

In a February 2, 2023 letter to the Cohocton Supervisor, DPS Staff outlined the 2019 Certificate's requirements, including required Phase I noise monitoring during two seasons (leaf off and leaf on).¹²⁵ DPS Staff noted that "the Department will independently collect sound level data using its own instrumentation, close to one of the developer's monitoring locations." As a result of the numerous noise complaints, DPS Staff conducted its own noise monitoring around the Phase I Facility. DPS Staff has not yet reported the results of that monitoring.

¹²³ February 23, 2023 Letter from Jason Zehr to Cohocton Town Supervisor.

¹²⁴ January 24, 2023 Letter from Cohocton Town Supervisor to Secretary Michelle L. Phillips.

¹²⁵ February 23, 2023 Letter from Jason Zehr to Cohocton Town Supervisor.

c. Phase I Leaf Off and Leaf On Reports

Baron submitted two post-construction noise monitoring reports required under the 2019 Certificate. In August 2023, Baron filed a "Postconstruction Sound Monitoring - Leaf Off" (Leaf Off Report), which assesses compliance with noise limits and details Phase I noise monitoring protocols, monitoring results, noise complaints, and noise issues during operations and monitoring. The Leaf Off Report recites that Baron and DPS Staff conducted noise monitoring in the Phase I Project area between February 15, 2023, and April 3, 2023, at eight monitoring locations, some of which were chosen based on noise complaints.¹²⁶ The distances from monitoring equipment to certain turbines were more than 1,000 meters away and, in some cases, between 2,430 and 3,775 meters away.¹²⁷

Although the Leaf Off Report notes that "issues were experienced with sound level meters," it provides no details with respect to those issues, including the noise levels experienced by receptors. The Leaf Off Report also notes that there were instances in which "the NROs were not correctly programmed" into individual turbines and "were not activating at all times" or "were activated in different wind directions than intended," but "have since been corrected by RWE."¹²⁸ The Leaf Off Report does not identify the noise levels experienced by receptors as a result of the NRO minimization measures not activating or activating incorrectly and does not make clear whether noise levels exceeded the regulatory limits and whether that data was included in the Leaf Off Report.

¹²⁶ RWE July 7, 2023 Postconstruction Sound Monitoring of Baron Winds-Leaf Off (filed July 11, 2023) (Leaf Off Report), pp. 4-7, Tables 2-3 and Figure 1.

¹²⁷ Id., (Leaf Off Report), p. 5, Table 3.

¹²⁸ Id., (Leaf Off Report), p. 27; Appendix B, p. B-1.

The Leaf Off Report also recounts "icing events" during Phase I operations, resulting in "the highest sound levels" and that "additional minimization measures are being considered," such as "software to automatically shut wind turbines down" and to assure "that noise limits are met and sound impacts are minimized."¹²⁹ The Leaf Off Report does not indicate whether noise levels were measured during icing events at nearby non-participating receptors to confirm that regulatory noise limits were not exceeded. The Leaf Off Report also does not identify the noise levels or duration experienced by receptors during icing events and does not make clear whether data taken during icing events was included in the Report.

The Leaf Off Report states that "measured sound levels" did not exceed the 2019 Certificate's regulatory limits or Town limits and Baron is investigating additional minimization measures to replace its manual turbine shutdown system to an automated system that would identify icing events and shut down affected turbines automatically.¹³⁰

In December 2023, Baron filed a "Postconstruction Sound Monitoring - Leaf On" Report (Leaf On Report), which recites the use of the same procedures as the Leaf Off Report and essentially the same monitoring locations, but adds two monitoring locations based on noise complaints.¹³¹ The Leaf Off Report again notes that issues were experienced with the sound

¹²⁹ Id., (Leaf Off Report), pp. 44, 47-48. The Leaf Off Report notes that, although the Phase I turbines were manually shut down during these icing events, "turbines may still have operated" during icing, delaying "reaction time" and manual shutdown. This would have prolonged the exceedance of noise limits.

¹³⁰ Id., (Leaf Off Report), p. 48.

¹³¹ Phase I "Postconstruction Sound Monitoring - Leaf On" (filed December 15, 2023) (Leaf On Report), pp. 4-6.

level meters during monitoring.¹³² The Leaf On Report indicates that Baron installed the Vestas Power Curve Ice Detection software as an additional minimization measure to address icing events.¹³³ It notes that the NRO activation issues evident in the Leaf Off Report "appear to have been corrected."¹³⁴ The Leaf On Report concludes that "in both the Leaf-Off and Leaf-On monitoring periods, no exceedances of any noise limit in the Certificate or local laws were found."¹³⁵

4. Amendment Petition II and Noise Impacts

Baron's Amendment Petition II proposes 26 turbines in different locations than initially proposed in its original 2017 Article 10 Application (Original Application). Amendment Petition II states that for the Phase II Project changes will result in a "reduction in overall permanent impacts" and that "[o]verall, the modifications requested will not result in a significant increase to environmental impacts as compared to the Certified Facility."¹³⁶ Amendment Petition II attaches (as Exhibit A) an "impact analysis" containing an evaluation of the Phase II Project changes in which Baron asserts, with respect to noise impacts, that "the regulatory limits and noise design goals are modeled to be met" and therefore "Phase II would have no greater sound level impacts as compared to the Certificated Project and does not result in a significant increase in adverse effect as compared to the Certificated Project."¹³⁷

¹³² Id., (Leaf On Report), pp. 20, 24.

¹³³ Id., (Leaf On Report), pp. 41, 44.

¹³⁴ Id., (Leaf On Report), Appendix B, p. B-1.

¹³⁵ Id., (Leaf On Report), pp. 43-44.

¹³⁶ Amendment Petition II, p. 5, 7, 19-20.

¹³⁷ Hearing Exhibit 2, Amendment Petition II, Appendix A, p. 18.

Exhibit A notes that to address the change in turbine height from 500 to 650 feet for Phase II, Baron conducted an "updated" Pre-Construction Noise Impact Assessment and Supplemental Sound Modeling (Phase II PNIA).¹³⁸ Phase II PNIA notes that receptor locations within one mile of proposed turbines were modeled, using "the only wind turbine model currently proposed" for Phase II, namely, the Vestas V150 4.5 MW turbine.¹³⁹ The Phase II PNIA also notes that the modeled noise results "are for the combined impacts" for both Phases I and II.¹⁴⁰ Like the Phase I PNIA, it identifies certain changes to the noise modeling procedures and NRO activation as differentiated from the previous modeling for the original Project, explaining:

In previous modeling (before the March 2020 supplemental modeling), if NROs were necessary, then they were applied to a specific turbine for all wind speeds and all wind directions. This is unnecessarily conservative, since turbine sound powers will be well below the specified maximum for lower wind speeds (6 m/s for example), meaning that NRO will not be necessary. The same applies to wind directions. If a receptor is upwind of the closest turbine(s), then the same NRO may not be necessary as is required during downwind conditions. The current modeling takes this into account in the same way that the March 2020 modeling did, modeling turbines that are placed into NRO individually, allowing application of NRO for only the necessary wind speeds and directions (emphasis added).¹⁴¹

¹³⁸ Hearing Exhibit 23, Appendix C, "Supplemental Sound Modeling" (Phase II PNIA), p. 18. In addition to the Phase II PNIA, Baron also submitted Phase II Sound Propagation figures/maps in support of Amendment Petition II. Hearing Exhibit 12, Figure 19-1.

¹³⁹ Hearing Exhibit 23, (Appendix C, Phase II PNIA), pp. 5, 7.

¹⁴⁰ Id., p. 6.

¹⁴¹ Id., p. 8.

The Phase II PNIA states that under the change from the previous modeling, the revised modeling shows that the 45 dBA Leq (8-hour) regulatory limit in the 2019 Certificate and the 40 dBA L night regulatory limit under the Town of Fremont's local laws "are met at all nonparticipating residential receptors."¹⁴² The Phase II PNIA also states that "using procedures consistent with the [Phase I] PNIA and Supplemental PNIA, the noise design goals and regulatory limits placed on Baron Winds are modeled to be met."¹⁴³

The Phase II PNIA notes that when regulatory limits or design goals are exceeded, the neighboring Cohocton/Dutch Hill Wind project "is the primary contributor."¹⁴⁴ The Phase II PNIA concludes that "both the 2019 Certificate's noise limits and Fremont's regulatory limits "are met at all nonparticipating residential receptors and property lines" for the Baron-only scenario and are met "where Baron Winds is the main contributor".¹⁴⁵ The Phase II PNIA also concludes that Cohocton/Dutch Hill is responsible for any noise levels that exceed the low frequency sound limit of 65 dBZ L 1-hour in all octave bands.¹⁴⁶

¹⁴² Id., p. 24.

¹⁴³ Id., p. 31; Table 18, pp. 285-286.

¹⁴⁴ Id., p. 25. The modeled cumulative noise impacts of both Baron and Cohocton/Dutch Hill show that the 45 dBA Leq (1-hour) limit is exceeded for eight of ten receptors; the 45 dBA Leq (8-hour) is exceeded for 6 of ten receptors; and the 40 dBA L night design goal is exceeded in nine of ten receptors. Id., pp. 28-29, Tables 8-10.

¹⁴⁵ Id., p. 30. The Phase I PNIA also asserts that the noise limits for participating residential receptors (55 dBA L8 hour and 50 dBA L night) also will be met.

¹⁴⁶ Id., pp. 30-31.

Baron did not submit with Amendment Petition II an NRO Plan or identify any proposed noise minimization measures for the Phase II Project.¹⁴⁷ Baron also did not propose turbine icing detection software, which was discussed in the Phase I Leaf Off Report and later implemented as an additional noise minimization measure.¹⁴⁸ On November 8, 2022, Baron submitted as a compliance filing a Noise Reduction Operations Plan (NRO Plan) for both Phase I and Phase II pursuant to Certificate Condition 68.

a. Amendment Petition II Noise-Related Evidence

DPS Staff submitted the pre-filed testimony of its noise expert, Miguel Moreno-Caballero, (Moreno-Caballero Testimony) objecting to Baron's change to the noise modeling protocol in the Phase II PNIA and NRO activation criteria approved in the 2019 Certificate.¹⁴⁹ The Moreno-Caballero Testimony also challenges Baron's failure to include in the record the manufacturer's sound information for the proposed Vestas V150 4.5 MW turbines. Witness Moreno-Caballero essentially challenges Baron's failure to propose adequate noise minimization measures for the Phase II Project and expresses concern about the likelihood of exceedances of the 2019 Certificate's noise limits.¹⁵⁰

¹⁴⁷ Hearing Exhibit 140, Phase I and Phase II NRO Plan (filed November 8, 2022). The NRO Plan contains no explanatory narrative and is made up of charts containing various numbers.

¹⁴⁸ See Leaf On Report, Appendix B, p. B-1.

¹⁴⁹ Hearing Exhibit 55, Testimony of Miguel Moreno-Caballero on behalf of DPS Staff (Moreno-Caballero Testimony).

¹⁵⁰ Id., Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 4, 10.

i. Absence of Manufacturer Noise Information

DPS Staff Testimony. The Moreno-Caballero Testimony states that Baron failed to provide manufacturer noise information for the proposed Vestas V150 4.5 MW turbines, which is necessary to evaluate noise modeling, potential impacts, and minimization measures associated with the Phase II Project.¹⁵¹ Witness Moreno-Caballero asserts that in the absence of manufacturer sound power levels, Baron's modeling and NRO Plan is not supported by actual data for the turbines proposed to be installed for the Phase II Project.¹⁵² The Moreno-Caballero Testimony further asserts that Baron's use of sound power levels for turbines different than those proposed to be used for the Phase II Project is not acceptable because the manufacturer's turbine-specific sound power levels are necessary not only for basic modes of operation but for establishing NROs as well.¹⁵³

In addition, the Moreno-Caballero Testimony states that, without supporting sound power level information from the manufacturer, the turbines cannot be confirmed to perform as Baron expects under the NRO Plan.¹⁵⁴ The Moreno-Caballero Testimony concludes that the Phase II Project's modeling and NRO minimization measures should be based only on actual manufacturer sound power level information.¹⁵⁵ Witness Moreno-Caballero asks the Siting Board to require Baron to submit revised modeling and an NRO Plan based on the manufacturer's

¹⁵¹ Id. (Moreno-Caballero Testimony), pp. 25-27.

¹⁵² Id. (Moreno-Caballero Testimony), pp. 26-28.

¹⁵³ Id. (Moreno-Caballero Testimony), p. 29. Witness Moreno-Caballero acknowledged that NROs need only be applied at wind speeds that produce exceedances of the 2019 Certificate's noise limits.

¹⁵⁴ Id. (Moreno-Caballero Testimony), p. 25.

¹⁵⁵ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 29-30.

sound power levels for the turbines to be used for the Phase II Project considering all wind directions and all wind speeds consistent with the 2019 Certificate and Baron's Original Application.¹⁵⁶

At the evidentiary hearing, witness Moreno-Caballero testified that without the manufacturer information for the sound power levels in wind directions other than downwind, the noise limits could be exceeded and that the NRO Plan is inaccurate in terms of when NRO minimization measures would be activated based on the assumption of lower sound levels in non-downwind directions.¹⁵⁷

In its Initial Brief, DPS Staff argues that without supporting information from the manufacturer confirming that the sound levels from the actual turbines proposed to be installed in Phase II, there is no assurance that they will perform as expected for the wind directions indicated in the NRO Plan.¹⁵⁸ DPS Staff notes that using a turbine proxy is not acceptable under the 2019 Certificate, which requires manufacturer sound power levels for the specific turbines to be documented.¹⁵⁹ DPS Staff further argues that in failing to provide the turbine manufacturer's sound power level information, Baron has not met

¹⁵⁶ Id. (Moreno-Caballero Testimony), pp. 30-31.

¹⁵⁷ Tr. 496-497.

¹⁵⁸ DPS Staff Initial Brief, p. 9 (citing Hearing Exhibit 55, Moreno-Caballero Testimony, p. 25).

¹⁵⁹ DPS Staff Initial Brief, p. 11, n. 8 (citing Certificate Condition 68(d)(i)).

its burden of proof in this proceeding with respect to the Siting Board's required noise findings.¹⁶⁰

Baron's Rebuttal Testimony. Baron does not dispute that it has not provided the manufacturer's sound power levels for the Vestas V150 4.5 MW turbine that it proposes to use for Phase II. Baron claimed throughout the proceeding that the information is not available. Baron expert noise witness, Per Lundqvist, states that the reduced sound power levels for the 4.5 MW turbine "are still pending confirmation from the manufacturer" and that "Vestas is currently finalizing the updated V150-4.5 specifications."¹⁶¹ He notes that the manufacturer's sound information for a different turbine model, the Vestas 150 4.2 MW, can be substituted for the 4.5 MW turbine for modeling purposes, asserting that both "have comparable sound specifications."¹⁶²

Mr. Lundqvist testifies that the 4.2 MW and 4.5 MW turbines have similar configurations and using the 4.2 MW as a proxy for the 4.5 MW turbine for purposes of modeling noise "appears reasonable."¹⁶³ Mr. Lundqvist states that the Vestas V150-4.2 MW turbine model essentially has the same "sound profile" as the 4.5 MW turbine model and both share a similar "configuration."¹⁶⁴ He acknowledges that the two have different

¹⁶⁰ DPS Staff Initial Brief, p. 11; Reply Brief, pp. 1-2 (citing 16 NYCRR §1000.12(b), which provides that "applicant has the burden of proof to demonstrate that all findings and determinations required by Section 168 can be made by the Board ...").

¹⁶¹ Id., p. 7.

¹⁶² Hearing Exhibit 93, Lundqvist Rebuttal Testimony, pp. 4, 7.

¹⁶³ Id., pp. 7-8.

¹⁶⁴ Id., Lundqvist Rebuttal Testimony, pp. 5-6. Witness Lundqvist does not explain the significance of similar turbine configurations in the context of noise impacts.

noise modes but that both "are best at low wind speeds."¹⁶⁵ He also acknowledges that the 4.5 MW turbine will have greater noise generation than the 4.2 MW turbine, but characterizes it as "a minimal impact."¹⁶⁶

In response to a DPS discovery request, Baron states that "not all specifications and modes are currently available from the manufacturer" for the 4.5 MW turbine model and that it used turbine sound data for a different model, the Vestas V150 4.2 MW turbine.¹⁶⁷ Baron's response also stated that Baron will provide "final sound modeling with the specifications for the turbine model selected ... and manufacturer information, if available, 60 days prior to the start of construction."¹⁶⁸

Witness Lundqvist also notes that it is common for developers to use proxy turbines or data when running noise modeling "because turbine technology is constantly changing."¹⁶⁹ He further notes that "if Baron Winds was required to have all final specifications for the turbine to be installed prior to obtaining the necessary permitting[,] Baron Winds would be forced to only apply outdated products and use old technology

¹⁶⁵ Id., pp. 3, 6.

¹⁶⁶ Id., p. 7.

¹⁶⁷ Hearing Exhibit 58, MMC-3 (Baron Response to DPS IR 2.3-1 dated March 22, 2023). Although Baron submitted manufacturer "Performance Specifications" in response to DPS Staff's discovery request, that document did not include sound power levels for the 4.5 MW turbine. Nothing in the record verifies that the 4.2 MW and 4.5 MW turbine have the same sound power levels.

¹⁶⁸ Hearing Exhibit 58, MMC-3 (DPS IR 2.3-1). To clarify, Baron has stated that the Vestas 150 4.5 MW turbine is the only turbine it is currently proposing for the Phase II Project. Hearing Exhibit 93, (Lundqvist Rebuttal Testimony), p. 3.

¹⁶⁹ Hearing Exhibit 93, Lundqvist Rebuttal Testimony, pp. 8.

for our future wind farms.”¹⁷⁰ Mr. Lundqvist states that Baron will submit manufacturer “final sound power information including NRO specifications and revised sound modeling as a compliance filing prior to Facility construction.”¹⁷¹

When asked whether the Vestas V150-4.5 MW turbine is “the lowest noise model available,” Mr. Lundqvist states that the 4.5 MW turbine “has a standard sound power level of 105 dB[A] for its normal operating mode”¹⁷² and refers to two manufacturer’s documents attached to his testimony, which he claims confirm that the sound levels of the 4.5 MW turbines “will perform as expected for the wind direction indicated in

¹⁷⁰ Id. Witness Lundqvist states that “[i]t is common for developers to use proxy turbines or data when running noise modeling” but cites no regulatory decisions made based on such proxied modeling.

¹⁷¹ Id., pp. 8-9. Baron has stated that the Vestas V150 4.5 MW turbine is the only turbine it is currently proposing for the Phase II Project. Hearing Exhibit 93, (Lundqvist Rebuttal Testimony), p. 3.

¹⁷² Id., p. 4

the NRO Plan.”¹⁷³ Attached to Mr. Lundqvist’s rebuttal testimony are manufacturer correspondence (PL-3) and Noise Reduction Management System specifications (PL-4).¹⁷⁴

In response to the Moreno-Caballero Testimony that manufacturer sound information is required in directions other than downwind, Baron submitted rebuttal testimony from noise experts Kenneth Kaliski and Isaac Old (Kaliski/Old Testimony) in which they point to the Vestas information attached to witness Lundqvist’s testimony and assert that sound power information “in other directions would only show lower sound levels.” The Vestas exhibits attached to the Lundqvist testimony do not, however, contain any specific assertion that sound power levels in directions other than downwind will be lower.

¹⁷³ Id., Hearing Exhibit 93, pp. 10-11; Hearing Exhibit 95 (Corrected PL-3: May 15, 2023 Vestas Sound Mitigation Letter); Hearing Exhibit 96; (Corrected PL-4: February 2023 Vestas Noise Reduction Management Systems Description V19). PL-3 generally discusses NROs and Vestas’ NRO Management System but does not specifically state the sound power levels for the 4.5 MW turbine and contains the following disclaimer: “This letter is for discussion purposes only and is not an offer of any commitment or additional warranty on our part, nor is it intended to be legally binding...” Consequently, it will be given little weight, as will witness Lundqvist’s testimony reciting Baron’s reliance on PL-3. PL-4 (p. 4) notes that the Noise Reduction Management System “reduces noise generated by the wind turbine, when certain combinations of wind speed, direction, rain intensity and time are present... by changing the operating conditions in the wind turbine.” PL-4 also notes that the loss in energy production is limited because noise reduction is activated only when certain combination[s] of wind speed, and direction are present. PL-4 fails to specify the noise levels that will be realized in order to limit energy loss. It also does not detail the “combinations of wind speed, direction” etc. that will result in a reduction of noise generated by the turbine. Like PL-3, PL-4 is of little evidentiary value.

¹⁷⁴ Id.

In its Initial Brief, Baron asserts that the "sound profiles for the 4.2 MW and 4.5 MW turbines are "very similar" and reiterates that "Vestas is currently finalizing updated V150 4.5 MW specifications."¹⁷⁵ Citing the Vestas letter (PL-3) and its reference to the 4.5 MW turbine's minimal additional impacts to noise generation, Baron argues that it has provided "ample evidence" to support the use of the 4.2 MW turbine as a proxy for the 4.5 MW turbine for purposes of sound modeling.¹⁷⁶ Baron claims that DPS Staff has not offered evidence to the contrary. Baron also asserts that the NRO Plan for Phase II that it submitted as a Phase I compliance filing is supported by reliable manufacturer information.¹⁷⁷ Baron claims that its later submission of the manufacturer sound power levels for the 4.5 MW turbine as a compliance filing is sufficient, but does not explain how such a post-order filing demonstrates, for our purposes, that the Phase II noise impacts have been avoided or minimized to the maximum extent practicable.¹⁷⁸

ii. Baron's Changes to Noise Modeling Protocols

DPS Staff Testimony. DPS Staff objects to Baron's change to the noise modeling protocol from what it had proposed in the Original Application on the grounds that it would affect the implementation of NROs as minimization measures. The Moreno-Caballero Testimony explains that NROs should be implemented during Facility operations by programming turbines

¹⁷⁵ Baron Initial Brief, pp. 40-41.

¹⁷⁶ Id., p. 41.

¹⁷⁷ Id., pp. 39-40. Baron implies that because the 4.5 MW turbine is "built on Vestas 4 MW platform, which was originally introduced in 2010" and is a "variant" of those Vestas' offerings, the actual 4.5 MW sound level information is unnecessary.

¹⁷⁸ Id., pp. 41-42.

with certain parameters to shut down the turbines or operate them in a reduced mode for purposes of limiting noise levels and complying with the Certificate's noise limits.¹⁷⁹ Witness Moreno-Caballero states that Baron's Phase II modeling does not show the application of "the same NRO at all wind directions and all wind speeds," as Baron had proposed in its Original Application.¹⁸⁰ He explains that Baron's modeling and NRO implementation is based on downwind-only wind directions, rather than NRO implementation in all wind directions and wind speeds as the Original Application proposed. Witness Moreno-Caballero notes that no other wind project in New York has proposed an NRO plan that includes downwind-only direction, as Baron is proposing here.¹⁸¹ He asserts that as a result, the modeling does not demonstrate that NROs will be properly activated and Phase II noise impacts will be minimized under the downwind-only modeling changes.

The Moreno-Caballero Testimony notes that the modeling and NRO activation change was not specifically requested as an amendment to the 2019 Certificate.¹⁸² The Moreno-Caballero Testimony further notes that Baron's Original Application did not consider or incorporate wind direction for purposes of implementing and activating NROs and that it was incorporated "only for the limited purposes of reporting long-term sound levels," as required by 16 NYCRR §1001.19(f), but not for purposes of implementing NROs.¹⁸³ He states that downwind-only

¹⁷⁹ Hearing Exhibit 55, Moreno-Caballero Testimony, p. 9.

¹⁸⁰ Id., Hearing Exhibit 55, Moreno-Caballero Testimony, pp. 29-30.

¹⁸¹ Hearing Exhibit 55 (Moreno-Caballero Testimony), p. 22.

¹⁸² Hearing Exhibit 55, Moreno-Caballero Testimony, p. 10.

¹⁸³ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 19-20.

direction was not used in the Original Application for NRO activation purposes. Witness Moreno-Caballero clarifies that in the Original Application, Baron "incorporated wind direction only for the limited purposes of reporting long-term sound levels" and not for the purpose of implementing NROs as noise minimization during Facility operations, as Baron now proposes.¹⁸⁴ Mr. Moreno-Caballero testifies that the noise modeling and NROs Baron proposed in its Original Application, rather than the currently proposed Phase II modeling, will reduce the risk of noise exceedances.¹⁸⁵ The Moreno-Caballero Testimony asserts that Baron's NRO Plan should apply for all wind directions and for each wind speed.¹⁸⁶

The Moreno-Caballo Testimony asserts that the NRO Plan and Phase II PNIA contain technical inaccuracies that call into question their reliability. Although Baron is required to disclose all data and sound test results, DPS Staff asserts that in addition to monitoring only two locations, neither is a sensitive receptor and Baron did not disclose relevant monitoring information such as: the turbine models monitored; the monitoring locations; other relevant turbines in the vicinity; whether the turbines were operating at maximum power levels; the type and magnitude of NROs implemented; noise levels in all wind directions; and the sound testing protocol followed.¹⁸⁷

Witness Moreno-Caballero acknowledges that, prior to construction, Certificate Condition 68(d)(i) requires Baron's

¹⁸⁴ Id.

¹⁸⁵ Tr. 521-522.

¹⁸⁶ Id., pp. 29-30.

¹⁸⁷ DPS Initial Brief, p. 10 (citing Moreno-Caballero Hearing Testimony, Tr. 340-352).

documentation of noise information, including the turbine manufacturer's tested sound power levels following IEC testing standards and specifications and NROs if needed to meet the Certificate's noise limits.¹⁸⁸ He notes, however, that this should be done in the context of a compliance filing to support the Phase II Project's NRO Plan.¹⁸⁹ He also notes that Baron's submission of a Phase I compliance filing that reflects an NRO Plan for both Phase I and Phase II - without the appropriate manufacturer's documented sound power levels for Phase II - does not allow for the appropriate analysis of the effectiveness of NROs as noise minimization measures for Phase II.¹⁹⁰

At the evidentiary hearing, witness Moreno-Caballero confirmed that if turbines are left in standard operation without NROs, the Certificate's noise limits would be exceeded for "several receptors" and that downward-only wind direction should not be relied on in implementing NROs.¹⁹¹ He testified that "the main point is we don't have data for these turbines supporting changes in sound levels based on different [wind] directions" and only downwind sound power levels are shown instead of manufacturer sound power levels for other wind directions.¹⁹²

Mr. Moreno-Caballero explains that a receptor may be surrounded by different turbines in different locations,

¹⁸⁸ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 17-18.

¹⁸⁹ Id., p. 18.

¹⁹⁰ As noted above, in November 2022, Baron submitted an updated NRO Plan as a Phase I compliance filing, but included the Phase II NRO Plan as well, which DPS Staff argues should not be approved.

¹⁹¹ Tr. 499, 502.

¹⁹² Tr. 503, 506-507. Mr. Moreno-Caballero testified that he was aware of articles that showed sound levels "when the wind is blowing in several wind directions" and not just downwind.

downwind from one but upwind from another, and that Baron's modeling is based on an ideal scenario and the assumption that there will be a single wind direction for all turbines at all times for the entire Project.¹⁹³ He notes that those conditions are not always present in the field and there could be different wind directions for different turbine that are in different orientations, as he has seen in the field at several facilities, including the turbines in the Phase I Project.¹⁹⁴ Witness Moreno-Caballero further testified that he had concerns that the NRO Plan incorrectly assumes that all turbines will have the same orientation, with the same wind direction and wind speed, when that is not what he has observed in the field. Witness Moreno-Caballero asserts that wind does not always hit turbines in one direction only.¹⁹⁵ He claims that NROs will not be activated when necessary if a downwind-only scenario is assumed.

In its Initial Brief, DPS Staff asserts that Baron's failure to specifically request a change to the modeling protocol in Amendment Petition II is contrary to the regulatory requirement that an amendment petition describe all changes proposed, provide supporting documentation, and set forth the data and information necessary to support a Certificate Application.¹⁹⁶ DPS Staff asserts that even if Amendment Petition II had requested the change to the downwind-only activation of NROs, it would have opposed the change because Baron will "correct" noise levels based on meteorological conditions, because the NROs will be implemented or changed over

¹⁹³ Tr. 508-510.

¹⁹⁴ Id.; Tr. 508-510.

¹⁹⁵ Tr. 510-513.

¹⁹⁶ DPS Staff Initial Brief, pp. 2-3 (citing 16 NYCRR §1000.16(b)(1) and(2)).

relatively short (10-minute) time frames, and because noise levels will not be monitored in real time.¹⁹⁷

In its Initial Brief, DPS Staff quotes the Phase II PNIA in which Baron concedes the change made to the modeling protocol from the one previously utilized: in previous modeling NROs "were applied to a specific turbine for all wind speeds and all wind directions."¹⁹⁸ DPS Staff recites the Phase II PNIA's statement that now, for Phase II, NROs are to be implemented "for only the necessary wind speeds and directions."

In its Initial Brief, DPS Staff calls "untrue" Baron's claims that the method of applying NROs to only specific (rather than all) wind directions and wind speeds was modeled in the Original Application and the Certificate "was issued based on those modeling runs."¹⁹⁹ DPS Staff explains that in its Original Application and during the initial evidentiary hearing phase, Baron did not model downwind-only direction for the purpose of implementing NROs as a noise minimization measure.²⁰⁰ Citing the testimony of Mr. Moreno-Caballero at the evidentiary hearing, DPS Staff argues that rather than using the factors proposed in the Original Application to determine noise levels for receptors and the need for NROs, Baron proposes a less conservative approach to implementing NROs as noise impact minimization.

¹⁹⁷ DPS Staff Initial Brief, pp. 8-9.

¹⁹⁸ DPS Staff Initial Brief, pp. 3-4 (citing Hearing Exhibit 23, Phase II PNIA, p. 8).

¹⁹⁹ DPS Staff Initial Brief, pp. 5, 8. In addition to the statements in Amendment Petition II that the changed modeling is consistent with the 2019 Certificate, Baron's noise witnesses, Kaliski/Old stated in rebuttal testimony that the method of applying NROs is consistent with the 2019 Certificate. Hearing Exhibit 105, p. 4.

²⁰⁰ DPS Staff Initial Brief, pp. 5-6 (citing Moreno-Caballero Testimony, pp. 19-20).

DPS Staff also indicates that in the Original Application, Baron proposed to use the ISO-9613-2 standard for short-term noise impacts only, which disregards wind direction and allows no meteorological correction.²⁰¹ DPS Staff states that wind direction was accounted for in the Original Application only for the limited purpose of calculating long-term noise impacts, as required by 16 NYCRR §1001.19(f), and not for the purpose of determining when NROs will be implemented, as Baron has done here.²⁰²

DPS Staff disputes the claim of Baron's experts in their evidentiary hearing testimony that all appropriate factors and parameters were accounted for in the Phase II modeling for purposes of evaluating noise impacts and NRO activation, noting that nothing in the record supports this claim.²⁰³ DPS Staff identifies the appropriate parameters that should be included, such as wind direction and shear, wind speed at 11 meters above ground, time of day/night, solar radiation, cloud cover, and distance to receptors. DPS Staff details the Original Application's use of the ISO-9613-2 standard in combination with the CONCAWE meteorological adjustments to determine whether noise levels at a receptor will increase based on those parameters.²⁰⁴ DPS Staff asserts that for the Phase II Project,

²⁰¹ DPS Staff Initial Brief, p. 6 (citing Hearing Exhibit 130, Baron Original Application, November 2017 PNIA, p. 20).

²⁰² Id.; Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 19-20

²⁰³ DPS Staff Initial Brief, pp. 7-8 (citing Tr. 470-473, Kaliski/Old Noise Testimony).

²⁰⁴ DPS Staff Initial Brief, pp. 6-7 (citing Hearing Exhibit 130, Baron's Original Application PNIA). DPS Staff explains that those factors are required to determine the "Pasquill Stability Category" and the "Meteorological Category" in assessing noise impacts on receptors.

the appropriate parameters will not be considered in real time in order to input that information into the software that activates or modifies NROs to minimize noise impacts.²⁰⁵

DPS Staff claims that Baron's Phase II NRO Plan will not be sufficiently conservative because it does not include the appropriate parameters to determine implementation of NROs, noting that wind speed will not be measured at 11 meters, wind shear will not be estimated, and stability and meteorological categories will not be calculated in real time in order to activate, modify or deactivate NROs and assure compliance with the 2019 Certificate's noise limits.²⁰⁶

DPS Staff also questions Baron's claim that implementing NROs as witness Moreno-Caballero urges will result in the loss of energy production, asserting that nothing in the record supports Baron's calculation. Thus, DPS Staff argues, no weight should be afforded Baron's assertion. DPS Staff asserts that, in any event, the loss of energy production does not absolve Baron from complying with the 2019 Certificate and the modeling protocol proposed in the Original Application.²⁰⁷

In its Initial Brief, DPS Staff argues that the Article 10 regulations do not allow for the assumption of noise attenuation due to weather or temperature when modeling and estimating noise levels, as Baron has done in its Phase II Modeling.²⁰⁸ Citing the Moreno-Caballero Testimony, DPS Staff

²⁰⁵ Id., p. 7.

²⁰⁶ DPS Staff Initial Brief, pp. 7-8 (citing Tr. 323-328).

²⁰⁷ DPS Staff Reply Brief, pp. 3-4. Baron's noise witness, Per Lundqvist testified that under witness Moreno-Caballero's proposal, the Facility would lose 1 GWh of energy, representing annual usage of 30 homes. Hearing Exhibit 93. Witness Lundqvist does not provide further details supporting this estimate.

²⁰⁸ DPS Staff Initial Brief, p. 6.

also argues that the Siting Board should require Baron to comply with the modeling protocol proposed in the Original Application, which was approved in the 2019 Certificate, and specifically to enforce Certificate Condition 1 (requiring Facility construction and operation as proposed in the Application and any updates/revisions) and Certificate Condition 11 (requiring implementation of avoidance, minimization and mitigation measures to address the impacts as described in the Application and any updates/revisions, the 2019 Certificate, and other record documents).²⁰⁹

In its Initial Brief, DPS Staff challenges the reliability of Baron's noise monitoring in only two locations.²¹⁰ DPS Staff indicates that Baron did not disclose or report the make, model, or location of the turbines surrounding the receptors evaluated; whether all relevant turbines in the vicinity were at maximum power levels; whether other turbines were in NRO mode; the type and magnitude of the NROs; and the sound power levels at all wind directions. DPS Staff states that Baron's monitoring results did not include all the information required by the approved Sound Testing Compliance Protocol (Compliance Protocol) under the 2019 Certificate. DPS Staff criticizes Baron's use of the median of the Leq-1-minute sound levels in the monitoring, which is not allowed by the 2019 Certificate or the approved Compliance Protocol.²¹¹

DPS Staff addresses the Commission approval of a compliance filing for the Phase I Project's similarly revised noise modeling, which modified NROs based on wind direction for particular wind speeds. DPS Staff notes that the Commission's

²⁰⁹ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 13-14.

²¹⁰ DPS Staff Initial Brief, p. 10.

²¹¹ Id.; Tr. 340-352.

order approving the compliance filing specifically states that it should not be relied on as precedent or to indicate a similar approval for Phase II.²¹²

DPS Staff also notes that Baron did not request in Amendment Petition II any changes to the modeling or NRO Plan, claiming that it was inappropriately raised for the first time in Baron's rebuttal testimony. In response to Baron's claim that DPS Staff has not presented evidence rebutting the NRO Plan,²¹³ DPS Staff asserts that Baron alone bears the burden of proof in this proceeding to demonstrate the consistency of the modeling and NRO Plan with the 2019 Certificate.²¹⁴

DPS Staff argues that Baron's modeling does not reflect "real world conditions" and therefore it "has no basis, is inaccurate, unsupported, and should be rejected."²¹⁵ DPS Staff concludes that in light of the foregoing, the Siting Board should not rely on Baron's monitoring results as evidence that NROs will be properly activated and noise impacts can be reduced or eliminated for the Phase II Project.²¹⁶

Town of Fremont Testimony. The Town of Fremont presented the pre-filed expert noise testimony of David M. Hessler, who asserts that the level of noise complaints for Phase II can be expected to be the same as those in Phase I and

²¹² Id., pp. 12-13, n. 10 (citing Noise Compliance Order, p. 14).

²¹³ Tr. 502-504.

²¹⁴ DPS Staff Initial Brief, pp. 11-12 (citing 16 NYCRR §1000.12(b)).

²¹⁵ DPS Staff Initial Brief, pp. 9-10 (citing Moreno-Caballero Hearing Testimony, Tr. 508-513).

²¹⁶ DPS Staff Initial Brief, p. 10.

may be based on opposition to the Facility.²¹⁷ He recites that Baron's Phase II PNIA identifies 113 Fremont residences expected to have noise levels "in the important 40 to 45 dBA Leq (1-hour) range - where the project sound level is high enough in absolute terms that some disturbance is possible, if not likely." He notes that this is more receptors than the 88 residences noted in the Original Application and suggests that the Phase II Project will have greater noise impacts than proposed in the Original Application.²¹⁸ Witness Hessler notes that more residences will see relatively high project sound levels for Phase II than with the previously proposed Original Project with more turbines.

Mr. Hessler calls Baron's noise Phase II PNIA "opaque and hard to understand" and lacking any discussion of the modeling inputs or identification of community noise impacts from the sound levels of larger turbines.²¹⁹ Mr. Hessler states that the Phase II PNIA does not address the question of potential noise impacts for the Phase II Project, but he nevertheless concludes that the noise limits will likely be met "on paper" and "under most normal circumstances" even though the PNIA is difficult to interpret and lacks context.²²⁰

Mr. Hessler further testifies that Baron presumably included in the Phase II PNIA modeling a 2 dBA uncertainly

²¹⁷ Hearing Exhibit 67 (Hessler Testimony), p. 5. At the time Mr. Hessler's Testimony was filed on March 24, 2023, there were approximately 75 noise complaints that had been filed for the Phase I Project. Several complaints were filed thereafter, with approximately 130 complaints filed from December 2022 through July 2023 and a few additional complaints filed in March and April 2024.

²¹⁸ Hearing Exhibit 67 (Hessler Testimony), p. 4.

²¹⁹ Hearing Exhibit 67 (Hessler Testimony), p. 3.

²²⁰ Id.

factor, but notes that such "modeling assumptions are barely mentioned." Mr. Hessler also testifies that a simple table of the previous receptor noise levels in Fremont and the expected new noise levels for the Phase II Project "would have clarified" the extent of Phase II's noise impacts.²²¹

Baron Rebuttal Testimony. Witness Lundqvist challenges DPS Staff's position with respect to noise modeling in all wind directions and all wind speeds and the resulting identification of NRO activation as a noise minimization measures.²²² He points to the Vestas manufacturer information attached to his testimony in stating "that wind speed and direction dependent application of noise reduced operation modes are state of the industry and work reliably and appropriately to implement noise mitigation."²²³ He states that if Baron was required to implement NROs at any wind direction, as Mr. Moreno-Caballero recommends, Baron would lose approximately 1 GWh of energy production per year, the annual energy usage for approximately 30 houses.²²⁴ Witness Lundqvist testifies that Baron's NRO Plan will be implemented for Phase II to minimize noise impacts.²²⁵

The Kaliski/Old Testimony indicates that there are more Phase II receptors in higher modeled noise levels but that the Facility will nevertheless meet the noise limits in the 2019 Certificate and in Fremont's local law.²²⁶ They claim that direction-specific sound levels were modeled in the Original

²²¹ Hearing Exhibit 67 (Hessler Testimony), p. 4.

²²² Hearing Exhibit 93 (Lundqvist Rebuttal Testimony), pp. 2-3.

²²³ Id., pp. 10-11.

²²⁴ Id., p. 11.

²²⁵ Hearing Exhibit 93 (Lundqvist Rebuttal Testimony), p. 4.

²²⁶ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), p. 12.

Application; that the modeling used CONCAWE adjustments; that the 2019 Certificate "was issued based on those modeling runs," and that the Phase II NRO Plan's inclusion of NRO modes "as a function of wind direction and wind speed" is consistent with the 2019 Certificate, which allowed noise modeling that incorporated the use of wind-directional NROs.²²⁷ They further claim that the 2019 Certificate allows NRO implementation as Baron proposes but that they are nevertheless requesting that the Siting Board approve it for Phase II, including use of NROs based on wind direction.²²⁸

Witnesses Kaliski and Old also testify that DPS Staff's modeling and NRO arguments "were rejected by the Siting Board" and that the only difference between the NROs proposed for Phase II from those proposed in the Original Application are that they are "more finely tuned for specific wind speeds and wind directions in order to maximum energy production while, at the same time, meeting noise limits."²²⁹ The Kaliski/Old Testimony indicates that although an NRO Plan is not required by the 2019 Certificate, an NRO Plan was filed for Phases I and II which "is consistent" with the Certificate.²³⁰

The Kaliski/Old Testimony states that there "is no difference between the mechanics or technology in the NRO used" in the Original Application and the mechanics and technology proposed in Amendment Petition II.²³¹ They also state that the

²²⁷ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 4-5.

²²⁸ Id. (Kaliski/Old Rebuttal Testimony), p. 5.

²²⁹ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 5-6.

²³⁰ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), p. 7

²³¹ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 5-6.

"only difference is that the application of an NRO is more finely tuned for specific wind speeds and wind directions in order to maximum energy production while, at the same time, meeting noise limits imposed..."²³² They assert that there is no reason for the noise modeling and NROs to assume other wind directions because "downwind conditions are the most conservative."²³³ They point to the Phase I Project's use of NROs that assume downwind-only directions. They predict for Phase II that there will be several indoor and outdoor "highly annoyed" noise receptors, making the impacts "comparable" to those identified in the Original Application.²³⁴

The Kaliski/Old Testimony indicates that the downwind-only directional NROs work and that Baron conducted noise monitoring at two Phase I wind turbine locations for the purpose of measuring "the effect of directional NROs" that would be in place for Phase II.²³⁵ They conceded that neither monitoring location was for a sensitive receptor and both were located between 250-300 meters from turbines.²³⁶ The Kaliski/Old Testimony concludes that "directional NRO clearly works in practice" at Phase I to reduce wind turbine noise in specified directions and will work for Phase II.²³⁷

²³² Id., p. 6.

²³³ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 8-9.

²³⁴ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 13-14.

²³⁵ Hearing Exhibit 106 (Kaliski/Old Testimony), p. 9 and n. 3. They did not dispute that the monitoring did not comply with the approved noise monitoring protocol.

²³⁶ Id., (Kaliski/Old Testimony), pp. 9-10, n. 3.

²³⁷ Id., (Kaliski/Old Testimony), p. 10.

At the evidentiary hearing, in response to being asked about the difference in the Phase II modeling protocol from what Baron had proposed in its Original Application, witnesses Kaliski and Old testified that the change involved "how the NROs are implemented" and, instead of "a blanket implementation, it's just for specific conditions."²³⁸ They further testified that the original modeling assumed that NROs would be implemented at lower wind speeds "whether or not [] needed" and thus that subsequent modeling was changed "so that the NROs would only be implemented when [] required, based on wind speed and wind direction."²³⁹ They testified that an updated NRO Plan applicable to both Phase I and Phase II was filed in the Fall of 2022.²⁴⁰

Witnesses Kaliski and Old indicated on cross-examination at the evidentiary hearing that the NRO Plan changes NRO activation based on certain wind speeds and wind direction.²⁴¹ They testified that NROs are set based on wind direction measured at the turbine nacelle, which is above the

²³⁸ Tr. 361-362.

²³⁹ Tr. 362. The record does not reflect the wind directions and wind speeds when NROs would be activated under the previous modeling as compared to the new downwind-only modeling protocol or identify the wind directions and wind speeds that would no longer require NROs to address noise impacts.

²⁴⁰ Tr. 312-313. The NRO Plan was not included with Amendment Petition II. Instead, Baron filed it as a Phase I compliance filing on November 8, 2022, for both Phases I and II pursuant to Certificate Condition 68(e) "in furtherance of the supplemental sound modeling filed on August 9, 2021 and updated revised sound modeling for Phase I of the Facility filed on September 26, 2022."

²⁴¹ Tr. 322.

hub height,²⁴² where the turbine's wind detection instrumentation is located, and not based on wind direction at 11 meters, as required under the CONCAWE methodology.²⁴³ They acknowledged that wind shear at 11 feet would be different than at the nacelle. Witnesses Kaliski and Old further testified that the NRO Plan does not incorporate different meteorological and stability categories as inputs for purposes of activating NROs.²⁴⁴

On cross-examination, in response to being asked why the previous Phase I monitoring of noise levels at six monitoring locations, all of which were sensitive receptors, was not used to measure and determine directional NROs, Kaliski and Old testified that the Phase I monitoring was a part of a compliance monitoring program with multiple turbines and it "wasn't relevant" because "you don't know which effect exactly you're measuring."²⁴⁵ Kaliski and Old further testified that they did not include in their rebuttal testimony all monitoring information required by the sound testing compliance protocol (Monitoring Protocol) approved under the 2019 Certificate.²⁴⁶

²⁴² The hub height for the 650-foot Vestas V150 4.5 MW turbines is between 90 and 120 meters or approximately 295 to 394 feet. Hearing Exhibit (MMC-3, DPS IR -2.3). Witnesses Kaliski and Old testified that the nacelle, where wind direction will be detected for NRO purposes, is above the hub. The exact nacelle height is unclear from the record but it is clearly well above 11 meters.

²⁴³ Tr. 316-318, 322-323.

²⁴⁴ Tr. 325-326.

²⁴⁵ Tr. 341-342.

²⁴⁶ Tr. 343-345. The Kaliski/Old testimony at the evidentiary hearing is unclear whether the monitoring itself was consistent with the approved compliance protocol, separate and apart from their statement that the rebuttal testimony did not include such a statement of consistency.

Witnesses Kaliski and Old also conceded that the monitored noise levels recited in their rebuttal testimony were reported with a Leq-1 minute median descriptor that is not permitted under the 2019 Certificate.²⁴⁷

The Kaliski/Old Testimony states that "customizing NRO by wind speed and wind direction maximizes energy production," while meeting noise limits imposed in the 2019 Certificate.²⁴⁸ In response to DPS Staff's position that downwind-only directional modeling previously was used only for long-term monitoring, the Kaliski/Old Testimony claims that "there was no requirement that directional modeling be used only for long-term results" because short term modeling "is very much, and has always been, a part of the long-term results."²⁴⁹ Witnesses Kaliski and Old claim that, although an NRO Plan is not required under the 2019 Certificate, the proposed NRO Plan for Phase II is consistent with industry standards and will allow Phase II to operate "as efficiently as possible."²⁵⁰

In its Initial Brief, Baron asserts that in Phase I, downwind-only directional NROs are "accurately working to reduce turbine sound levels in specified directions," citing the Rebuttal Testimony of witnesses Kaliski and Old.²⁵¹ Baron argues that DPS Staff has failed to demonstrate that downwind-only NROs do not work or are ineffective in mitigating noise.²⁵² Baron claims that to require NROs, as DPS Staff argues, would result

²⁴⁷ Tr. 349-352.

²⁴⁸ Hearing Exhibit 105 (Kaliski/Old Rebuttal Testimony), p. 6.

²⁴⁹ Hearing Exhibit 105 (Kaliski/Old Rebuttal Testimony), pp. 5-6.

²⁵⁰ Id., p. 7.

²⁵¹ Baron Initial Brief, p. 43 (citing Hearing Exhibit 105, pp. 9-12).

²⁵² Baron Initial Brief, p. 35.

in a loss of 1 GWh of energy annually. Baron asks the Siting Board to find that the downwind-only NROs, as proposed, appropriately minimize noise impacts for Phase II.²⁵³

iii. Adequacy of Noise Impact Minimization

DPS Staff witness Moreno-Caballero asserts that in the absence of manufacturer sound power level information and appropriate noise modeling and NRO activation, the Phase II Project may violate the 2019 Certificate's regulatory noise limits and design limits.²⁵⁴ In other words, the required minimization of noise impacts in the 2019 Certificate is at issue. Witness Moreno-Caballero notes that no other wind project in New York has proposed an NRO plan that factors downwind-only direction as Baron is proposing here.²⁵⁵ The Commission also made that point in its Phase I Noise Compliance Order for Phase I.²⁵⁶

Baron witnesses Kaliski and Old disagree with DPS Staff's suggestion that the NRO Plan could result in exceedances of the 2019 Certificate's noise limits. They claim that DPS Staff "does not support" its position with any studies or data that Phase II will exceed the 2019 Certificate's noise limits.²⁵⁷ Witnesses Kaliski and Old testified at the evidentiary hearing that, based on the Phase II PNIA modeling, they were "confident"

²⁵³ Id.

²⁵⁴ Hearing Exhibit 55 (Moreno-Caballero Testimony), p. 11.

²⁵⁵ Hearing Exhibit 55 (Moreno-Caballero Testimony), p. 22.

²⁵⁶ Noise Compliance Order, p. 14 ("[i]t should be noted that no other Article 10 project has proposed to modify NROs based upon wind direction for a particular wind speed)."

²⁵⁷ Hearing Exhibit (Kaliski/Old Testimony), p. 6.

that NROs would be activated when necessary for Phase II to comply with the Certificate's noise limits.²⁵⁸

Discussion

The potential noise impacts associated with operation the Phase II Project was the most contentious issue in dispute among the parties in this proceeding. Two questions are presented: first, whether the complete manufacturer noise information, namely the sound power levels for the Vestas V150 4.5 MW turbine, is necessary to evaluate the Phase II Project's noise impacts; and second, whether Baron's change to the pre-construction noise modeling protocol will assure that NROs are timely and properly activated when required during Phase II operations. Although inter-related, these issues are separately addressed below and share the common objective of ensuring that the Phase II Project will comply with applicable noise limits and impact minimization requirements and thereby support the Siting Board's required finding that such impacts have been avoided or minimized to the maximum extent practicable, as Article 10 requires.²⁵⁹

On this record, we cannot make the requisite findings without requiring the submission of the manufacturer turbine sound power levels for DPS Staff review. We find that, in the absence of manufacturer sound power levels for the Vestas V150

²⁵⁸ Tr. 363-364. Baron's noise experts stated that they lacked sufficient information to be confident that NROs were being activated when necessary for Phase I. Tr. 364.

²⁵⁹ Because Baron proposed in Amendment Petition II extensive changes to the Original Project, which the Secretary determined is a "revision" to the 2019 Certificate within the meaning of 16 NYCRR §1000.2(a)(k), the record here must support a finding here that noise impacts will be avoided or minimized to the maximum extent practicable and the Siting Board cannot rely on its prior finding in the 2019 Certificate. PSL §168(2)(b) and (3)(c).

4.5 MW turbine, Baron has failed to demonstrate that the change to a less conservative, downwind-only direction in the noise modeling and associated NRO Plan adequately protects the community from Phase II's noise impacts.

iv. Absence of Manufacturer Sound Power Information

We agree with DPS Staff that the record is inadequate to evaluate Phase II's noise impacts because Baron failed to submit complete turbine manufacturer sound power levels to enable DPS Staff and the other parties to evaluate the Phase II Project's noise impacts and NRO minimization measures in the context of the Phase II PNIA noise modeling. Baron witness Lundqvist testified that the sound power levels for a different turbine model, the Vestas V150 4.2 MW turbine, could be used as a "proxy" for the Vestas V150 4.5 MW turbine model proposed for Phase II. Baron asserts that the two turbine models have "comparable sound specifications."²⁶⁰

Comparable sound specifications does not mean that the sound power levels for the two turbines are the same, particularly when the 4.5 MW turbine model for Phase II has greater generation capacity than the 4.2 MW turbine that Baron claims is a proxy. Moreover, Baron's noise experts never testified that the sound power levels of the two turbine models are the same. There simply is no way to test Baron's assertion that the two are comparable without actually comparing the sound power levels for the 4.5 MW turbine with those of the 4.2 MW.

Baron relies on a letter from Vestas attached to witness Lundqvist's testimony but we find the letter does not

²⁶⁰ Hearing Exhibit 151 (Lundqvist Rebuttal Testimony), p. 4.

provide support for Baron's position.²⁶¹ The Vestas letter does not say that the sound power levels for the 4.2 MW turbine are comparable to or the same as those of the 4.5 MW turbine and does not indicate that one can be used as a proxy for the other. That letter only addresses the reliability of Vestas' NRO system. Moreover, it contains a broad disclaimer, stating that it is for discussion purposes only, does not constitute a warranty, and is not legally binding. The letter is therefore entitled to little weight here.

Similarly without basis is Baron's position that the manufacturer's sound power levels for the 4.5 MW turbine are not necessary to evaluate the Phase II Project's potential noise impacts, noise modeling, NRO Plan. DPS Staff asserts that the NRO Plan's elimination of NROs for some wind directions is not supported without the manufacturer's sound power levels.²⁶² DPS Staff asserts that in the absence of this information, it cannot confirm that the turbines and NROs will perform as Baron claims for the assumed wind directions in the NRO Plan.²⁶³ We find that DPS Staff's position is reasonable, particularly when NRO activation as a noise impact minimization is at issue.

The Article 10 regulations require that Baron's noise modeling "shall fairly match the unique operational noise characteristics of the particular equipment models..." to be used

²⁶¹ Hearing Exhibit 95 (PL-3, May 15, 2023 Vestas NRO Letter). This letter addresses only NROs and says that "Vestas can confirm that wind speed and direction dependent application of noise reduced operation modes are state of the industry and work reliably and appropriately to implement noise mitigation."

²⁶² Hearing Exhibit 55 (Moreno-Caballero Testimony), p. 24-25; DPS Staff Initial Brief, pp. 9-10.

²⁶³ Hearing Exhibit 55 (Moreno-Caballero Testimony), p. 25; DPS Staff Initial Brief, p. 9.

for the Facility.²⁶⁴ The 4.5 MW turbine model's sound power levels constitute a unique operational noise characteristic of the type that is required to fairly match the modeling. Without the manufacturer's sound power levels, DPS Staff cannot evaluate when Baron's noise modeling matches the turbine's noise characteristic and thereby determine if Baron has fulfilled this regulatory requirement. It is difficult to understand how Baron could propose for Phase II the Vestas V150 4.5 MW turbine model, which presumably is commercially available, without having complete noise information available for DPS Staff's review.

v. Changes to Noise Modeling Protocols and NROs

Baron's change to the modeling protocol to a downwind-only direction and NRO activation prompted DPS Staff to question whether the Phase II Project's noise impacts will be adequately minimized.²⁶⁵ DPS Staff also questions the Phase II PNIA's accuracy, which states that previous modeling was "unnecessarily conservative" and, because turbine sound power levels "will be well below the specified maximum for lower wind speeds," NROs will not be necessary.²⁶⁶ Baron does not dispute that it changed the modeling protocol to one that is less conservative or that the modeling drives how NROs are to be activated during Phase II Facility operations, but nevertheless expresses confidence that the Phase II Facility will comply with the applicable noise limits in the 2019 Certificate and Fremont's local law. DPS Staff disagrees, asserting that Baron should be required to

²⁶⁴ 16 NYCRR §1001.19(n).

²⁶⁵ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 13-14, 25; DPS Staff Initial Brief, pp. 9-10.

²⁶⁶ Hearing Exhibit 23 (Phase II PNIA), p. 8. The Phase II PNIA states that previous modeling was "unnecessarily conservative" and since turbine sound power levels "will be well below the specified maximum for lower wind speeds," NROs will not be necessary.

submit Phase II modeling consistent with the prior, more conservative modeling protocol that utilized all wind directions and all wind speeds.²⁶⁷

As discussed above, it is not possible to evaluate the accuracy of the expected noise impacts in Baron's Phase II PNIA without the manufacturer sound power levels for the 4.5 MW turbines. It is also not possible to determine whether Baron's proposed modeling approach and NRO activation are as protective in minimizing noise impacts as the more conservative modeling approach set forth in the Original Application without comparing both.

We agree with DPS Staff and find that Baron's change to the modeling protocol to a less conservative approach is inconsistent with the 2019 Certificate, which expressly approved the Project consistent with what Baron had proposed in its Application.²⁶⁸ There is no need to revisit the details of the modeling Baron proposed in the Original Application because Baron concedes that it changed.²⁶⁹ Nevertheless, the 2017 PNIA states that the noise modelling was done in accordance with ISO 9613-2, which "assumes downwind sound propagation between every source and every receptor, consequently, all wind directions, including the prevailing wind directions, are taken into account."²⁷⁰

²⁶⁷ Hearing Exhibit 55 (Moreno-Caballero Testimony), pp. 13-14.

²⁶⁸ 2019 Certificate, Conditions 1 and 11.

²⁶⁹ Hearing Exhibit 23 (Phase II PNIA), p. 8.

²⁷⁰ Hearing Exhibit 130 (2017 PNIA), pp. 144-145. The 2017 PNIA also states that the modeling "is a widely accepted acoustical propagation modeling tool, used by many noise control professionals in the United States and internationally."

We find unpersuasive Baron's claims that DPS Staff's current objections to the modeling "were rejected by the Siting Board" and have "already been adjudicated," and that the only difference between the Original Application and the NROs proposed for Phase II are that they are "more finely tuned for specific wind speeds and wind directions in order to maximum energy production while, at the same time, meeting noise limits."²⁷¹ The issue the Siting Board considered in the 2019 Certificate was whether NROs should be included at all in pre-construction noise modeling, as DPS Staff argued. The Siting Board rejected DPS Staff's argument to exclude NROs entirely from the modeling but did not address whether modeling in a downwind-only direction, rather than in all wind directions at all wind speeds, will be sufficient for purposes of timely activating NROs as a noise impact minimization measure.²⁷²

It is clear from the record that DPS Staff is not revisiting its argument that NROs should not be included at all in noise modeling. DPS Staff is objecting to Baron's change to a downwind-only turbine configuration for NRO activation purposes, asserting that it does not reflect real-world

²⁷¹ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), p. 6; Baron Initial Brief, pp. 37-39. Baron contradicts the claim that the Siting Board already approved its downwind only modeling protocol by stating that "to be explicitly clear," it is asking the Siting Board to approval its proposal to implement NROs based on downwind-only assumptions. Id., p. 39.

²⁷² 2019 Certificate, p. 105. As the Siting Board noted, DPS Staff urged eliminating NROs in the modeling. The Siting Board rejected that position and DPS Staff is not revisiting that determination here. Instead, DPS Staff urges that the modeling should address all wind directions and all wind speeds, as proposed in the Original Application, because the turbines will not timely activate NROs. Moreno-Caballero Testimony, pp. 24-28.

conditions and is not sufficiently protective as noise minimization. Contrary to Baron's claim, the Siting Board did not address or adjudicate the issue presented here.

Baron also cites its Original Application, which indicates that "NROs can be programed for selected wind speeds, wind directions and times of day."²⁷³ This does not address the issue presented, which is related to the selection of a downwind-only turbine configuration. Baron points to nothing in the Original Application or the 2019 Certificate authorizing the currently proposed change to the modeling protocol and NRO activation.

Baron argues that the modeling change is supported by reliable turbine manufacturer information.²⁷⁴ To support its claim that the downwind-only direction is acceptable for purposes of activating NROs, Baron's noise witnesses rely on the Vestas NRO Letter, discussed above.²⁷⁵ Although the Vestas NRO Letter's states that "wind speed and direction dependent application of noise reduced operations modes are state of the industry and work reliably," it does not address that downwind-only directional NRO activation Baron proposes or say that it

²⁷³ Baron Initial Brief, p. 37 (citing Hearing Exhibit 130, November 29, 2017 PNIA, p. 143).

²⁷⁴ Baron Initial Brief, pp. 39-41 (citing Lundqvist Rebuttal Testimony, pp. 3-8; Hearing Exhibit 105, Kaliski/Old Rebuttal Testimony, pp. 8-9).

²⁷⁵ Hearing Exhibits 89 and 90 (Lundqvist Exhibits PL-3, Vestas NRO Letter and PL-4, Vestas NRMS).

will sufficiently reduce noise impacts as required by the 2019 Certificate.²⁷⁶

Baron also relies on the Vestas Noise Reduction Management System Description specifications (Vestas NRMS) to support its claim that the downwind-only modeling change and NRO activation will work adequately. The Vestas NRMS is a generic document covering on-shore turbines with various generation capacity, from 2.0 MW turbines to 4.5 MW, that are manufactured on Vestas' "global software platform."²⁷⁷ It describes the Vestas NRMS as a system that "reduces noise generated by the wind turbine, when certain combinations of wind speed, direction, rain intensity and time are present," and claims that the "loss in energy production is limited ... because noise reduction is activated only when certain combination of wind speed and direction are present."²⁷⁸ Although the Vestas NRMS contains technical information related to modes, sub-functions, and the management of wind speed, time, and rain intensity,²⁷⁹ it does not address Baron's downwind-only modeling change and NRO activation programming approach.²⁸⁰

Baron's noise witnesses, Kaliski and Old, assert that sound power information "in other directions would only show

²⁷⁶ The Vestas NRO Letter states that NROs "can be programmed according to time, wind speed, wind direction, or a combination," implicitly recognizing that programming can include wind directions other than downwind. As discussed above, it is entitled to little weight based on its broad disclaimer.

²⁷⁷ Hearing Exhibit 90 (PL-4, Vestas NRMS), p. 4.

²⁷⁸ Id. (PL-4, Vestas NRMS), p. 4

²⁷⁹ Id. (PL-4, Vestas NRMS), pp. 4-11.

²⁸⁰ Like the Vestas NRO Letter, the Vestas NRMS's should be given little weight because of its disclaimer that it is "for information purposes only and is subject to changes in content." Hearing Exhibit 90, (PL-4, Vestas NRMS), p. 4.

lower sound levels," and rely on the Vestas letter and Vestas NRMS.²⁸¹ Neither document states explicitly, nor demonstrates effectively, that sound power levels for the Vestas V150 4.5 MW turbine would in fact have lower sound levels in other wind directions.

Baron's NRO Plan covering both Phase I and Phase II was submitted as a Phase I compliance filing rather than as a supporting document for Amendment Petition II. The NRO Plan became a critical issue in this proceeding when DPS Staff drew attention to it. Witnesses Kaliski and Old testified that the NRO Plan "is consistent" with the 2019 Certificate.²⁸² Although the 2019 Certificate notes that "modern wind turbine design incorporates NROs" to meet noise limits, we find nothing in the record to support Baron's consistency claim.²⁸³

Moreover, in submitting the NRO Plan for Phase II as a Phase I compliance filing, Baron appears to be attempting to skirt the very issue DPS Staff raises in this proceeding; namely, whether the NRO Plan for Phase II based on changed noise modeling complies with the 2019 Certificate and assures that NROs will be properly activated to minimize noise impacts to the maximum extent practicable. An NRO Plan covering Phase II should not have been submitted as a Phase I compliance filing because it assumes the Siting Board's approval of both the changed modeling and NRO Plan for Phase II when the Siting Board has not done so.

²⁸¹ Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), pp. 8-10.

²⁸² Baron Initial Brief, pp. 37-39; Hearing Exhibit 106 (Kaliski/Old Rebuttal Testimony), p. 7

²⁸³ 2019 Certificate, pp. 107, 120-121; Appendix A, Certificate Conditions 11 and 71.

Baron's change to the noise modelling directly affects when NROs are activated as noise minimization. Notwithstanding Baron's claims that the Commission "explicitly allowed sound modeling to incorporate wind direction" in the 2019 Certificate, it also made clear that it was seeking approval for such a modification to its certificate requirements in this proceeding.²⁸⁴ The 2019 Certificate did not approve downwind-only noise modeling and NRO activation.²⁸⁵ Moreover, the downwind-only concept was not discussed in the 2019 Certificate or the PNIA submitted with Baron's Original Application. Indeed, as Baron notes, the PNIA only states that NROs "can be programmed for selected wind speeds, wind directions, and times of day."²⁸⁶

Baron also cannot rely on the Commission's Phase I Compliance Order approving the Phase I PNIA as a compliance filing, which expressly noted that the approval "should not be considered indicative of any future approvals related to Baron Winds Phase II and is not to be relied upon as precedent in other cases."²⁸⁷ In any event, the change of noise modeling and NRO activation implicate Certificate Condition 11, which requires impact minimization as proposed in the Original

²⁸⁴ Baron Initial Brief, p. 39 (citing Kaliski/Old Rebuttal Testimony, p. 5).

²⁸⁵ The Siting Board's 2019 Certificate in large part adopted the RD's noise recommendations, which allowed Baron's use of NROs in modeling, but did not consider or determine that pre-construction noise modeling may be based on downwind-only modes for purposes of NRO activation.

²⁸⁶ Hearing Exhibit 130 (2017 PNIA), p. 141.

²⁸⁷ Noise Compliance Order, p. 14 (approving noise compliance filing for Phase I only).

Application.²⁸⁸ To the extent that the downwind-only modeling implicates NRO activation as noise minimization, it cannot be approved in a compliance filing because it amends the 2019 Certificate.²⁸⁹

Baron claims that if NROs are implemented as DPS Staff urges, the Phase II Facility would lose 1 GWh per year of energy production for approximately 30 homes.²⁹⁰ Such a loss, however, even if it were corroborated, is not sufficiently large to override Article 10's requirement that noise impacts be minimized to the maximum extent practicable.

Baron also claims that downwind-only NROs are proposed for only four Phase II turbines and cites its response to a DPS discovery request (DPS IR 2.1).²⁹¹ The proffered discovery response does not support this claim. Putting aside the fact that none of Baron's witnesses provided testimony to support this claim, nothing in Amendment Petition II or the Phase II PNIA limits Baron to the use of the downwind-only modeling protocol and NRO Plan to only four turbines.

Baron calls DPS Staff's concerns about the Phase II NRO Plan and noise impacts "mainly speculation and conjecture," arguing that DPS Staff presented no evidence in the record to

²⁸⁸ The 2019 Certificate requires Baron to construct and operate the Facility in accordance with its Application, as revised and updated, and with the Certificate Conditions, including those governing impact minimization. 2019 Certificate, Appendix A, Certificate Conditions 1, 11.

²⁸⁹ 16 NYCRR §1002.2(e) ("compliance filing may not be used to request an amendment to a Certificate").

²⁹⁰ Baron Initial Brief, p. 35 (citing Hearing Exhibit 151 Lundqvist Rebuttal Testimony, p. 12).

²⁹¹ Baron Initial Brief, p. 36 (citing Baron Response to DPS IR 2.1 and NRO Plan). Baron claims NROs are needed at the four turbines to meet the 2019 Certificate's 45 dBA Leq (8-hour) limit and 40 dBA Lnight design goal.

support the claims that the proposed NROs do not work properly.²⁹² Baron also disputes DPS Staff's position that the NRO Plan will result in inaccuracies and could result in exceedances of applicable noise limits.²⁹³ Baron claims that DPS Staff did consult with manufacturers and did not provide direct evidence to support its position. Baron misunderstands its burden and incorrectly assigns to DPS Staff an obligation to prove that the proposed NROs do not work. Baron has the burden of proof in the first instance and did not meet it.²⁹⁴

Baron also claims that the Phase II Facility "will undergo required compliance monitoring" and if downwind-only NROs are found to exceed noise limits, Baron "will have to implement minimization measures."²⁹⁵ Baron ignores the Siting Board's required finding in this proceeding that Phase II noise impacts will be minimized to the maximum extent practicable. To make the required finding, the Siting Board cannot not allow an ad hoc process implemented at Baron's discretion during operations to minimize noise impacts to the maximum extent practicable.

The 2019 Certificate requires submission of compliance filings for pre-construction noise modeling and post-construction operational monitoring in leaf on and leaf off seasons that are applicable to Phase II.²⁹⁶ Whether NROs will be properly activated and the Phase II Project's noise impacts adequately minimized is a question that may be addressed in the compliance phase. We acknowledge that a substantial period of

²⁹² Baron Initial Brief, p. 37.

²⁹³ Baron Initial Brief, pp. 42-45.

²⁹⁴ 16 NYCRR §1000.12(c).

²⁹⁵ Baron Initial Brief, p. 45.

²⁹⁶ 2019 Certificate, Appendix A, Certificate Conditions 69-70.

time has passed since the evidence was collected in this case. Thus, the data associated with the Vesta 45 turbines may be available now or in the near future. Baron will be required to submit such data, rather than the data they used in the case as a proxy, as a compliance filing to be evaluated by DPS Staff. In the event such data is unavailable to be filed in compliance, we will require Baron to retain an independent consultant approved by DPS Staff to perform the pre-construction noise modeling and submission of a revised Phase II PNIA and NRO Plan. We also clarify that the modeling be undertaken considering all wind directions at each wind speed and require Baron to provide the independent consultant with all relevant manufacturer sound information, including but not limited to sound power levels, for the Vestas V150 4.5 MW turbine (or the turbine model chosen for the Phase II Facility). Such noise information shall also be provided for substation equipment.

The independent consultant shall revise the Phase II PNIA and the NRO Plan may then be compared with Baron's Phase II PNIA using the downwind-only approach. The independent consultant should also perform all post-operational seasonal monitoring required in the 2019 Certificate, including the Leaf On and Leaf Off Reports for Phase II. The independent noise consultant shall report directly to DPS Staff. Baron shall be provided with an opportunity to comment on any draft written reports submitted to DPS Staff for approval.

Notably, Baron has implemented ice detection software as a noise minimization measure at the Phase I Facility but has not proposed the same technology for Phase II.²⁹⁷ Since Phase I and Phase II are in the same geographic area and are subject to the same weather, this additional noise minimization measure

²⁹⁷ Leaf On Report, p. 41.

should be required for Phase II. We therefore require icing detection software capable of controlling and curtailing turbine operations in the event of icing events for Phase II.

The foregoing measures will assure that Phase II noise impacts are minimized to the maximum extent practicable and support our required findings under PSL §168(3)(c).

vi. Phase I Noise Complaints.

In its Initial Brief, Baron attempts to excuse the many Phase I Facility noise complaints by asserting that they are typical and "not unusual" once a wind facility becomes operational because "residents are exposed to a new sound source that they previously were not exposed to."²⁹⁸ Baron asserts that the noise limits in the 2019 Certificate "are not intended to prevent sound complaints, but instead are designed to minimize sound impacts while maintaining the ability of projects to operate efficiently to produce clean renewable energy."²⁹⁹

Baron understates the intention of the 2019 Certificate and the underlying Article 10 statutory framework, both of which are intended to protect a community from adverse noise impacts while clean energy is produced. Both also have the objective of promoting responsible siting of renewable generation with limited impacts on a community and the environment. In other words, a developer's interests in maximizing energy production does not supersede the interests of the community, public health, and the environment. Baron cannot disregard community complaints despite its claim that such are typical.

Noise complaints can occur at any wind facility but the number of Phase I complaints and the timeframe taken to

²⁹⁸ Baron Initial Brief, pp. 45-46.

²⁹⁹ Id., p. 46.

resolve such complaints have raised legitimate concerns with DPS Staff and should not be repeated in Phase II. The Siting Board's objective in the 2019 Certificate was prompt resolution of noise complaints instead of a lengthy, time-consuming process, which assumes as a threshold matter that Baron agrees that there is a problem. Baron's track record with respect to Phase I noise issues is a strong indicator of how it will deal with similar issues during Phase II operations. Baron's failure to promptly address persistent noise complaints for Phase I resulted in a formal request by the Town of Cohocton to DPS Staff for an investigation. This in turn resulted in DPS Staff expending time and resources to acquire noise monitoring equipment and undertake an investigation and its own noise monitoring. The current Complaint Resolution Protocol gives Baron the discretion to determine the legitimacy of noise complaints and to take further action in a timeframe it deems appropriate. That discretion should be exercised with much greater care going forward.

In addition, Baron should also amend its Complaint Resolution Protocol to reflect that it is applicable to all complaints received as related to the entire Project, including those involving road repair, dust, and other potential violations of the 2019 Certificate.

B. Shadow Flicker

The 2019 Certificate identified shadow flicker impacts to receptors, adopted the Examiners' recommendations, established a maximum annual limit for receptors, and imposed

monitoring and other requirements.³⁰⁰ The Siting Board found, based on the record, that only 5 non-participating receptors in Fremont would experience more than 20 hours of shadow flicker annually.³⁰¹ As a result, the Siting Board adopted Certificate Condition 57, which limits shadow flicker to a maximum of 20 hours annually for non-participating Fremont receptors and requires monitoring to demonstrate compliance.³⁰² Fremont's Local Law has the same 20-hour annual limitation, but also provides that for all receptors close to or exceeding the limit, turbines "shall be equipped with a sensor with the ability to shut down during times of Shadow Flicker."³⁰³

In addition to establishing the annual limit, Condition 57 requires Baron to submit as a compliance filing a Shadow Flicker Impacts Minimization and Mitigation Plan (SF Mitigation Plan) that includes details of "detection and prevention technology and operational measures" to prevent exceedances of the 20-hour annual limit.³⁰⁴

Specifically, Condition 57 requires the SF Mitigation Plan to include an updated analysis of receptors based on final Facility design; monitoring protocol during operations based on meteorological conditions; details of shadow detection and

³⁰⁰ 2019 Certificate, p. 103; Appendix A, Condition 58, pp. 22-23. Shadow flicker is a visual effect caused by wind turbine blades moving in direct sunlight, creating bright and sometimes intense flickering that can be seen by surrounding receptors. An applicant is required to identify shadow flicker impacts and address such impacts. 16 NYCRR §1001.24(a)(9).

³⁰¹ 2019 Certificate, pp. 98-99, 101.

³⁰² 2019 Certificate, Appendix A, pp. 16-17.

³⁰³ Hearing Exhibit 35 (Fremont Local Law No. 2 of 2018) §8.10(A)(18). The Fremont Local Law also requires submission of modelling results and a demonstration of compliance.

³⁰⁴ 2019 Certificate, p. 103.

prevention technology or operational measures to be adopted for monitoring or turbine operational control and curtailment during periods producing shadow flicker; and shielding and blocking measures such as landscaping and window treatments for complaining receptors not subject to the 20-hour limit.³⁰⁵ Condition 57 also requires Baron to confer with the New York State Department of Transportation (DOT) regarding shadow flicker impacts on Route 21 and submit a summary of the consultation to DPS Staff regarding impacts and a description of measures to minimize such impacts, with final design drawings and site plans.

Baron claims that "Phase II will not have greater operating effects from shadow flicker and does not result in a significant increase in adverse effects as compared to the Baron Winds Certificated Project."³⁰⁶ Amendment Petition II states that 27 Fremont receptors will be exposed to more than 20 hours and 12 will be exposed to more than 30 hours of shadow flicker annually from the Phase II Project.³⁰⁷ It also asserts that detection and prevention technology and operational measures will prevent exceeding the 20-hour limit for Fremont receptors.

In support of Amendment Petition II, Baron submits a Shadow Flicker Phase II Study (SF Study) and a Shadow Flicker Impacts Control, Minimization and Mitigation Plan (SF Mitigation Plan) and asserts that both demonstrate Phase II's compliance with the 20-hour annual limit.³⁰⁸

³⁰⁵ 2019 Certificate, Appendix A, Condition 57, pp. 22-23.

³⁰⁶ Baron Initial Brief, p. 76. See also Hearing Exhibit 2 (Amendment Petition II, Exhibit A), p. 17.

³⁰⁷ Hearing Exhibit 2 (Amendment Petition II, Exhibit A), p. 16-17.

³⁰⁸ Hearing Exhibit 22 (Appendices B-1 and B-2, SF Study and SF Mitigation Plan).

The SF Study analyzes the Phase II shadow flicker impacts resulting from 650-foot turbines on 213 "sensitive receptors within ten rotor diameters" or 5,250 feet of turbine locations with and without vegetation screening.³⁰⁹ The SF Study models shadow flicker impacts and estimates that, with vegetation screening, a total of 10 receptors are expected to receive 20 to 30 hours annually and 17 receptors will receive more than 30 hours.³¹⁰ The SF Study proposes as mitigation and Certificate compliance measures "monitoring operational conditions," "shadow detection and prevention technology and

³⁰⁹ Hearing Exhibit 2 (Amendment Petition II, Exhibit A), pp. 16-17; Hearing Exhibit 22 (Appendix B-1 August 26, 2022 Shadow Flicker Phase II Study), pp. 1, 5. The Study's methodology of assessing only 213 receptors and using a ten turbine rotor diameters to identify receptors may require further review by DPS Staff for the purpose of confirming that all receptors have been identified and that Condition 57's 20-hour limit is not exceeded. By way of comparison, Canisteo Wind's updated Shadow Flicker Impact Assessment Report analyzed 1,113 receptors and did not consider the effect of vegetative or structural screening for its 290 MW facility located in a rural area that is similar to Phase II.

³¹⁰ Hearing Exhibit 22 (Appendix B-1, SF Study), Table 4, p. 6; Amendment Petition II, Exhibit A, pp. 16-17. The SF Study estimates that, without vegetative screening, a total of 28 receptors are expected to receive 20 to 30 hours annually and 30 receptors will receive more than 30-hours.

operational measures," and use of a complaint resolution process.³¹¹

Baron also analyzed shadow flicker on State Route 21, as required by the 2019 Certificate and Condition 57, and conferred with the New York State Department of Transportation (DOT).³¹² Baron claims that DOT did not respond to its attempt to confer and asserts that impacts the shadow flicker impacts on Route 21 "are predominantly blocked by vegetation" and, where not blocked, vehicles traveling at the posted 55 miles per hour "will quickly traverse" the affected area.³¹³ Baron claims that it is unaware of any documented safety hazards to drivers from shadow flicker on roadways.

The SF Mitigation Plan identifies Fremont receptors who will exceed the 20-hour annual limit assuming vegetative

³¹¹ Hearing Exhibit 22 (Appendices B-1, SF Study), p. 6. The text of the SF Study varies from the receptor summary contained in Table 4. The text states that without vegetative screening "28 receptors are expected to receive between 20 and 30 annual hours, with 30 receptors expected to receive more than 30 hours of shadow flicker per year." On the other hand, Table 4 estimates that without vegetative screening, 15 non-participating Fremont receptors will receive 20 to 30 hours annually and 11 Fremont receptors will receive more than 30 hours. As a result, the number of Fremont receptors exceeding the 20-hour annual limit is unclear. If vegetative screening is considered, the SF Study lowers the number of 20- to 30-hour Fremont receptors to 17 but does not identify the number of receptors exceeding 30 hours; and Table 5 indicates that the number of 20 to 30-hour receptors is 13, with 4 receiving more than 30 hours annually. Id., Table 5, p. 6. To add to the confusion in the record, Table 6 identifies a greater number of Fremont receptors who exceed the 20-hour limit with vegetative screening (35) and without (52), but inexplicably concludes that only 17 Fremont receptors will exceed the limit. Id., Table 6, pp. 8-9.

³¹² 2019 Certificate, p. 101.

³¹³ Hearing Exhibit 22 (SF Study), p. 7.

screening and proposes installation of shadow flicker sensors with automatic turbine curtailment, using various methods that assume times of day and year when shadow flicker will occur.³¹⁴ The SF Mitigation Plan states that there are 20 receptors in Fremont predicted to experience more than 20-hours of shadow flicker annually, assuming vegetation.³¹⁵ It proposes to install a sensor-based shadow flicker detection and curtailment system to "monitor expected times" shadow flicker will occur, assess impacts on receptors, and curtail turbines if the 20-hour limit annual is exceeded. The SF Mitigation Plan also proposes a "calendar-based curtailment system" as another option but provides no further details of the system.³¹⁶ The SF Mitigation Plan claims that shadow flicker impacts will be reduced to less than 20 hours for all Fremont receptors, assuming vegetative screening and curtailment.³¹⁷

The SF Mitigation Plan also proposes a complaint process "by which complaints will be logged and resolved in a timely manner." For any complaints that are not identified Fremont receptors exceeding the 20-hour limit, Baron "may elect to provide shielding or blocking measures, such as landscape plantings or window treatments, to mitigate impacts."³¹⁸ The SF Mitigation Plan concludes that the Plan demonstrates that the Project can be operated within the 20-hour annual shadow flicker limits.³¹⁹

³¹⁴ Hearing Exhibit 22 (Appendix B-2), pp. 2-3; (Appendix B-1, SF Study), p. 17.

³¹⁵ Hearing Exhibit 22 (Appendix B-2, SF Mitigation Plan), p. 2-3.

³¹⁶ Id., p. 5.

³¹⁷ Id., pp. 3-4 and Table 1.

³¹⁸ Id., p. 4.

³¹⁹ Id., p. 5.

In its Initial Brief, Baron claims that the Phase II Project will have “no additional impacts” beyond those analyzed in the 2019 Certificate for the Original Project.³²⁰

Discussion

The record is not clear regarding the number of non-participating Fremont residences who may be affected by more than 20 hours annually. The Amendment Petition, the SF Study and the SF Mitigation Plan inconsistently report the number of Fremont receptors that will exceed the 20-hour annual limit.³²¹ In each of its three filings Baron assumes vegetative screening, without identifying the location and effectiveness of the screening or the receptors screened. Moreover, Baron’s filings assume the effectiveness of vegetation screening without discussing the impacts resulting from the fact that the Phase II Project area will lose much of its vegetation from November to May. Notably, the SF Study’s “Worst Case” raw data modelling results (without vegetation screening assumed) indicate that far more Fremont receptors will exceed 20 hours annually.³²²

³²⁰ Baron Initial Brief, pp. 76-77.

³²¹ Baron indicates that, with vegetative screening, 35 receptors in Fremont will receive more than 20 hours annually but does not identify the number of receptors who will receive more than 30 hours annually. Hearing Exhibit 2 (Amendment Petition II, Exhibit A), p. 17. The SF Study, on the other hand, estimates that 17 Fremont receptors will exceed 20 hours, also assuming vegetative screening, and again does not identify the receptors that will exceed 30 hours annually. Hearing Exhibit 22 (Appendix B-1, SF Study), p. 17. Counting the receptors in the SF Mitigation Plan, 20 Fremont receptors are expected to exceed 20 hours, assuming vegetative screening, and that of those, approximately six will exceed 30 hours, and one will exceed 40 hours. Hearing Exhibit 22 (Appendix B-2, SF Mitigation Plan), Table 1, pp. 3-4.

³²² Hearing Exhibit 22 (Appendix B-1, SF Study, WindPro Model Output Summary), Appendix C.

Without clarity on the receptors exceeding the 20-hour limit, we cannot properly evaluate Baron's proposed avoidance or minimization measures for impacted receptors. Consequently, we cannot make our required finding of avoidance or minimization of shadow flicker impacts to the maximum extent practicable for the Phase II Project without taking further action to ensure such minimization.³²³

The 2019 Certificate requires Baron to submit as a compliance filing an updated analysis of shadow flicker impacts based on the final Phase II Project design, including updates reflecting any changes or other circumstances.³²⁴ Condition 57 details the contents of this compliance filing.³²⁵ We will require Baron to undertake revised modeling SF Study and update the impact analysis to address the defects noted above, including accurately identifying the non-participating Fremont receptors exceeding the 20-hour annual limit with and without vegetation screening and estimate the number of hours of annual shadow flicker impacts under worst case and expected scenarios, including Phase II, and Phase I and Phase II cumulatively.³²⁶

We also require Baron to submit as a compliance filing a revised Phase II SF Mitigation Plan identifying the specific non-participating Fremont receptors who may exceed the 20-hour limit and those receptors where year-round vegetative screening will limit shadow flicker to less than 20-hours, with the details of the nature and location of such screening. The SF

³²³ PSL §168(3)(c).

³²⁴ 2019 Certificate, pp. 101-102.

³²⁵ Condition 57(a)-(e).

³²⁶ The SF Mitigation Plan already notes that due to the proximity of Phase I turbines, the Phase II analysis included adjacent Phase I turbines. Hearing Exhibit 22 (Appendix B-2, SF Mitigation Plan), p. 1.

Mitigation Plan should also contain the monitoring protocol to be used to detect shadow flicker and the operational controls and curtailment criteria to be implemented seasonally and throughout the year upon exceedances of the 20-hour annual limit. As required in the SEEP, the SF Mitigation Plan must include "the use of landscaping to mitigate visual impacts relating to shadow flicker."³²⁷

In addition, we require Baron to share with DPS Staff all raw monitoring data and information documenting shadow flicker impacts on receptors as part of its compliance filing and in furtherance of DPS Staff's enforcement of the 2019 Certificate's 20-hour annual limit. The compliance filing shall identify the specific receptors exceeding 20-hours annually and those exceeding 30-hours (or more) and shall propose minimization measures to the extent necessary.³²⁸ DPS Staff shall have the discretion to determine the mitigation measures required for exceedances of the 20-hour annual limit.

Baron should continue to submit a shadow flicker complaint log to DPS Staff quarterly, which must note the receptor location, the turbine(s) generating the shadow flicker complaint, and the timeframe within which the complaints were resolved or whether they remain unresolved after 30 days.

We are concerned with Baron's proposal to the extent that allows it to exercise its own discretion on impact minimization through window treatments or landscaping for

³²⁷ 2019 Certificate, Appendix B (SEEP), §19, pp. 22-23.

³²⁸ The record seems to indicate that the 20-hour annual limit can be exceeded for an undefined period if Baron is performing operational monitoring. Baron cannot use monitoring on its own timeframe to avoid addressing complaints promptly in conformance with the revised Complaint Resolution Plan.

complaining receptors that are not identified as subject to the 20-hour limit. The SF Mitigation Plan provides:

For receptor locations that submit complaints for exposures that are not subject to the 20-hour or 30-hour annual limits, Baron Winds 2 may elect to provide shielding or blocking measures, such as landscape plantings or window treatments, to mitigate impacts.³²⁹

This appears to mean that if Baron has not identified in its modeling a complaining receptor that is subject to the 20-hour limit, it has the discretion to determine an appropriate mitigation measure by its choice of using either landscape plantings or window treatments. Baron would need receptor consent to implement such measures because access to a receptor's property is necessary. Baron should consult with the complainant with regard to their preference for the mitigation measure used, but in addition to landscaping and window treatment options, temporary seasonal turbine curtailment should be included as an additional measure when it has been demonstrated that such is necessary to achieve compliance with the 20-hour annual limit.

We reiterate the 2019 Certificate's 20-hour annual limit for all Fremont receptors and the requirement to minimize shadow flicker impacts on all receptors exceeding the limit through operational controls and curtailment, regardless of whether Baron has identified the receptor in its modeling as "subject to" the 20-hour limit. Where disputes occur, DPS Staff may, in consultation with Baron and based on monitoring data, make a final determination of whether a complaining party is

³²⁹ Hearing Exhibit 22 (Appendix B-2, SF Mitigation Plan), p. 4. The inclusion of the 30-hour limit in the Phase II SF Mitigation Plan is in error because Phase II Fremont receptors are subject to only the 20-hour limit.

experiencing more than 20-hours of shadow flicker and, if appropriate, identify its recommended minimization measures, which Baron should implement within 30-days of DPS Staff's written determination. Likewise, for complaining receptors who are demonstrably experiencing less than 20-hours based on Baron's monitoring data, DPS Staff has the discretion to determine whether and to what extent minimization measures, including seasonal or periodic curtailment, should be employed.

In our view, Baron's proposed complaint resolution process for shadow flicker complaints lacks sufficient detail and does not call for submission of monitoring data/information to DPS Staff or the resolution of complaints within a specified timeframe. As evidenced by the Phase I Project's noise complaints, Baron has not timely resolved complaints. Notably, the Siting Board recognized in the 2019 Certificate that there should not be excessive delays to the implementation of shadow flicker mitigation and complaint resolution.³³⁰ Baron's shadow flicker complaint process favors monitoring rather than mitigation and appears to place the burden on proving annual exceedances on receptors. With Baron in possession of the monitoring data and information associated with the number of hours of receptor exposure, the burden of proof should not be on the receptor. Moreover, as noted above, this data and information should be submitted to DPS Staff and be made available to complaining receptors.

In the 2019 Certificate, the Siting Board noted that "when complaints regarding exceedances of the thresholds cannot be resolved," turbine curtailment is reasonable and practicable for exceedances of the applicable limits.³³¹ While the 2019

³³⁰ Id., 2019 Certificate, pp. 100, 103.

³³¹ 2019 Certificate, p. 100.

Certificate does not provide a timeframe for resolution of shadow flicker complaints, we determine that the complaint resolution process should be limited to 30-days absent extraordinary circumstances.

Baron claims in the SF Study that, as required by Condition 57, it consulted with DOT about shadow flicker impacts on Route 21 and "received no response."³³² The details associated with Baron's DOT consultation are not disclosed in the record and are relevant to Phase II because Route 21 is located within the Project Area. A summary of Baron's consultation with DOT, which Condition 57 requires, is also not a part of the record. Baron nevertheless claims that drivers on Route 21 will be going 55 miles an hour and will quickly pass through any areas of shadow flicker posing a safety risk.³³³ Consequently, Baron proposes no mitigation for Route 21.

The Siting Board's intention in the 2019 Certificate to assure that there is no safety risk to drivers on Route 21 has been frustrated because there is insufficient information to support a conclusion that the Phase II Project does not present such a risk. Fremont raised the Route 21 safety issue during the Siting Board's consideration of the Original Project, which were addressed in Condition 57 by requiring Baron to consult with DOT. Baron's theory that drivers on Route 21 are going too fast to experience shadow flicker impacts is purely speculative and otherwise unsupported.

We again direct Baron to consult with DOT, this time with the assistance of DPS Staff, and address whether shadow flicker from the Phase II Facility will pose a safety hazard to drivers on Route 21. Baron is required to comply with Condition

³³² Hearing Exhibit 22 (Appendix B-1, SF Study), p. 7.

³³³ Id.

57 and file with the Secretary a detailed summary of the DOT consultation, which must address the safety question. The summary should also be provided to DOT as well as DPS Staff so both have an opportunity to comment. This will assure that the Siting Board's intention to assure road safety on Route 21 is effectuated.

5. Communications

Amendment Petition II indicates that the Phase II Project will have a potential impact on existing broadcast communications and will disrupt the television signals for 18 stations, although modern digital television receivers are unlikely to be affected.³³⁴ If television reception is affected, Baron recommends "a high-gain directional antenna" be used outdoors and oriented toward the signal to mitigate interference.³³⁵ For Phase II, Baron proposes the complaint resolution process in the 2019 Certificate.

The 2019 Certificate examined television impacts and adopted Condition 45, which establishes a complaint process calling for Baron to (1) investigate improving reception; and (2) if reception cannot be improved, provide cable or direct broadcast satellite reception.³³⁶ Based on that process, the Siting Board concluded that television reception impacts would be minimized.

Fremont objects to the Phase II Project's identified impacts to television reception and emergency services communications and Baron's proposed minimization through a

³³⁴ Hearing Exhibit 2 (Amendment Petition, Exhibit A), p. 53.

³³⁵ Id.

³³⁶ 2019 Certificate, pp. 142-143.

complaint process, with the burden on residents.³³⁷ Fremont notes that at least one Phase I Facility resident has reported disruption to reception and that Baron's expert acknowledges that such disruption is possible or even likely.³³⁸ Fremont's expert asserts that impacts from larger turbines will increase occurrences of television interference and suggests additional studies to define such impacts, while acknowledging that newer high definition television (HDTV) receivers are better equipped to deal with interference.³³⁹

Discussion

Similar to the Condition 57, the Siting Board's expectation that Condition 45's complaint resolution process will address television reception impacts could be frustrated because it lacks a reasonable timeframe for Baron to complete an investigation of reception improvement and provide alternative cable or satellite reception to affected residents in the absence of improvement. Condition 45's requirement to report to DPS Staff any complaints not resolved in 30 days is insufficient to assure Baron's diligent efforts to promptly address this impact, as is the provision related to "arbitrating complaints" within 60 days, which favors Baron and delays resolution to the detriment of affected residents. Condition 45 and the Complaint Resolution Plan lacks an enforcement mechanism to assure that Baron timely resolves complaints, leaving residential complainants without a remedy from the Siting Board or the Commission.

³³⁷ Hearing Exhibit 69 (Evans Testimony), pp. 3-6; Fremont Initial Brief, pp. 31-32.

³³⁸ Fremont Initial Brief, p. 31.

³³⁹ Hearing Exhibit 78 (Meyer Rebuttal Testimony), pp. 6-8.

As such, we require Baron to submit a revised Complaint Resolution Plan for Phase II television reception and other communications complaints that imposes a 30-day timeframe for such complaints to be resolved either through demonstrable reception improvement or the provision of cable/satellite reception. Baron's investigative efforts to improve reception and provide alternative reception must be completed within 30-days of receipt of the complaint and the results should be reported to DPS Staff in writing.

We disagree with Fremont's request for additional studies, which may prove costly and lack real benefit beyond the requirement that Baron improve reception or provide alternative cable/satellite reception. The record reflects a minimal likelihood of reception interference if residents own newer, HDTV receivers.

C. Setbacks

Fremont's Wind Law establishes a minimum setback distance of 1.5 times the turbine height (or the manufacturer's recommended setback distance) from property lines, public roads, overhead utility lines, and public and utility rights of way. It also requires a 1,500-foot setback from the nearest residence (or the manufacturer's recommended distances, whichever is greater).

The impact of the setback restriction was a litigated issue during the proceeding. Fremont challenged Baron's planned 1,500 setback distance for non-participating property owners, claiming that it does not comply with the Wind Law. Fremont argues that the 1,500-foot residential setback requirement in the Wind Law was based on the Law's 500-foot turbine height limit and was established to represent three times that turbine height for public safety purposes, including risks associated with fire, ice and blade throw, noise, visual and shadow

flicker. Fremont claims that Baron's planned 1,500-foot setback frustrates and violates the Wind Law. Fremont further argues that Baron should be required to increase the minimum setback from 1,500 feet to 1,950 feet, or three times the 650-foot turbine height. Fremont also asserts that Baron's "internal standard for setbacks" for non-participating residences proposed in the Original Application was a minimum of three times the turbine height, thereby further supporting a 1,950-foot setback.

In response, Baron indicates that the planned turbine setbacks of approximately 1,500 feet exceed the Fremont Wind Law's 1.5 X turbine height setback requirement ($1.5 \times 650 \text{ feet} = 975 \text{ feet}$). Baron claims that Fremont failed to present testimony or evidence supporting the Wind Law's intent to require a setback of three times the turbine height or supporting the asserted safety risks. Baron argues that Fremont failed to change its local law during the pendency of the proceeding and that it is "more reasonable to conclude that the Town believed 1,500 feet to be adequately protective, and there is no evidence to the contrary in the Record."

Baron does not address the issue of the manufacturer's recommended setback distances or the Original Application's setback proposal of three times the turbine height. We disagree with Baron that the record does not support Fremont's legal interpretation of its own Wind Law that the 1,500 setback was based on turbines with a 500-foot height limit. In light of the 500-foot height limit, Fremont's Wind Law can reasonably be read to support that conclusion. Nevertheless, we agree with Baron that a 1,500-foot setback for the Phase II turbines is sufficiently protective of non-participating property owners and consistent with Siting Board precedent. For the avoidance of any misunderstanding, we note that the setback distance is to be measured from the turbine location to the nearest property

lines, public roads, overhead utilities, and public and utility rights of way.

D. Decommissioning, Site Restoration and Financial Security

1. Phase II Facility Decommissioning.

Baron requests modification of the 2019 Certificate insofar as it requires a minimum amount for Facility decommissioning and site restoration, as documented in a Decommissioning Plan. For the reasons detailed below, we deny Baron's requested modification as it relates to Phase II decommissioning/restoration cost estimate and the associated irrevocable letter of credit for the benefit of Fremont because its request is not supported by the record.

2. 2019 Certificate

The Siting Board largely adopted the Recommended Decision's proposed treatment of the financial assurance required for Project decommissioning and site restoration but rejected the ALJs' recommendation that a specific amount not be set because of the lack of clarity in the record of that proceeding. The Siting Board found that the amount "should, in no event, fall below the \$9,763,500 amount" proposed by Baron and should be in the form of an irrevocable letter of credit for the sole benefit of the four Host Towns.³⁴⁰ In departing from the Recommended Decision's recommendation not to set an amount, the Siting Board recognized that the record reflected Baron's proposed cost of \$9,763,500 and adopted it as the "baseline value" or minimum amount for the Original Project that should be required for Facility decommissioning/restoration.³⁴¹ The Siting Board noted that Baron is required to file updates to the estimated costs and that if those "later estimates demonstrate

³⁴⁰ 2019 Certificate, pp. 162-164; Recommended Decision, p. 168.

³⁴¹ 2019 Certificate, p. 162.

that a higher reserve should be established, those estimates should prevail...."³⁴²

The Siting Board also rejected Baron's use of salvage value for Facility components as an offset to the required amount. The Commission agreed with the ALJs that "Baron should not be allowed to offset the estimated cost for decommissioning and site restoration with the value of projected amounts that could be received in salvaging the wind farm components" because it would not provide adequate assurance to the local communities being left with "abandoned infrastructure."³⁴³ The Siting Board found that "any risk involved in recovering salvage value should be borne" by Baron, and that nothing in the record "will ensure that sufficient funds will exist to cover decommissioning costs" for the Host Towns at the end of the Facility's 25 to 40 year lifespan in the event that Baron fails to perform the decommissioning.³⁴⁴

To implement its findings, the Siting Board included Condition 44 in the 2019 Certificate, which recites the \$9.764 million minimum decommissioning/restoration amount and requires Baron to establish irrevocable letters of credit for the sole benefit of host Towns.³⁴⁵ Condition 44 also sets forth the required contents of the Plan and mandates that it be updated one year after commencement of Facility operations and every

³⁴² Id., pp. 162-163.

³⁴³ Id., p. 164.

³⁴⁴ Id., pp. 163-164. The Siting Board recognized that the Article 10 regulations, 16 NYCRR §1001.29(a)(4), requests information about component salvage and recycling, but that does not mean that there should be any offset for those values in establishing the Host Towns' letters of credit. Id., pp. 164-165.

³⁴⁵ 2019 Certificate, Appendix A, Condition 44, pp. 14-15.

five years thereafter, with revised cost estimates and without salvage value included in the calculation.

Condition 44 further requires the Plan and cost estimates to be done by a licensed professional engineer, with any changes to the letters of credit documented.³⁴⁶ In addition, prior to commencement of Facility operations, Condition 44 requires submission of the Host Towns' approval of the letters of credit, proof of the calculated costs under the Plan, and copies of the agreements showing that Host Towns have the right to draw on the letters of credit.³⁴⁷

3. Town of Fremont Local Law

Like the 2019 Certificate and Condition 44, Fremont's Wind Law requires submission of a Decommissioning Plan and details its contents:

The applicant shall submit a decommissioning plan, which shall include: 1) the anticipated life of the WECS; 2) the estimated decommissioning costs in current U.S. dollars; 3) how said estimate was determined; 4) the method of ensuring that funds will be available for decommissioning and restoration; 5) the method, such by annual re-estimate by a licensed engineer, that the decommissioning cost will be kept current; and 6) the manner in which the WECS will be decommissioned and the Site restored, which shall include removal of all structures and debris to a depth of three feet, restoration of the soil, and restoration of vegetation (consistent and compatible with surrounding vegetation), less any fencing or residual minor improvements requested by the landowner (emphasis added).³⁴⁸

³⁴⁶ 2019 Certificate, Appendix A, Condition 44(d), p. 15.

³⁴⁷ 2019 Certificate, Appendix A, Condition 44(a), (b), (c) and (e), pp. 14-15.

³⁴⁸ Hearing Exhibit 35 (Amendment Petition II, Appendix N, Town of Fremont Local Law No. 2 of 2018), §8.8(A)(10), p. 8.

These are substantive provisions applicable to Baron and no waiver of this local law was requested in Amendment Petition II.³⁴⁹

4. Amendment Petition II and Phase II Decommissioning Plan

Baron Winds seeks a modification to the Certificate Condition 44, to reduce by \$1.25 million the \$9.764 minimum amount for overall decommissioning and site restoration costs for both Phase I and Phase II, as required in the 2019 Certificate approving the Original Project. Baron thereby requests modification of not only Condition 44, but the amounts required to be posted as letters of credit for the benefit of all of the Host Towns for the Original Project (Cohocton, Dansville, Wayland and Fremont).³⁵⁰

Baron claims that because the overall Phase I and Phase II Projects have reduced the number of turbines, the required decommissioning/restoration cost estimates for Fremont should be reduced to \$3.792 million and the amount of the letter of credit required to be posted for the benefit of Fremont similarly reduced.³⁵¹ Baron claims in Amendment Petition II that the overall costs for decommissioning/restoration for the Phase II Facility in Fremont have been reduced by \$1.25 million.³⁵² Baron asserts that because "the overall cost of the Facility components proposed to be constructed has been reduced, including Facility components to be constructed in the Phase II

³⁴⁹ PSL §168(3)(e).

³⁵⁰ Amendment Petition II, pp. 7-8.

³⁵¹ Id. Phase II is reduced to 26 turbines from 33 turbines proposed under the Original Project, although in light of the total Phase I and Phase II approved megawatts discussed above, further reduction in the number of turbines is possible.

³⁵² Amendment Petition, p. 7.

Facility Area, there is no need for nor justification to require" the prior minimum amount established by the Siting Board and that disallowing the newly estimated \$1.25 million reduction "simply imposes an additional financial burden" on Baron without benefit to the Host Towns, including Fremont.³⁵³

Baron also claims that its newly revised estimate "is sufficient to cover any decommissioning activities" in the "unlikely event" that the Fremont must perform those activities.³⁵⁴ Baron also notes that decommissioning and restoration activities will take eight to ten months and "will adhere to the appropriate governing authorities, and will be in accordance with applicable federal, state and local permit and decommissioning agreements."³⁵⁵

Baron submits with Amendment Petition II a draft Decommissioning Plan for the Phase II Facility, which contains a summary of decommissioning/restoration and Table 1, which outlines by line item the estimated costs, including removal of turbines, concrete, collection lines "where necessary," meteorological towers, the Operations and Maintenance Building, and the substation; reclamation of 11 miles of access roads; and site restoration.³⁵⁶ The Decommissioning Plan states that following the 25- to 40-year life of the phase to facility, wind turbines, equipment, buildings, and infrastructure will be

³⁵³ Amendment Petition, p. 8.

³⁵⁴ Id.

³⁵⁵ Amendment Petition II, Exhibit A, p. 55. Baron notes that underground cables installed at depths greater than three to four feet "will be left in place." Id.

³⁵⁶ Hearing Exhibit 34 (Amendment Petition II, Appendix M, Draft Phase II Decommissioning Plan), pp. 5-7 and Table 1.

removed.³⁵⁷ The Plan estimates the Total Costs for Phase II decommissioning/restoration to be \$3.792 million, but it also includes a \$2.226 million line item for "Total Project Salvage Value" (that is, scrap value for steel, copper, and turbine components), which is subtracted from the \$3.792 million in Total Costs, leaving a "Total Net Decommissioning Cost" of \$1.566 million for Phase II.³⁵⁸

Baron's draft Decommissioning Plan is not signed by a New York State independent licensed professional engineer, as required by Condition 44, but acknowledges that requirement for the Plan that must be submitted with cost estimates within one year of Facility operations and every fifth year thereafter.³⁵⁹ Baron claims that reducing the previously required \$9.764 cost estimate "is procedural and will not significantly increase adverse environmental impacts" and that the Plan's estimate includes a 10 percent "contingency" and a 5 percent "indirect cost."³⁶⁰

On April 5, 2024, Baron filed an updated Phase I Decommissioning Plan covering only the Phase I Facility, which increased the previously estimated decommissioning/restoration costs, thereby increasing the amount of the irrevocable letters of credit required under Condition 44 for the Phase I Host

³⁵⁷ Id., p. 3. The Plan also provides for decommissioning turbines that are not operational for 12 months, with limited exceptions requiring Baron to demonstrate diligent, good faith efforts to restore turbine operations.

³⁵⁸ Id., pp. 10-11, Table 1. The Phase II draft Decommissioning Plan does not have a licensed engineer's stamp and it is unclear whether it was prepared as Condition 44 requires.

³⁵⁹ Amendment Petition II, p. 8.

³⁶⁰ Id., pp. 8-9.

Towns, Cohocton, Dansville, and Wayland.³⁶¹ With the updated Phase I Decommissioning Plan, Baron included amended letters of credit for each of the Phase I Host Towns, increasing the required amount for each as compared to Baron's previous 2021 estimate:³⁶²

Comparison of Phase I Decommissioning/Restoration Cost Estimates

	<u>2021 LC Estimate</u>	<u>2024 LC Estimate</u> ³⁶³
Town of Cohocton	\$3,316,025	\$4,872,893
Town of Dansville	\$ 280,774	\$ 412,597
Town of Wayland	<u>\$1,123,097</u>	<u>\$1,650,389</u>
Total	\$4,719,896	\$6,935,879

Thus, Baron's updated Phase I Decommissioning Plan documents a \$2.216 million increase (a nearly 50 percent increase) to the 2021 cost estimates for Phase I decommissioning/restoration. Such a substantial increase in just a three-year period is significant and calls into question Baron's prior 2021 estimate. Despite the Siting Board's rejection in the 2019 Certificate of using salvage values to offset to estimated costs, the Phase I Plan still subtracts \$5.977 million for component salvage/scrap value, showing a net estimated cost of \$959,140 in current dollars to address the Phase I Facility.³⁶⁴

5. Fremont Objection to Reduction

Fremont objects to Baron's attempt to reduce the decommissioning/restoration estimate and argues that the Phase

³⁶¹ Phase I Decommissioning Plan, Towns of Cohocton, Dansville and Wayland. Baron's Phase I updated Decommissioning is stamped by a licensed professional engineer.

³⁶² Phase I Irrevocable Letters of Credit for Towns of Cohocton, Dansville and Wayland.

³⁶³ Id.

³⁶⁴ Phase I Decommissioning Pla), p. 17, Table 4.D.1.

II Project's increased turbine height and overall size, labor and disposal costs, and inflationary and other factors show that Baron's estimate is not reasonable.³⁶⁵ Fremont notes that annual inflation rates are between 5 and 10 percent, which should be included as cost factors in the estimates. Fremont reiterates the Siting Board's finding in the 2019 Certificate that the required decommissioning/restoration costs should be no less than \$9.764 million and nevertheless asserts that the Siting Board should be increasing the minimum amount required given current economic conditions.

In their testimony, Fremont's experts, Stephen LeFevre and Kayla Kibling (LeFevre/Kibling Testimony), question Baron's failure to include an inflation factor in the Phase II Plan or to otherwise address inflationary effects on labor, disposal, and other costs.³⁶⁶ They also challenge Baron's inclusion of salvage as an offset in Baron's Plan. The LeFevre/Kibling testimony compares the unit costs in the January 2019 Decommissioning Plan for the entire Project (Phases I and II) that assumed 500-foot turbines with the unit costs in the August 2022 Phase II Plan that assumed 650-foot turbines submitted in support of Amendment Petition II and point out that both unit costs are exactly the same. Fremont's experts call Baron's assumption in this regard "unreasonable," "inaccurate and misleading" because additional costs are associated with Phase II's taller turbines, larger foundations and deeper footings (350 feet versus 200 feet) and higher labor, materials, equipment, and disposal costs as a result of changed economic

³⁶⁵ Fremont Initial Brief, pp. 26-28; Fremont Reply Brief, pp. 17-17.

³⁶⁶ LeFevre/Kibling Testimony, pp. 5-7. Fremont also claims that Baron's draft Decommissioning Plan lacks complete and thorough information underlying the estimates.

conditions.³⁶⁷ They argue that the 2019 unit costs should not be the same as the 2022 unit costs in the Phase II Plan.

Witnesses LeFevre and Kibling also question why Baron is using in the draft Phase II Plan a lower unit cost for access road reclamation than the unit cost in the 2019 Plan (\$12,963 per mile in 2022 versus \$15,750 per mile in 2019).³⁶⁸ They also challenge Baron's calculations of certain line items in the estimate, noting that the Plan fails to provide the basis for how the estimates were reached. Their strongest criticism of the cost estimates in Baron's draft Phase II Plan is the absence of any inflation factor, which they assert should be assumed over the life of the Phase II Project. Witnesses LeFevre and Kibling attach to their testimony the cost estimate for other wind facilities, which they present as evidence that Baron's estimates are too low and the draft Phase II Plan insufficiently detailed.³⁶⁹

Fremont offered as an exhibit its discovery request for additional information related to Baron's cost estimates, which also asked whether the estimates address "the current economic cycle of dramatic inflation and rising labor costs."³⁷⁰ Fremont also asked whether Baron had evaluated and accounted for the recently demonstrated costs associated with the nearby

³⁶⁷ Id., pp. 5-6.

³⁶⁸ Id., pp. 7-8.

³⁶⁹ Id., pp. 8-9. For example, Baron does not include a cost for necessary engineering and permitting services, contingency costs, and indirect costs, which other New York wind facilities include in their estimates (citing EVA's Decommissioning Cost Assessment for Canisteo Wind, Alle-Catt Wind, Eight Point Wind, Cassadaga Wind, Ball Hill Wind Park, Bluestone Wind, and the Original Project).

³⁷⁰ May 1, 2023 Baron Response to Town of Fremont Interrogatory/Document Request 1.11, prepared by Lisa Oliver.

Cohocton Wind facility during its repowering, given the current rates of inflation. In response to both questions, Baron responded in the negative, saying "[o]nly present value costs were included" in the estimate. Baron noted, however, that it would update the decommissioning cost estimates in its Final Decommissioning Plan submitted as a compliance filing after Siting Board action on Amendment Petition II, increasing the estimates by \$408,250 for a total estimated cost of \$4,200,490.

6. Baron's Rebuttal Testimony

In response to Fremont's position, Baron presented the rebuttal testimony of Lisa Oliver in support of its request to amend Condition 44 and reduce the estimated costs associated with decommissioning/restoration for the Phase II Facility. Ms. Oliver prepared the draft Decommissioning Plan's cost estimate, prepared certain discovery responses, and testified at the evidentiary hearing. She claims that the reduction in the number of Phase II turbines (from 33 to 26) supports reducing the estimate.³⁷¹ Ms. Oliver acknowledges that in the Phase II Plan, she did not update the assumptions in the 2019 estimates for the Original Project and that she did not include an inflation amount. She states that in the Final Phase II Decommissioning Plan to be submitted in the compliance phase, Baron will update the cost estimates to reflect an inflation factor of 2.5 percent, resulting in an increase to the estimate of \$400,000.³⁷² Ms. Oliver clarifies that even though included in the Phase II Plan, Baron is not requesting an offset for salvage value and that only "present value" costs are included.

³⁷¹ Hearing Exhibit 81 (Oliver Rebuttal Testimony). Ms. Oliver's rebuttal testimony is not paginated and specific citations therefore cannot be included.

³⁷² Id.

Ms. Oliver attaches to her rebuttal testimony the January 2019 Draft Decommissioning Plan for the entire Project, both Phase I and Phase II, with a Cost Summary Table, which she prepared.³⁷³ Although Ms. Oliver testified in support of Baron as to the adequacy of the draft Phase II Decommissioning Plan submitted in support of Amendment Petition II, she did not participate in preparing it.³⁷⁴

At the evidentiary hearing, Ms. Oliver acknowledged the absence of an inflation factor in the Phase II Plan cost estimate and testified that the Plan would be revised once the Phase II Facility was commercially operational.³⁷⁵ She further indicated that Baron would include a 2.5 percent inflation rate in the Plan. When asked whether a 2.5 percent inflation rate was appropriate and what the inflation rate should be as of June 2023, Ms. Oliver responded that she is "not an economist," does not "have a good number," and "honestly" does not know the current inflation rate in the United States, but that it is probably not 2.5 percent.³⁷⁶ She discussed the 10 percent contingency factor and 5 percent indirect costs factor in the 2019 Decommissioning Plan.³⁷⁷ The Draft Phase II Plan does not have line items for an inflation factor, a 10 percent contingency, or a 5 percent indirect cost factor, like the 2019 Draft Plan, but Ms. Oliver testified that should would include all of those factors in a Final Phase II Plan.³⁷⁸

³⁷³ Hearing Exhibit 83 (Oliver Rebuttal Testimony, LO-2, Appendix RRR, Draft Decommissioning Plan), Table I, p. 11.

³⁷⁴ Tr. Hearing Exhibit 34 (Amendment Petition II, Appendix M, Draft Decommissioning Plan, Phase II).

³⁷⁵ Tr. 146.

³⁷⁶ Tr. 148-150.

³⁷⁷ Tr. 151.

³⁷⁸ Tr. 152.

Ms. Oliver testified that in terms of Facility decommissioning activities, the concrete turbine foundations would not be removed and disposed of, and what will be removed is "limited to the pedestal portion" of the 26 turbines.³⁷⁹

7. DPS Staff Position

DPS Staff submitted the testimony of witness John Quackenbush (Quackenbush Testimony), which noted that the Phase II Plan cost estimates "may require adjustments" causing decommissioning/restoration costs "to equal or exceed the originally established minimum baseline of \$9,763,500" established by the Siting Board.³⁸⁰ The Quackenbush Testimony also criticized Baron's inclusion in the draft Phase II Plan of salvage values as an offset, which Condition 44 makes clear is not permitted.³⁸¹ DPS Staff recommended removal of salvage language from the estimate.³⁸² The Quackenbush Testimony also noted the potential for cost increases due to inflation and the absence of that factor in the Phase II Plan's cost estimates.³⁸³

Although DPS Staff did not explicitly object to Baron's request for a \$1.25 million reduction for required decommissioning/restoration costs for both Phase I and Phase II, Witness Quackenbush reserved DPS Staff's rights to continue to review and consider the cost estimates in the Final Phase II Plan.³⁸⁴

Ultimately if the overall financial assurance estimate (based on review of the final Decommissioning Plan compliance filing) is below the originally established baseline amount of

³⁷⁹ Tr. 156-157.

³⁸⁰ Hearing Exhibit 53 (Quackenbush Testimony), p. 16.

³⁸¹ Id.

³⁸² Id., pp. 16-17.

³⁸³ Id., p. 16.

³⁸⁴ Quackenbush Testimony, pp. 15-16.

\$9,763,500, then DPS Staff would not object to approval of a financial assurance amount less than that currently established in the Certificate.³⁸⁵

The Quackenbush Testimony is based on an overall 9 turbine reduction of the Original Project's 68 approved turbines to a total of 59 turbines for both Phase I and Phase II and the theory that that reduction alone would lower total decommissioning/restoration costs.³⁸⁶ The Quackenbush Testimony does not address other Phase II Project changes that could affect cost estimates.

Discussion

We deny Baron's request to reduce the required \$9.763 million minimum costs for decommissioning/restoration established in the 2019 Certificate. Baron has not demonstrated that the baseline 2019 Certificate amount should be reduced. In denying the reduction request, we are guided by the analysis in the Siting Board's 2019 Certificate, which relied on the ALJ's Recommended Decision; Fremont's Wind Law establishing criteria similar to the Siting Board's; and the record before us, specifically, Baron's draft Phase II Decommissioning Plan and proposed estimate submitted in support of Amendment Petition II and its expert testimony. We also rely on Baron's recently filed substantial increase to decommissioning/restoration cost estimates for the Phase I Project.

Baron documented the increases to Phase I estimates in its April 5, 2024 updated Phase I Decommissioning Plan and Host Town letters of credit.³⁸⁷ As compared to the Phase II Plan

³⁸⁵ Id., p. 17 (emphasis added).

³⁸⁶ Id., p. 11.

³⁸⁷ April 5, 2024 Phase I Plan, pp. 12-17; April 2, 2024 Cohocton, Dansville, and Wayland Letters of Credit.

considered here, Baron does not present a comprehensive estimate of Phase II decommissioning/restoration costs. Baron acknowledges that an inflation factor is missing, but the Phase II Plan is also missing cost estimates for contingencies and indirect costs, both of which appear in Baron's prior and recently updated Phase I Plans.³⁸⁸ Baron's concession that the Phase II Plan estimate should increase by \$400,000 is insufficient and, in any event, assumes a 2.5 percent inflation rate, which seems low given the higher inflationary rates over the last three years affecting labor, materials, services, and other sectors of the economy.³⁸⁹

The 2019 Certificate relied on Baron's own \$9.763 million estimate for the entire Original Project submitted as part of its Original Application,³⁹⁰ which it now seeks to reduce. Baron has not demonstrated that there is any likelihood that its estimate, now for both Phase I and Phase II, is lower nearly five years later.

The Siting Board discussed this issue at length in the 2019 Certificate and had the overall objective of protecting the Host Towns from paying for Facility decommissioning/restoration. The Siting Board specifically addressed salvage values as an offset and unequivocally excluded those from consideration, as

³⁸⁸ Hearing Exhibit 83 (Oliver Rebuttal Testimony, Exhibit LO-2), p. 11; Updated Phase I Plan, p. 17.

³⁸⁹ Baron's expert witness declined to address whether the proposed 2.5 percent inflation rate was reasonable, given the level of inflation in the United States over the last 3 years. Instead, witness Oliver claimed that the 2.5 percent inflation factor was adopted due to Fremont's position. Tr. 145-150.

³⁹⁰ Hearing Exhibit 83 (Oliver Rebuttal Testimony, Exhibit LO-2, Original Application Appendix RRR, January 2019 Draft Decommissioning Plan), p. 11.

the ALJs recommended in their Recommended Decision.³⁹¹ Despite the Siting Board's unequivocal exclusion, Baron included such an offset in its draft Phase II Plan.³⁹² Baron also continues to include salvage values as an offset in its Phase I Plans.³⁹³ The Siting Board made the estimated costs subject to updating within one year of Facility operations and every five years thereafter in an effort to assure the accuracy of the estimate over time for the protection of the Host Towns.

Even after acknowledging the absence of an inflation factor in its Phase II Plan, Baron did not revise the Plan during this proceeding and, instead, continually asserted that the issue would be addressed in the Final Phase II Plan submitted as a compliance filing after the Siting Board rules on Amendment Petition II. However, the record does not contain any commitment that Baron would include the contingency and indirect cost factors in its estimates in the Final Phase II Plan submitted in the compliance phase.

Baron claims that DPS Staff "does not object to removing the minimum baseline established in Condition 44."³⁹⁴ This is not an accurate representation of DPS Staff's position. DPS Staff specifically reserved its right to address issues associated with the Final Phase II Plan during the compliance phase.³⁹⁵

³⁹¹ 2019 Certificate, pp. 161-165; RD, pp. 168-172.

³⁹² Hearing Exhibit 34 (Amendment Petition II, Appendix M, Draft Phase II Plan), p. 11 (reflecting \$3.763 million in Total Decommissioning Costs and subtracting \$2.226 million in Total Project Salvage Value, for a Total Net Cost of \$1.566 million).

³⁹³ Phase II Plan, Appendix M; Updated Phase I Plan, pp. 16-17.

³⁹⁴ Baron Initial Brief, p. 65.

³⁹⁵ Quackenbush Testimony, pp. 16-17.

We do not agree that such issues should be considered in the compliance phase. Our denial ensures that there can be no misunderstanding later in the compliance phase about the cost factors a Final Phase II Plan should include to be approved. To do otherwise would allow for the unnecessary potential for Baron and DPS Staff to reach an impasse on the necessary detailed cost factors that should be included in the Final Phase II Plan to assure that such plan is as comprehensive and accurate as practicable.

We find no reason on this record to depart from the Siting Board's 2019 Certificate establishing a minimum amount of \$9.763 million for decommissioning/restoration for the entire Project. We also find that Baron's flawed draft Phase II Plan reflects an approach that does not fully protect Fremont in the event that it is required to decommission the Phase II Facility and restore it to its previous state.

At the time DPS Staff filed its testimony, it did not have the benefit of Baron's April 5, 2024 updated Phase I Decommissioning Plan, which substantially increased the Phase I decommissioning/restoration costs by \$2.216 million after only a three-year period. Moreover, DPS Staff's testimony is based only on the reduced number of turbines overall (Phase I and Phase II) and does not address the other Phase II Project changes that will affect the decommissioning/restoration cost estimates, including the addition of a collection substation, increases to the miles of collection lines and access roads, and areas of disturbance, and larger turbine foundations.³⁹⁶

³⁹⁶ Amendment Petition II, Exhibit A, pp. 2-12, 24-26.

Baron did not seek a waiver of Fremont's local Wind Law governing decommissioning and site restoration.³⁹⁷ We find that this substantive local law is consistent with Condition 44 and, to a degree, overlaps with it. Given that no waiver was requested, we find it applicable to and binding on Baron's Phase II Facility.³⁹⁸ However, we note that DPS Staff should make any final recommendations on the Plan's details of its decommissioning/restoration performance criteria under the Article 10 regulations during compliance review.³⁹⁹ As an example, Baron's draft Phase II Plan provides for removal of collection lines "where necessary."⁴⁰⁰ This appears to be ambiguous and seems to give Baron the discretion to determine the collection lines that are necessary to remove. Our concern with such details is that it does not appear to require the removal of all Facility structures and debris, including collection lines, but leaves it to the discretion of Baron to determine if removal is necessary.

In light of our decision, we establish that at a minimum, inflation, contingency, and indirect cost factors should be included in a revised draft Phase II Plan and in the Final Phase II Plan, and that any reference to or line item value for salvage or scrap offsets should be excluded and Baron should submit a more detailed and comprehensive draft Phase II Plan before commencement of construction, which should be prepared by an independent licensed professional engineer in

³⁹⁷ Hearing Exhibit 35 (Amendment Petition II, Appendix N, Town of Fremont Local Law No. 2 of 2018), §8.8(A)(10), p. 8.

³⁹⁸ PSL §168(3)(e).

³⁹⁹ 16 NYCRR §1001.29(a).

⁴⁰⁰ Hearing Exhibit 34 (Amendment Petition II, Appendix M, Draft Phase II Decommissioning Plan), pp. 5-7, Table 1.

accordance with this Order.⁴⁰¹ The potential for confusion regarding the Plan's cost estimates and the risk to Fremont is too great to wait until Baron files its Final Phase II Plan. Finally, we note that DPS Staff, in consultation with Fremont, may require other relevant cost factors and more detailed performance criteria in the draft and Final Phase II Plans, which demonstrably may affect the amount of Fremont's letter of credit.

E. Clarification of MW Generation Capacity for Phase II

The 2019 Certificate authorized Baron to construct and operate a wind-powered electric generating facility with a maximum generation capacity of 242⁴⁰² and Certificate Condition 5 provides that "[t]he total generating capacity of the Facility shall not exceed 242 megawatts (MWs)."⁴⁰³ Amendment Petition II requests Siting Board approval of a maximum generating capacity of 117 MW for Phase II.⁴⁰⁴ Amendment Petition I sought Siting Board approval of a maximum generating capacity of 166.6 MW for

⁴⁰¹ The requirement that Baron file a Final Phase II Plan within one-year of commencement of Facility operations remains unaffected, as Condition 44 provides, but resolution of the issues presented here cannot await that post-operational filing.

⁴⁰² 2019 Certificate, p. 2; Ordering Clause 3, p. 175.

⁴⁰³ 2019 Certificate, Certificate Condition 5, p. 2.

⁴⁰⁴ Amendment Petition II, p. 2 ("Baron Winds Phase II consists of up to 26 utility-scale wind turbines (all in the Town of Fremont) with a maximum facility generating capacity of 117 MW.")

Phase I.⁴⁰⁵ In approving Amendment Petition I, the Siting Board approved Baron's generation of up to 166.6 MW for the Phase I Project.⁴⁰⁶ The Siting Board left unchanged the 2019 Certificate's 242 MW maximum generation capacity limit for the entire Facility. Given Baron's request for approval of 166.6 MW for Phase I, Phase II is left with a maximum generation capacity for of 75.4 MW (242 MW Total minus 166.6 MW for Phase I = 75.4 MW for Phase II).

Amendment Petition II request for approval of a maximum generating capacity of 117 MW is approximately 41.6 MW more than the Siting Board has approved in allowable generation capacity. Baron did not request an increase in the maximum 242 MW generating capacity authorized in the 2019 Certificate in either Amendment Petition I or Amendment Petition II. In the absence of a request to amend the 2019 Certificate and increase the maximum generation capacity for both Phase I and Phase II, we decline to approve Baron's request for 117 MW for Phase II, as requested in Amendment Petition II. To do so would result in a new maximum generation capacity of 283.6 MW (166.6 MW + 117 MW = 283.6 MW) that no party to this or the previous Phase I proceeding was on notice of and given the opportunity to address. This includes DPS Staff and DEC Staff whose analysis

⁴⁰⁵ Amendment Petition I, Exhibit A, p. 2 ("Phase I is located in the Towns of Cohocton, Dansville, Fremont, and Wayland (Figure 1-2) ..." [and] consists of up to 33 utility-scale wind turbines (23 in the Town of Cohocton, 2 in the Town of Dansville, 8 in the Town of Wayland, 0 in the town of Fremont) with a maximum facility generating capacity of 166.6 MW"). See also Exhibit A, p. 24 (Phase I capacity of 167 MW yields an estimated 1,116 bat fatalities per year).

⁴⁰⁶ Order Approving Amendment (issued May 6, 2020), pp. 3-4 ("Baron Winds evaluated five turbine models for the design and indicates it will select two for Phase I with a maximum facility generating capacity of up to 166.6 MW and a maximum height of up to 650 feet").

of both Phases was dependent on maximum generation capacity.⁴⁰⁷ Baron's estimate in Amendment Petition I that Phase I and Phase II would have a combined maximum generating capacity of 238.8 MW does not change this analysis.⁴⁰⁸ The issue is the maximum number of megawatts the Siting Board approved in the 2019 Certificate (242 MW) and the maximum number approved in the Phase I Order (166.6 MW).

Baron has not sought to increase the approved 242 MW generation capacity under the 2019 Certificate. Thus, we will not consider Baron's request for approval of 117 MW on an individual basis, but only in the context of the combined Phase I and Phase II. We reiterate that the combined maximum generation capacity for Phases I and II is 242 MW. If Baron intends to construct and operate a Phase II Facility that would increase the total allowable maximum generation capacity, it is required to seek additional approval through a further amendment petition.

VIII. ENVIRONMENTAL IMPACTS - PSL §168(2) - (3)

A. Wetlands and Water Bodies

Article 10 recognizes the State's public policy expressed in the Environmental Conservation Law to preserve, protect, and conserve freshwater wetlands and the benefits they provide; to prevent the despoilation and destruction; to regulate their use and development consistent with the general

⁴⁰⁷ For example, DEC Staff's estimate of the number of bald eagles that would be taken was calculated based on the megawatts generated.

⁴⁰⁸ See Amendment Petition I, p. 4 ("Combined, Baron Winds Phase I and Phase II will comprise 58 turbines with a maximum generating capacity of 238.8 MW, representing 10 fewer turbines and 3.2 fewer MW than the Certificated Baron Winds Project (68 turbines))."

welfare and beneficial economic, social, and agricultural development of the State; to protect the quality of the waters of the State.⁴⁰⁹ This preservation, protection, and conservation policy extends to streams, waterbodies, and water quality.⁴¹⁰

As compared to the impacts analyzed in Baron's Original Application, Amendment Petition II identifies increased overall "temporary" terrestrial, wetlands and plant communities impacts of the Phase II Project (up from 247.2 to 394.6 acres) and decreased "permanent impacts" (down from 32.1 to 27.9 acres).⁴¹¹ Baron does not define the criteria used to determine whether an impact is temporary or permanent.

In support of Amendment Petition II, Baron submitted wetland and stream delineations conducted in April, May, and June of 2022. Baron identifies 79 wetlands in an "expanded" delineation area that is beyond the delineation area for the Original Project.⁴¹² Baron estimates that like the Original Project, 17 wetlands will be impacted by the Phase II Project.⁴¹³ Baron claims that for Phase II, it has reduced permanent wetland impacts from 24,406 square feet to 14,540 square feet; and has reducing temporary impacts from 150,363 square feet to 28,596 square feet.⁴¹⁴ Baron also claimed that it avoided 32 wetlands and that the Phase II Project would impact 17 others.⁴¹⁵

⁴⁰⁹ ECL §24-0103, and 6 NYCRR §663.1.

⁴¹⁰ ECL §15-0105; 6 NYCRR Part 608; 6 NYCRR Part 701 et seq.

⁴¹¹ Amendment Petition II, Exhibit A, p. 27

⁴¹² Hearing Exhibit (Amendment Petition II, Appendix G); Hearing Exhibit 75 (Baker Rebuttal Testimony), pp. 3-4; Baron Initial Brief p. 61.

⁴¹³ Amendment Petition II, Exhibit A, p. 37.

⁴¹⁴ Amendment Petition II, Exhibit A, pp. 36-37; Hearing Exhibit 75 (Baker Rebuttal Testimony), p. 3; Baron Initial Brief p. 62.

⁴¹⁵ Amendment Petition II, Exhibit A, pp. 37-41, Table 22-3.

For impacts to streams and surface water resources, Baron identified 72 streams in the expanded delineation area, of which eight are protected under the ECL, six of which have the highest protective classification, Class A(T), meaning that they are trout and/or trout spawning habitat.⁴¹⁶ Baron claims that stream impacts have been minimized, with permanent impacts reduced by 256 linear feet and temporary impacts reduced by 2,036 linear feet.⁴¹⁷ Baron also notes that all streams near underground collection lines will be crossed using horizontal directional drilling (HDD) and that temporary equipment crossings will be used, where necessary.

DEC Staff raised the issue of HDD for adjudication in the proceeding in large part because of the occurrence of nine Phase I inadvertent returns and drilling fluid releases, especially at Neil's Creek.⁴¹⁸ In its testimony, DEC Staff witness Jennifer Landry (Landry Testimony), expressed concerns about the nine releases of drilling fluids and the resulting impacts to protected wetlands and streams during Phase I Project construction activities from July 11, 2021, through October 31, 2022.⁴¹⁹ Two Phase I releases occurred at Neil's Creek, which has a regulatory protected stream classification of Class

⁴¹⁶ Amendment Petition II, Exhibit A, pp. 42-43, n. 8 (citing ECL Article 15 and the water quality regulations in 6 NYCRR §701 et seq.).

⁴¹⁷ Id., pp. 42-47, Table 23-1; Hearing Exhibit 75 (Baker Rebuttal Testimony), p. 4. Baron does not disclose the Original Project's total impacts to streams for comparison purposes with the Phase II Project.

⁴¹⁸ DEC Staff Statement of Issues, p. 1; Hearing Exhibit 64 (Landry Testimony), pp. 3-5; DEC Initial Brief p. 8.

⁴¹⁹ Hearing Exhibit 64 (Landry Testimony), p. 3.

C(TS).⁴²⁰ The nine drilling fluids releases that occurred were estimated to be between 10 and 1,000 gallons and occurred during HDD activities at stream and/or wetland crossings and required remedial/cleanup activities pursuant to Baron's Inadvertent Return Plan (IR Plan).⁴²¹ The Landry Testimony attaches reports of the nine releases by Baron's various Environmental Monitors.⁴²² The makeup and toxicity of Baron's Phase I Project released drilling fluids is not clear from the record. Baron calls the drilling fluid "mud" and "sodium bentonite" and asserts that it is "not classified as toxic or hazardous," but is not biodegradable, which "is not practicable for this project" because it is not a "stocked item."⁴²³

Crossing Neil's Creek will also be required during Phase II construction activities. DEC Staff testified that based on the previous releases, "there is a high likelihood that future HDD attempts will also fail and result in further" releases.⁴²⁴ DEC Staff noted that additional impacts to waterbodies was possible during Phase II construction.

⁴²⁰ Hearing Exhibit 64 (Landry Testimony), pp. 3-5; DEC Initial Brief, p. 8.

⁴²¹ Id., pp. 3-4.

⁴²² Hearing Exhibit 66a (Landry Testimony, Exhibit JL-3, Baron Environmental Monitor Inadvertent Return Reports of releases during HDD activities). This document was not included in the Exhibit List even though it was one of Ms. Landry's exhibits and therefore has been added.

⁴²³ Settlement Proposal, Exhibit D, IR Plan, p. 1. Generally, drilling fluids used in HDD can consist of bentonite, clay, water, polymers, and/or other materials, but should be identified and be non-toxic. See Federal Energy Regulatory Commission Guidance for Horizontal Directional Drill Monitoring, Inadvertent Return Response, and Contingency Plans (October 2019), p. 8.

⁴²⁴ Hearing Exhibit 64 (Landry Testimony), p. 5.

DEC Staff notes that although Baron met the IR Plan's requirements during HDD activities, it should be modified for Phase II, in consultation with DPS Staff and DEC Staff, to include "identification of potential receptors, performance of a site-specific geotechnical investigation to determine appropriate crossing methods and placement, and specification of alternative crossing methods" where releases impacting sensitive resources are likely.⁴²⁵

In its rebuttal testimony, Baron asserts that the nine releases during HDD drilling were each an "exception," that HDD activities "followed the protocol established in the approved" IR Plan, that drilling was stopped, and that "appropriate remediation steps" taken.⁴²⁶ The record is not clear on the extent of environmental impact from the releases although at the evidentiary hearing, Baron's witness testified that drilling fluid may be hazardous to fish.⁴²⁷ Baron's rebuttal testimony suggested that an overhead crossing method and not HDD be used during Phase II, given the steep slopes and shallow bedrock at the crossing at Neil's Creek.⁴²⁸ Baron asserted that an overhead crossing is the most feasible alternative.

At the evidentiary hearing, Baron's witnesses testified that impacts were involved with both the overhead crossing method, including clear-cutting trees and bushes, and with the trenched crossing method, including water quality

⁴²⁵ Hearing Exhibit 64 (Landry Testimony), p. 5; DEC Initial Brief pp. 8-9.

⁴²⁶ Hearing Exhibit 75 (Baker Rebuttal Testimony), pp. 4-5.

⁴²⁷ Tr. 115.

⁴²⁸ Hearing Exhibit 75 (Baker Rebuttal Testimony), pp. 7-8; Hearing Exhibit 99 (Dagger/Schwartz Rebuttal Testimony), pp. 6-7. Baron explained that trenching as an alternative crossing method is not feasible at Neil's Creek and has greater impacts than an overhead crossing.

impacts from stream bed disturbance.⁴²⁹ Baron's witnesses further testified that HDD was the way to avoid or minimize adverse impacts from stream and wetland crossings, although HDD cost is a consideration.⁴³⁰ Baron's witness first testified that it had assessed the Phase II crossing locations and that without exception each is feasible for HDD, but later testified about decisions that will be made in the field for HDD alternatives.⁴³¹

When asked about the performance of Baron's HDD contractor and whether Baron was considering a new contractor for Phase II due to the multiple releases of drilling fluid during Phase I construction, Baron's witness testified about the "lessons learned" from Phase I HDD, including that "some of the geo-tech and some of the locations" could be improved and that Baron will be reevaluating its contractors and adding geotechnical personnel to review sensitive crossing locations and monitor HDD to avoid or quickly catch inadvertent returns.⁴³²

In July 2023, Baron, DEC Staff, and DPS Staff again executed the Settlement Proposal.⁴³³ With the Settlement Proposal, Baron submitted a revised draft IR Plan that was approved by Baron, DEC Staff, and DPS Staff to address numerous concerns about HDD, specifically around Neil's Creek.⁴³⁴ In the revised draft IR Plan, Baron agreed to submit as a compliance filing a report containing a comprehensive investigation, evaluation, analysis, and feasibility study for crossing Neil's

⁴²⁹ Tr. 91-92.

⁴³⁰ Tr. 89.

⁴³¹ Tr. 82-83.

⁴³² Tr. 112-113, 125-127.

⁴³³ Settlement Proposal, Exhibit A, pp. 4-5.

⁴³⁴ Hearing Exhibit 160 (Draft Revised Inadvertent Return Plan); Hearing Exhibit 163 (Neil's Crossing Overhead Stream Crossing Figure 1).

Creek with an overhead crossing plan rather than the previously required HDD underground crossing method, which DPS Staff will review and the Siting Board will approve before commencement of construction.⁴³⁵ The Stipulation provides for Baron to include in the revised IR Plan additional detailed information to identify potential receptors and site-specific geotechnical conditions and to determine the least environmentally damaging crossing method for Neil's Creek, which would avoid further drilling fluid releases and otherwise minimize impacts to the maximum extent practicable.⁴³⁶

In its Initial Brief, DEC Staff argues that the Certification requirements and IR Plan were inadequate to address the real-world problems encountered during Phase I and highlighted the ecological value of Neil's Creek where drilling fluid releases had occurred.⁴³⁷ DEC Staff testified that Phase II construction will include additional an HDD crossing at Neil's Creek, making it highly probable that more releases would occur, given the slope and geological material of the crossing area. DEC Staff noted that further releases resulting from HDD "failures" would cause detrimental impacts to Neil's Creek.⁴³⁸

Discussion

Inadvertent returns cause adverse environmental impacts to wetlands and water bodies, which is the reason they should be avoided during construction-related HDD activities.⁴³⁹ Certificate Conditions 52 and 119 and the Site Environmental

⁴³⁵ Id., Hearing Exhibits 160 and 163 (Landry Testimony), p. ; Baron Initial Brief pp. 62-63.

⁴³⁶ Exhibits 160 and 163 (Landry Testimony), pp. 2-5; DEC Initial Brief p. 9.

⁴³⁷ DEC Initial Brief, p. 8.

⁴³⁸ Tr. 65-74.

⁴³⁹ Id.

Engineering Plan Guide (SEEP Guide) assume that HDD will be the sole method of stream and wetland crossings for the Phase II Project.⁴⁴⁰ This is the approved crossing method in most if not all Article 10 cases. In the Settlement Proposal, DEC Staff and DPS Staff agreed to an exception to HDD and Condition 52(a). Although Baron and the agency parties indicate that changes to the Certification Conditions and the SEEP Guide are unnecessary, to depart from the HDD requirement in Condition 52(a) requires Siting Board approval. We grant such approval, subject to additional requirements discussed hereafter.

The IR Plan attached to the Settlement Proposal is deficient because it lacks sufficient detail and important elements. We therefore require Baron's submission of a more detailed IR Plan as a pre-construction compliance filing with the following revisions.

Nothing in the record supports revisiting the 2019 Certificate's requirement to use HDD for all stream and wetland crossings other than Neil's Creek. Thus, HDD should continue to be the only crossing method used for the Phase II Project, with the exception of Neil's Creek and that any crossing method (other than HDD at Neil's Creek) must be approved by the Siting Board or the Commission. To the extent necessary, we clarify that we do not intend that Baron have flexibility or discretion in the field to depart from the required HDD crossing method, including at Neil's Creek, without strict agency consultation and oversight.⁴⁴¹ The revised IR Plan attached to the Settlement

⁴⁴⁰ 2019 Certificate, Appendix A, Certificate Condition 52(a)(iii).

⁴⁴¹ DEC Staff witness testified that Baron alone would determine in the field whether HDD would be used at a stream or wetland crossing. Tr. 67, 71. She later indicated that only prior to field work would DEC be consulted on the crossing method, as required by the Certificate Conditions. Tr. 69.

Proposal appears to give Baron such discretion in the field and should be modified consistent with our determination.

Additionally, Baron's revised IR Plan should address crossing alternatives for Neil's Creek in greater detail and include not only the information agreed to by the parties in the Settlement Proposal (e.g., a detailed investigation, evaluation, analysis, and discussion of HDD feasibility and other alternative crossing methods at Neil's Creek) but should identify the nature and extent of environmental impacts associated with each alternative.

The record does not include the geotechnical assessment Baron referenced in its testimony for each HDD crossing and the proposed IR Plan does not call for submission of that assessment. We therefore require Baron to submit its geotechnical assessment of each crossing location to DPS Staff for review.

The proposed IR Plan also does not adequately engage the Environmental Monitor in the HDD process. Instead, it gives primary responsibility the Site Supervisor/Foreman for HDD oversight and fails to make clear the independent Environmental Monitor's role and responsibility to protect wetland and water resources.⁴⁴²

Baron's revised IR Plan should provide for an independent Environmental Monitor with shared responsibilities with the Site Supervisor/Foreman to oversee HDD activities and immediately report directly to DEC Staff and DPS Staff any spills, releases, or inadvertent returns and any remedial activities. The Environmental Monitor's reporting should be in writing and should address the circumstances of the release, the date, time, location, quantity and other details of the release,

⁴⁴² Settlement Proposal, Exhibit D, p. 2-3.

the environmental impacts, the work stoppage, the remedial measures undertaken to address the release, and the relative success of remedial measures. The IR Plan should provide for an immediate work stoppage and continuation of drilling only with DPS Staff and DEC Staff approval.

The IR Plan also does not focus sufficiently on the prevention of inadvertent returns or spills/releases during HDD and favors post-release response efforts. To remedy this, we require the revised IR Plan to document a best practices approach to prevention, specifying the tools, equipment (e.g., pressure monitoring) and other measures to be employed during drilling to avoid and minimize the potential for inadvertent returns, including increased detection and additional personnel with geotechnical and drilling expertise. Such measures may include: performing a geologic evaluation and engineering assessment of the drilling site; hiring a trained and experienced contractor and equipment operator; identifying the additives and mix of components in the drilling fluid; installing pressure-monitoring tools to monitor drilling operations and assure immediate cessation of drilling activities in the event of a release; implementing a comprehensive emergency response and remedial plan to address releases; and assessing the success of post-release response/remediation. The record is unclear whether Baron undertook these preventative measures before or after the many Phase I HDD inadvertent returns incidents.

Although Baron testified that it is reviewing the performance of its HDD contractor, going forward, Baron's Phase II HDD contractor is required to have documented experience in HDD, particularly in environmentally sensitive stream and wetland crossings, and should have experienced personnel who have performed such activities successfully.

Of note is Baron's testimony related to the performance of its HDD contractor in view of the nine Phase I releases. Certificate Condition 101 states that all "necessary precautions shall be taken to preclude contamination of any wetland or waterway by suspended solids, sediments, fuels, solvents, lubricants, epoxy coatings, paint, concrete, leachate, or any other environmentally deleterious materials associated with the Project." Given the repeated releases of drilling fluids during HDD activities, it is not clear whether Baron complied with Certificate Condition 101 because the record does not reflect the necessary precautions taken during Phase I to prevent inadvertent returns.

Although Baron testified that it is reviewing the performance of its HDD contractor, we reiterate that its Phase II HDD contractor should have documented experience in HDD, particularly in environmentally sensitive stream and wetland crossings, and should have experienced personnel who have performed such activities successfully. We anticipate that DPS Staff will closely scrutinize the contractor's experience given the history of Phase I.

Finally, we expect Baron to employ more comprehensive planning and better avoidance and minimization measures during Phase II HDD activities to prevent inadvertent returns and the resulting environmental impacts to wetlands and streams.

B. Bald Eagle Impacts

The State's threatened and endangered species laws and regulations, ECL §11-0535 and 6 NYCRR Part 182, prohibit the taking of threatened and endangered species and, like Article 10, require Baron to avoid impacts to listed protected species

to the maximum extent practicable.⁴⁴³ If Baron demonstrates that full avoidance is impracticable, it must minimize impacts to the maximum extent practicable. Such minimization of impacts may be achieved with an endangered and threatened species management plan (ETSM Plan).⁴⁴⁴

In considering 500-foot turbines, the Siting Board's 2019 Certificate found that the Original Project's impacts to bald eagles and other protected species were unavoidable and imposed Certificate Conditions to minimize those impacts.⁴⁴⁵ The Siting Board also approved Amendment Petition I, when Baron proposed to increase the turbine height to 650 feet, after the Secretary's finding that the Phase I changes would not significantly increase environmental impacts as compared to the Original Project.⁴⁴⁶ On November 22, 2022, and the Commission

⁴⁴³ See DEC Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects (2016).

⁴⁴⁴ Denoncour/Palumbo Testimony, pp. 5-7; DEC Initial Brief, p. 5.

⁴⁴⁵ 2019 Certificate, Appendix A, pp. 25, 43-44. Certificate Conditions 61-62 address minimizing impacts to bats; Conditions 63 and 97 deal with minimizing impacts to bald eagles; Condition 64 impose an avian and bat monitoring requirements; and Conditions 95-100 deal with bats and other protected listed species, including northern harriers, short-eared owls, and upland sandpipers.

⁴⁴⁶ Order Approving Amendment (issued May 6, 2020) (Phase I Amendment Order), pp. 15-16. DEC Staff's position in the Phase I proceeding was that the scientific literature reaches different conclusions on the impact of taller turbines on bald eagles, particularly in high-risk areas near migratory routes, rivers, ridge lines, and any area with a high density of birds. DEC Staff nevertheless concluded that the Phase II number of bald eagles taken would be the same as what had been estimated for the Phase I Project and the Original Project because the total MW capacity would be the same as the number previously approved in the Certificate.

approved Baron's Phase I ETSM Plan for bald eagles pursuant to Certificate Condition 63.⁴⁴⁷

In Amendment Petition II, Baron indicated that the approved Phase I ETSM Plan would extend to Phase II and no further compliance filing would be submitted. The Commission's Order approving the Plan is expressly limited to Phase I. The Settlement Proposal among Baron, DPS Staff, and DEC Staff recites an agreement that the Phase II Project would not change the impacts to bald eagles and that the existing Certificate Conditions and SEEP Guide will adequately protect the species.⁴⁴⁸ In the Settlement Proposal, Baron also agreed to submit a separate ETSM Plan as a compliance filing for Phase II and to develop further mitigation beyond the Phase II ETSM Plan if the estimated take of bald eagles was exceeded.⁴⁴⁹ Fremont did not execute or otherwise agree to the Settlement Proposal and continued to advance objections regarding bald eagle impacts.

Town of Fremont Position. Fremont presented eagle impacts as a disputed issue in the proceeding, asserting that nesting locations had changed since Baron had conducted the studies supporting the Original Application and the layout of the Project had changed significantly.⁴⁵⁰ Fremont asserted that a complete bald eagle study of the Phase II Project area was

⁴⁴⁷ Order Approving Compliance Filings 49, 50(e) and (f), 52(a), 52(a)(i), 61, 63, and 64, subject to Conditions (issued November 22, 2022) (Phase I Eagle ETSM Plan Order), p. 15.

⁴⁴⁸ Settlement Proposal, p. 3. This agreement was confirmed in DEC Staff's testimony. Tr. 21-31, 51-52; Hearing Exhibit 161.

⁴⁴⁹ Settlement Proposal, p. 3, ¶¶ D and E.

⁴⁵⁰ Fremont Statement of Contested Issues (filed May 10, 2023), p. 4.

necessary based upon recent nest sightings by town residents.⁴⁵¹ Fremont shared the recent nest sighting information with DEC Staff and the other parties. As a result, DEC Staff performed a site visit and Baron undertook a "field review" of the Phase II Project area.

Fremont argues in its Initial Brief that the community is home to several bald eagle nests and that their locations have changed since Baron's original studies. Fremont claims that if the Siting Board approves taller than 500-foot turbines for Phase II, a more comprehensive review of impacts is needed for each nest, which should be "documented, considered, and protected during planning, construction, and operation of the project."⁴⁵² Fremont criticizes the DEC-approved ETSM Plan that authorizes the killing of eagles in the Phase II community in return for supporting populations in another part of the State, calling it "dismissive and callous" and "a dramatic example of inequitable distribution of the environmental impact and cost of constructing wind energy projects in economically and politically disadvantaged communities."⁴⁵³ The Town requests that the Siting Board protect the bald eagles and their habitats in the Phase II Project area.

DEC Staff Position. DEC Staff's wildlife experts testified that the Siting Board's approval of the Phase I

⁴⁵¹ Fremont Initial Brief, pp. 24-25. During the evidentiary hearing, Fremont raised the eagle nest observations but did not present confirming testimony. For purposes of completing the record and at the request of the Presiding Examiner, Fremont filed a post hearing motion to admit an affidavit detailing the nest sightings, which was granted. Hearing Exhibits 147-149 (June 22, 2023 Affidavit of Cynthia Smith; Exhibit CS-1, Photographs of Bald Eagle Nests).

⁴⁵² Fremont Initial Brief, p. 25.

⁴⁵³ Id.; Fremont Reply Brief p. 15.

Project's ETSM Plan extended to the Phase II Project and that the Phase II Project would not result in additional impacts to bald eagles "regardless of any new nests discovered."⁴⁵⁴ DEC Staff took no issue with Baron's reliance on the Original Application materials for the Phase II Project's impacts and required minimization measures.

At the evidentiary hearing, counsel for DEC Staff reported that Baron would submit a ETSM Plan for Phase II as a compliance filing, even though the Plan would cover both Phases I and II.⁴⁵⁵ Baron's wildlife expert confirmed that the ETSM Plan had not been updated for the Phase II Project.⁴⁵⁶ Baron also agreed during the evidentiary hearing to submit a separate Phase II ETMS Plan as a compliance filing.⁴⁵⁷

In its Initial Brief, DEC Staff argued that the approved ETSM Plan "would continue to satisfy" all regulatory requirements in the ECL and the implementing regulations.⁴⁵⁸ DEC Staff requested that the Siting Board not modify the 2019 Certificate Conditions or the SEEP Guide and stressed ensuring Baron's compliance with regulatory requirements and applicable Certificate Conditions for the Phase II Project.⁴⁵⁹

DPS Staff Position. DPS Staff asserted in its testimony that the Phase II Project modifications do not warrant a conclusion different than the conclusion the Siting Board reached in the 2019 Certificate that wildlife impacts have been

⁴⁵⁴ Hearing Exhibit 59 (Denoncour/Palumbo Testimony), pp. 6-7; DEC Initial Brief, pp. 5-6.

⁴⁵⁵ Tr. 31-32.

⁴⁵⁶ Tr. 41-44.

⁴⁵⁷ Tr. 31, 51-52. Baron's agreement in this regard is documented in the Settlement Proposal.

⁴⁵⁸ DEC Staff Initial Brief, pp. 5-6.

⁴⁵⁹ Id., p. 6.

avoided or minimized to the maximum extent practicable.⁴⁶⁰ DPS Staff noted that "multiple factors other than turbine height" support the conclusion that impacts to bald eagles would not increase.⁴⁶¹ DPS Staff also recited the reduction in the amount of disturbed acreage as compared to the Original Project.

In its Initial Brief, DPS Staff relies on the Siting Board's prior findings regarding wildlife impacts resulting from the Original Project and asserts that the Conditions imposed in the 2019 Certificate will minimize and mitigate such impacts.⁴⁶² DPS Staff also refers to the following approved Phase I compliance filings: final bird and bat conservation strategy developed under Certificate Condition 42; the post-construction avian and bat monitoring and adaptive management plan under Condition 64; and the ETSM Plan filed under Condition 63.⁴⁶³ DPS Staff otherwise defers to DEC Staff's position that bald eagle and other wildlife impacts resulting from the Phase II Project will be minimized to the maximum extent practicable.

Baron Position. In support of Amendment Petition II, Baron initially did not provide an updated bald eagle survey or other evidence of wildlife impacts that may result from the Phase II Project, including the new component layout and 650-foot turbines. Baron argues that the Siting Board already considered the potential impacts to bald eagles from taller wind turbines in the 2019 Certificate and Phase I Order.⁴⁶⁴ Baron claims that it had "assessed the Phase II modifications[']

⁴⁶⁰ Hearing Exhibit 54 (DPS Environmental Panel Testimony), pp. 17-18.

⁴⁶¹ Id.

⁴⁶² DPS Staff Initial Brief, pp. 16-17.

⁴⁶³ Id., p. 17.

⁴⁶⁴ DPS Initial Brief p. 16; Baron Reply Brief p. 22.

potential impact on wildlife” and had concluded that the Phase II Project’s risks would not increase.⁴⁶⁵ Baron did not submit with Amendment Petition II the referenced wildlife assessment of the Phase II Project and relies in part on the 2018-2019 bald eagle information submitted with the Original Project. That information is dated 2018-2019 and is not specific to the new Phase II Project layout.⁴⁶⁶

Baron’s wildlife expert testified that for bald eagles, the Phase II Project “would result in a much lower estimate of take than estimated by NYSDEC in the original proceeding” already mitigated in the Commission-approved Phase I ETSM Plan.⁴⁶⁷ Baron’s witness testified that if the estimate of bald eagle taking is greater than DEC Staff estimates, Baron “would develop further mitigation actions” in consultation with DEC Staff.⁴⁶⁸ Baron’s witness concluded that the Certificate Conditions governing bald eagles (Conditions 63-64, 98-99) address any potential impacts.⁴⁶⁹

Shortly before the evidentiary hearing, Baron submitted an Updated Eagle Analysis documenting new bald eagle

⁴⁶⁵ Baron Initial Brief, pp. 59 (citing Amendment Petition II, Exhibit A, p. 31-35). Baron did not file the referenced wildlife “assessment” with Amendment Petition II.

⁴⁶⁶ The bald eagle and wildlife impact information in the Original Application required by 16 NYCRR §1001.22 is contained in Exhibit 22 and included: February 15, 2019 Updated Eagle Analysis (Appendix 22-1); and November 29, 2017 Eagle Use Point Count Survey Results (Appendix PP), Work Plan for Targeted Eagle Use Survey (Appendix RR), November 29, 2017 Addendum to Bird and Bat Survey Report (Appendix SS). In support of Amendment Petition I, Baron relied on the foregoing 2018-2019 documents from the Original Application.

⁴⁶⁷ Hearing Exhibit (Gravel Rebuttal Testimony), p. 3.

⁴⁶⁸ Id. Baron’s witness also testified about the unexplained loss of a bald eagle’s nest previously identified.

⁴⁶⁹ Id., p. 4.

nests in and near the Phase II Project area that had not been previously identified.⁴⁷⁰

In its Initial and Reply Briefs, Baron relies on its Updated Eagle Analysis and details the field review performed by its wildlife expert. Baron also relies on DEC Staff's conclusion in that the Phase II Project will not increase risks to bald eagles when compared to the Original Project, that the 2019 Certificate Conditions require adequate avoidance, minimization, and mitigation measures, and that the net conservation of the species is achieved through the ETSM Plan.⁴⁷¹ Baron asserts that it investigated and addressed Fremont's nest observations in the Updated Eagle Analysis and argues that Fremont had not offered any support for its arguments that bald eagle impacts have not been addressed.⁴⁷² Baron asserts that the record supports the Siting Board's finding that the Phase II Project's impacts have been avoided or minimized to the maximum extent practicable.⁴⁷³

Discussion

The Settlement Proposal clarified that Baron will not rely on Phase I submissions to comply with Certificate Conditions for the Phase II Project. Baron agreed to comply with Condition 63 by submitting a Phase II ESTM Plan as a compliance filing. Baron also agreed that if the actual take of bald eagles is greater than DEC Staff estimated, additional

⁴⁷⁰ Hearing Exhibits 161-162.

⁴⁷¹ Baron Initial Brief, pp. 59-60 (citing Tr. 41); Baron Reply Brief, pp. 22-23. Baron points to DEC Staff's claim that the net conservation of the species is achieved through the ETSM Plan.

⁴⁷² Baron Initial Brief, pp. 60-61 (citing Hearing Exhibit 54 (Denoncour/Palumbo Testimony)), pp. 5-6.

⁴⁷³ Baron Reply Brief pp. 23-24.

mitigation will be undertaken. We therefore do not see the need to make any changes to the applicable Certification Conditions (63, 98, and 99) or to the SEEP as our adoption of the Settlement Proposal serves to clarify the disputed issues in the proceeding. With the adoption of the Settlement Proposal and confirmation of the applicability of existing Certificate Conditions, as documented in the record of this proceeding, we find that Phase II bald eagle impacts have been avoided or minimized to the maximum extent practicable.

C. Northern Long-Eared Bats

Impacts to northern long-eared bats (NLEBs) was not a disputed issue in the proceeding. DEC Staff testified that NLEBs are a protected threatened or endangered species and that the Phase II Project would not result in additional impacts.⁴⁷⁴ DEC Staff also testified that Baron's compliance with the 2019 Certificate Conditions would result in a net conservation benefit to NLEBs.⁴⁷⁵ DEC referred to the Commission-approved Phase I NLEB ETSM Plan and the Bat Curtailment Plan (Phase I NLEB Plans), asserting that both demonstrated a net conservation benefit for the species and adequately addressed impacts.⁴⁷⁶

Baron's NLEB expert agreed with DEC Staff in relying on the Phase I NLEB Plans and the Commission's approval of both as compliance filings, claiming that "a net conservation benefit has been achieved" for the species and no further mitigation is necessary.⁴⁷⁷

⁴⁷⁴ Hearing Exhibit 54 (Denoncour/Palumbo Testimony), pp. 4-5.

⁴⁷⁵ Hearing Exhibit 54 (Denoncour/Palumbo Testimony), p. 5. DEC Staff also included in the record here its 2019 testimony about the Original Project's NLEB impacts. Hearing Exhibit (TE-3, Denoncour/Herzog Testimony).

⁴⁷⁶ Hearing Exhibit 54 (Denoncour/Palumbo Testimony), p. 5.

⁴⁷⁷ Hearing Exhibit (Gravel Rebuttal Testimony), p. 2.

Discussion

The Commission's Order approving the Phase I NLEB Plan and Bat Curtailment Plan (Phase I Order Approving NLEB Plans) made clear that it was applicable only to the Phase I Project.⁴⁷⁸ We find that the Commission did not intend to cover the Phase II Project impacts in that Phase I Order. Because this was not a disputed issue in the proceeding, the Settlement Proposal does not address Baron's responsibility to comply with the applicable Certificate Conditions governing NLEBs and other wildlife (Conditions 61 and 63). We therefore clarify that for the Phase II Project, Baron is required to comply with all applicable Conditions for NLEB and other wildlife, including submission of a Phase II ETSM Plan and NLEB Curtailment Plan as compliance filings.

IX. WAIVER OF FREMONT WIND LAW

Fremont Local Law Compliance

The Siting Board is required to find, among other things, that Baron's Facility is designed to operate in compliance with substantive local laws governing the environment and public health and safety. Fremont's Wind Law governs issues associated with the environment and public health to which Article 10 states "shall be binding" on Baron. Among other things, Fremont's Wind Law limits turbine heights to 500 feet in height. The Siting Board may elect not to apply a provision of Fremont's Wind Law if it finds that, with respect to the Phase II Project, the law is "unreasonably burdensome" in view of existing technology or the needs of, or costs to, ratepayers. The Siting Board is required to provide an affected municipality with an opportunity to present evidence in support of a local

⁴⁷⁸ Order Approving Compliance Filings 46, 48, 61, and 63 Subject to Conditions (Phase I NLEB Plans), p. 10.

law subject to waiver. In its decision to waive a local law as unreasonably burdensome, the Siting Board must state the reasons for the waiver.

Request for Waiver of Height Restriction Law

Baron asks the Siting Board not to apply the 500-foot height restriction in Fremont's Wind Law because it is unreasonably burdensome considering existing technology. Baron claims that its waiver request "is grounded in considerations pertaining to existing technology and the needs of consumers" and that the Phase II Facility otherwise will comply with all of Fremont's other applicable substantive local laws.

In determining whether Fremont's height restriction is unreasonably burdensome and should not be applied, Baron must demonstrate why it should not bear the burden, the degree of burden caused by the local law, that the requested waiver cannot reasonably be obviated by design changes to the facility, that the requested waiver is the minimum necessary, and that the adverse impacts of granting the waiver are mitigated to the maximum extent practicable. If a waiver request is based on a claim of "existing technology," Baron must demonstrate technological limitations related to the Facility components, including bulk, height, process or material making compliance "technologically impossible, impractical or otherwise unreasonable." If a waiver request is based on the needs of consumers, Baron must demonstrate that the need for the facility outweighs community impacts resulting from applying the law.

In the Baron rebuttal testimony of Jason Dagger and Scott Schwartz (Dagger/Schwartz Testimony), Baron notes that 500-foot turbines no longer qualify for the federal Production Tax Credit and that "very few turbines are available below 500 feet." Witnesses Dagger and Schwartz assert that if Fremont's 500-foot limit is applied, Phase II would require 20 more

turbines to be installed "to meet the MW goals of the Facility" and would "result in substantially less energy production."

Baron rebuttal witness, Per Lundqvist, states that the proposed 650-foot Vestas V150-4.5 MW turbine is "ideal" for the Phase II Project based on a wind resource analysis and meteorological data.

In Amendment Petition II, Baron claims that the environmental impacts associated with taller turbines "are minimal" and the turbines selected achieve "optimal efficiency." With respect to wildlife, noise, shadow flicker, and other impacts associated with taller turbines, Baron asserts in Amendment Petition II that those have been minimized to the maximum extent practicable.

Baron identifies increased visual impacts associated with the taller turbines in a Supplemental Visual Impact Analysis (Supplemental VIA) and states that the cumulative visual impact of the taller turbines for both Phase I and Phase II will increase beyond the impacts associated with the Original Project, with up to 58 turbines visible for an additional 10.3 miles to 14.2 miles; and cumulative Facility visibility of 140.1 miles versus visibility of 129.8 miles. The Supplemental VIA indicates that the majority of the viewpoints identified in the Original Project "will experience a perceptible change as a result of the layout revisions proposed," in Phase II Project layout. It concludes that despite the fact that changes in the appearance of the two Facilities "will be perceptible" when compared with the Original Project, there will be a minimal change to the overall visual impacts of Phase I and Phase I because the use of fewer turbines will result in reduced visual impacts.

Baron claims that "[n]ewer, taller turbine technology has the potential to increase the Facility's overall capacity

factor allowing the Project to maximize the capture of the wind resource and produce more renewable energy." Baron states that for the Phase II Project, it is proposing "the industry's highest producing onshore, low wind turbine" with a high-capacity factor, which is "ideal" for the Phase II site based on the wind resource analysis and meteorological data. In its Initial Brief, Baron argues that limiting turbine selection "to outdated inefficient equipment is not reasonable, particularly given the fact that there is no significant increase in potential environmental impacts" associated with the taller turbines.

Baron also claims that the Facility will meet the average annual consumption of approximately 43,000 households and that unless Fremont's height restriction is waived, it will "dramatically reduce energy production, requiring additional turbines, access roads, and collection lines to achieve the same level of energy production, providing no perceptible benefit to the community or the environment and undermining the need of consumers for clean energy." Baron states taller turbines allow access to more wind and produce more energy, and that "it is becoming increasingly difficult to justify manufacturing smaller, less efficient turbines." Baron recites the Siting Board's prior approval of the increased turbine height for the Phase I Facility and claims that Phase II is no different in terms of impacts from the taller turbines.

Amendment Petition II states that turbine manufacturers were able to provide three turbine options that met Fremont's 500-foot height restriction, but that these options would require "substantial tree-felling" for the turbines to operate most efficiently and that 500-foot turbines cannot compete with modern technology. Baron asserts that those options also would result in less energy production.

In both Amendment Petition II and its Initial Brief, Baron claims that the CLCPA, public interest, and consumer needs require the Siting Board's waiver of Fremont's turbine height restriction law. Baron argues that the Siting Board should allow renewable energy developers of a "NYSERDA-contracted project ready to commence construction, to make use of the best technology to produces as much clean energy as possible." Baron argues that requiring compliance with Fremont's "arbitrary" local law "would undermine the State's goals" and "come at a cost to consumers who want and need clean renewable energy sources."

Baron claims that its waiver request is "the minimum necessary" and cannot be further obviated by design changes and maintain efficiency, while noting that turbine models either meeting Fremont's height restriction or shorter than 650 feet while available are less efficient. Finally, Baron claims that the impacts of waiving Fremont's height restriction have been mitigated to the maximum extent practicable because Phase II's environmental impacts are not significantly increased and are otherwise addressed in the 2019 Certificate Conditions.

DPS Staff Position

In its testimony, DPS Staff indicates that it does not oppose Baron's waiver request and that Baron presents a "cogent argument" that Fremont's height restriction is unreasonably burdensome due to changes in technology. DPS Staff points out Baron's assertion that to achieve compliance with Fremont's height restriction, Baron would have to use less efficient turbines with a lower capacity factor, resulting in siting more turbines with a larger disturbance area. DPS Staff also notes that the Phase II Project "is designed to meet or exceed Fremont's setback requirements." Notably, DPS Staff states that, at that time, the record did not include Fremont's input

on the waiver of the height restriction. DPS Staff qualifies its opinion that the waiver may be justified by stating that it "expects that the Siting Board will consider the full record of this proceeding," including the Town's position.

In its Initial Brief, submitted with knowledge of Fremont's position on waiver of the height restriction, DPS Staff argues that the waiver is justified based on the state of existing technology. DPS Staff also points to the Siting Board's approval of taller turbines for the Phase I Project and that the waiver would present a minimal burden on Fremont and the surrounding community.

Town of Fremont Position

Fremont did not present testimony related to Baron's waiver request. Instead, it asserts in its Initial Brief that Baron has not met the regulatory and legal requirements for a waiver of the height restriction law and that Home Rule restricts the Siting Board's authority to waive local laws.

Fremont argues that Baron has failed to present any evidence of consumer needs or costs that outweigh the Facility's impact if the height restriction is waived. Fremont further argues that Baron has not submitted evidence of technological limitations that require a waiver, other than an assertion that fewer shorter turbines complying with the height restriction are available. Relying on information filed as part of Baron's Original Application, Fremont states that 500-foot turbines are more suitable and that Baron presents a self-created difficulty for its own economic advantage. Fremont further states that Baron is making a self-interested economic argument and has not shown that it will offer lower rates to consumers if the waiver is granted.

Fremont details the Town's support of the Original Project, which proposed to comply with the 500-foot height

restriction, and that Baron's current Phase II waiver position represents a "bait and switch." Fremont relies on part of Baron's Original Application that discusses turbine alternatives and concludes that 500-foot turbines are more suitable for the Project than 650-foot turbines.

Fremont also argues that, when considering waiver of the turbine height restriction law, the Siting Board should consider the importance of Fremont's Wind Law and the principle of Home Rule set forth in the New York Constitution. Fremont claims that the Wind Law's height restriction should be upheld under Home Rule and that Article 10 does not preempt it. In response to Baron's claim in Amendment Petition II that the CLCPA overrides and requires waiver of local laws, Fremont asserts that the CLCPA does not expressly or impliedly preempt local laws and that it is unreasonable and inequitable to burden the Town with an "implied obligation" to meet New York's aggressive energy goals. Fremont concludes that the use of the CLCPA as the basis to override Fremont's Wind Law "is offensive" to the Constitutional principle of Home Rule.

Fremont cites several Court of Appeals cases in support of its position that Home Rule prevents the Siting Board's waiver of a local law. Fremont claims that unless another State law expressly preempts a local land use law, Home Rule makes the local law "preeminent." Fremont acknowledges, however, that Article 10 arguably preempts certain local laws, while asserting that the CLCPA does not.

Discussion

While we agree with Fremont that the CLCPA lacks an express preemptive provision related to local laws, we do not need to determine here whether CLCPA preemption is applicable given Article 10's express authority to waive the substantive provisions of Fremont's Wind Law. Despite the general municipal

power to regulate public property under the New York Constitution, the Legislature "retains ultimate control" over such property and may, through the enactment of general laws, may restrict a municipality's authority expressly or by implication.

Article 10 expressly preempts local procedural laws related to major electric generation facilities. While no case has yet construed the constitutionality of Article 10's waiver provisions for a substantive local law under PSL §168(3)(e), in a parallel context, the Appellate Division has held that Home Rule does not erode the preemptive effect of a generation siting law that allows the Office of Renewable Energy Siting (ORES) to waive unreasonably burdensome local laws.

Given that the Legislature's inclusion of waiver authority under PSL §168(3)(e) were the Siting Board determines that a local law is unduly burdensome and waive it in view of existing technology and the needs of ratepayers, we reject Fremont's Home Rule argument. Our conclusion is based on Article 10's legislative scheme that advances a substantial State interest in facility generation siting. Notwithstanding such waiver authority, Article 10 charges the Siting Board with protecting local interests through multiple provisions, including the requirement that local substantive laws are binding on an applicant (making waiver the exception rather than the rule), the requirement that the Siting Board find that a facility will comply with all local laws not otherwise waived, and the provision of intervenor funding to foster municipal participation in the proceeding.

In view of the foregoing, we consider whether Baron has met its burden in showing that Fremont's Wind Law limiting turbine heights to 500 feet is unreasonably burdensome. Baron presented only brief expert testimony in the record in support

of an unreasonably burdensome finding as alleged in Amendment Petition II.

The Dagger/Schwartz Rebuttal Testimony first claims that 500-foot turbines no longer qualify for the federal Production Tax Credit. They state that very few turbines meeting Fremont's 500-foot height restriction are available and that the proposed Vestas V150 4.5 MW 650-foot turbine is the most efficient and least environmentally impacting turbine.

At the evidentiary hearing witnesses Dagger and Schwartz testified that there are turbines on the market within the 500-foot height limit that could be used for the Phase II Project, but that they would not meet the energy production required and may not be "available in production ... in time for this project." They also testified that the 500-foot Siemen's Gamesa 500-foot turbines used for Phase I are "no longer available for this project." Witnesses Dagger and Schwartz claimed that that 500-foot turbines would produce 154-159 gigawatt hours per year, assuming construction of 34 turbines, or 72 percent fewer megawatt hours of energy produced by 650-foot turbines, assuming construction of 26 taller turbines as proposed for Phase II. They testified that this calculation assumed production of three megawatts per 500-foot tall turbine and that there are no turbines of that height capable of producing more than 3 megawatts.

We agree with Fremont that Baron's waiver request is primarily based on existing technology requiring Baron to demonstrate "that there are technological limitations (including governmentally imposed technological limitations) related to necessary facility component bulk, height, process or materials that make compliance by the applicant technically impossible, impractical or otherwise unreasonable."

Baron claims that the Siting Board should not apply Fremont's height restriction because turbines meeting the 500-foot height limit are less efficient, thereby reducing Phase II's energy production. Baron also claims that a waiver is warranted because turbines meeting the 500-foot limit no longer qualify for the federal Tax Production Credit and it is unreasonable to force Baron to use them for Phase II. While neither the efficiency of a turbine model or its qualification for tax credits make compliance with Fremont's law technically impossible, impractical, or otherwise unreasonable, we elect not to apply Fremont's height restriction law here. It is not disputed that 650-foot turbines are more efficient and have greater energy production capacity than the 500-foot turbines Baron proposed in its Original Application. It is also not disputed that fewer turbines will be necessary for Phase II if Fremont's law is not applied, resulting in more limited environmental impacts, a position supported by DPS Staff. Finally, the Siting Board previously approved taller turbines for Baron's Phase I Facility and for at least two other wind generation facilities. On this record, the taller turbines are consistent with a finding that the law is unreasonably burdensome given the current state of existing technology.

X. REAL PROPERTY DISPUTES

Intervenor Robert Wagner. Intervenor Wagner is a Fremont resident who signed an Easement Option and Easement Agreement (Easement Agreement) with Baron on February 25, 2019, for a specific portion of his property, making him a participating property owner. The Easement Agreement appends a metes and bounds property description and a map showing the old

easement location proposed in Baron's Original Application.⁴⁷⁹ The Easement Agreement contains a provision that defines its expiration date (or "Option Term") to be for five years beginning on February 25, 2019.

During the proceeding, intervenor Wagner repeatedly objected to Baron's location of the turbine on his property, which by his estimate was one quarter of a mile from the initially intended easement to an area near a family cabin and sugar maple tree tapping area. In addition to the changed location, he also objected to the turbine's 650-foot height, which he asserted would clearly be seen by him and his neighbors in the new location as compared to the 500-foot turbine in the old location. He termed Baron's proposal "a big change, an unethical change" and a breach of the Easement Agreement because it would be affecting the area of his property that he and his family enjoyed most.⁴⁸⁰ Intervenor Wagner also expressed concern about noise and shadow flicker impacts resulting from the turbine in that location.

Intervenor Wagner expressed his concerns about the changed Phase II Project impacts on his property beginning with the April 12, 2023 public statement hearing. He continued to express those concerns at the June 6-7, 2023 evidentiary hearing, in multiple conferences with the Examiners and the parties, and in multiple written submissions to the record.⁴⁸¹

⁴⁷⁹ R. Wagner Easement Agreement, Exhibits A, B-1 (February 25, 2019).

⁴⁸⁰ R. Wagner Motion to Dispute Contract (filed May 3, 2023).

⁴⁸¹ Intervenor Wagner submitted information about the dispute on May 3, 2023, July 8, 2023, September 22, 2023, and February 28, 2024 motions and other filings, which included the Phase II site plan map showing the new turbine location, the Easement Agreement, chronology of events, photographs, and set back information.

At the June 6, 2023 evidentiary hearing, he stated that he had repeatedly tried to resolve the issue with Baron, without success, and complained about Baron's lack of responsiveness because no representative had reached out to him. At that time, the Presiding Examiner urged Baron to meet with intervenor Wagner and resolve the dispute.

At a November 1, 2023 procedural conference, the Presiding Examiner inquired about the status of the dispute and Baron clarified that, although intervenor Wagner had an Easement Agreement with Baron, a turbine was not located on his property.⁴⁸² Although this is technically true, the Easement Agreement provides that the rotors of a turbine on a contiguous property would overhang intervenor Wagner's property.⁴⁸³ The Easement Agreement also gives Baron the following rights: to ingress to and egress from the Easement Area; inspect, study, survey, conduct environmental, biological, cultural, geotechnical and other tests, on the property and remove vegetation; to construct, install, operate, repair, replace and remove Project improvements; to clear brush, trees and timber; to cross each part of the Property for audio, visual view, light, shadow flicker, noise, vibration, air turbulence, electromagnetic and electrical/radio frequency interference; ice throw/shedding "and any other effects attributable to" the Facility.⁴⁸⁴

Following a November 1, 2023 procedural conference, intervenor Wagner submitted a summary of the dispute with Baron, asserting that the Easement Agreement clearly defined the

⁴⁸² Email from J. Klami to Examiners/Parties (November 3, 2023).

⁴⁸³ Wagner Easement Agreement, §4.01(a)-(f), pp. 2-3; §7.01, pp. 5-6.

⁴⁸⁴ Id., Wagner Easement Agreement, §4.01, pp. 2-3; §7.01, pp. 5-6.

easement area in the appended map; that the easement location was based on the well-being of his family and neighbors as well as turbine height, icing, shadow flicker, noise, and visual/aesthetic impacts; that the noise impacts will now be 50 dBA throughout his property and that the value of his property will be reduced; that he had "zero communications from Baron" regarding the changes; and that the Agreement was based on the Original Project, before it was split into Phase I and Phase II.⁴⁸⁵ He claims that he would never have signed the Easement Agreement or any other agreement if Baron had proposed turbine T107 in the location now proposed on the east side of his property because of the increased impacts to the area of his property used for recreation, hunting, maple tree tapping, and wood cutting. Intervenor Wagner complains of the stress the dispute has caused.

In response, Baron submitted an explanation of its position in a November 10, 2023 letter, claiming that that the dispute was "at an impasse," that the Siting Board "lacks jurisdiction to interpret or rule on any private contract" with a third party, and that it was waiting for the outcome of this proceeding "to determine next steps" with respect to intervenor Wagner's Easement Agreement.⁴⁸⁶ Baron acknowledged that under the 2019 Certificate, it would have to demonstrate that it held all necessary real property interests prior to Facility construction.

Baron explained that there are three types of real property contracts: Host Agreements, Easement Agreements, and Good Neighbor Agreements. A Host Agreement provides for

⁴⁸⁵ Email from R. Wagner to Examiners/Parties and Summary dated November 4, 2023.

⁴⁸⁶ Letter from J. Klami to Examiners/Parties dated November 10, 2023, pp. 2-3.

Facility components to be located on a participant's property. Baron does not explain an Easement Agreement like intervenor Wagner's and apparently it is one on which Facility components are not located although the property will be impacted by Facility operations and the owner agrees to be considered "participating." An Easement Agreement gives Baron broad rights over property.⁴⁸⁷ Baron explains that a Good Neighbor Agreement (like intervenor M. Oehlbeck's, discussed below) also does not have Facility components, but provides for a waiver of noise and other limitations established in the Certificate and in local laws.⁴⁸⁸

Under a Host Agreement, Baron asserts that it has the ability to shift the location of project components up to 500 feet prior to the commencement of construction, as identified on a final site plan to be provided to each landowner and can move components more than 500 feet only with landowner approval.⁴⁸⁹ Baron does not differentiate between the Host and Easement Agreements. Baron states that it "has consulted with each landowner hosting project components regarding the Phase II Amendment and there are no outstanding issues" other than the dispute with intervenor Wagner.⁴⁹⁰

On February 28, 2024, intervenor Wagner submitted a letter to the Secretary indicating that the Option Term in the Easement Agreement had expired on February 25, 2024, and that he was not a participating property owner for Phase II.⁴⁹¹

⁴⁸⁷ Wagner Easement Agreement, §4.01, pp. 2-3; §7.01, pp. 5-6.

⁴⁸⁸ Id., pp. 3-4.

⁴⁸⁹ Id., p. 3.

⁴⁹⁰ Id.

⁴⁹¹ R. Wagner Letter and Easement Agreement Excerpt (February 28, 2024).

Intervenors Marty Oehlbeck and Nathan Oehlbeck. The Oehlbeck intervenors are related and live on adjacent parcels in the Town of Cohocton. Baron asserts that Intervenor M. Oehlbeck signed a March 2019 Host Agreement for the Phase I Project, waiving certain requirements in the 2019 Certificate and applicable local laws.⁴⁹²

On October 4, 2023, intervenor M. Oehlbeck submitted a Memo for Correction of the Record indicating that Baron identified his residence located at 3360 Brown Hill Road in the Town of Cohocton, as a participating residence when it is not.⁴⁹³ He notes that the property on which his residence is located is not participating, although part of the property near the substation is subject to an agreement with Baron and is participating for the Phase I Project. Intervenor Oehlbeck asserts that he advised Baron that the Host Agreement does not apply to the Phase II substation, indicated the error in the Phase II PNIA, requested a correction, and has not received a response.⁴⁹⁴

On October 9, 2023, intervenor M. Oehlbeck filed an Objection to the Record and Motion noting that the scope of the agreement with Baron did not extend to the Phase II substation and that on June 11, 2023, he sent a registered letter to Baron indicating as much.⁴⁹⁵ This motion was not addressed during the proceeding and will be addressed here.

⁴⁹² Letter from J. Klami to Examiners/Parties (November 10, 2023), pp. 3-4.

⁴⁹³ M. Oehlbeck Record Correction Request (October 4, 2023).

⁴⁹⁴ Id.

⁴⁹⁵ Intervenor M. Oehlbeck Objection to the Record and Motion (October 9, 2023). In support of his position, he appends the Phase II PNIA, Figure 7, "Mitigated Short-Term Sound Propagation Modeling Results." Hearing Exhibit 23 (Phase II PNIA), p. 15.

Intervenor M. Oehlbeck claims that Baron's labeling of his residential property as participating in the Phase II PNIA is "a mischaracterization;" that the residential portion of his property is adjacent to the participating portion and should be designated in the record as non-participating for purposes of applicable noise limits; that the participation agreement with Baron is limited in scope with respect to equipment placement and noise levels; that Baron has more limited real property rights than it claims with respect to his property; and that the agreement cannot be construed to extend to the newly proposed Phase II substation.⁴⁹⁶ Intervenor M. Oehlbeck requests that Baron be compelled to review the status of his property, submit necessary changes, and determine whether the Phase II Project will comply with applicable noise limit of 45 dBA and the Cohocton Town Law at his home.⁴⁹⁷

In a November 1, 2023 conference, the Presiding Examiner indicated that there was insufficient clarity in the record to rule on the issues raised in the Oehlbeck intervenors' motion and filings. At that time, counsel for Baron asserted that the record adequately demonstrates Phase II's compliance with applicable noise limits at both Oehlbeck properties. In support of this assertion, Baron provided specific citations to the Phase II PNIA in a November 3, 2023 email.⁴⁹⁸

In a November 10, 2023 letter, Baron addressed in greater detail the Oehlbeck motion, indicating that it had

⁴⁹⁶ Id., (citing Phase II PNIA, Table 13, p. 93).

⁴⁹⁷ Id., p. 2. Although Baron responded to other pending motions to strike by intervenors Zigenfus and N. Oehlbeck, on which the Examiners ruled and denied the motions, it did not timely respond to intervenor M. Oehlbeck's October 9, 2023 motion.

⁴⁹⁸ Email from J. Klami to Examiners/Parties (November 3, 2023) (citing Phase II PNIA, pp. 93, 140, 186, 234, and 282).

reviewed the status of the Good Neighbor Agreement with intervenor M. Oehlbeck and that it waives all noise limitations imposed by any local law, the Article 10 Certificate, or any other law.⁴⁹⁹ Baron claims that regardless of whether his property is considered participating, the Phase II Project meets the stricter 45 dBA noise limit for non-participating property owners. Baron asserts that his property was in the Phase I Facility area and he was only now objecting to noise limits under the 2019 Certificate and Cohocton local law. Baron also asserts that the Oehlbecks are "trying to equate cumulative sound levels with the sound limits in the Certificate and Cohocton's local law."⁵⁰⁰ Baron argues that this is a "new issue" that cannot be raised after the record closes.⁵⁰¹ Baron also argues that the Siting Board cannot rehear the issue of cumulative noise impacts now.⁵⁰²

Discussion

As Baron recognizes, it is required to demonstrate that it has obtained, or is under a binding contract or option to obtain, title to or a leasehold interest in the real property affected by the Phase II Project, including property on which Project components will be located. Although this is a required

⁴⁹⁹ Letter from J. Klami to Examiners/Parties (November 10, 2023), pp. 3-4.

⁵⁰⁰ Id., p. 4

⁵⁰¹ Id.

⁵⁰² Letter from J. Klami to Examiners/Parties (November 10, 2023), p. 5.

part of an Article 10 Application,⁵⁰³ Certificate Condition 26 allows Baron's demonstration to be made as a pre-construction information filing.

Although Amendment Petition II states that real property interests "are or could potentially be affected by" the Phase II Project were analyzed, no analysis was provided for inclusion in the record.⁵⁰⁴ Amendment Petition II summarily states that "Baron Winds II has obtained, or can obtain, access to all parcels needed for Project components in Baron Winds Phase II," but provides no documentation supporting this statement.⁵⁰⁵ No list of the real property interests it actually holds with participating property owners for Phase II components even though the record reflects that Baron holds such interests from intervenors Wagner and Oehlbeck.⁵⁰⁶

Intervenor Wagner's February 2019 Easement Agreement with Baron was based on the Original Project's layout and 500-foot turbines. For the Phase II Project, Baron proposes a 650-foot turbine (T107), which will be in a different location on

⁵⁰³ 16 NYCRR §1001.13(c). Baron is also required to state that is "has obtained, or can obtain, such deeds, easements, leases, licenses or other real property rights or privileges as are necessary for all interconnections for the facility." 16 NYCRR §1001.13(d). Amendment Petition II does not contain such a statement.

⁵⁰⁴ Hearing Exhibit 2 (Amendment Petition, Exhibit A), p. 6.

⁵⁰⁵ Id., p. 15. In support of Amendment Petition II, Baron submitted a tax parcel map (Figure 4-1) showing the parcels needed for Phase II and the owners, but does not identify the parcels, if any, in which it holds an easement, lease, title, or other interest.

⁵⁰⁶ Baron provides only a tax parcel map showing the parcels needed for Phase II and identifying the parcel owners. Hearing Exhibit 10 (Amendment Petition II, Tax Parcel Map), Figure 4-4. Baron mistakenly identifies this in Amendment Petition II (Exhibit A, p. 15) as Figure 4-1 and it should be Figure 4-4.

property adjacent to intervenor Wagner's property. During the proceeding, Baron did not submit an updated Easement Agreement with intervenor Wagner, did not exercise its option under that Agreement, and otherwise did not resolve the dispute. On this record, Baron also did not dispute that the Easement Agreement's Option Term had expired or claim that it continues to have rights with respect to the Wagner property.

The dispute appears to be moot based on intervenor Wagner's claim that Baron did not exercise the option and the Easement Agreement's Option Term expired. A fair reading of the Easement Agreement supports his position. If that is the case, Baron no longer has an Easement Agreement for the Wagner property and it has reverted to non-participating status subject to more protective setback, noise and annual shadow flicker limits, and other more protective provisions in the 2019 Certificate.

Baron acknowledges that it will be required to demonstrate its real property interests under Certificate Condition 26. Based on the record, including both Baron's and Mr. Wagner's filings, we recommend that the Siting Board remove any doubt about whether its determination to approve the Phase II Project also approves the placement of turbine T107 as part of the Facility layout that overhangs the Wagner property and make clear that unless Baron can demonstrate a valid Easement Agreement with intervenor Wagner, which is not subject to dispute, arbitration, or legal action, turbine T107 and any other Facility components affecting the Wagner property should be moved or removed from the final layout and design of the Phase II Project.

With respect to the two Oehlbeck disputes, we find the record unclear about whether noise and other impacts from Phase II are at issue. The record indicates that the adjacent

Oehlbeck properties are located in the Town of Cohocton, where the Phase I Project is located. As Baron notes, the Phase II PNIA reflects that non-participating sound levels of 45 dBA will be met at intervenor M. Oehlbeck's property (Receptor 1330D).⁵⁰⁷ This assumes that noise from the Phase II substation is included in those modeled results.⁵⁰⁸ Intervenor M. Oehlbeck was an active participant in the Original Project and had ample opportunity to address Phase I noise issues affecting his property at that time. We agree with Baron that the Oehlbeck's cannot now complain about Phase I noise impacts. But if noise generated by the Phase II Project, including the newly proposed substation, will impact the Oehlbeck properties, that is a different consideration.

We disagree with Baron that the issue intervenor M. Oehlbeck raises is new. He has a right to assure that Phase II noise limits are met at his property, which involves the substation and the potential cumulative noise from Phases I and II. We also disagree with Baron's position that cumulative noise impacts are not applicable and that the Siting Board cannot "rehear" that issue now.⁵⁰⁹ As the Siting Board's Order Approving Amendment for Phase I notes, the cumulative impacts of both Phase I and Phase II are subject to review in this proceeding.⁵¹⁰

We have required in this Order Baron to retain an independent consultant to perform revised noise modeling with

⁵⁰⁷ Email from J. Klami to Examiners/Parties (November 3, 2023).

⁵⁰⁸ Hearing Exhibit 23 (Phase II PNIA), p. 93. It is unclear whether the non-participating levels for low frequency noise at applicable octaves will be met.

⁵⁰⁹ Letter from J. Klami to Examiners/Parties (November 10, 2023), p. 5.

⁵¹⁰ Order Approving Amendment, p. 15.

the more conservative protocol proposed in the Original Application and to perform post-operational monitoring to confirm the modeled results. The revised modeling must necessarily assess noise emanating from the proposed Phase II substation as well as the cumulative noise the Oehlbeck properties may perceive from the Phase I and Phase II Facilities combined with the nearby Cohocton Facility. The revised modeling and post-operational noise monitoring of the substation and the three Facilities will demonstrate whether Baron is complying with applicable participating and non-participating noise limits. Until that information is understood, there is no reason to address the question of whether Oehlbeck's residential property is participating or non-participating. In any event, that question appears unsuited for a Siting Board determination because it involves construction of a private contract between intervenor M. Oehlbeck and Baron.

The Wagner and the two Oehlbeck disputes raise another question about Baron's demonstration under Certificate Condition 26 and involves submission of real property information as an information filing, which is not shared with either the parties or Phase II participants who have an agreement with Baron. Condition 26 provides:

Documentation, including proofs of consent, redacted as needed to protect confidential information, demonstrating that all necessary agreements are in place for use of the Facility Site for construction and operation (e.g., landowner agreements, easements, setback waivers, or Good Neighbor Agreements).

Although the Siting Board does not resolve private real property disputes, such disputes should be avoided because they have the potential to impact members of the community, delay construction and operation of the Phase II Project, and necessitate the expenditure of legal and other resources to

address. Adequate notice to all participating property owners is a reasonable mechanism to prevent future disputes from arising.

Consequently, we require Baron's demonstration under Condition 26 to be submitted as a compliance filing rather than an information filing, which should be on notice to all participating property owners as well as the parties to the proceeding, with an affidavit of service demonstrating proper notice has been served. We further note that the Condition 26 compliance filing should be in the form of a list of the names and addresses of property owners with whom Baron has agreements that are not subject to dispute and should include: the type of agreement; date of execution and date of any revision; and tax parcel identification number. The compliance filing should also include a map identifying the participating property location and the location of Facility components. DPS Staff should be given the discretion to determine any other information required. If Baron seeks to protect information on the list, only the names of property owners may be redacted. Baron shall file both redacted and unredacted lists in DMM as part of the compliance filing, providing the unredacted list to all parties who have executed the Protective Order.

Condition 26, as revised, is intended to avoid future time-consuming disputes and fulfill the requirements of 16 NYCRR §1001.13(c) and (d) and the Siting Board's intent in the 2019 Certificate, given the questions raised by the Wagner and Oehlbeck disputes.

XI. FREMONT'S OTHER OBJECTIONS

Visual Impacts. Fremont complains about the increased visual impacts of the Phase II Project due to the increased

turbine height.⁵¹¹ Fremont claims that the turbines will be seen from farther away and questions the methodology used by Baron's expert.

As Baron notes, Fremont does not present evidence that refutes the analysis in the Supplemental Visual Impact Assessment (SVIA) that there will be a minimal visual difference between the Original Project and Phase II because of the reduction in the number of turbines by nine to 26 turbines.⁵¹² The SVIA also assessed the cumulative visibility of Phase I and Phase II when compared to the Original Project and concluded that the impacts are consistent with those already assessed and determined to be minimized to the maximum extent practicable in the 2019 Certificate.⁵¹³ Notably, DPS Staff testified that although the increase in turbine height will be discernible, it will not result in a significant increase to visual impacts.⁵¹⁴

In the 2019 Certificate, the Siting Board found that the Certificate Conditions would minimize visual impacts. These include the use of non-reflective turbines in a uniform white/off-white color; submission of an Exterior Lighting Plan; a prohibition on advertisements, conspicuous lettering, or company logos; and medium intensity strobe lighting in its aircraft detection lighting system.⁵¹⁵ These Conditions apply to the Phase II Project. Consequently, we find that these required measures will minimize the Phase II Project's visual impacts.

⁵¹¹ Fremont Initial Brief, pp. 28-30; Fremont Reply Brief, p. 17.

⁵¹² Baron Initial Brief, pp. 66-68; Baron Reply Brief, pp. 27-28; Hearing Exhibit 30 (Appendix I, SVIA); Hearing Exhibit 102 (VanDerGeest Testimony), pp. 3-4.

⁵¹³ 2019 Certificate, pp. 134-136.

⁵¹⁴ Hearing Exhibit 54 (DPS Environmental Panel Testimony), pp. 20-21; DPS Staff Initial Brief, pp. 22-23.

⁵¹⁵ Certificate Conditions 39 and 50.

Soil Disturbance Impacts. Fremont takes issue with the 151.8 acre increase to agricultural soil impacts resulting from the Phase II Project, claiming that impacts characterized as temporary may be permanent and such impacts are to prime farmland.⁵¹⁶ Its expert witnesses compared Phase II's soil impacts with the Original Project, noting a moderate decrease at one turbine location but an increase at three others.⁵¹⁷

Baron responds that Fremont fails to consider the overall reduction in permanent impacts to farmland soils as compared to the Original Project.⁵¹⁸ Baron also asserts that it used conservative assumptions in identifying impacts and may have overestimated them. Baron argues that it will follow AGM's 2018 Guidelines for Agricultural Mitigation for Wind Power Projects and notes that AGM Staff submitted a letter in lieu of testimony stating that compliance with those Guidelines "will reduce and/or eliminate potential agricultural impacts to the maximum extent practicable."⁵¹⁹

The record reflects Baron's assessment of soil impacts and its efforts to minimize such impacts in the Phase II layout. The record also reflects AGM Staff's well-reasoned position with respect to Baron's agreement to comply with the AGM Guidelines. In addition, DPS Staff criticizes Fremont's expert testimony as "an incomplete presentation of soil impacts," recites AGM's position indicating Baron's adherence to the AGM Guidelines and

⁵¹⁶ Fremont Initial Brief, p. 30; Fremont Reply Brief, p. 18.

⁵¹⁷ Hearing Exhibit 71 (LeFebre/Kibling Testimony), p. 10.

⁵¹⁸ Baron Initial Brief, pp. 70-72; Hearing Exhibit 75 (Baker Rebuttal Testimony), pp. 10-11.

⁵¹⁹ Hearing Exhibit 74, March 24, 2023 AGM letter.

concludes that agricultural soil impacts will be avoided or minimized to the maximum extent practicable.⁵²⁰

We find AGM Staff's position to be compelling because it is the agency responsible for protecting the State's farmland. DPS Staff's agreement with AGM's position is also persuasive. We agree with both agencies that Baron's compliance with the AGM Guidelines will minimize soil impacts resulting from construction and operation of the Phase II Project to the maximum extent practicable.

Fremont's Proposed Certificate Conditions. In Fremont's Initial Brief, for the first time it includes proposed additional conditions for Phase II, which were not proposed during the proceeding.⁵²¹ Baron objects to all of Fremont's proposed conditions because they are either already addressed in the 2019 Certificate or are otherwise unsupported by the record.⁵²²

We agree with Baron that Fremont's proposed conditions 7 and 8 are already covered in the 2019 Certificate. Fremont's proposed condition 7 (requiring compliance with Fremont's noise limits) is addressed in existing Conditions 12 and 68 and Baron does not dispute their applicability to Phase II. Fremont's proposed condition 8 (requiring aircraft detection lighting or similar technology) is addressed in existing Conditions 37(c) and 46 and associated compliance filings, as Baron argues.

In addition, proposed condition 1 (requiring compliance with all local laws except for construction hours, which were waived in the 2019 Certificate) is already addressed in the 2019 Certificate, which waived the local law governing

⁵²⁰ DPS Staff Initial Brief, pp. 24-25.

⁵²¹ Fremont Initial Brief; Fremont Reply Brief.

⁵²² Baron Reply Brief, pp. 30-32.

such hours. This proposed condition is also addressed in this Order, which includes an additional waiver of Fremont's turbine height restriction. For the same reason, Fremont's proposed condition 2 must be rejected because it asks the Siting Board to limit turbine heights to 500 feet, which this Order waives to allow 650-foot turbines and is the second exception to Baron's local law compliance obligation. Baron is otherwise required to comply with all other local laws, including the requirement that collection lines be buried to the extent practicable, which Fremont asks the Siting Board to order in proposed condition 3.

In the 2019 Certificate, the Siting Board determined that visual impacts were minimized to the maximum extent practicable based on Baron's revision to the Facility layout "to include the underground installation of all proposed electric collection system lines," thereby addressing DPS Staff's concerns about the visual impacts of above ground lines.⁵²³ Amendment Petition II proposes to install underground collection lines and does not request a waiver of Fremont's local law or any change to the 2019 Certificate. Baron's layout here is therefore assumed to include underground installation of all collection lines, with one exception: the Neil's Creek HDD crossing, discussed above.

Fremont's proposed conditions 4 requires the use of serrated trailing edges. Baron's noise expert testified at the evidentiary hearing that serrated trailing edges would be used for the Phase II turbines to mitigate noise levels.⁵²⁴ We

⁵²³ 2019 Certificate, pp. 134-135.

⁵²⁴ Tr. 418. In addition, in response to a question at the April 12, 2023 information session about serrated turbine blades, Baron representative Jason Dagger also indicated that they would be used to address noise impacts. PSH 6 PM Info. Tr. 43-44.

disagree with Baron's change of position as reflected in its Reply Brief, which states that "should there be a finding of non-compliance with noise conditions" then serrated trailing edges will be considered under existing Condition 70(a)(ii).⁵²⁵ Baron's citation to Condition 70(a)(ii) is not an existing Condition. Nevertheless, Condition 70(a) is not applicable. It only requires post-construction monitoring. It does not require serrated trailing edges or Baron's implementation of any mitigation measures. Baron's argument that an existing Condition addresses Fremont's proposed condition 4 is unsupported.

Baron's noise expert, Ken Kaliski, testified on cross-examination by counsel for Fremont as follows:

Q. Is it your opinion based on this study that those serrated trailing edges are part of how larger turbines can or should mitigate sound levels?

A. Yes.

Q. Okay. To your knowledge, does the proposed Phase Two include those as -- as a -- a given that they will be used?

A. Yes.

Thus, Baron's expert testified that Phase II would use serrated edges and its representative stated the same to the public. Baron is bound by its expert's sworn testimony and the statements of its representatives in this proceeding. Baron cannot change its position on the use of serrated edges for the first time in its Reply Brief. We therefore agree with Fremont that including this as an additional Certificate Condition will avoid any doubt or misunderstanding that serrated trailing edges

⁵²⁵ Baron Reply Brief, p. 31.

are required for Phase II turbines insofar as Baron repeatedly stated that they would be used.

Similarly, Fremont's proposed condition 5 (requiring for installation of turbine ice detection equipment), while addressed generally in Condition 12's local law compliance requirement, is also being expressly required in this Order's noise section and the addition of a Condition. Baron for the first time in its Reply Brief says that it has agreed to install ice detection equipment in compliance with Fremont's Wind Law.⁵²⁶ Nothing in the record reflects Baron's agreement in this regard. Its Reply Brief is not a part of the record and, in any event, is insufficiently binding and buried amid arguments. Accordingly, we agree with Fremont that making this requirement clear for Phase II by adding this Condition will remove any doubt that icing detection equipment must be installed for Phase II turbines.

Finally, in proposed condition 6 Fremont asks the Siting Board to require Baron to install fire suppression systems on Phase II turbines. Fremont proposes condition 6 for the first time in its Initial Brief, providing Baron and other parties with an inadequate opportunity to address it. Moreover, Fremont failed to present any testimony or other record evidence in support of this proposal. It is therefore denied.

XII. CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT

The Climate Leadership and Community Protection Act (CLCPA) sets forth the State's specific greenhouse gas emission reduction targets by established deadlines. In furtherance of these targets, CLCPA Section 7 requires agencies, when issuing

⁵²⁶ After multiple noise complaints during icing events, Baron installed the equipment for the nearby Phase I Facility, as it notes in its Leaf On Report.

"permits, licenses and other administrative approvals and decisions," to "consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in [ECL] article 75."⁵²⁷ The CLCPA also provides that, in taking such administrative action, agencies shall "not disproportionately burden disadvantaged communities."⁵²⁸

This is a renewable generation facility that will foster the State achieving its greenhouse gas reduction objectives and, in theory, replace fossil fuel generation. We find that our approval of Amendment Petition II for the Phase II Project will not interfere with the CLCPA's objectives and we conclude that our action is consistent with the CLCPA's mandate. We also find that the record reflects that the Project is not located in a disadvantaged community and therefore will not have a disproportionately adverse impact on such a community.

XIII. CONCLUSION

Based on the record before us, the arguments of the parties, all applicable laws and policies, and as discussed above, we grant Amendment Petition II and the Transfer Petition subject to the terms and conditions in this Order, associated documents attached to this Order, additional and/or revised Certificate Conditions, and all other Certificate Conditions contained in the 2019 Certificate.

⁵²⁷ L. 2019, ch. 106, §7(2). If an agency concludes that its action is inconsistent with or will interfere with attainment of the CLCPA's greenhouse gas emission reduction limits, it "shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located."

⁵²⁸ Id., §7(3).

The Board on Electric Generation Siting and the Environment orders:

1. This Order constitutes the decision of the Siting Board in this proceeding.

2. The Secretary's determination that Amendment Petition II constitutes a "revision" is adopted and, together with this Order, constitutes the decision of the Board on Electric Generation Siting and the Environment in this proceeding.

3. Baron Winds, LLC and Baron Winds II LLC shall file a compliance item demonstrating that the two companies have entered into a written agreement binding each entity to jointly and severally comply with the 2019 Certificate's terms, conditions, and limitations, and with any order issued thereunder, without regard to the two Project Phases or the separate corporate Certificate Holders.

4. Baron Winds II LLC shall file a compliance item explaining the source of Phase II Project financing that confirms Baron Winds II LLC's financial qualifications as required by the Article 10 regulations. Such demonstration should include evidence of any financing agreement with investors and/or upstream entities that reflects a commitment to finance the Phase II Project's construction and operation and all aspects of Certificate compliance.

5. Upon receipt and acceptance of the compliance items required by ordering clauses 9 and 10, below, Baron Winds, LLC 's requested transfer to Baron Winds II LLC may become effective.

6. Subject to the conditions set forth in this Order and appended to it, Amendment Petition II is granted, pursuant to Article 10 of the Public Service Law, to Baron Winds, LLC and Baron Winds II LLC, for the construction and operation of a wind

generating facility, known as Phase II, having a maximum combined generation capacity with Phase I of 242 megawatts. Phase II located in the Town of Fremont, Steuben County, New York, consists of a maximum of 26 turbines of 650 feet in height, a collection substation, collection lines, access roads, meteorological towers, and associated facility components, pursuant to real property agreements with landowners, which agreements shall not be subject to dispute, and a point of interconnection to the existing 230 kilovolt Canandaigua Switching Station owned and operated by the New York State Electric and Gas Company. Pursuant to 16 NYCRR §1000.15(a), Baron Winds, LLC and Baron Winds II LLC shall file written acceptances of the 2019 Certificate and this Order within 30 days following the date of issuance of this Order.

7. The Certificate of Environmental Compatibility and Public Need, With Conditions, granted to Baron Winds, LLC by Order issued September 12, 2019, is modified to grant the September 6, 2022 Petition for Amendment filed by Baron Winds, LLC and Baron Winds II LLC, consistent with the discussion and requirements contained in this Order and consistent with the Secretary's September 20, 2022 determination.

8. Upon acceptance of the Certificate granted in this Order or at any time thereafter, Baron Winds, LLC and Baron Winds II LLC shall serve copies of its compliance filings in accordance with the requirements set forth in 16 NYCRR §1002.2(c) and applicable Certificate Conditions. Pursuant to 16 NYCRR §1002.2(d), interested persons and parties may file comments on any compliance filing within 21 days after the date of service.

9. Prior to the commencement of construction, Baron Winds, LLC and Baron Winds II LLC shall comply, to the extent required by law, with the requirements of Public Service Law

Section 68 that do not relate to the construction and operation of the Facility approved under Public Service Law Article 10.

10. If Baron Winds, LLC and Baron Winds II LLC decide not to commence construction of the Phase II Project or any portion of the Phase II Project or decides to transfer the Certificate, it shall so notify the Secretary in writing within 30 days of making such decision and shall serve a copy of such notice upon all parties to this proceeding and all persons and entities entitled to service of Amendment Petition, pursuant to 16 NYCRR §1000.16(b), including but not limited to property owners that may be affected by the Phase II Project. If Baron Winds, LLC and Baron Winds II LLC decide to further transfer the 2019 Certificate, as revised in this Order, they shall seek approval for the transfer and comply with the applicable requirements in seeking approval for such transfer.

11. Any provision of the 2019 Certificate not otherwise modified herein or otherwise heretofore modified remains in full force and effect.

12. This proceeding is continued.

By the New York State Board
on Electric Generation Siting
and the Environment,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary