Department of Public Service
Office of Renewable Energy Siting and Electric Transmission

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RESPONSE TO PETITIONS FOR PARTY STATUS, STATEMENT OF ISSUES BY THE APPLICANT, AND THE STATEMENT OF COMPLIANCE WITH LOCAL LAWS AND REGULATIONS

In the Matter of the

APPLICATION FOR A WIND FACILITY PERMIT PURSUANT TO

ARTICLE VIII OF THE PUBLIC SERVICE LAW

of

HOFFMAN FALLS WIND LLC

Towns of Fenner, Nelson, Eaton, and Smithfield, Madison County

Matter No. 23-02976

May 19, 2025

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I. INTRODUCTION

Pursuant to Article VIII of the Public Service Law (PSL) and implementing regulations at 16 NYCRR Part 1100, Hoffman Falls Wind LLC (Hoffman Falls or the Applicant) filed a siting permit application (Application) with the Office of Renewable Energy Siting and Electric Transmission (the Office or ORES).[1] The Applicant has requested a permit for the siting, design, construction, operation, maintenance, and decommissioning of a 100 megawatt (MW) wind facility (Facility or Wind Facility) located in the Towns of Fenner, Nelson, Eaton, and Smithfield, Madison County. If approved, the Facility would produce approximately 100 MW of renewable energy and reduce greenhouse gas emissions by approximately 111,000 metric tons of carbon dioxide.[2]

Following a comprehensive review of the Application in accordance with PSL Article VIII, Office Staff (Staff) issued a Draft Permit for the proposed Facility on February 18, 2025.[3]

Pursuant to the Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues

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[1] Effective April 20, 2024, the Renewable Action through Project Interconnection and Deployment (RAPID) Act (L 2024, ch 58, part O) repealed Executive Law § 94-c, repealed the current Public Service Law Article VIII, and enacted a new Public Service Law Article VIII entitled "Siting of Renewable Energy and Electric Transmission" (see RAPID Act §§ 2, 11). The RAPID Act also retitled the Office as the Office of Renewable Energy Siting and Electric Transmission; transferred the Office from the Department of State to the Department of Public Service; and continued all existing functions, powers, duties, and obligations of the Office under former Executive Law § 94-c. Further, all applications pending before the Office on the effective date of the Act are considered and treated as applications filed pursuant to the RAPID Act as of the date of application filing (see id. § 4). Accordingly, this Brief generally references the current Public Service Law Article VIII rather than former Executive Law § 94-c.

With respect to ORES's regulations at 19 NYCRR part 900 (Part 900), the RAPID Act transferred part 900 to 16 NYCRR chapter XI, and continued Part 900 in full force and effect subject to conforming changes, such as the substitution of numbering, names, titles, citations, and other non-substantive changes to be filed with the Secretary of State (see RAPID Act § 7). The conforming changes were filed with the Secretary of State and became effective July 17, 2024. Accordingly, this Brief generally uses the numbering of the new 16 NYCRR part 1100 rather than the numbering of former Part 900.

[2] Record 49, Exhibit 17: Consistency with Energy Planning Objectives at 12.

[3] Record 121, Draft Permit dated February 18, 2025 (Draft Permit).

Determination Procedure (Combined Notice) issued on February 18, 2025,[4] the Towns of Fenner, Nelson, Smithfield, and Eaton submitted a Combined Petition for Party Status, Issue Statement and Statement of Compliance with Local Laws (Towns' Combined Petition) proposing a total of six issues for adjudication.[5] Madison County submitted a Petition for Party Status and Statement of Issues (County Petition) proposing two issues for adjudication.[6] The Applicant submitted a letter indicating that it had not identified any substantive or significant issues requiring adjudication and that it found the terms of the Draft Permit acceptable.[7]

Based upon a comprehensive review of the record (Record), Staff recommends a finding that no substantive and significant issues have been raised requiring adjudication under 16 NYCRR § 1100-8.3(c), and that the Office continue processing the Application to issue the requested siting permit, including issuance of a written summary and assessment of public comments received during the public comment period in accordance with 16 NYCRR § 1100-8.3(c)(5).

II. PROCEDURAL BACKGROUND

A. ORES Pre-Application Procedures

An important cornerstone of the PSL Article VIII process is pre-application consultation with local agencies and community members who may be adversely impacted by the siting of the proposed Wind Facility. To provide early identification of critical natural and cultural resource issues and avoid, minimize or mitigate potential adverse impacts to such resources to the maximum extent practicable, the Applicant completed pre-application consultation with the Office and involved local and State agencies at the earliest point possible in the Applicant's project planning process in compliance with 16 NYCRR § 1100-1.3(a) - (i).

With respect to local agencies and the community, the Applicant conducted pre-application meetings with the Towns of Fenner, Nelson, Smithfield, and Eaton,

[4] Record 123, Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issues Determination Procedure (Combined Notice).

[5] Record 128, Town of Fenner, Nelson, Smithfield, and Eaton Combined Petition for Party Status, Issue Statement and Statement of Compliance with Local Laws (Towns' Combined Petition).

[6] Record 127, Madison County Petition for Party Status and Statement of Issues (County Petition).

[7] Record 129, Applicant Statement of Issues.

and has engaged in ongoing consultations with local emergency responders and school districts.[8] The Applicant presented information and provided printed materials at Town Board meetings in September and October of 2023, and in separate meetings during that time with Town Supervisors, Code Enforcement Officers, Town Attorneys and other representatives.[9] A meeting for community members was held on October 19, 2023, at Nichols Pond County Park in Canastota, NY to inform the public about the proposed Facility, the application process and timeline, environmental studies completed and in progress, information on sound and shadow flicker considerations, preliminary visual simulations, potential community benefits, and host community benefit and payment in lieu of tax (PILOT) payments. [10]

On November 7, 2023, the Applicant published a notice of intent to file an application in accordance with the requirements of 16 NYCRR § 1100-1.3(d).[11] This notice provided a project summary and served to inform local agencies and potential intervenors of the future availability of funding.

Consultation with other State agencies was also completed during the pre-application process. This consultation included: the New York State Department of Environmental Conservation (NYSDEC) on impacts to wetlands, waterbodies, and threatened and endangered species; the Adirondack Park Agency (APA) regarding visual impact, wetlands and wildlife; and the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) and the State Historic Preservation Office (SHPO) regarding potential historic, archaeological, and cultural resources.

B. ORES Wind Facility Permit Application

The Applicant submitted its Application to the Office on February 15, 2024.[12] Upon receipt of the Application, submissions and materials were reviewed by a team

[8] Record 76, Exhibit 2 (Revision 1): Overview and Public Involvement at 16; see also additional information at Record 38, Appendix 2-A: Consultation Log; Exhibit 6.

[9] Id.; see also Record 38, Appendix 2-A: Consultation Log at 6-8.

[10] Record 76, Exhibit 2 (Revision 1): Overview and Public Involvement at 17; see also additional information at Record 38, Appendix 2-A: Consultation Log.

[11] Record 14, 60-Day Notice.

[12] Records 23 – 54.

of subject matter experts from the Office and as applicable, NYSDEC, the New York State Department of Public Service (NYSDPS), OPRHP/SHPO, the New York State Department of Agriculture and Markets (NYSAGM), APA and other involved State Agencies. A Notice of Incomplete Application (NOIA) was issued within 60 days as required by 16 NYCRR §§ 1100-4.1(c) and (e) on April 15, 2024.[13]

After having received its first NOIA on April 15, 2024, the Applicant supplemented its Application on June 6, 2024.[14] The Office issued a second NOIA on August 5, 2024,[15] and the Applicant supplemented and amended the Application on September 16, 2024, September 27, 2024, October 18, 2024, October 30, 2024, and November 26, 2024.[16] On December 20, 2024, the Office found the Application complete and in compliance with PSL § 142(1) and 16 NYCRR §§ 1100-4.1(c) and (g).[17]

C. Issuance of Draft Permit and Combined Notice

Pursuant to PSL § 142(2), the Office shall publish draft permit conditions no later than 60 days after determination of a complete Application, followed by a minimum 60-day public comment period. On February 18, 2025, the Office issued a Draft Permit for a Major Renewable Energy Facility (Draft Permit). The Draft Permit was posted for public comment on the Office's official public website at https://dps.ny.gov/ores-permit-applications, under DMM Matter Number 23-02976.

In issuing the Draft Permit, Staff considered the Record described herein and found that the proposed Wind Facility, together with applicable provisions of the Uniform Standards and Conditions (USCs) (subpart 4 of Draft Permit), necessary Site Specific Conditions (SSCs) (subpart 5 of Draft Permit), and applicable pre-construction and post-construction compliance filings (subpart 6 of Draft Permit), would comply with PSL Article VIII and applicable provisions of the Office's regulations at 16 NYCRR Part 1100 and avoid, minimize or mitigate, to the maximum extent practicable, potential significant adverse environmental impacts of the proposed Facility.

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[13] Record 72, Notice of Incomplete Application.

[14] Record 75-84.

[15] Record 85, Second Notice of Incomplete Application.

[16] Record 90-117.

[17] Record 118, Notice of Complete Application.

Also on February 18, 2025, the assigned Administrative Law Judges (ALJs) issued the Combined Notice.[18] The Combined Notice established April 28, 2025, as the date for submission of all petitions for party status, the local municipal Statements of Compliance with Local Laws and Regulations, and the Applicant's Statement of Issues.[19] The Combined Notice also established a public comment hearing on the Draft Permit to be held at Madison Hall, 100 East Main Street, Morrisville, NY 13408 on April 23, 2025 at 6:00 p.m. with a public comment period extending through April 25, 2025, for the submission of written comments on the Draft Permit.[20] Additionally, the Combined Notice gave notice of the commencement of the issues determination procedure.[21]

D. Public Hearing and Comment Period

On April 23, 2025, the Office held an in-person public comment hearing at Madison Hall, 100 East Main Street, Route 20, Morrisville, NY 13408. Assigned ALJs Dawn MacKillop-Soller and Christopher McEneney Chan presided over the public comment hearing. The hearing took place between approximately 6:00 p.m., and 7:00 p.m. during which 27 people provided verbal comments.[22]

Twenty-two (22) speakers made comments in opposition to the Facility. Specifically, these speakers provided comments on: (1) loss of agricultural land; (2) the facility's non-compliance with the Comprehensive Plan and local zoning; (3) potential socioeconomic impacts, including impacts to property values; (4) effects on wildlife; (5) decommissioning; (7) existing wind turbines and the community's contribution already towards State renewable energy targets; (8) visual impacts; (9) Home Rule; (10) increased electricity rates; (11) possible microwave and other interference; (12) health concerns; (13) potential impacts to the local Amish community; (14) threatened and endangered species; (15) noise; (16) public involvement and redactions; (17) risk of blade failure, fire, or other malfunction; (18)

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[18] Record 123, Combined Notice of Availability of Draft Permit Conditions, Public Comment Period and Public Comment Hearing, and Commencement of Issue Determination Procedure (Combined Notice); See 16 NYCRR § 1100-8.2.

[19] Record 123 at 3 – 4; see also 16 NYCRR §§ 1100-8.2(d)(3), 1100-8.4(b), 1100-8.4(d).

[20] Record 123, Combined Notice at 2; see also 16 NYCRR §§ 1100-8.29(d)(1), 1100-8.3(a).

[21] Record 123, Combined Notice at 2 – 3; see also 16 NYCRR § 1100-8.3(b).

[22] Record 131, Public Comment Hearing Transcript.

potential groundwater or well contamination; (19) legal or policy concerns regarding the validity of the permitting process; (20) intermittency and consistency with grid planning objectives; (21) alternative siting locations; and (22) cumulative impacts.[23]

Five (5) speakers made comments in support of the Facility. Specifically, these speakers provided comments on: (1) the Facility mitigating effects from climate change; (2) the socioeconomic benefits of the Facility and the creation of jobs; (3) increasing demand for energy; (4) Applicant's social responsibility and community outreach; and (5) benefits to future generations.[24]

As of the close of the written public comment period, the Office had received one hundred and twenty-seven (127) written public comments via the DMM Public Comment Tab, the Office's general mailbox, the ORES contact webpage, and/or via U.S. mail or other delivery service.

Ninety-six (96) of these comments were in opposition to the Facility, providing comments on: (1) the height of the turbines; (2) the lack of public approval; (3) multiple energy generating facilities located within the County; (4) the potential for an effect on communications, including cellular service and emergency services; (5) turbine setbacks; (6) potential visual impacts, including shadow flicker; (7) lack of socioeconomic benefits; (8) effects on local wildlife; (9) public health and safety, including fires, battery energy storage system, and potential health effects; (10) use of productive farmland; (11) potential reduction in property values; (12) existing wind turbines within the Town; (13) the Town's local laws and ordinances; (14) home rule; (15) redactions in the Application materials; (16) impacts from construction; (17) effects on roadways and transportation; (18) lightning strikes; (19) lack of public involvement; (20) the Facilities being owned by a foreign company; (21) potential impacts from construction ; (22) concerns related to concrete needed for construction; (23) concerns over good neighbor agreements; (24) potential impacts to surface water and groundwater; (25) potential impacts to agricultural community character; (26) concerns regarding PILOT agreements; (27) noise concerns; (28) potential impacts to livestock and pets; (29) concerns related to the decommissioning of the facility; (30) setbacks to turbines; (31) energy generated from the facility getting transmitted to other parts of the State; (32) potential for blasting; (33) objections to applicants requests for nondisclosure; (34) opposition to the RAPID Act; (35) the Facilities

[23] See Record 131, Public Statement Hearing Transcript.

[24] See Record 131, Public Statement Hearing Transcript.

distance from residential homes; (36) the developers use of eminent domain; (37) potential impacts to air traffic; (38) loss of forestland; (39) the lack of a fire department in Town of Fenner and Nelson; (40) previous turbine fires; and (41) the lack of consideration for cultural resources.

Twelve (12) of these comments were neutral, addressing: (1) existing renewable energy facilities located within the county of Madison; (2) questions regarding setbacks to future construction; (4) the Madison County Planning Board presentation; (4) scenic viewsheds; (5) questions regarding effect on communications; (6) questions regarding impacts from natural disasters, including tornadoes; (7) questions based on potential microwave interference; (8) questions regarding redactions of Application materials; (10) questions related to turbine operation during bird migration season; (11) questions regarding the decommissioning and site restoration plan; and (12) questions about alternative siting locations.

Eighteen (18) of these comments were in support of the project, providing comments on: (1) socioeconomic benefits of the facility; (2) reduction of reliance on fossil fuels; (3) the facilities reduction in climate change impacts; (4) the financial support provided to hosting landowners and farmers; (5) the socioeconomic benefits of the Facility; (6) combatting the effects of climate change; (7) support for the State's green energy initiative; (8) necessity to accelerate wind and solar energy production; (9) the facilities contribution to the CLCPA goals and targets; (10) reduction of air pollution; (11) financial support for nearby schools; (12) creation of jobs; (13) the facilities contribution to increasing the State and Countries energy independence; (14) the facilities lack of emissions; (15) the endless supply of renewable energy; (16) bill credits for residential electric utility customers; (17) the ability for farmers to easily farm around turbines; and (18) the ability for project participants to continue to keep and operate their farms.

E. Applicant's Statement of Issues; Petition for Full Party Status or Amicus Status; and Municipal Statement of Compliance with Local Laws and Regulations

The Combined Notice set April 28, 2025, as the date for submission of all petitions for full party status and amicus status, the local municipal Statements of Compliance with Local Laws and Regulations, and the Applicant's Statement of

Issues, in compliance with 16 NYCRR §§ 1100-8.2(d)(3), 1100-8.4(d) and 1100-8.4(b), respectively.[25]

1. Applicant's Statement of Issues

On April 28, 2025, the Applicant timely filed a letter in lieu of a Statement of Issues stating that it "has not identified any substantive or significant issue requiring litigation in this proceeding" and it "finds the terms of the Draft Permit acceptable."[26]

2. Petitions for Full Party Status and Municipal Statements of Compliance

The Towns' Combined Petition for full party status was timely filed on April 28, 2025.[27] The Towns claim that "because the Applicant has failed to demonstrate that the local laws for which waivers sought are unreasonably burdensome, an adjudicatory hearing is required" with regard to "noncompliance and waiver" of certain provisions of each Town's local laws.[28] The Towns also claim that "the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that the impacts of the Facility on the community character have been avoided, mitigated, or minimized."[29] Finally, the Towns claim that visual impacts to the Route 20 Scenic Byway were not sufficiently analyzed.[30] In the alternative, the Towns request amicus status pursuant to 16 NYCRR §§ 1100-8.4(c), (f)(2), and (g)(2) "for the right to file a brief and to have the opportunity to present oral argument on the issues identified in the ALJ's ruling on its [sic] party status."[31] In their Statement of Compliance with Local Laws and Regulations, the Towns claim that the Facility does not comply with each of the local law provisions that the Applicant requested relief from, which are identical to those raised by the Towns as issues for adjudication.[32]

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[25] Record 123, Combined Notice.

[26] Record 129, Applicant's Issues Statement.

[27] Record 128, Towns' Combined Petition.

[28] Record 128, Towns' Combined Petition at 29. The filed Towns' Combined Petition does not have any page numbers, but citations are made as though the pages were consecutively numbered.

[29] Record 128, Towns' Combined Petition at 62.

[30] Record 128, Towns' Combined Petition at 62-4.

[31] Record 128, Towns' Combined Petition at 22.

[32] Record 128, Towns' Combined Petition at 2-13.

The County Petition was timely filed on April 28, 2025.[33] The County seeks full party status and raises two issues for adjudication: (1) whether the Facility will impact emergency communications in violation of the Federal Communications Act; and (2) whether the decommissioning plan for the Facility, which provides that turbine foundations will be removed to a depth of at least four feet below grade, violates State and local law regarding solid waste disposal.[34] The County also claims it "is a mandatory party relative to the adjudicatory hearing process and should be granted full party status," citing 16 NYCRR § 100-8.4(b).[35]

The County also provided a Statement of Compliance with Local Laws and Regulations where it reiterates non-compliance with its solid waste law and alleges that a permit from the County Highway Superintendent is required under Highway Law § 136 for construction and utility work impacting County roads, but acknowledges this latter issue is addressed in the Draft Permit.[36] In addition to its Petition, the County filed a written public comment in which it identifies concerns regarding microwave interference, decommissioning, impacts to County roads, contingency planning, and the potential for additional renewable energy development in the County.[37]

III. FINDINGS AND DETERMINATIONS OF FACT

A. Avoidance, Minimization and Mitigation Standard

PSL Article VIII and the Office's regulations at 16 NYCRR Part 1100 establish a clear standard to apply in evaluating the potential significant adverse impacts that may result from the construction and operation of the proposed Hoffman Falls Wind Facility. This standard follows the hierarchy of avoiding, minimizing, and mitigating potential impacts to the maximum extent practicable, thus balancing the need to efficiently advance the major renewable energy facilities that are critical to meeting renewable energy requirements of the Climate Leadership and Community

[33] Record 127, County Petition.

[34] Record 127, County Petition at 5-8.

[35] Record 127, County Petition at 2.

[36] Record 127, County Petition at 8.

[37] Public Comment No.130.

Protection Act (CLCPA)[38] and the Renewable Action through Project Interconnection and Deployment (RAPID) Act[39] with the need to ensure the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit (or not permit) such facilities, as required by PSL § 136.

The rigorous pre-application studies and required application exhibits, together with the permit's USCs and SSCs, form the basis of review for balancing resources, CLCPA targets, and the environmental and community benefits of the Facility. Applicants must show that potential significant adverse impacts would be avoided or minimized to the maximum extent practicable and offer mitigation measures to offset the unavoidable impacts of the Facility to the maximum extent practicable.[40]

B. Applicant's Avoidance, Minimization and Mitigation Measures

The Applicant engaged in a comprehensive pre-application consultation process. Collectively, the information derived from the early consultation with the Towns, community, the Office, and involved State agencies, as well as the delineations, consultations, and studies completed during the pre-application phase, led to the avoidance and minimization of potential impacts to resources during Facility siting. The siting and layout of the Facility was further modified through the Application phase where resources were balanced, and minimization and mitigation measures applied to reduce potential significant adverse environmental impacts to the maximum extent practicable.

The Applicant has designed its proposed Wind Facility through a comprehensive and iterative site planning process to avoid, minimize or mitigate potential significant adverse impacts to wetlands, streams, agricultural resources, cultural resources, and other environmental and ecological resources, reflecting a

[38] Chapter 106 of the Laws of 2019.

[39] L 2024, ch 58, part O.

[40] ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Final Decision of the Executive Director, Jan 13, 2022 at 31-33.

successful balancing of competing interests consistent with the overall intent of PSL Article VIII.[41]

C. Facility Environmental Benefits and Contribution to CLCPA Targets

New York State enacted the CLCPA to reduce harmful emissions and combat climate change. The CLCPA, among other things, requires that a minimum of 70% of statewide electric generation be produced by renewable energy systems by 2030, and that by the year 2040 the statewide electrical demand system will generate zero emissions.[42]

As a matter of law, New York State has found and determined that "[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York"[43] and that the adverse impacts of climate change include extreme weather events, rising sea and lake levels, decreased freshwater and saltwater fish populations, increases in air temperatures with attendant increases in power demand, exacerbation of air pollution, increases in infectious diseases, asthma, heart attacks and other negative health outcomes.[44] As the Legislature further declared, the adverse impacts of climate change include "a detrimental effect on some of New York's largest industries, including agriculture, commercial shipping, forestry, tourism, and recreational and commercial fishing."[45] Decarbonizing New York's electrical sector is a key component of the CLCPA's effort to combat climate change and prevent or ameliorate these harms, and the development of large-scale renewable energy generation facilities in compliance with PSL Article VIII will play a critical role in meeting the State's renewable energy goals.

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[41] See e.g., High River Energy Center, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued March 11, 2021), at 110; Flint Mine Solar, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued August 4, 2021), at 65.

[42] CLCPA, Chapter 106 of the Laws of 2019, Section 1, subd. 12(d) and Section 4, creating a new section 66-p of the Public Service Law at § 66-p(2).

[43] Id. at Section 1, subd. 1.

[44] Id.

[45] Id.

Staff considered the proposed Facility's contribution of up to 100 MW of renewable energy generation toward New York State's CLCPA targets, and the environmental benefits of the proposed Facility, which include, but are not limited to, the Facility's ability to offset approximately 111,000 metric tons of carbon dioxide and associated greenhouse gas emissions per year.[46]

D. Community Benefits of the Facility

PSL § 142(6) and 16 NYCRR § 1100-6.1(f) require the Applicant to provide a host community benefit as defined by the Public Service Commission, as determined by the Office, or other benefits agreed to by the Applicant and host community, such as Payments in Lieu of Taxes (PILOTs).

The proposed Facility will provide host community benefits to the following taxing jurisdictions: Madison County, the Towns of Fenner, Eaton, Nelson, and Smithfield, the Morrisville-Eaton Central School District, the Cazenovia Central School District, and the Cazenovia Fire District, the Smithfield Fire District, and the Morrisville Fire District.[47] The host community benefits include but are not limited to the creation of an estimated 66 onsite construction jobs for New York residents with an estimated $4.7 million in annual earnings; $0.2 million of which is the estimated annual earnings of the 5 onsite construction jobs for Madison County residents; a PILOT agreement; local and regional spending; host community agreements, and direct property tax payments.[48] The proposed Facility will provide these positive socioeconomic impacts to the host communities while not significantly increasing costs to local authorities, school districts, or emergency services.[49]

IV. FINDINGS AND DETERMINATIONS OF LOCAL LAWS

A. Required Findings Regarding Local Laws for ORES Permit Applications

PSL Article VIII consolidates the permitting of major renewable energy facilities into a single state entity – ORES. Pursuant to PSL § 144(2), local procedural

[46] Record 49, Exhibit 17: Consistency with Energy Planning Objectives at 12.

[47] Record 75, Exhibit 18 (Revision 1): Socioeconomic Effects (Redacted) at 13.

[48] Id. at 9-13.

[49] Id. at 15.

requirements for their "development, design, construction, operation, or decommissioning" are preempted unless expressly authorized under the PSL or ORES regulations. Further, PSL § 142(5) provides that a final Siting Permit may only be issued if the Office makes a finding that the proposed Facility, together with any applicable USCs, SSCs, and compliance filings set forth in the Permit, would comply with applicable laws and regulations. In making this determination, the Office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed Facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed Facility.[50]

Pursuant to 16 NYCRR § 1100-2.25(a) and (b), the Applicant is required to identify in the Application all local requirements applicable to the Facility of a substantive nature, and provide a statement that the Facility "conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply."[51] For each waiver request, the Applicant must provide a statement of justification, supported by facts and analysis, that shows: (1) the degree of burden caused by the requirement, (2) why the burden should not reasonably be borne by the Applicant, (3) that the request cannot reasonably be obviated by design changes to the facility, (4) that the request is the minimum necessary, and (5) that the adverse impacts of granting the request shall be mitigated to the maximum extent practicable.[54]

B. ORES Staff's Finding Regarding Local Laws for Hoffman Falls Facility

In compliance with 16 NYCRR §§ 1100-2.25(a) and (d), the Applicant identified applicable substantive provisions of the local laws for the Towns of Fenner, Eaton, Nelson, and Smithfield, and demonstrated that it complies with all except for those from which it has sought relief.[52] In the Draft Permit, Staff recommended a finding that except for the provisions from which the Applicant requested relief, as proposed and permitted, the Facility shall comply with the applicable substantive provisions

[50] PSL § 142(5); see also 16 NYCRR § 1100-6.3(a).

[51] 16 NYCRR §§ 1100-2.25(a), (b) and (c).

[52] Record 76, Exhibit 24 (Revision 1): Local Laws and Ordinances.

of all four Towns' laws identified in Exhibit 24.[53] Pursuant to 16 NYCRR § 1100-6.3(a) and subpart 4.3(a) of the Draft Permit, the Applicant must construct and operate the Facility in accordance with such laws, except those determined to be unreasonably burdensome.[54]

C. ORES Staff's Finding that Hoffman Falls has Met its Burden to Justify Relief from Certain Local Laws

1. Town of Fenner Land Use Regulations

The Town of Fenner Land Use Regulations (Land Use Regulations) divide the Town into three zoning districts (Districts A, B and C).[55] A majority of the portion of the Facility within the Town of Fenner (12 turbines) is located in the A and B Districts, with 2.3 acres of the Facility site in District C.[56]

District A allows single-family dwellings, two-family dwellings, and farms as principle uses.[57] Various specific accessory and special permit uses are also permitted, but the Land Use Regulations otherwise provide that all other uses are prohibited in District A.[58] District B allows the same principal uses as District A along with mobile dwellings.[59] Various specific accessory and special permit uses are also permitted in District B, but the Land Use Regulations otherwise provide that all other uses are prohibited.[60]

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[53] Record 121, Draft Permit at subpart 4.3(b).

[54] Id. at p. 21.

[55] Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at 1, 5-6, 27-29.

[56] Record 76, Figure 3-6: Zoning Districts (Revision 1); Record 117, Appendix 24-E (Revision 2): Statement of Justification at 25.

[57] Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF p. 27.

[58] Id. at PDF p. 27-28.

[59] Id. at PDF p. 28.

[60] Id. at PDF p. 29.

The Land Use Regulations were amended in 2000 to establish District C for the purpose of fostering the development of the Town's wind-power resource.[61] District C allows all principal uses permitted in District B, along with specific accessory and special permit uses, with the latter including "wind power electricity generation and transmission facilities."[62] The existing Fenner Wind Farm is located in District C.[63] The Applicant requested relief from the use prohibitions in order to site the Facility in District A and District B, and seeks to apply existing District C standards for wind energy electricity generation and transmission facilities as if the Facility were fully located in District C.[64]

The Applicant also requested waivers from five other local law provisions in the Town of Fenner: (1) turbine setback distances from surrounding non-participating property lines; (2) a six-foot fence height limit as applied to the interconnection facilities and ADLS structure fencing; (3) a 35-foot structure height limit as applied to the point of interconnection (POI) switchyard and collection substation; (4) a 35-foot structure height limit and 200-foot lot frontage requirement as applied to the ADLS structure; and (5) a 50 dbA noise limit during turbine operation as measured at the closest parcel boundaries.[65] The Applicant also requested relief from five provisions of the Town of Fenner Subdivision Regulations related to a proposed subdivision for the interconnection facilities.[66]

In the Draft Permit, Staff recommended approval of relief from the use prohibition against "wind power electricity generation and transmission facilities" in Districts A and B.[67] Staff agreed that the Applicant met its burden to demonstrate that the prohibition, which would prevent the Facility from being constructed, is

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[61] See Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF p. 5. District C was further revised in 2001 and 2005. Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF 9-13. According to the Applicant, it requested that the Town of Fenner expand District C to include parcels that would host the Hoffman Falls Wind project, but it has not done so. Record 117, Appendix 24-E (Revision 2): Statement of Justification at 24

[62] Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF 5.

[63] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 24.

[64] Id. at 23.

[65] Id. at 6-12; 23-41; 47-50; 64- 65.

[66] Id. at 38-42.

[67] Record 121, Draft Permit at 5.

unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the Facility.[68] Relief is limited to the locations of the Facility as shown on Final Plans, Profiles and Design Drawings.[69] Staff also recommended a condition that the Facility comply with the existing substantive requirements applicable to "wind power electricity generation and transmission facilities" contained in the Land Use Regulations, except those deemed unreasonably burdensome pursuant to a waiver request.[70]

Staff also recommended approval of limited relief from the Town of Fenner's 1.5x setback to non-participating parcels for turbines 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11, subject to compliance with the Office's setbacks for property lines set forth in 16 NYCRR § 1100-2.6(d), Table 1.[71] Specifically, the Applicant requested relief in order to be able to locate turbines in compliance with the Office's 1.1x turbine height setback and account for final turbine selections and micro siting of the final location.[72] Staff agreed that the Applicant met its burden to justify relief, which is necessary to locate turbines so as to "take advantage of the available wind resource and the best most efficient turbine on the market for the conditions at the Facility site."[73] Relief is also subject to Office review and approval of final plans showing final turbine locations, which will be reviewed in accordance with 16 NYCRR § 1100-11.1 governing modification requests.[74]

Staff also recommended approval of relief from the six-foot fence height limit because the Facility must be constructed in compliance with the National Electric Code, which requires seven-foot fencing, as does 16 NYCRR § 1100-6.4(i).[75]

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[68] See Record 117: Appendix 24-E (Revision 2): Statement of Justification at 38-42.

[69] Record 121, Draft Permit at 5.

[70] Id.

[71] Id. at 5-6.

[72] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 7.

[73] Id. at 8.

[74] Record 121, Draft Permit at 6.

[75] Record 121, Draft Permit at 6; see also Record 117: Appendix 24-E (Revision 2): Statement of Justification at 65-66.

Staff recommended denial of relief from the 35-foot maximum structure height requirement as applied to the POI and collection substations and the ADLS structure, and from lot frontage requirements as applied to the ADLS structure because relief was not necessary because the Facility and its components (a "wind power electricity generation and transmission facility") are not a "business, professional, or industrial" use or a "Multi-family" use or a "Mobile dwelling park" to which those requirements apply.[76]

Staff further recommended approval of relief from the Town of Fenner's noise standard for wind facilities, which provides that noise levels shall not exceed 50 dBA measured at the boundaries of surrounding parcels.[77] This provision sets a do not exceed limit rather than a metric for averaging; monitoring and measuring sound at parcel boundaries makes compliance difficult and costly. Therefore, Staff agreed that as applied to the Facility, this provision is unreasonably burdensome in light of the CLCPA targets and environmental benefits of the Facility.[78] Relief is conditioned on compliance with the Office's noise limits for wind facilities at 16 NYCRR § 1100-6.5(a) and required by subpart 4.5(a) of the Draft Permit.[79]

Finally, Staff recommended denial of the Applicant's request for relief from certain provisions of the Town of Fenner Land Use Regulations governing subdivided lots on the grounds that PSL § 144(2) does not preempt local subdivision requirements and the Office is not empowered to provide such approvals.[80] The Applicant must obtain such approvals from the Town in accordance with 16 NYCRR § 1100-6.1(d) and subpart 4.1(d) of the Draft Permit.

2. Town of Nelson Land Use and Development Law

The Town of Nelson's Land Use and Development Law (Land Use and Development Law) classifies the Facility as a Commercial Wind Energy Facility

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[76] See Land Use Schedule Minimum Dimensions Table, Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF p. 3.

[77] Record 121, Draft Permit at 7.

[78] Record 121, Draft Permit at 7; see Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 48-50.

[79] Record 121, Draft Permit at 53-59.

[80] Id. at 7-8.

which is a special permit use in the Rural zoning district where the one turbine proposed in the Town of Nelson is located.[81] The turbine is also located in the Town of Nelson's Scenic Vista/Scenic Highway Overlay District.[82]

The Applicant requested relief from four provisions of the Nelson Land Use and Development Law: (1) Scenic Vista/Scenic Highway Overlay District and scenic viewshed provisions; (2) a turbine setback distance from surrounding non-participating property lines; (3) a 50 dBA noise limit during turbine operation as measured at the closest parcel boundaries; and (4) a minimum road frontage requirement of 450-feet.[83]

In the Draft Permit, Staff recommended approval of relief from the Nelson setback and noise limit on the same basis as identical provisions in the Fenner Land Use Regulations, requiring the one turbine located in Nelson to comply with the Office's setbacks and noise limits. Staff also recommended approval of relief from the requirement that a parcel participating in a Commercial Wind Energy Facility have 450-feet of road frontage. The parcel at issue has only 50-feet of road frontage remaining after partial abandonment of the adjacent road, but the Record shows there will be sufficient access to the turbine for construction, operation and emergency first responders.[84]

Regarding the request for relief from the Scenic Vista/ Scenic Highway Overlay District and scenic viewshed provisions, Staff took the position that no relief from the Scenic Vista/Scenic Highway Overlay District provisions is necessary because they are preempted pursuant to PSL § 144(2). Land Use and Development Law § 404.2 is a statement of the legislative intent behind the establishment of the Scenic Vista/Scenic Highway Overlay District and contains no substantive provisions, and § 404.4(a) sets out procedural requirements for special use permit applications before

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[81] See Record 76, Figure 3-6: Zoning Districts (Revision 1); Record 54, Appendix 24-C: Town of Nelson Local Laws and Ordinances at PDF p. 27.

[82] See Record 76, Figure 3-6: Zoning Districts (Revision 1); Record 53, Town of Nelson Local Laws and Ordinances at PDF 31; Record 117: Appendix 24-E (Revision 2): Statement of Justification at 42.

[83] Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 12-13; 27-30; 41-50;

[84] Record 121, Draft Permit at 10; see Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 28-31.

the Town.[85] The last "scenic viewshed" provision, Land Use and Development Law § 512.2(D), applies to Commercial Wind Energy Facilities and provides: "No individual tower facility shall be installed in any location that would substantially detract from or block view of a portion of a recognized scenic viewshed, as viewed from any public road right-of-way or publicly owned land within the Town of Nelson, or that extends beyond the border of the Town of Nelson."[86] Based on the information in the Record that demonstrates that impacts to visual resources have been avoided, minimized, and mitigated to the greatest extent practical, Staff recommended denial of the waiver on the grounds that the Facility complies with this requirement.[87]

3. Town of Smithfield Building and Control Law and Code of the Town of Eaton

The Towns of Smithfield and Eaton have nearly identical local laws governing Wind Energy Conversion Systems (WECS).[88] In the Town of Smithfield, which does not have zoning districts, WECS are a permitted use in all areas of the Town except the Hamlet Districts, subject to site plan and special use permit approval.[89] In the Town of Eaton, WECS are a permitted use in all areas of the Town except one residential zoning district, also subject to site plan and special use permit approval.[90]

The Applicant requested relief from six identical local law provisions of the Town of Smithfield Building and Control Law (Building and Control Law) and the Code of the Town of Eaton (Town Code): (1) a construction hours limit of 7 am to 7 pm, Monday through Friday; (2) a minimum setback distance requirement of 2.0

[85] Record 121, Draft Permit at 8-9; see Record 54, Appendix 24-C: Town of Nelson Local Laws and Ordinances at PDF p. 31.

[86] Record 54, Appendix 24-C: Town of Nelson Local Laws and Ordinances at PDF p. 41.

[87] Record 121, Draft Permit at 8-9.

[88] Record 54, Appendix 24-D: Town of Smithfield Local Laws and Ordinances at PDF p. 44-78; Record 54, Appendix 24-A: Town of Eaton Local Laws and Ordinances at PDF p. 539-574.

[89] Record 54, Appendix 24-D: Town of Smithfield Local Laws and Ordinances at PDF p. 50; see also Record 76, Figure 3-6: Zoning Districts (Revision 1). Portions of the Facility located within the Town of Smithfield are located outside of the Peterboro Hamlet and the Hamlet Buffer District; Record 76, Exhibit 24 (Revision 1): Local Laws and Ordinances at 57.

[90] Record 54, Appendix 24-A: Town of Eaton Local Laws and Ordinances at PDF pp. 539-574. The Facility is not proposed to be located in the Residential District No. 2 (RD-2); See Record 76, Figure 3-6: Zoning Districts (Revision 1).

times the total height of the turbine, including blades, from non-participating property lines; (3); a provision providing that a WECS is deemed abandoned by the Town if operation ceases for 12 months; (4) a provision requiring a non-functional or inoperative WECS to be removed from the site and the site restored within 120 days; (5) a requirement that decommissioning security be no less than 150% of the cost of full decommissioning (including salvage value) and (6) a requirement that: "All WECS shall be required to use components and materials made and manufactured in the United States of America."[91] In addition, the Applicant requested relief from the 2.0x turbine height setback from public roads for one turbine (Turbine 18) in the Town of Eaton on the grounds that forcing compliance would result in it being too close to Turbine 17 causing waking effects and non-compliance with other setbacks.[92]

In the Draft Permit, Staff recommended approval of the request for relief from the construction hours limits in both Smithfield and Eaton.[93] The Applicant requested relief because these limits preclude construction on weekends and do not provide for exceptions, which are "necessary especially for wind turbine erection activities."[94] The relief is subject to compliance with the Office's construction hour limits contained in 16 NYCRR § 1100-6.4(a) as required by subpart 4.4(a) of the Draft Permit.[95]

Staff also recommended approval of relief from the 2.0x setback requirement to non-participating property lines.[96] Relief is limited to Turbines 14 and 15 in Smithfield and Turbines 16, 17, 18, 19, 22 and 23 in Eaton, and is based on the same reasoning and justification as the setback requests for other Town setbacks.[97] As with other requests, relief is subject to review and approval of final turbine locations by

[91] Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 13-15; 50-64.

[92] Id. at 18-19.

[93] Record 121, Draft Permit at 11, 13.

[94] Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 51.

[95] Record 121, Draft Permit at 11, 13, 22.

[96] Id. at 11, 13.

[97] Id. at 11, 13-14.

the Office pursuant to 16 NYCRR § 1100-11.1 and compliance with the Office's setbacks.[98]

Staff recommended denial of the provisions in both Towns of Eaton and Smithfield regarding when a facility is deemed abandoned by the Town and removal of non-functional or inoperative WECS.[99] These provisions are procedural requirements and are therefore preempted by PSL § 144(2), which provides that "no . . . municipality or political subdivision or any agency thereof may, except as expressly authorized under this article or the rules and regulations promulgated under this article, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility or a major electric transmission facility with respect to which an application for a siting permit has been filed . . ."

Staff recommended approval of relief from Smithfield's and Eaton's requirements that the amount of decommissioning security be "no less than 150% of the cost of full decommissioning (including salvage value) and restoration" on the grounds that this would impose greater costs over the life of the Facility than compliance with the Office's requirements, which provide for a 15% contingency and allow offset by salvage value amount.[100]

Staff also recommended approval of the Applicant's request for relief from the Smithfield and Eaton "made in America" requirements.[101] The Applicant indicated that it made this request "out of an abundance of caution" even though the provisions do not specify that 100% of the Facility's components and materials must be made in America.[102] The Applicant demonstrated that compliance with this requirement would increase costs, and is technically infeasible since "there are no wind turbines

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[98] Record 121, Draft Permit at 11, 13-14; see also Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 14-21.

[99] Record 121, Draft Permit at 11-12, 14.

[100] Record 121, Draft Permit at 12, 15; see also Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 55-58.

[101] Record 121, Draft Permit at 13, 16.

[102] Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 62.

available in the United States that would be considered 100% Made in America."[103] The Applicant states that it will follow any requirements established by the New York State Energy Research and Development Authority (NYSERDA) related to utilizing materials and equipment manufactured in the United States.[104]

Finally, Staff recommended approval of the Applicant's request for relief from Eaton's public road setback for Turbine 18, limited to this turbine only and subject to compliance with the Office's setback to public roads.[105]

V. ISSUES IDENTIFIED FOR ADJUDICATION

A. Issues Determination Procedure

"The purpose of the issues determination procedure is to determine whether substantive and significant issues of fact related to the findings that the Office must make on an application require adjudication and, if not, to resolve legal issues related to those findings."[106] If "a party has raised a triable issue of fact requiring adjudication, the ALJ will define the issue as precisely as possible, set the matter down for an evidentiary hearing, and determine which parties are granted party status for the hearing."[107] If "no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are reviewed."[108] Evidentiary hearings (i.e. adjudicatory hearings) are not required or held on purely legal issues.

1. Standards of Review

The decision on whether an adjudicatory hearing is required is made by the presiding ALJs during the issues determination procedure in compliance with 16 NYCRR § 1100-8.3(b). An issue is adjudicable if: (1) it relates to a substantive and

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[103] Record 117: Appendix 24-E: Statement of Justification (Revision 2) at 62.

[104] Id. at 65.

[105] Record 121, Draft Permit at 14.

[106] ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 22.

[107] Id. at 23.

[108] Id.

significant dispute between the Office and the Applicant concerning a proposed term or condition of the Draft Permit (including USCs); (2) public comment (including comments by a municipality) on a Draft Permit condition raises substantive and significant issues; (3) it is related to a matter cited by the Office as a basis for denial and is contested by the Applicant; or (4) it is proposed by a potential party and is both substantive and significant.[109] Hearing participation is authorized pursuant to a petition process set forth in 16 NYCRR § 1100-8.4.

In accordance with the Office's permit hearing regulations, where contested issues are not the result of a dispute between the applicant and the Office but are proposed by third parties, the issue must be both "substantive" and "significant" in order to be adjudicable.[110] An issue is "substantive" if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to a project, such that a reasonable person would require further inquiry.[111] In determining whether such a demonstration has been made, the ALJ shall consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination, and any subsequent written or oral arguments authorized by the ALJ.[112] An issue is "significant" if it has the potential to result in a denial of a permit, a major modification to the proposed facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit (including USCs).[113]

Legal determinations made by ORES Staff as reflected in the Draft Permit are reviewed for an error of law.[114] An error of law occurs when an "agency improperly

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[109] 16 NYCRR § 1100-8.3(c).

[110] 16 NYCRR § 1100-8.3(c)(l)(iv).

[111] 16 NYCRR § 1100-8.3(c)(2).

[112] Id.

[113] 16 NYCRR § 1100-8.3(c)(3).

[114] See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 24 (citing Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6 (citing Matter of Incorporated Vil. Of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979])).

interpret[s] or applie[s] a statute or regulation."[115] Exercises of discretion and policy decisions made by ORES Staff are reviewed for an abuse of discretion.[116] A reviewing body cannot interfere with an exercise of discretion by an administrative agency "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'"[117] Staff's recommendations with regard to the Office's legislatively-authorized discretion to waive, in whole or in part, a local law provision an applicant has demonstrated is "unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility" have been deemed exercises of discretion.[118] "If ORES staff determines, based on its review of the application materials and the justification provided by applicant, that the applicant has supported its request with sufficient facts and analysis, ORES staff has the discretion to recommend not to apply, in whole or part, those substantive local law provisions it concludes are unreasonably burdensome in view of the CLCPA targets and the environment [sic] benefits of the proposed facility."[119]

2. Petitioner's Burden and Offer of Proof

For a potential party to participate in an adjudicatory hearing, it must file a petition in writing that, among other things, contains an offer of proof specifying the witness(es), the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to each issue identified.[120] Likewise, any municipality that proposes to adjudicate any issues related to a facility's compliance with local laws and regulations must also file a petition for party status

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[115] Alexander, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, Civil Practice Law and Rules § 7803.

[116] See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 24 (citing Bear Ridge Solar, Decision at 12; Homer Solar, Decision at 9; Horseshoe Solar, Decision at 10; Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 6 (citing Matter of Peckham v Calogero, 12 NY3d 424, 430-431 [2009]; Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974])).

[117] Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty., 34 N.Y.2d 222, 231 (1974) (quoting Cohen and Karger, Powers of the New York Court of Appeals, pp. 460-461).

[118] See Matter of Homer Solar Energy Center, LLC, Executive Director Decision at 21.

[119] Id. at 23.

[120] 16 NYCRR § 1100-8.4(c)(2)(ii).

meeting these requirements.[121] General criticisms, expressions of concern, speculation, or conclusory statements are insufficient to raise an adjudicable issue.[122]

In situations where the Office has reviewed an application and finds that a component of the applicant's facility, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.[123] In addition, to raise an issue for adjudication, a party must allege facts, supported by an offer of proof meeting the requirements of 16 NYCRR § 1100-8.4(c), that are either contrary to what is in the application materials or draft siting permit, demonstrate an omission in the application or draft siting permit, or show that defective information was used in the application or draft siting permit.[124]

A potential party carries the burden of persuasion through a sufficient offer of proof by a qualified expert.[125] Any assertions made in a potential party's offer of proof must have a factual or scientific foundation, and the qualifications of the experts that a petitioner identifies may also be examined at this stage, including the proposed expert's background and expertise.[126] The Office may rebut opposing offers of proof by citing to the application, Draft Permit and proposed conditions, and Office Staff's analysis.[127]

B. Petitioners Have Failed to Provide the Required Offer of Proof

Petitions for party status must include an offer of proof. Neither the combined petition submitted on behalf of the Towns of Fenner, Nelson, Eaton, and Smithfield (collectively "the Towns"), nor the petition submitted by Madison County ("the

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[121] 16 NYCRR § 1100-8.4(d).

[122] ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021 at 8-9; See also Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006 at 5-10 (NYSDEC).

[123] 16 NYCRR § 1100-8.3(c)(4).

[124] See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Ruling of the Administrative Law Judges on Issues and Party Status (Issues Ruling), May 2, 2024 at 25-26.

[125] 16 NYCRR 1100-8.4(c)(2)(ii).

[126] See ORES Matter No. 21-00749, Matter of Prattsburgh Wind, LLC, Issues Ruling at 26-27; see also ORES Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Record 69 at 5-6.

[127] Id.

County"), (collectively "the Petitioners") provides the requisite offer of proof for any of the alleged substantive and significant factual issues they seek to raise for adjudication.

The Towns raise several individual issues throughout their Petition but only provide the following "offer of proof:"

> The Town's engineering consultants, C&S Companies, will provide evidence and testimony on the issues raised above. Specifically, Bryan Bayer, P.W.S., and/or Emma Aversa, P.E., will provide testimony. Both Mr. Bayer and Ms. Aversa have a great deal of experience in planning environmental and engineering projects for public and private clients, including wind generating energy projects.[128]

Exhibit A to the Towns' Combined Petition includes a set of Application review comments prepared by C&S Companies, which the Towns have stated in their petition is the evidence offered and "demonstrates that which the Towns will rely on if an adjudicatory hearing is granted on the substantive and significant issues identified in this Petition."[129]

The statements provided by the Towns in their Combined Petition fall short of the standard for a sufficient offer of proof. The Towns have provided statements which describe the witnesses and nature of the evidence they expect to present but fail to specify the "grounds upon which the assertion is made with respect [to] each issue identified."[130] Exhibit A to the Towns' Petition is a set of comments that does not contain anything that can be construed as testimony.[131]

The County raises two issues it alleges are adjudicable, but makes no statement as to its offer of proof in its petition.[132] As discussed below, the County only states that "adjudicable issues remain as to whether the siting of the Project turbines

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[128] Record 128, Towns' Combined Petition at 64.

[129] Id. at 2.

[130] 16 NYCRR § 1100-8.4(c)(2)(ii).

[131] Record 128, Exhibit A to Towns' Combined Petition.

[132] Record 127, County Petition.

in the vicinity of the County's Mutton Hill tower could result in a violation of the Federal Communications Act."[133] Exhibits A and B to the County's petition include comments and a preliminary study prepared by C&S Companies and Microwave Networks, Inc, respectively.[134] These do not constitute a sufficient offer of proof. The preliminary study only provides the same information as is already contained in the Record. And while the County states that time constraints have left them in the preliminary stage, the County fails to indicate how further studies – which it admits may only "confirm or deny" its assertion - might be construed as an offer of proof in order to support its claims, especially taking into consideration that the Applicant has fully completed a study with regard to this very matter, refuting the County's assertion.[135]

16 NYCRR Part 100 clearly provides that a petitioner carries the burden of persuasion at this stage of the proceeding through a sufficient offer of proof made by a qualified expert.[136] The general statements provided by the Towns and the County in their petitions and accompanying exhibits, provided without any further explanation or justification to bolster their assertions or support the claims they make, fail to demonstrate a substantive and significant issue for adjudication.

C. Towns' Combined Petition

The Towns raise six "issues requiring further inquiry through the adjudicatory hearing process:" (1) "noncompliance and waiver of the Town of Fenner's Local Laws;" (2) "noncompliance and waiver of the Town of Nelson's Local Laws;" (3) "noncompliance and waiver of the Town of Smithfield's Local Laws;" (4) "noncompliance and waiver of the Town of Eaton's Local Laws;" (5) "the project would effectively change the very character of the Towns as rural and agricultural municipalities;" and (6) "the visual impacts to the Route 20 Scenic Byway were not sufficiently analyzed."[137]

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[133] Record 127, County Petition at 6

[134] Record 127, County Petition, at 5-6; Record 127, Petition for Party Status Exhibit – A; Record 127, Petition for Party Status Exhibit – B.

[135] Record 127, County Petition,

[136] See 16 NYCRR § 1100-8.3(c)(4).

[137] Record 128, Towns' Combined Petition at 30-64.

Regarding their local law claims, the Towns repeatedly "assert," for each local law provision addressed in the Draft Permit, that "the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that certain local laws are unreasonably burdensome pursuant to Section 142(5) of the New York State Public Service Law, 16 NYCRR § 1100-2.25(c), and such relevant provisions of 16 NYCRR Part 1100." However, as discussed above, once the Office has issued a Draft Permit with Staff's recommendations to approve waiver requests, the burden shifts to any petitioner seeking to raise a substantive and significant issue with regard to those waivers. The Towns bear the burden of proof on these claims and, having failed to make an adequate offer of proof, the Towns' claims fail. Moreover, as explained above, Staff did not recommend approval of every one of the Applicant's waiver requests but denied some waiver requests based on the inapplicability or preemption of the local law provision or because the Office is not empowered to approve it. The Towns do not make any arguments regarding those specific legal positions, and therefore fail to make any demonstration that these recommendations were in error. Also, as demonstrated below, the information in the Record shows that any potential impacts to community character, including visual and agricultural resources, have been avoided, minimized, or mitigated to the greatest extent practicable.

The Towns also include, not as an issue for adjudication, but as "precise grounds for opposition or support" a general statement that the Towns oppose the Facility in its entirety and take issue with the ORES permitting process due to several Presidential executive orders that have been issued since the beginning of 2025.[138] The Towns point to two executive orders issued by the President of the United States on January 20 and April 8, 2025, as well as federal permitting policies described below as bases for their opposition to Staff's issuance of a final Siting Permit.[139] The first: "Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects," signed on January 20, 2025 ("Permitting Executive Order"), directs all federal agencies to pause all "new or renewed approvals, rights of way, permits, leases, or loans for onshore or offshore wind projects" until the Secretary of the Interior completes a comprehensive review of the federal leasing and permitting practices. The Towns contend that the Facility will be unable to obtain any necessary federal permits due to the Permitting Executive Order and claims it

[138] Record 128, Towns' Combined Petition at 24; 26.

[139] Id. at 22-27.

would be "potentially fatal to this Application, rendering any decision by ORES to approve the Draft Permit premature and ultimately a nullity."[140]

The Towns' argument regarding the Permitting Executive Order's effect on the Facility's ability to obtain necessary federal permits is both speculative and irrelevant. ORES's permitting process is separate and distinct from those under the federal government's jurisdiction and further, ORES's decision-making process is not contingent on what is happening at the federal level.

The second executive order: "Protecting American Energy from State Overreach," signed on April 8, 2025 ("State Overreach Executive Order"), directs the U.S. Attorney General to identify and stop the enforcement of state laws that address climate change and other environmental issues. The Towns argue that the State Overreach Executive Order deems "approval of the Draft Permit by ORES" improper.[141] As of the date of this brief, the U.S. Attorney General has not taken action regarding the New York state laws governing ORES's permitting process. Furthermore, the Towns have failed to demonstrate how the State Overreach Executive Order interferes with ORES's permitting process.

The Towns fail to meet the minimum requirements to be granted full party status and their proposed issues for adjudication should be rejected. However, in an abundance of caution, Staff addresses each issue below.

1. Town of Fenner Local Laws

The Towns claim that the Applicant failed to meet its burden to demonstrate, using facts and analysis, that certain Town of Fenner local laws are unreasonably burdensome and that an adjudicatory hearing is required for each waiver recommended by Staff.[142] The Towns bear the burden of proof for these claims and have failed to raise any adjudicable issues.

Moreover, Staff recommended waiver on a full or limited basis of only four of the relief requests in the Town of Fenner: (1) the use prohibition, (2) the minimum setback distance from surrounding property lines, (3) the 6-foot minimum fence

[140] Record 128, Towns' Combined Petition at 24.

[141] Id. at 26.

[142] Id. at 29.

height, and (4) the noise limit. For the requests for relief from maximum structure height and lot frontage, Staff recommended denial because these requirements apply only to "business, professional, or industrial" and "Multi-family" uses and "Mobile dwelling parks," and are not applicable to the Facility. And for the five waiver requests related to subdivision requirements, Staff recommended denial of the waivers on the basis that the Office is not expressly authorized or empowered to grant subdivision approval and the Applicant must obtain such approvals from the Town pursuant to 16 NYCRR § 1100-6.1(d). Each of Staff's recommendations with regard to the Town of Fenner local law provisions is addressed below.

a. Use Prohibition

The Towns claim that the Applicant failed to meet its burden to justify waiver of Fenner Land Use Regulations §§ 301.4 and 302.4 which prohibit "Wind Power Electricity Generation and Transmission Facilities" in Districts A and B.[143] As discussed above, the Town of Fenner Land Use Regulations divide the Town of Fenner into zoning districts A, B, and C, with only District C defining an area of the Town "where commercial wind-powered electricity generation and transmission facilities may be developed" and creating "established standards for commercial wind power electricity generation and/or transmission facilities in the Town."[144] "District C corresponds directly with those parcels hosting wind turbines and associated infrastructure for the Fenner Wind Farm developed in the Town in 2001."[145] Therefore, the Facility cannot be located in District C; existing land leases for the Fenner Wind Farm prohibit turbines from another developer and there is insufficient space to minimize wake effects and turbulence, resulting in "higher wake-induced energy losses, increased loading due to turbulence airflow, and a shorter operational lifespan."[146]

While the Applicant states it requested that the Town of Fenner expand District C to include the parcels proposed in this Facility, it declined to do so.[147] Therefore, the Applicant requested a waiver from the use prohibition to allow the

[143] Record 128, Towns' Combined Petition for Party Status and Statement of Compliance at 30

[144] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 23.

[145] Id. at 24.

[146] Id. at 25, 27.

[147] Id. at 24.

Facility to be located outside of District C but comply with applicable substantive provisions applicable to the Facility.[148] The Applicant relied on PSL Article 10 precedent in making this request, arguing that "the local laws which would prevent a project from being constructed would be unreasonably burdensome *per se*, and similar prohibitions and limitations inconsistent with state law and policy have been considered unreasonably burdensome."[149] The Applicant also provided a statement of justification as required by 16 NYCRR § 1100-2.25(c), stating that (1) the Town of Fenner's use prohibition would prevent any portion of the Facility from being built in the Town; (2) it is not technically feasible to place turbines in District C, so the Facility would lose half of its proposed capacity (+/- 50 MW); (3) the "request cannot be obviated by design changes to the Facility, as the use restriction does not allow the Facility to be built in any districts within the Town;" (4) the "request is the minimum necessary as without waiver the Project cannot be constructed or operated in District C;" and (5) the "adverse impacts of granting the request will be mitigated to the maximum extent practicable as the Facility has been designed to avoid, minimize and mitigate environmental and cultural impacts to the maximum extent practicable in accordance with the [Office's regulations]."[150]

Based on this information in the Record, Staff recommended relief from the Town of Fenner's use prohibition to allow for the construction and operation of the Facility limited to the areas as shown on the final design plans and in compliance with applicable District C regulations, except those that are waived.[151] While the Towns claim that the Applicant failed to meet its burden to show that the use prohibition is unreasonably burdensome, they make no offer of proof to show that any of the information provided by the Applicant to support its relief request is incorrect or faulty. The Towns do not dispute that the Facility cannot be located in District C or that the effect of the use prohibition is to prevent construction of any portion of the Facility in the Town of Fenner.

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[148] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 23.

[149] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 24, citing Application of High River Energy Center Case 17-F-0597; Application of Flint Mine Solar, Case 18-F-0087; Application of Hecate Green, Case 17-F-0619;

[150] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 26-28.

[151] Record 121, Draft Permit at subpart 5(a).

Rather, the Towns complain that the Applicant "never submitted a request for rezoning to the Town Board" but instead "chose to bypass the Town Board, ignore its legislative authority, and seek a waiver (and essentially request a use variance) from ORES."[152] The Towns claim that by "refusing to adhere to the precedent that all other landowners and applicant must comply with, the Applicant cannot in fact demonstrate that Fenner's local law is unreasonably burdensome to warrant a waiver."[153]

The Towns are simply incorrect. PSL § 142(5) specifically provides: "In making a final siting permit determination with respect to a major renewable energy facility, ORES may elect not to apply, in whole or in part, any local law or ordinance that would otherwise be applicable if it makes a finding that, as applied to the proposed facility, it is unreasonably burdensome in view of the CLCPA targets, and the environmental benefits." There is no requirement that prior to filing an application with ORES, an applicant must first formally seek or obtain a rezoning or use variance from a Town whose local laws amount to a ban on the proposed facility. The Office's legislatively granted authority to consider and approve direct requests for relief from unreasonably burdensome local laws has been repeatedly upheld.[154] The Towns' claim has no merit.

The Towns further claim that ORES erred in granting this waiver "without adequately accounting for the adverse environmental effects and cultural impacts of the Facility on the land which the Town has opted to keep free from the development of commercial wind-powered electricity generation and transmission facilities." They claim that "[i]gnoring the sound planning practices employed by Fenner places an undue (and unjustified) burden on residents of Districts A and B."[155] The Towns also assert that allowing the Facility to be built in Districts A and B "puts the Town [of

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[152] Record 128, Towns' Combined Petition at 30.

[153] Id.

[154] See, e.g., ORES DMM Matter No. 21-00976, Matter of Homer Solar Energy Center, LLC; Record 64, Decision of the Executive Director, Jan. 9, 2023, at 20; see also Matter of Town of Copake v New York State Office of Renewable Energy Siting, 216 AD3d 93, 191-193 (3d Dept 2023), mot for rearg or lv to appeal pending; Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt., 281 AD2d 89, 95 (3d Dept 2001); Matter of TransGas Energy Sys., LLC v New York State Bd. on Elec. Generation Siting & Envt., 65 AD3d 1247, 1252 (2d Dept 2009), lv denied 13 NY3d 715 (2010).Nor would such a waiver, which is legislatively authorized, constitute "illegal spot zoning." See Record 128, Towns' Combined Petition at 30.

[155] Record 128, Towns' Combined Petition at 31.

Fenner's] residents at risk."[156] Finally, the Towns express concern that overhead components are proposed within residential areas.[157]

The Towns, who bear the burden of persuasion, have failed to make a sufficient offer of proof to support these claims. They have made no showing of a burden on District A and B residents or that the location of turbines or overhead components in those Districts will present a risk. In accordance with regulatory requirements and the findings that the Office must make to issue a Siting Permit for the Facility, the Record demonstrates that the Facility will not result in any significant agricultural or cultural impacts, that human health and safety will be protected, and that overall, any significant adverse environmental impacts of the Facility have been avoided, minimized or mitigated to the greatest extent practicable.[158] Therefore, Staff's recommendation to waive the use prohibition has a rational basis in the Record, and the Towns have failed to demonstrate an adjudicable issue.

b. 1.5x Non-participating Property Line Setback

The Applicant requested relief from setbacks to non-participating property lines for certain turbines in all four Towns.[159] The Towns' setback distances – 1.5x turbine height plus the rotor radius in Fenner and Nelson, and 2.0x the total turbine height (including blades) in Smithfield and Eaton, all exceed the Office's equivalent setback of 1.1x maximum blade tip height, with which the Facility will comply.[160] With the exception of one turbine for which the Applicant seeks waiver from the

[156] Record 128, Towns' Combined Petition at 32.

[157] Id.

[158] See Exhibits 2, 6, 9, and 15; Record 97, Exhibit 6 (Revision 2) at 11-14. (Staff notes that the proposed Safety Response Plan and the proposed Site Security Plan were provided to the Towns of Eaton and Smithfield on September 12, 2023, and the Town of Fenner on September 13, 2023, and that the Applicant followed up via email on November 28, 2023 notifying all Town Supervisors of an upcoming meeting with local emergency responders on that same day, and requesting feedback from the Towns on both plans by December 15, 2023. Record 97, Exhibit 6 (Revision 2) at 14 states that no responses had been received to date.) See also Record 38, Appendix 2-A: Stakeholder Engagement Log at 6 and 9. Record 109, Exhibit 9 (Revision 2, Redacted) at 19-20. Record 98, Exhibit 15 (Revision 1) at 5, 11-24. See also Record 101, Figure 15-7 (Revision 1), Record 47, Appendix 15-B: Agricultural Area Plan.

[159] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 6-23.

[160] See Record 117, Appendix 24-E (Revision 2): Statement of Justification at 6-7.

public road setback in Eaton, the Facility otherwise complies with all other Town setbacks and with all ORES setbacks.[161]

In Fenner, the Applicant requested relief for Turbines 1, 2, 4, 5, 7, 8, 9, 10, and 11. To support its waiver requests, the Applicant provided a detailed explanation of the siting considerations and constraints for each turbine, providing more than a "general assurance" that they have been sited in the least impactful locations as the Towns claim.[162] In each case, the Applicant demonstrates that the turbine has been sited to maximize efficiency while complying with ORES setbacks and minimizing noise, flicker, and other impacts to surrounding properties and to environmental resources.[163] Based on the Record, the Office recommended relief from the minimum setback distance to non-participating property lines limited to the specific turbines, subject to compliance with the Office's setbacks and review of final turbine locations consistent with subpart 5(a) of the Draft Permit.[164]

The Towns claim that "[g]iven the Town of Fenner's experience with turbine failure," this request for relief "unjustly jeopardizes the health, safety and welfare of non-participating landowners…" but provide no further support or any offer of proof for this assertion.[165] As discussed above, the Record shows that human health and safety has been addressed and will be protected, and the Towns fail to demonstrate any adjudicable issue.

The Towns also claim that the Applicant has "failed to acquire all of the necessary lease rights" which is "fatal to the Application" and makes "any determination on the Application by ORES … arguably premature and a waste of ORES (and taxpayer) resources."[166] This claim fails. To be complete, an application may include "a demonstration that the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or

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[161] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 6-7.

[162] Record 117, Figure 24-4: Local Law Wind Turbine Setback Waiver Request Areas; Record 98, Appendix 24-E (Revision 2): Statement of Justification at 6-12.

[163] See Record 117, Appendix 24-E (Revision 2): Statement of Justification at 8-13.

[164] Record 121, Draft Permit at 5-6.

[165] Record 128, Towns' Combined Petition at 34.

[166] Id.

is under binding contract or option to obtain such title or leasehold interest, *or can obtain* such title or leasehold interest."[167] Further, pursuant to subpart 6.1(h) of the Draft Permit and 16 NYCRR § 1100-10.2(h), the Applicant will be required to file " a copy of all necessary titles to or leasehold interests in the facility, including ingress and egress access to public streets, and such deeds, easements, leases, licenses, or other real property rights or privileges as are necessary for all interconnections for the facility" which will be reviewed by the Office prior to the commencement of construction.[168]

Finally, the Towns claim that because "several turbines in both Fenner and Smithfield … are set to be located in close proximity to wetlands" and the Applicant's wetland report does not reflect the current regulatory updates of the NYSDEC, the Applicant must "complete a more thorough review, with additional field testing to determine whether the additional wetlands are wetlands of 'unusual importance' and subject to DEC jurisdiction."[169] The Towns are incorrect. Any wetland jurisdictional determination that was processed by the Office before 2025 remains valid for 5 years from the date of issuance and the Facility remains subject to the former 6 NYCRR Part 664 regulations.[170] Thus, the current wetland report from the Applicant is appropriate for the Office's determination.

c. Maximum Fence Height

The Applicant requested waiver of the Town of Fenner's 6-foot front yard fence height limit to allow for compliance with National Electric Code Requirements and ORES Regulations at 16 NYCRR § 1100-6.4(i), which require a fence height of at least 7 feet or more for electrical equipment and National Grid standards, which require a minimum of 8 feet for a switchyard fence.[171] The Towns claim that the Applicant has failed to meet its burden to justify the waiver and that ORES erred in granting this

[167] 16 NYCRR § 1100-2.5(c)(emphasis added).

[168] Record 121, Draft Permit at 75.

[169] Record 128, Towns' Combined Petition at 35.

[170] Record 45; Appendix 14-B: NYS Wetlands Jurisdictional Determination. (Issued December 15, 2023, states on page 1 that the determination is valid for a period of five years from the date of the letter.)

[171] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 65-66.

waiver without "adequately accounting for the negative effects these components will have on the surrounding residential community."[172]

The Towns have not made a sufficient offer of proof to support these claims, nor have the Towns provided facts or analysis which show that ORES made an error in recommending this relief request. The Record demonstrates that the proposed fencing is necessary for the protection of both people and equipment at the Facility and is to be constructed according to code.[173] Based on the Record, Staff determined that a recommendation to waive the 6-foot fence height limit was appropriate, and thus there are no issues for adjudication.

d. Maximum Structure Height and Minimum Lot Frontage

The Fenner Land Use Regulations set a "Maximum Structure Height" of 35 feet for all permitted uses in all three zoning districts, except for the "Multi-family" use which has a limit of 45 feet and the "Farm" use, which has no height limit.[174] The Applicant sought a determination that the height limit is not applicable to the interconnection facilities on the grounds that they do not meet the Town's definitions for "business, professional, or industrial uses" that the Town applies to buildings through their Land Use Schedule.[175] In the alternative, the Applicant requested a waiver on the grounds that "height requirements for these components are dictated by engineering and electrical codes and are necessary for the safety and protection of both people and equipment."[176]

The Applicant made a similar request regarding the applicability of the "Maximum Structure Height" of 35 feet to the ADLS Structure in Fenner, requesting a determination that the ADLS Structure does not meet the definitions for "business, professional, or industrial uses."[177] In the alternative, the Applicant requests a waiver for the ADLS structure on the grounds that "height requirements for this

[172] Record 128, Towns' Combined Petition at 36.

[173] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 66.

[174] Record 54, Appendix 24-B: Town of Fenner Local Laws and Ordinances at PDF p. 25.

[175] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 31.

[176] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 32.

[177] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 34-35.

tower are dictated by the functional purpose of the ADLS tower, as well as engineering and electrical codes standard with ADLS towers, and are necessary for the safety and protection of both people and equipment."[178]

The Fenner Land Use Regulations also set a 200-foot lot frontage requirement for "business, professional, or industrial uses" in District C.[179] The Applicant has likewise requested that these provisions are not applicable on the basis that the ADLS structure does not meet the aforementioned definitions of the Town of Fenner. In the alternative, the Applicant requested a waiver on the grounds that the proposed parcel hosting the ADLS structure only has 125 feet of road frontage and that the location of the ADLS structure on the parcel has been thoroughly reviewed and chosen as the most suitable location.[180]

Staff agreed that the height limit is inapplicable to the ADLS Structure, POI switchyard and collection substation.[181] Staff also agreed that the lot frontage requirement is inapplicable to the ADLS structure, and likewise recommended denial of these requests on the grounds that they are not necessary.[182] The Towns do not challenge Staff's interpretation, but rather object on the basis that the Applicant failed to submit "any site-specific information documenting a requirement from National Grid that warrants a waiver" and that ORES "failed to consider the Town's intention by creating a 'business, [professional], or industrial' use type within District B and C."[183]

As noted, the Towns do not dispute Staff's interpretation that the interconnection facilities and ADLS structure do not meet the "business, industrial, or professional uses" provided by the Town of Fenner, and the Towns do not provide a sufficient offer of proof for their claim that the Office failed to consider the Town of Fenner's intention when creating these use types. Staff did in fact consider these use

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[178] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 35.

[179] Id. at 34-35.

[180] Id. at 35.

[181] Record 121, Draft Permit at 6.

[182] Id.

[183] Record 128, Towns' Combined Petition at 37. (Staff assumes that the Town misquoted their Land Use Schedule on page 37 "business, industrial, or industrial" and instead meant to quote "business, professional, or industrial.")

types, as well as the fact that Fenner also created a separate "Wind Power Electricity Generation and Transmission Facilities" use with separate standards, and properly recommended a finding that the height and frontage limits applicable to the former do not apply to the latter.

Nor is any documentation of a requirement from National Grid necessary. The POI switchyard will be connected to the National Grid transmission system.[184] Therefore, it stands to reason that these components must be constructed to National Grid standards, as the Applicant states they will be..[185] The Towns fail to demonstrate that Staff made any error in making the recommendation to grant the aforementioned waiver requests and fail to raise an adjudicable issue.

e. Noise Limit

The Town of Fenner's Land Use Regulations require that the level of noise produced during wind turbine operation shall not exceed 50 dBA, measured at the boundaries of all of the closest parcels owned by non-site owners and that abut either the site parcels or any other parcels adjacent to the site parcel.[186] The Applicant requested relief from this requirement on the grounds that compliance is "unreasonably burdensome given the technical difficulties with implementing and monitoring such a requirement."[187] After having reviewed the record, the Office agreed that the Town of Fenner's law was ambiguous and did not define the metric needed to determine compliance. The Facility has been designed to meet the Office's requirements and ensure that sound impacts are minimized and mitigated to the maximum extent practicable.[188] Therefore the Office recommended the approval of the requested relief conditioned on compliance with the noise standards in subpart 4.5(a) of the Permit.[189]

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[184] Record 53, Exhibit 21: Electric System Effects and Interconnection at 1.

[185] Record 53, Exhibit 21: Electric System Effects and Interconnection at 1; Record 117, Appendix 24-E (Revision 2): Statement of Justification at 32.

[186] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 47.

[187] Id.

[188] Id. at 49.

[189] Record 121, Draft Permit at 7.

The Towns rely on the comments provided from C&S Companies submitted in their Exhibit A to state that "the Applicant interpreted Fenner's law to require them to measure and monitor every location along every property line, this requirement could be satisfied with noise contour mapping supporting levels of 50 dbA at such property lines."[190]

The Towns also state that the Applicant "failed to consider the cumulative sound impacts of the existing Fenner Wind Farm and the proposed Facility, as well as any noise impacts generated from the Oxbow Hill Solar project."[191] This is incorrect, as the Applicant did provide a cumulative noise impact assessment as required by 16 NYCRR § 1100-2.8(c)(1), which included a total of twelve turbines from the existing Fenner Wind Facility.[192] With regard to the noise impacts generated from Oxbow Hill Solar, 16 NYCRR § 1100-2.8(c) separates the noise analysis for wind facilities from the noise analysis required for solar facilities, and does not require that a cumulative analysis be completed for all types of generation facilities within the study area.[193]

The Towns have also claimed that Staff's decision to recommend this relief request has ignored the detrimental impact the turbines will have on the health and wellbeing of its residents.[194] The Office, in reviewing the Application Exhibits and materials submitted by the applicant, has taken these concerns into consideration in making this recommendation to grant relief. Based on these considerations, mitigation measures proposed by the Applicant, and the condition that the applicant will comply with the maximum noise standards established in the Permit by ORES Regulations, the Office maintains their recommendation to grant relief.

The Towns have provided no offer of proof beyond the engineering comments in Exhibit A to support their claims regarding noise issues, and as stated previously, these comments do not constitute an adequate offer of proof. Thus, the Towns arguments fail and no issues for adjudication have been raised.

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[190] Record 128, Towns' Combined Petition at 38.

[191] Id.

[192] See Record 108, Exhibit 7 Part 13 of 13: Appendix 7-H Cumulative Analysis.

[193] 16 NYCRR § 1100-2.8(c)

[194] Record 128, Towns' Combined Petition at 39.

f. Subdivision Requirements

The Applicant requested relief from five provisions of the Fenner Subdivision Regulations. The Office recommended denial of these relief requests on the basis that the Office is not empowered to grant subdivision approval pursuant to 16 NYCRR § 1100-6.1(d) and therefore the Applicant shall comply with subpart 4.1(d) of the Draft Permit, requiring the Applicant to acquire other permits and approvals which the Office is not empowered to provide or has expressly authorized.[195]

The Towns claim that "the relief granted by ORES completely disregards sound land planning principles in favor of a unique land use that is not intended to exist after the expiration of a lease."[196] The Towns continue to argue that they will be left with "nonconforming properties that lack road frontage and may not be used as buildable lots" after the lease terms expire and the turbines are decommissioned.[197] As discussed above, Staff recommended denial of these relief requests and included a condition that the applicant comply with subpart 4.1(d) of the Permit requiring the applicant to acquire all necessary permits.[198] It appears as though the Towns conflate this recommendation of a denial combined with a requirement to comply with subpart 4.1(d) of the Permit as a recommendation to grant the waiver relief. ORES did not grant any relief regarding this request for a waiver of the subdivision regulations, and the Applicant is still required to comply with subpart 4.1(d) of the Permit.

2. Town of Nelson Local Laws

In the Combined Petition, the Town of Nelson has alleged general noncompliance with the Town of Nelson's Land Use and Development Law, and has claimed that the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that certain local laws are unreasonably burdensome.[199]

Of the 6 waivers requested by the Applicant, Staff recommended relief for three – including (1) minimum setback distance of 1.5 times from non-participating

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[195] Record 121, Draft Permit at Subpart 4.1(d).

[196] Record 128, Towns' Combined Petition at 40.

[197] Id.

[198] Draft Permit at 7-8.

[199] Record 128, Towns' Combined Petition at 40-42.

property lines, (2) restrictions on noise limits, (3) and the 450-foot minimum road frontage. Denial was recommended on the remaining waivers, all relating to the Scenic Vista/Scenic Highway Overlay District and "scenic viewsheds" in the Town of Nelson, as either preempted pursuant to § 144(2) or because the Facility was found to be in compliance with the relevant local law provision.[200] As discussed below, the Towns do not make an offer of proof, but merely raise a general issue of noncompliance with the Town of Nelson's local laws and states that "the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that certain local laws are unreasonably burdensome."[201]

a. Scenic Overlay and Scenic Viewshed Requirements

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The proposed location for the turbine located in the Town of Nelson is within the Scenic Vista/Scenic Highway Overlay District as well as the Rural (R) District. The Applicant requested relief from § 404.2 and § 404.4 of the Town of Nelson's Land Use and Development Law pertaining to their Scenic Vista and Scenic Highway Overlay District, as well as § 512.2(D) of the Wind Energy Facilities Regulations.[202] Section 404.2 outlines the intent of the Scenic Vista Scenic Highway Overlay District as avoiding overly obtrusive development resulting in a variety of conditions; § 404.4(a) requires that the applicant demonstrate that the activity will not have a substantial adverse effect upon the scenic vista in order to receive a special use permit; and (3) § 512(2(D) prohibits an individual tower facility from being installed in any location that would substantially detract from or block the view from a recognized scenic viewshed. The Office recommended denial of relief from §§ 404.2 and 404.4(a) on the basis that § 404.2 is simply a statement of legislative intent which does not establish any applicable development standards and § 404.4(a) is preempted pursuant to Public Service Law § 144(2) as a procedural requirement necessary for a special use permit. The Office also recommended denial of relief from § 512.2(D) on the basis that the Facility complies given that turbine 13 will not substantially affect the scenic view.[203]

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[200] Record 121, Draft Permit at 8-9.

[201] Record 128, Towns' Combined Petition at 42.

[202] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 41-42; Record 76, Exhibit 24 (Revision 1): Local Laws and Ordinances at 31-31.

[203] Draft Permit at 8-9; Record 128, Towns' Combined Petition at 41-47.

In their request for relief, the Applicant demonstrated that that the Town of Nelson's scenic overlay district is ambiguous, subjective, that a strict interpretation would prohibit the construction of proposed turbine 13, and requested a waiver to the extent that ORES determines that the Facility does not already comply with these standards.[204] The proposed location of turbine 13 considered waking from other proposed turbines, productivity as related to the wind resource, elevation, avoidance of impacts to delineated wetlands and streams, occupied habitat, and compliance with required setbacks, shadow flicker limits, noise limits, and property rights constraints, as depicted on figures provided by the Applicant.[205]

PSL § 144(2) provides that no municipality may require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility.[206] The Office recommended denial of relief from §§ 404.2 and 404.4(a) as preempted pursuant to § 144(2) because, as stated previously, § 404.2 is inapplicable and § 404.4(a) is a procedural requirement set in place by the Town of Nelson as a part of a special use permit approval. Staff's recommendation of denial of relief from § 512.2(D) was based on the facility's compliance with the provision as demonstrated in the Applicant's analysis showing that the turbine does not contribute disproportionately to the visual contrast along Scenic Route 20.[207] Staff also took into consideration Applicant's compliance with the visual mitigation requirements set forth in 16 NYCRR § 1100-6.4(l), which require the Applicant implement an approved Visual Impacts Minimization and Mitigation Plan.

The Towns have failed to provide any argument or offer of proof to show that the Applicant has not justified the need for this waiver or that the Office has made an inappropriate recommendation. Because the Towns have the burden of persuasion and have failed to provide an adequate offer of proof, their arguments fail.

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[204] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 42 – 48.

[205] Record 101, Figure 24-2 (Revision 2): Wind Turbine Siting Constraints, sheet 6 of 8; Record 117, Appendix 24-E (Revision 2): Statement of Justification at 42 – 48.

[206] PSL § 144(2).

[207] See Record 79 Appendix 8-A (Revision 1) at 86.

b. Setbacks

The Applicant requested relief from the setback requirements for Wind Turbines to non-participating property lines imposed by the Town of Nelson's Land Use and Development Law.[208] The turbine proposed in the Town of Nelson is currently sited in "the least impactful location on parcels within the Applicant's control that achieves compliance to the maximum extent practicable."[209] The Applicant provides additional grounds for its relief request stating that "any relocation away from one non-participating parcel to achieve compliance with the local law regulation will encroach upon another non-participating parcel."[210] Other Facility parcels located in the Town of Nelson are smaller non-contiguous parcels located closer to State Route 20, and are not large enough to accommodate a 1.5 times setback from non-participating property lines if this turbine was proposed within them.[211] The Office recommended relief for the minimum setback distance provided that the Applicant comply with the setbacks set forth in 16 NYCRR § 1100-2.6(d). Table 1, and further noted that final turbine locations will be reviewed consistent with subpart 5(a) of the Permit and 16 NYCRR § 1100-11.1.[212] In making this recommendation the Office reviewed the analysis provided by the Applicant in their Statement of Justification in accordance with 16 NYCRR § 1100-2.25(c), combined with Figures provided by the Applicant displaying numerous siting constraints associated with the Turbine proposed in the Town of Nelson.[213]

The Towns state that the Applicant has offered an argument of convenience regarding the location of this turbine but does not provide any offer of proof to demonstrate that the Applicant's waiver request was inappropriate, or that Staff made any error in making the recommendation for relief. Therefore, the Towns arguments fail.

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[208] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 6-7.

[209] Id. at 13.

[210] Id.

[211] Id.

[212] Draft Permit at 10.

[213] Record 101, Figure 24-2: (Revision 2) sheet 6; Record 117, Appendix 24-E (Revision 2): Statement of Justification at 6; 13; 21-22.

c. Noise Limits

The Town of Nelson asserts noncompliance with the noise limits set by the Land Use and Development Law § 512.2(D) and that the Applicant has "failed to meet its burden to demonstrate, using facts and analysis, that certain local laws are unreasonably burdensome…"[214] This local law sets the noise limits "not to exceed 50 dBA, measured at the boundaries of all the closest parcels that are owned by non-site owners and that abut either the site parcel(s) or any other parcels adjacent to the site parcel held in common…"[215] The Applicant's relief request was based on the ambiguity and restrictive nature of this local law and that compliance with such a requirement is "unreasonably burdensome given the technical difficulties with implementing and monitoring such a requirement."[216] The Office recommended granting this relief and specified in the Draft Permit that the Facility must comply with the noise standards set forth in subpart 4.5(a) of the Permit.[217]

The Towns do not challenge ORES's recommendation, but states that the Applicant has "not offered any technical data or evidence in support of its allegation that compliance is 'extremely difficult.'" The Applicant explains in its Statement of Justification that: (1) setting monitoring limits at property lines where it is unlikely that people will actually reside does not protect against potential health impacts associated with sound impacts and if the applicant were forced to comply with a not to exceed 50dBA sound limit at non-participating property lines, it would need to remove all the turbines in Nelson (and Fenner); (2) a monitoring program of the scale necessary to adequately monitor along all non-participating property boundaries would be extremely difficult to implement, and results of the monitoring would likely be inconclusive; (3)moving the turbines to comply with this requirement is not possible given other siting constraints; (4) the request is the minimum necessary to ensure sound impacts are minimized and mitigated; and (5) the sound from the Facility will meet Office requirements and will adequately minimize noise on adjacent properties and at specific locations where people reside.[218] The Office took

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[214] Record 128, Towns' Combined Petition at 43.

[215] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 47.

[216] Id. at 47-48.

[217] Record 121, Draft Permit at 10.

[218] 16 NYCRR § 1100-2.25(c); see Record 117, Appendix 24-E (Revision 2): Statement of Justification at 48-50.

the aforementioned arguments provided by the Applicant in their Statement of Justification into consideration when making this recommendation, as well as the Applicant's compliance with the noise limits for wind facilities contemplated by 16 NYCRR § 1100-6.5(a) and set forth in subpart 4.5(a) of the draft permit.[219] Further, the Towns have the burden of persuasion on this issue and have not produced any offer of proof to support its statements. Thus, its arguments fail and no issues for adjudication have been raised.

d. Road Frontage Requirements

The Town of Nelson's Land Use and Development Law requires a minimum road frontage for commercial wind facilities of 450 feet.[220] The Applicant requested relief from this requirement on the basis that the parcel on which Turbine 13 is proposed to be sited does not have 450-feet of road frontage.[221] The Applicant states that this parcel is the only suitable parcel for Turbine 13, and in its current location the turbine complies with all Part 1100 setback, noise and shadow flicker requirements, as well as the Town of Nelson's 1.5 times setback from public roadways.[222] The Towns claim that the Applicant did not provide an analysis of alternative parcels. The Applicant explained in their Statement of Justification that of the other Facility parcels within the Town of Nelson, only two have adequate road frontage and provided details as to why each parcel is not suitable.[223]

Staff reviewed the Figures and analysis provided by Applicant in its Statement of Justification as to why the relief requested for Turbine 13 is the minimum necessary and that this turbine is proposed to be sited in the least impactful location in making the recommendation for relief.[224] Staff recommended limited relief for this request specific to this parcel such that the Applicant shall comply with setbacks set forth in 16 NYCRR § 1100-2.6(d) and further noted that final turbine locations will

[219] Record 121, Draft Permit at 52-53; see also 16 NYCRR § 1100-6.5(a).

[220] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 27.

[221] Id.

[222] Id. at 28; see Record 101, Figure 24-1 (Revision 2): Wind Turbine Setbacks at Sheet 13.

[223] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 28 and 43-45.

[224] Id. at 27-30; Record 101, Figure 24-2 (Revision 2): Wind Turbine Siting Constraints.

be reviewed consistent with subpart 5(a) of the Permit ant 16 NYCRR § 1100-11.1.[225]

Again, the Towns have not met their burden and has failed to provide an offer of proof. Thus, the Towns claims fail and no adjudicable issue has been raised.

3. Towns of Smithfield and Eaton Local Laws

The Applicant requested 13 waivers combined from the Towns of Smithfield and Eaton. The Office recommended four of the requested waivers from the Town of Smithfield, including – (1) limits to construction hours; (2) maximum setback distance of 2.0 times the total turbine height from a non-participating property line; (3) a requirement that financial security for decommissioning be no less than 150% of the cost of full decommissioning (including salvage value); and (4) the requirement to utilize components and materials made in the United States of America.[226] The Office recommended relief for five of the requested waivers from the Town of Eaton, including – (1) limits to construction hours; (2) maximum setback distance of 2.0 times the total turbine height from a non-participating property line; (3) maximum setback distance of 2.0 times the total turbine height from public roads; and (4) the requirement to utilize components and materials made in the United States of America.[227] Staff's recommendations with regard to the aforementioned relief requests were based on the analysis provided by the Applicant pursuant to 16 NYCRR § 1100-2.25(c) as well as the Applicant's requirement to adhere to the conditions imposed by the Permit and Uniform Standards and Conditions imposed by the Office pursuant to 16 NYCRR § 1100-6.[228]

The remaining waiver requests relating to both Towns for (1) decommissioning plan abandonment requirements; and (2) decommissioning plan removal and restoration requirements, were both recommended for denial as those provisions are preempted on a procedural basis pursuant to § 144(2) of the Public Service Law. The Applicant will provide a Final Decommissioning and Site Restoration Plan to the Office for final approval in accordance with 16 NYCRR § 1100-6.6.

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[225] Record 121, Draft Permit at 14.

[226] Record 121, Draft Permit at 10-13.

[227] Id. at 13-16.

[228] 16 NYCRR §§ 1100-2.25(c); 1100-6, see 16 NYCRR § 1100-6.1(a).

As set forth above and discussed below, the Towns have merely raised an issue of general noncompliance with their local laws and failed to provide an adequate offer of proof. As such no adjudicable issues have been raised.

a. Construction Hours

The Applicant requested waiver from the following provision in both the Town of Smithfield Wind Regulations and Town of Eaton Code: "Construction of the WECS shall be limited to the hours of 7 AM to 7 PM, Monday through Friday."[229] The Applicant relied upon past PSL Article 10 decisions providing similar construction hour waivers and states that compliance with the hours required by the Towns of Smithfield and Eaton would increase project costs and extend the construction schedule.[230] In the Draft Permit, Staff recommended approving the relief requested for both Towns provided that the Applicant comply with the construction hours set forth in subpart 4.4(a) of the Permit.[231]

The Towns claim that ORES has "failed to take into consideration the effects that longer construction hours will have on the host community."[232] Staff carefully reviewed the record in making this recommendation and agreed with the Applicant that full compliance with the Towns' construction hours could unnecessarily extend construction schedules, resulting in potential impacts to the surrounding community.[233] This recommendation is consistent with the Office's well-established position that the uniform construction hours are sufficient and reasonable to facilitate constriction.[234] Staff also notes that the New York State Board on Electric

[229] Eaton Town Code § 120-23.15(D)(16), Record 54, Appendix 24-A: Town of Eaton Local Laws and Ordinances at PDF p. 554; Smithfield Building and Control Law § 1100-5(D)(16), Record 54, Appendix 24-D: Town of Smithfield Local Laws and Ordinances at PDF p. 57.

[230] Record 98, Appendix 24-E (Revision 2): Statement of Justification at 50-51.

[231] Record 121, Draft Permit at 11 and 13.

[232] Record 128, Towns' Combined Petition at 46 and 54.

[233] Id. at 61-62.

[234] See Chapter XVIII, Title 19 of NYCRR Part 900, Office of Renewable Energy Siting, Assessment of Public Comments (issued arch 3, 2021) at 101-102. accessible online at: https://dps.ny.gov/system/files/documents/2024/08/assessment-of-public-comments_chapter-xviii-title-19-of-nycrr-part-900-subparts-900-.pdf

Generation Siting and the Environment (Siting Board) has issued numerous decisions resulting in similar standardized construction hours.[235]

The Towns have raised no offers of proof in relation to Staff's recommendations for relief and thus no adjudicable issues have been raised.

b. Setbacks

The Applicant requested relief from setback requirements from non-participating property lines in both the Towns of Smithfield and Eaton, and from public roads for one turbine in the Town of Eaton. The Town of Smithfield's Building and Development Control Law and Town of Eaton Code both provide for a minimum distance of 2.0 times the total height of the turbine to a non-participating property line.[236]

There are two turbines proposed to be located in the Town of Smithfield. The Applicant requested relief on the grounds that relocation of those turbines to bring them into compliance with the Town's setbacks would result in diminished productivity, increased turbulence, wake loss, increased agricultural impacts, as well as an increase in wetland disturbance for one of the turbines.[237] The Town claims that the Applicant has not provided any proof or scientific data, and merely assures ORES that each of the turbines have been sited in the least impactful locations and achieves compliance with the Town's regulations to the maximum extent possible.[238] The Application includes numerous Figures which show the constraints that the

[235] See, DPS DMM Case No. 16-F-0062, Matter of Eight Point Wind LLC; Record 188, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 14-F-0490, Matter of Cassadaga Wind LLC; Record 408, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 15-F-0122, Matter of Baron Winds LLC; Record 465, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 16-F-0328, Matter of Number Three Wind LLC; Record 242, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 16-F-0559, Matter of Bluestone Wind LLC; Record 358, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 16-F-0267, Matter of Atlantic Wind LLC; Record 277, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; DPS DMM Case No. 18-F-0262, Matter of High Bridge Wind LLC; Record 139, Order Granting Interlocutory Review and Affirming Issues Ruling.

[236] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 13.

[237] Id. at 14-15.

[238] Record 128, Towns' Combined Petition at 47.

Applicant describes in their Statement of Justification[239] on which staff based their recommendation for relief for the two turbines in the Town of Smithfield.[240]

The Office recommended limited relief from the aforementioned setback requirement in the Town of Eaton for seven turbines, and instead recommended utilizing the setbacks for wind turbines set forth in 16 NYCRR § 1100-2.6(d), Table 1.[241] The Applicant provided background on each turbine, why each location was selected, why alternative locations could not be selected, and took waking, location in relation to public roads, encroachment upon other non-participating parcels, increased grading and forest clearing.[242]

The Applicant also requested relief from the Town of Eaton's minimum setback distance of 2.0 times the total height of the turbine from public roads.[243] This relief request was limited to only one turbine in the Town of Eaton, and the Applicant based its request on the grounds that shifting this turbine to come into compliance with the public road setback would result in increased waking effects since the turbines would be in too close of a proximity.[244] Based on the Record, the Office recommended limited relief to turbine 18 located in the Town of Eaton and recommended compliance with setbacks provided in 16 NYCRR § 1100-2.6(d), Table 1.[245]

In making the aforementioned recommendations, Staff took the Applicant's extensive analysis of each turbine placement into consideration as well as the figures provided to further explain and show how the turbines in the Towns of Smithfield and Eaton will fully comply with the 1.1x setback provided in 16 NYCRR § 1100-2.6(d) Table 1, while being sited at the least impactful locations.[246] The Towns of

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[239] Record 117, Figure 24-4: Local Law Wind Turbine Setback Waiver Request Areas; Record 117, Appendix 24-E (Revision 2): Statement of Justification.

[240] Record 121, Draft Permit at 11

[241] Id. at 13-14

[242] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 16-20.

[243] Id. at 17.

[244] Id.

[245] Record 121, Draft Permit at 14.

[246] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 13-23; Record 117, Figure 24-4 Local Law Wind Turbine Setback Waiver Request Areas.

Smithfield and Eaton have both failed to provide an offer of proof in support of their positions and thus have not raised any adjudicable issues.

c. Decommissioning Abandonment Requirements

The Towns of Smithfield and Eaton both have local laws that require that a Wind Energy Conversion System (WECS) "shall be deemed abandoned if its operation is ceased for 12 consecutive months."[247] The Applicant requested relief from the 12-month abandonment time period to the extent that the local laws in both towns do not allow the Applicant the ability to extend the timeframe for good cause after the 12-months, making such requirements unreasonably burdensome considering that there are various circumstances that turbines could become inoperative.[248]

The Applicant will be required to submit a Final Decommissioning and Site Restoration Plan in accordance with 16 NYCRR § 1100-6.6 and this requirement is also taken into consideration in subparts 4.6 and 6.1(b)(1) of the Permit. Therefore, Staff recommended denial of these waiver requests on the grounds that they are preempted as procedural pursuant to PSL § 144(2). Staff added a condition to this recommendation to require that the Applicant conduct decommissioning and site restoration pursuant to the schedule in the Final Decommissioning and Site Restoration Plan found in Subparts 4.6 and 6.1(b)(1) of the Permit which must be submitted to the Office for approval as a compliance filing.[249] The Towns do not challenge Staff's determination that the provision is preempted pursuant to PSL § 144(2). Rather, the Towns restate arguments made by the Applicant in their Statement of Justification and allege that this waiver disregards the impact non-operational turbines will have on the community and undermines the ability of local communities to address their concerns.[250] Staff notes that the preemption of these local laws does not mean that the Towns' interests are not protected, as ORES Regulations, permit conditions and the Final Decommissioning and Site Restoration Plan approved pursuant to 16 NYCRR § 1100-6.6 and the permit conditions, work together to address these concerns.

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[247] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 57.

[248] Id. at 58.

[249] Record 121, Draft Permit at 11-15; see also 16 NYCRR § 1100-10.2(b).

[250] Record 128, Towns' Combined Petition at 58.

As discussed above, the Towns do not challenge Staff's determination to preempt these provisions as procedural pursuant to PSL § 144(2), furthermore the Towns do not provide an offer of proof to support their claims. Thus, no adjudicable issue has been raised.

d. Decommissioning Security

Both Smithfield and Eaton require the financial security for decommissioning to "be no less than 150% of the cost of full decommissioning (including salvage value) and restoration."[251] The Applicant based their request on the grounds that the "imposition of this higher contingency would add approximately $755,302 in additional contingency requirements to the Project."[252] The Applicant will be required to submit a Final Decommissioning and Site Restoration Plan in accordance with 16 NYCRR § 6.6 and Subpart 6.1(b) of the Permit.[253] The Office also has a well-established position that a 15% contingency is reasonable based on careful consideration of the best practices for siting renewable energy projects.[254] Taking the aforementioned into consideration. Staff recommended approval of these requests and further conditioned the recommended approval on the applicant providing decommissioning and site restoration security as required by Subparts 4.6 and 6.1(b) of the Permit.[255]

The Towns claim that the Applicant has "failed to provide any financial proof of the actual cost to decommission a wind turbine of approximately 700 feet in height" and that without any "hard financial data, there is no evidence upon which ORES can reach a determination…"[256] This is incorrect. Appendix 23-A provides Decommissioning Costs for the project as a whole, as well as a breakdown for costs per Town, and further shows the net decommissioning costs with both the ORES

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[251] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 54.

[252] Id. at 55.

[253] 16 NYCRR § 1100-6.6; record 121, Draft Permit at 66-67.

[254] Record 121, Draft Permit at 12 and 15-16; Chapter XVIII, Title 19 of NYCRR Part 900, Office of Renewable Energy Siting, Assessment of Public Comments (issued arch 3, 2021) at 101-102. accessible online at: https://dps.ny.gov/system/files/documents/2024/08/assessment-of-public-comments_chapter-xviii-title-19-of-nycrr-part-900-subparts-900-.pdf.

[255] Record 121, Draft Permit at 12 and 15-16.

[256] Record 128, Towns' Combined Petition at 59.

requirement of a 15% contingency and the Town of Smithfield and Eaton requirement of a 50% contingency.[257]

The Towns have failed to submit any offer of proof to support its claims and have failed to assert any error that Staff has made in making this recommendation. Thus, no adjudicable issue has been raised.

e. Decommissioning Removal and Restoration

The Towns of Smithfield and Eaton both require that any turbine which is not in operation for 12 consecutive months must be removed and the site restored within 120 days.[258] The Applicant requested relief from these requirements in both Towns to the extent that turbines must be removed and restored within 120 days on the grounds that this time period is "unreasonably brief and may be infeasible or impossible to achieve, particularly depending upon the seasonable timing of decommissioning and site restoration activities."[259] The Applicant will be required to conduct decommissioning and site restoration pursuant to the schedule in the Final Decommissioning and Site Restoration Plan approved by the Office consistent with 16 NYCRR § 1100-6.6.[260] Staff therefore recommended the denial of these provisions on the basis that they are preempted as procedural pursuant to PSL § 144(2). Staff added a recommended condition in the Draft Permit stating that the Applicant will conduct decommissioning and site restoration pursuant to the schedule in the Final Decommissioning and Site Restoration Plan consistent with subparts 4.6 and 6.1(b)(1) of the Permit.[261]

The Towns do not challenge Staff's recommendation, nor do they make any claims beyond general noncompliance with the Towns' local laws. Again, no offer of proof has been provided, and as such no adjudicable issues were raised.

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[257] Record 117, Appendix 23-A (Revision 2): Decommissioning and Site Restoration Plan at 7-10.

[258] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 59.

[259] Id. at 59-60.

[260] 16 NYCRR § 1100-6.6.

[261] Record 121, Draft Permit at 13 and 16.

f. Made in America Requirement

Both the Towns of Eaton and Smithfield have enacted local laws requiring that "[a]ll WECS shall be required to use components and materials made and manufactured in the United States of America."[262] The Applicant requested relief from this requirement on the grounds that compliance "would be extremely difficult, if not impossible, to produce and construct a turbine entirely made in America."[263] The Applicant states that they are reading these local laws as though all components of the wind turbine must utilize parts made in America.[264] They further clarify that if the local law does not require 100% of the materials to be made in America, the directives proposed by NYSERDA in response to PSL § 66-r require using "commercially reasonable efforts to source and procure components…to construct the Facility from manufacturing facilities located in New York State, and utilize materials…produced by steel mills within the United States."[265] The Towns claim that the Applicant ignores the economic realities of today, the trade wars, and the impact of global supply chains.[266] The Towns make statements explaining recent tariffs that have been imposed on imports from Mexico and Canada, and increased tariffs from China, but make no legal argument or any offer of proof.[267]

The Applicant's request is based on the grounds that many components are specialized and "require advanced manufacturing processes that are only available outside of the United States."[268] The Applicant states that many manufacturers that are headquartered in the United States rely on parts manufactured in other countries, and that ultimately the choice of component origin is the manufacturer's choice and not left to the developer.[269] Staff agreed that compliance with this requirement would not serve the public interest and would be unreasonably

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[262] Record 53, Appendix 24-A: Town of Eaton Local Laws and Ordinances at PDF p. 565; Record 54, Appendix 24-D: Town of Smithfield Local Laws and Ordinances at PDF p. 68.

[263] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 61.

[264] Id.

[265] Id. at 62-63.

[266] Record 128, Towns' Combined Petition at 52.

[267] Id. at 52-53.

[268] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 63.

[269] Id.

burdensome in light of the CLCPA targets. Staff also took the Applicant's agreement to use commercially reasonable efforts to source and procure components to construct the Facility from manufacturing facilities located in the United States pursuant to the NYSERDA directive into consideration, and thus recommended approval of these requests in the Draft Permit .[270]

As discussed above, the Towns have failed to make an offer of proof to support their claims or that Staff has made any error in making this recommendation.

4. Community Character

The Towns claim that "the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that the impacts of the Facility on the community character have been avoided, mitigated or minimized, specifically pursuant to the Towns' rurality and agriculture, pursuant to 16 NYCRR §§ 1100-2.3(s); 1100-2.9(a); 1100-2.16; and such other relevant provisions of 16 NYCRR Part 1100."[271] These regulatory provisions cited by the Towns are not USCs or specific findings that the Office is required to make, but instead set forth information that must be contained in the Application. Exhibit 3 addresses "Location of Facilities and Surrounding Land Use" and must include "A description of community character in the area of the facility, an analysis of impacts of facility construction and operation on community character, and identification of avoidance or mitigation measures that will minimize adverse impacts on community character."[272] Exhibit 8 addresses "Visual Impacts," and must include a "visual impact assessment" (VIA) to determine the extent of and assess the significance of facility visibility."[273] And Exhibit 15 addresses "Agricultural Resources" and must include an assessment of such resources within the 5-mile study area; maps of active agricultural land use, landowner-imposed development restriction, areas that will remain in agricultural use, and soils; an Agricultural Plan to avoid, minimize, and mitigate agricultural

[270] Record 121, Draft Permit at 13 and 16.

[271] Record 128, Towns' Combined Petition at 62.

[272] 16 NYCRR § 1100-2.4(s). Staff assumes that the Town meant to cite to 16 NYCRR § 1100-2.4(s), not 16 NYCRR § 1100-2.3(s). 16 NYCRR § 1100-2.4(s) further provides: "For the purposes of this exhibit, community character includes defining features and interactions of the natural, built and social environment, and how those features are used and appreciated in the community."

[273] 16 NYCRR § 1100-2.9(a).

impacts; a drainage remediation plan; and, if proposed, an agricultural co-utilization plan.[274] The Application includes all the required information.

Exhibit 3 of the Application includes a description of community character, evaluation of impacts, and identification of avoidance or mitigation measures.[275] It states that the Facility "is proposed to be located in a rural portion of Madison County, which is characterized by a mix of agricultural and forested land surrounding relatively small rural communities."[276] It continues:

> The proposed Facility will convert approximately 18.8 acres (approximately 1%) of the certified agricultural district land within the Facility Site to built facilities and maintained areas necessary for Facility operation. The remainder of the land can continue to be farmed, preserving the character of the towns as farming communities. Moreover, the lease payments made to farmers will supplement their income, potentially preserving their ability to continue farming long-term and enhancing the opportunity to protect the agricultural nature of the communities hosting the Facility.[277]

The Application states that noise impacts will be minor and will not affect the character of the community.[278] The "visibility and visual impact of the Facility will be highly variable based on distance, number of turbines in view, weather conditions, sun angle, extent of visual screening from topography and vegetation, scenic quality, viewer sensitivity and/or existing land uses."[279] Additional avoidance and mitigation measures cited are:

- Siting the Facility away from population centers and areas of dense residential development.

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[274] 16 NYCRR § 1100-2.16.

[275] Record 96, Exhibit 3 (Revision 2): Location of Facilities and Surrounding Land Use at 40-43.

[276] Id. at 40.

[277] Id.

[278] Id. at 42.

[279] Id.

- Locating access roads and turbines to avoid or minimize disturbance of wetlands, streams, and cultural/historic resources.
- Using existing roads for turbine access whenever possible to avoid or minimize disturbance of wildlife habitat, wetlands, streams, and cultural/historic resources.
- Following setback requirements outlined in the Section 94-c regulations to site the Project away from non-participating boundary lines, structures, and public roadways.
- Burying electrical interconnection lines between turbines.
- Implementing agricultural protection measures to avoid, minimize, or mitigate impacts on agricultural land and farm operations.
- Consultation with various stakeholders to identify local resources of concern and to minimize any potential impacts to the community.[280]

Exhibit 8 of the Application includes the required VIA, which examined a visual study area of five miles, as well as viewshed mapping and analysis, photographic simulations, and line of sight profiles to assess the visibility of the Facility.[281] Facility siting includes consideration of avoidance and minimization of impacts to visual resources including changes to the proposed locations and layout. To avoid impacts to visual resources, the collection substation and point-of-interconnection switchyard are sited as far from the road as possible.[282]

The Towns state that if they "lose available prime farmland, the Towns will be hindered from contributing to New York's agricultural economy."[283] The Record shows, however, that a very small fraction of agricultural production lands within the region has the potential to be impacted by the Facility. Exhibit 15 of the Application states that agricultural production areas comprise approximately 1,554.5 acres or 40% of the 3,897-acre Facility site, and of the total acreage of agricultural production areas, 655.7 are Mineral Soil Groups (MSG) 1-4.[284] The 89.6 acres of MSG 1-4 soils in agricultural production areas that will be temporarily impacted by the Facility

[280] Record 96, Exhibit 3 (Revision 2): Location of Facilities and Surrounding Land Use at 42-3.

[281] Record 98, Exhibit 8 (Revision 2): Visual Impacts at 2-5.

[282] Record 76, Appendix 8-B (Revision 1): Visual Impact Minimization and Mitigation Plan at 6.

[283] Record 128, Towns' Combined Petition at 62.

[284] Record 98, Exhibit 15 (Revision 1): Agricultural Resources at 12, 15.

represent approximately 14% of MSG 1-4 soils in agricultural production areas within the Facility site, less than 1% within the five-mile study area, and less than 1% within Madison County.[285] The total acreage of land that will be taken out of agricultural production during operations is approximately 91.6 acres, representing 2% of the Facility site.[286]

> Regarding potential agricultural economic impacts, the Application states:
> To better understand potential impacts of the Facility on agricultural businesses and operations, a survey was distributed in July of 2023 to all participating landowners with parcels that contain active agricultural land that host Facility components. The purpose of the survey was to determine how the Facility may impact agricultural operations for participating landowners. The Applicant received responses from all landowners surveyed. Of the 41 complete surveys received, 37 (90%) indicated at least one active agricultural land use occurring on the property in the last five years (2019-2023). Four of the 41 surveys (9%) indicated inactive (for agriculture) or did not provide land use data within the last five years; see Appendix 15-A for copies of the Agricultural Survey correspondence.
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> Of the 37 responses from landowners indicating recent or existing agricultural use, 14 landowners indicated no change to existing land use is expected to result from the development of the proposed Facility. One landowner who produces crops, livestock, and livestock products indicated that they may have to plant differently. Another landowner who grows crops and livestock indicated that the Facility would affect existing agricultural use in a positive way. The remaining landowners did not indicate whether the proposed Facility would affect existing agricultural land use on their parcel.[287]

In addition, the Applicant worked closely with landowners to carefully site linear Facility components (e.g., access roads and collection lines) in areas that would allow the landowners to continue any desired farming practices, minimizing the

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[285] Record 98, Exhibit 15 (Revision 1): Agricultural Resources at 15.

[286] Id. at 24.

[287] Id. at 10-11.

Facility's agricultural impacts.[288] The Applicant is also proposing to install collection lines underground to avoid impacts to agricultural lands during operations.[289]

Staff acknowledges the Towns' concerns regarding the siting of multiple large-scale renewable energy facilities within their jurisdictional boundaries. The Applicant's proposal to co-locate the Facility with the Fenner Wind Farm and Oxbow Hill Solar will ensure the Facility does not alter the agricultural character of the Towns. The Applicant's minimization measures, intended to impact as little agricultural land as possible, will preserve the town's character as a farming community. Additionally, the benefits of renewable energy development outweigh the Facility's minor impacts to community character. Renewable energy improves grid reliability while reducing harmful greenhouse gas emissions, which ultimately creates stronger, healthier, and more resilient communities. When similar concerns were raised in proceedings by the New York State Board on Electric Generation Siting and the Environment (Siting Board), the Siting Board found that when the potential impacts of individual proposals were avoided, minimized, and mitigated through siting and design, they should go forward in the interest of achieving the State's renewable energy goals as set forth in the Climate Leadership and Community Protection Act.[290] The same balancing of interests is accomplished here:

> With regards to maintaining community character, we find that the Facility is designed to minimize impacts that are of concern to the community. The Project is the result of compromise to address various concerns raised by different parties during the course of this proceeding, including the Town, while also recognizing the landowner's desire to lease his land for the Project. As such, the Project "adequately reflects

[288] Record 98, Exhibit 15 (Revision 1): Agricultural Resources at 23.

[289] Id.

[290] Matter No. 17-F-0619 Application of Hecate Greene 1 LLC, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions at 34 ("We are sensitive to the fact that this is not the only utility-scale solar facility proposed to be sited in the Town of Coxsackie. However, we find that the Facility, as designed and conditioned, will mitigate environmental impacts to the maximum extent practicable. Indeed, the siting of this Facility will advance the environmental goals of the Climate Leadership and Community Protection Act and will advance reaching State renewable goals.").

the balancing of competing interests that is both characteristic of such projects and consistent with Article 10's overall intent.[291]

5. Visual Impacts Assessment

The Towns claim that the Facility is in violation of the State's Scenic Byway program as well as numerous local laws protecting this scenic viewshed and that the Facility will "decrease the number of tourists traveling along [Route 20], which in turn will affect the economy of the Towns."[292] This claim, however, is without merit. The Town relies on the comments submitted by their engineering consultant in Exhibit A to support these claims and in doing so provides no supporting evidence or examples of what kinds of impacts the Facility would bring to Route 20.

Towns' Exhibit A, comments related to Exhibit 8, Visual Impact Assessment, lists notable viewpoints from the Application for the Towns of Fenner and Nelson showing potential Facility visibility from State Route 20 and the Heaven and Hell Bike Trail.[293] The Applicant's photosimulations of viewpoints (VP) 40, 84, 86, 87, and 88[294] demonstrated that the proposed turbine would not introduce a significant contrasting element into the existing views from State Route 20. For example, the contrast ratings for VP40[295] averaged 1.4 out of 4.0, which is a rating described as 'insignificant to moderate contrast'. In fact, none of the Route 20 views was rated for contrast higher than an average of 1.9 out of 4.0, including VP40 which is not in Nelson or in the scenic overlay district. Based on a review of the supplemental photosimulations (VP84-88) the closer you get to the turbine, the more effectively it is screened by roadside vegetation, even at leaf off, and thus Staff concluded that this turbine will only have minimal to moderate contrast with the existing landscape.[296]

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[291] Matter No. 17-F-0619 Application of Hecate Greene 1, LLC, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions at 34-35.

[292] Record 128, Towns' Combined Petition at 63.

[293] Record 128, Towns' Exhibit A at PDF p 17-25; see, Appendix 8A (Revision 1) at 87 (The Heaven and Hell Bike Trail is identified by the Applicant as a Visually Sensitive Resource (VSR)).

[294] Record 78, VIA (Revision 1): Attachment D1; Record 77, VIA (Revision 1): Attachment D, Part 1 of 3; Record 78, VIA (Revision 1): Attachment D, Part 2 of 3; Record 78, VIA (Revision 1): Attachment D, Part 3 of 3.

[295] Record 78, VIA (Revision 1): Attachment D, Part 2 of 3 at 7 – 10.

[296] Record 79, Appendix 8-A (Revised): Visual Impact Assessment at 84-85.

Staff maintains that the Facility will not significantly impact Route 20 and the record demonstrates that visual impacts will be avoided, minimized, and mitigated. The Applicant conducted a robust visual assessment and identified 287 important or representative viewpoints (VPs) within the visual study area (VSA) and for further evaluation in consultation with the Towns of Eaton, Fenner, Nelson, and Smithfield; OPRHP/SHPO; the Office, and other stakeholders.[297] The initial viewshed analysis indicated that the Facility would potentially be visible from 21 important or representative VPs representing 33 Visually Sensitive Resources (VSRs) within the VSA.[298] A total of 132 photographic simulations and 101 line-of-sight profiles were evaluated as part of the visual analysis.[299] The Applicant subsequently relocated four of the turbines, conducting a second visual impact analysis and an additional set of 168 photosimulations and wireframe renderings to demonstrate the changes did not result in a more significant visual impact.[300] Facility siting includes consideration of avoidance and minimization of impacts to visual resources including changes to the proposed locations and layout. To avoid impacts to visual resources including the use of fewer, large turbines generally results in a better visual outcome than a greater number of smaller turbines.[301]

As noted above, there is no merit to the Towns' claims. The Towns have provided a list of comments in Exhibit A prepared by a consultant after having reviewed the Application, the Towns do not provide any support in Exhibit A for this claim, and as discussed above this is not an offer of proof.[302] The Towns also restate the Department of Transportation's description of Scenic Route 20 from the Department of Transportation website.[303] This is also not an offer of proof, nor does

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[297] Record 79, Appendix 8-A (Revised): Visual Impact Assessment at 45—50, 77.

[298] Record 98, Appendix 8-C: Visual Impacts Assessment Addendum, Part 1-4 of 10; Record 99, Appendix 8-C: Visual Impacts Assessment Addendum, Part 5-8 of 10; Record 100, Appendix 8-C: Visual Impacts Assessment Addendum, Part 9-10 of 10.

[299] Record 76, Appendix 8-B (Revised): Visual Impact Minimization and Mitigation Plan at 7.

[300] Record 98, Appendix 8-C: Visual Impact Assessment Addendum, Part 1 of 10 at 1—5.

[301] Record 76, Appendix 8-B (Revised): Visual Impact Minimization and Mitigation Plan at 10.

[302] Record 128, Towns Exhibit A at PDF 16-25.

[303] Record 128, Towns' Combined Petition for Party Status and Statement of Compliance at 63; see https://www.dot.ny.gov/display/programs/scenic-byways/route-20.

it provide any support for the Towns' claim that the Facility is in violation of the State's Scenic Byway Program, or that the proposed turbines will affect the economy of the Towns. Based on the foregoing, Staff maintains that the Towns have failed to raise an adjudicable issue pertaining to the visual impacts to the Route 20 Scenic Byway.

D. Madison County

The County raises two issues for adjudication.[304] First, the County claims that the siting of the wind turbines will interfere with its emergency radio system in violation of the Federal Communication Act's prohibition against willful or malicious interference with licensed radio communications.[305] Second, the County claims that the plan to leave concrete wind turbine foundations 4 feet below grade upon decommissioning violates state and local solid waste laws.[306] As demonstrated below, the Record already indicates that there will be no impact on the County's communications system, nor will there be any violation of solid waste laws. Therefore, the County fails to present any issues for adjudication.

1. Microwave Interference

The County claims there is "potential" for interference with its public safety microwave radio system from Turbine 6 based on a "preliminary review of available data" conducted by its contractor Microwave Networks, Inc. (Microwave Networks Analysis).[307] The County states it has commissioned further detailed "Fresnel Zone" analysis, which is not yet completed due to time constraints of the consultant, "to confirm or rule out its consultant's initial opinions."[308] Nevertheless, the County

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[304] Record 127, County Petition.

[305] Id. at 5-6.

[306] Id. at 6-8.

[307] Id. at 5.

[308] Record 127, County Petition at 6. According to the Applicant's Exhibit 20: "Microwave telecommunication systems are wireless point-to-point links that require clear line-of-sight conditions between each microwave dish. To assure an uninterrupted line of communication, a microwave link should be clear, not only along the axis between the center point of each microwave dish, but also within a formulaically calculated distance around the center axis of the radio beam, known as the Fresnel Zone. The potential impacts to microwave paths whose Fresnel Zone is impacted by a wind turbine would include a reduction in signal level, lower path reliability, and/or intermittent signal drops. The primary method to avoid issues with microwave paths is to design wind projects in locations

claims that "adjudicable issues remain as to whether the siting of Project turbines (particularly Turbine 6) in the vicinity of the County's Mutton Hill tower could result in a violation of the Federal Communications Act," and "conflicting expert opinions … provide questions of fact amenable to resolution in the context of an evidentiary hearing…"[309]

The County's claims fail. There are no conflicting expert opinions. The same potential for interference from Turbine 6 raised in the County's Microwave Networks Analysis was identified by the Applicant in the Microwave Study in the Record.[310] The Microwave Networks Analysis identified two microwave paths, and two turbines located close to each path, but concluded that only one turbine - Turbine 6 - presents a "risk factor" for the microwave link's performance.[311] Likewise, the Applicant's Microwave Study identified one "potential obstruction case" based on a two-dimensional analysis – also Turbine 6.[312] Therefore, there is no conflict between information in the Record and the information attached to the County Petition, and thus no adjudicable issue.

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that do not infringe on the Fresnel zones. Other mitigation for these impacts would be to redesign the path so that the signal blockage is removed. A redesign may include changing centerlines, locations, or frequency bands to work around the wind turbine." Record 98, Exhibit 20 (Revision 1): Effect on Communication at 9-10.

[309] Record 127, County Petition at 6.

[310] Turbine 6 is referred to as "RMUT4" in the Microwave Networks Analysis. Compare Record 127, Exhibit B to County Petition at 3 to Record 101, Appendix 20-D (Revision 1): Microwave Study at 6.. The County's consulting engineers also reviewed the September 4, 2024 Microwave Study included in the Record and noted that it identified a site that was of concern. See Record 127, Exhibit A to County Petition.

[311] Record 127, Exhibit B to County Petition at 6. The Microwave Networks Analysis was based on a turbine with a 132 meter rotor diameter and 64.5 meter/212 foot blade length, with no indicated hub height.

[312] Record 101, Appendix 20-D (Revision 1): Microwave Study at 5-6. The Applicant's Microwave Study was based on a blade diameter of 158 meters and turbine height of 117 meters. This is consistent with the tallest turbine under consideration in the Application. See Record 81, Exhibit 5 (Revision 1): Design Drawings at 4. The first version of the Microwave Study in the Record was based on a blade diameter of 163 meters. See Record 53, Appendix 20-D: Microwave Study. It does not appear that Exhibit 20 was revised to reflect this change. See Record 98, Exhibit 20 (Revision 1): Effect on Communications. In both cases, the cross sectional analysis concluded that there was sufficient clearance between the blades and the microwave Fresnel Zone, and no obstruction was found. Compare Record 101, Appendix 20-D (Revision 1): Microwave Study at 7-8 to Record 53, Appendix 20-D: Microwave Study at 1-9.

Nor will there be any "malicious" or "willful" interference with the County's microwave communication system in violation of 47 USC § 333.[313] While the County says it has commissioned a study to "confirm or rule out" actual interference, such a detailed cross-sectional analysis has already been conducted by the Applicant and included in the Record.[314] The consultant further evaluated the identified "potential obstruction case" with a cross-sectional analysis, which calculated "the precise height and width of 100% of the first Fresnel Zone at the turbine location based on the antenna heights of the two link endpoints and the earth curvature bulge at the specific turbine location."[315] This analysis calculates the clearance between the blades and the microwave Fresnel Zone. The results of the cross-sectional calculations showed positive clearance values, indicating clearance of the Fresnel Zones. The Microwave Study concludes that no turbines "were found to have potential obstruction with the microwave systems in the area."[316] As demonstrated above, the County's stated intention to provide the further study - which it acknowledges may rule out any actual interference just as the Applicant's Microwave Study did - is not a sufficient offer of proof to raise an adjudicable issue. In the absence of any ability on the part of the County to show that it will prove otherwise, the County's claims fail.

The Applicant has indicated that it will conduct micrositing to determine final turbine locations in the context of its request for relief from the Towns' setback requirements.[317] Staff recommended approval of the waiver requests, including for Turbine 6 located in the Town of Fenner, subject to the Office's review of final turbine locations as identified in final design drawings, which must be submitted prior to commencement of construction.[318] Any change in final turbine locations will be subject to assessment pursuant to 16 NYCRR § 1100-11.1, and the Applicant will

[313] 47 USC § 333 provides: "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under [47 USC Chapter 5] or operated by the United States Government."

[314] See Record 101, Appendix 20-D (Revision 1): Microwave Study at 7-8.

[315] Record 101, Appendix 20-D (Revision 1): Microwave Study at 7.

[316] See Record 101, Appendix 20-D (Revision 1): Microwave Study at 7-8.

[317] Record 117, Appendix 24-E (Revision 2): Statement of Justification at 7.

[318] Record 121, Draft Permit at 6, 10, 11, 14.

need to demonstrate that the conclusions of the Microwave Study remain the same.[319] Therefore, the fact that turbine locations are not final yet does not raise any issues.

Finally, the Applicant commits to identify and mitigate any impacts to communications systems that occur post construction, stating: "In the unlikely event that a public safety entity believes their coverage has been compromised by the Facility, the Applicant will work with the public safety entity to remedy any interference related to the Facility."[320] Based on the foregoing, there are no adjudicable issues with regard to interference with the County's microwave radio system.

2. Decommissioning

The County claims that the proposal to leave portions of turbine foundations buried more than 4 feet below grade in the ground per the preliminary Decommissioning and Site Restoration Plan "is in apparent conflict with current State and local law" and that "adjudicable issues remain as to whether the decommissioning plan for the Project violates State and local law."[321] First, the County claims that the remaining foundations constitute "solid waste," and 6 NYCRR § 360.9(b)(4) prohibits "discarding waste, beyond initial collection, except at a[n authorized] facility or collection event."[322] The County further claims that Madison County Local Law #3 of 2004 (County Solid Waste Law) Section III(9)(b) prohibits "open dumps," and that this law was not identified in the Application, but ORES "will have to make a determination as to the applicability and potential waiver" of this law "as it pertains to abandonment of some estimated 13,000 tons of concrete upon decommissioning the facility."[323] The County makes no offer of proof on this issue,

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[319] Record 121, Draft Permit at 6, 10, 11, 14. 16 NYCRR § 1100-11.1 provides for assessment of permit modifications requested by the permittee.

[320] Record 98, Exhibit 20 (Revision 1): Effect on Communications at 12 ("Possible solutions include optimizing nearby base transmitters, adding a repeater site, and/or using utility towers, meteorological towers, or even the turbine towers within the Facility as base station or repeater sites.")

[321] Record 127, County Petition at 8.

[322] Id. at 7.

[323] Record 127, County Petition at 8. In its Statement of Compliance, the County further claims that the Decommissioning and Site Restoration Plan "appears to be in anticipatory conflict" with its local law "prohibiting unauthorized solid waste disposal in the County to the extent it purports to allow for the abandonment on site of construction wastes below four feet subgrade." Record 127, County Petition at 8. The County did not provide a copy of the referenced Local Law #3 of 2004. Staff was able to locate

nor does it demonstrate why or how these solid waste laws are applicable. Therefore, the County's claim fails.

The concrete turbine foundations that will be left in place do not constitute "solid waste," because they will not be "discarded."[324] Solid waste or waste is defined by the New York State Department of Environmental Conservation as "…discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, municipal, commercial, institutional, mining or agricultural operations or from residential activities including materials that are recycled or that may have value."[325] A material is considered discarded if it is spent, worthless, or in excess to the generator, and is:

> (i) thermally, physically, chemically or biologically processed;
>
> (ii) disposed through discharge, deposit, injection, dumping, spilling, leaking or placement into or on any land or water so that the material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water; or
>
> (iii) accumulated or transferred instead of or before being processed or disposed."[326]

There is no statutory or regulatory definition of "disposal," but administrative decisions and case law support the interpretation that to dispose or to discard requires an action such as hauling or dumping.[327] Therefore, to constitute

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a copy filed with the Department of State on October 18, 2004, available at: https://locallaws.dos.ny.gov/

[324] The term is defined the same under State regulations and the County Solid Waste Law. The County Solid Waste Law provides: "Solid Waste shall have the meaning specified in 6 NYCRR Part 360-1.2 as the same may be amended, superseded or replaced." There is no such section, so it is assumed that the definitions in 6 NYCRR § 360.2 are applicable.

[325] 6 NYCRR § 360.2(a)(1)

[326] 6 NYCRR § 360.2(a)(2). *Discharge* means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying or dumping of any material, including waste or leachate, into or on any air, land or water. 6 NYCRR § 360.2(b)

[327] NYSDEC Case No. R4-2017-1026-258 (In the Matter of Merrick Trucking Corp., at PDF p. 1-2) (respondent in violation of ECL article 27 for actively disposing of solid waste through hauling 161 loads of topsoil, rocks, bricks, processed paint wood, electrical wiring, piping, foam, tiles, metals, and plastics which respondent deposited at the site); NYSDEC Case No. DEC Case No. R5-20230912-2396 (In the Matter of Anthony Smith d/b/a Smith's Land Clearing Debris Landfill) (respondent in violation of Article 27 of the ECL and 6 NYCRR Part 360 for accepting and disposing of construction and demolition debris and waste tires, and was fined for the "actual act of disposal" at PDF p. 14); State v.

solid waste, a material must be actively discarded. Here, the material will simply be left in place – neither processed nor disposed of. To leave materials in place cannot be considered a "discharge, deposit, injection, dumping, spilling, leaking or placement." Moreover, the County has made no demonstration or offer of proof that the buried concrete "or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water." Therefore, the materials that will be left in place upon decommissioning will not constitute solid waste.

Even if it did constitute solid waste, the concrete left in place would not be subject to the prohibition in 6 NYCRR § 360(9)(b)(4) cited by the County because it only applies to solid waste that has been collected first. It provides:

> A person must not discard waste, beyond initial collection, except at a facility or collection event allowed under this Part [regulating Solid Waste Management Facilities] and Parts 361 [Material Recovery Facilities], 362 [Combustion, Thermal Treatment, Transfer, and Collection Facilities], 363 [Landfills], 365 [Regulated Medical Waste], or Subpart 374-2 [Used Oil] of this Title.[328]

This provision clearly applies only to solid waste that is first collected, e.g., picked up curbside or from where it was generated, and provides that it must then be brought to an authorized facility to be discarded. Here, there will be no "collection" of the concrete – which will be left in place - to make this provision applicable.

Nor would there be a violation of the County Solid Waste Law prohibition against "open dumps." Section III(9)(b) of the County Solid Waste Law provides: "There shall be no open dumps in the County." "Open Dump" is defined as "a Solid Waste disposal area which is not authorized to be operated under applicable Federal and State laws and regulations." As demonstrated above, the concrete left in place is not "disposed of" and does not constitute solid waste, thus it cannot be an "open

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Prato, 45 Misc. 3d 722, 730, 993 N.Y.S.2d 442, 450-451 (Sup. Ct. 2014) (fill illegally delivered, deposited and graded on the property in violation of 6 NYCRR § 360 and Article 17 of the ECL for harmful discharge); and NYSDEC Case No. R2-20050607-202, (In the Matter of Mezzacappa Brothers, Inc., Sam Mezzacappa and Frank Mezzacappa, at PDF p. 51) (respondents in violation of various provisions of 6 NYCRR 360 and the ECL and found to be improperly discarding solid waste by throwing it over a fence or finding it dumped over a slope).

[328] 6 NYCRR § 360.9(b)(4).

dump." Therefore, this provision does not apply to the Facility, and no waiver would be necessary. Moreover, the Final Permit will include the decommissioning of the Facility pursuant to the final Decommissioning and Site Restoration Plan, so it will therefore be "authorized to be operated."[329]

Finally, the Office's regulations specifically contemplate abandonment in place of buried components: Applicants must provide a "gross and net decommissioning and site restoration estimate … with line items (and associated dollar amounts) for decommissioning of all facility components removed four (4) feet below grade in agricultural land and three (3) feet below grade in non-agricultural land…"[330] The County claims this conflicts with the requirement in 16 NYCRR § 1100-6.6 that "The permittee shall adhere to all state laws and regulations in effect at the time of decommissioning regarding the disposal and recycling of components."[331] These two provisions are not in conflict, because one permits components to be left in place, while the other governs components that will be disposed of or recycled.

VI. THE TOWNS' REQUEST FOR AMICUS STATUS SHOULD BE DENIED

In its Petition for Party Status, the Towns state "[i]n the alternative, if the Towns are not awarded full party status, then amicus status is sought for the right to file a brief and to have the opportunity to present oral argument on the issues

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[329] Nor would leaving the concrete in place upon decommissioning require any authorization from NYSDEC. Pursuant to PSL § 1442(2), "no other state agency . . . may, except as expressly authorized under this article or the rules and regulations promulgated under this article, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility . . . with respect to which an application for a siting permit has been filed . . . Notwithstanding the foregoing, the department of environmental conservation shall be the permitting agency for permits issued pursuant to federally delegated or federally approved programs." Unlike state hazardous waste programs which are delegated pursuant to Subtitle C of the federal Resource Conservation and Recovery Act (RCRA), management of solid waste under Subtitle D of RCRA is specifically left to the states. Compare 42 USC § 6926 (requiring federal authorization for state administration and enforcement of hazardous waste programs) with 42 USC § 6941 (providing for federal technical and financial assistance for state solid waste management planning); see also 40 CFR § 272 Subpart HH (final authorization for New York State-administered hazardous waste program). Therefore, the NYSDEC solid waste program is not a federally designated or approved program, and it is preempted pursuant to PSL § 144(2).

[330] 16 NYCRR § 1100-2.24(c).

[331] Record 127, County Petition at 7.

identified in the ALJ's ruling on its party status. 16 NYCRR § 1100-8.4(c), (f)(2) and (g)(2)."[332]

16 NYCRR § 1100-8.4(c)(3)(ii) indicates that one of the "[a]dditional contents required for petitions for amicus status" is "identify[ing] the nature of the legal or policy issue(s) to be briefed *which meets the criteria of* [16 NYCRR §] 1100-8.3(c)."[333] 16 NYCRR § 1100-8.3(c) provides the "[s]tandards for adjudicable issues" (i.e., substantive and significant issues). Therefore, the "legal or policy issue" identified by an amicus party must meet the substantive and significant standard set forth in 16 NYCRR 1100-8.3(c) and discussed in Section V.A.

As demonstrated above in Section V.C, the Towns have failed to raise any substantive and significant issues, thus there is little basis for requesting amicus status. Additionally, 16 NYCRR § 1100-8.4(c)(3)(ii) requires a party seeking amicus status to provide a statement explaining why the proposed party is in a "special position" with respect to that issue. No such statement is included within the Towns' Petition. Indeed, the request for amicus status appears to be an attempt for a second bite at some level of party status, without even an attempt at meeting the regulatory requirements. This is not the intention of amicus status. Accordingly, the Towns should be denied amicus status.

VII. MADISON COUNTY'S PETITION FOR MANDATORY PARTY STATUS SHOULD BE DENIED

In its Petition, the County states that: "Accordingly, Madison County is a mandatory party relative to the adjudicatory hearing process and should be granted full party status. § 1100-8.4(b)"[334] The County seems to misunderstand the criteria for qualifying for mandatory party status under 16 NYCRR § 1100-8.4(b). The ALJs must first determine that an adjudicatory hearing in a proceeding is necessary before they decide to grant requests for mandatory party status.[335] Here, as discussed above,

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[332] Record 128, Towns' Combined Petition at 22.

[333] 16 NYCRR § 1100-8.4(c)(3)(ii) (emphasis added).

[334] Record 127, County Petition at 2.

[335] See ORES Matter No. 23-02984, Matter of Foothills Solar, LLC, Issues Ruling at 33 ("Among the purposes of the issues determination procedure is to determine party status for participation in any adjudicatory hearing held on an application…We hold that there are no issues joined for adjudication. Therefore, an adjudicatory hearing in this matter is not necessary. We have also determined and resolved all legal arguments. Accordingly, the Town of Mayfield's petition for full party status, or in

neither the Towns of Fenner, Nelson, Smithfield, or Eaton, nor Madison County have demonstrated that there are any substantive and significant factual issues requiring an adjudicatory hearing. Therefore, Madison County's request for mandatory party status should be denied.

VIII. RESPONSE TO MADISON COUNTY COMMENTS

On April 25, 2025, Madison County submitted written public comments pursuant to the Combined Notice.[336] Upon review, Staff finds that they do not raise any substantive or significant issues. In its comment, the County repeats its assertions regarding Municipal Home Rule, microwave interference, decommissioning involvement, and transportation infrastructure included in its Petition, which have been addressed in Section V.D, above. The County also raises an issue regarding the County's review of the Applicant's Public Health, Safety and Security Plan and Safety Response Plan, stating that "safety programming is not yet adequately developed to facilitate coordination between facility employees and government first responders" and suggest that the Plan be modified to ensure County involvement and consultation.[337] The Office requires a final Safety Response Plan to be submitted for approval pursuant to subpart 5(d) of the Permit and in accordance with 16 NYCRR §§ 1100-2.7 and 10.2, which shall provide for emergency responder training.[338]

Finally, the County expresses concern that siting of the Facility will lead to further development of such facilities in the community. Staff acknowledges this concern but notes that the selection of locations of proposed major renewable energy facilities is outside the scope of the Office's jurisdiction. To the extent they are not fully addressed here, the County's public comments will be addressed in the Assessment of Public Comments as required pursuant to 16 NYCRR § 1100-8.3(c)(5) should a Final Siting Permit be issued in this proceeding.

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the alternative amicus status, is denied. Because no issues are joined for adjudication that implicate the Towns' jurisdiction, the Town's alternative request for party status as a responding municipality pursuant to 16 NYCRR 1100-8.4(b) is denied.") (citations omitted).

[336] DMM Public Comment Tab – Comment No. 130.

[337] DMM Public Comment Tab – Comment No. 130 at PDF p. 8.

[338] Record 121, Draft Permit at 63.

IX. CONCLUSION

Based on the foregoing, no substantive and significant factual issues requiring adjudication have been demonstrated in this matter. In addition, given that the Towns of Fenner, Nelson, Eaton, and Smithfield as well as Madison County have all failed to demonstrate any error of law or abuse of discretion by ORES Staff, no legal issues exist in this matter.

Staff finds that the proposed Facility, together with the uniform standard conditions, site specific conditions, and required compliance filings in the Draft Permit, would comply with PSL Article VIII, the Office's regulations at 16 NYCRR Part 1100, and avoid, minimize and/or mitigate, to the maximum extent practicable, potential adverse environmental impacts of the Facility. Accordingly, Staff recommends issuance of a final Siting Permit.