

NEW YORK STATE
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

In re the Matter of

Application of Alle-Catt Wind Energy LLC for a Certificate
of Environmental Compatibility and Public Need
Pursuant to Article 10 for a Proposed Wind Energy
Project, Located in Allegany, Cattaraugus, and Wyoming
Counties, New York, in the Towns of Arcade, Centerville,
Farmersville, Freedom, and Rushford.

CASE 17-F-0282

CATTARAUGUS COUNTY'S RESPONSE TO ALLE-CATT WIND'S PETITION FOR
RELIEF AND COUNTER MOTION TO DISMISS PETITION

Dated: March 23, 2021
Webster, New York

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INTRODUCTION

Cattaraugus County (the “County”) now files this Reply in Opposition to Alle Catt Wind Energy, LLC’s (“ACWE’s”) Supplement to Petition for Relief Under Certificate Condition 4 (the “Petition”, DMM Item No. 488). The Petition is ACWE’s most recent attempt to engage in rulemaking by motion. ACWE asks the Siting Board to adopt a new rule: that Road Use Agreements will now be negotiated and executed by the state government, on behalf of host municipalities, and without local input. Further, ACWE demands the Siting Board reverse decades of past practice, and adopt generic road use terms preferred by ACWE, and that have been rejected by host municipalities throughout the state.

To achieve its goal of removing local control over local roads, ACWE demands the Siting Board modify the CECPN to withdraw its delegation of authority to the County to execute a Road Use Agreement. Although the County maintains no such delegation is necessary because local control over roads is not preempted, assuming *arguendo* that the CECPN did delegate road use approvals to the County, ACWE’s Petition constitutes a request for Revision of the CECPN that fails to comply with the requirements of Rule 16 NYCRR § 1000.16(b).

The County has consistently and conscientiously negotiated with ACWE to formulate a Road Use Agreement (“RUA”) that mitigates or avoids potential adverse impacts to County roads. The County transmitted an initial draft RUA to ACWE on January 26, 2022, which has subsequently undergone numerous rounds of revision by both ACWE and the County. Exhibits 1 through 10 of this response provide a clear picture of the County’s conduct during RUA discussions.

Negotiation of the RUA has been an iterative process that has resulted in an improved

draft agreement that more adequately protects the County's interests. Yet now, in an act of apparent buyer's remorse, ACWE asks the Siting Board to revert to the deficient agreement unfortunately agreed to by at least two of the host municipalities.¹ Just some of the improvements proposed by the county include:

- 1.) Increased amount of financial security to fund replacement of damaged roads in the event ACWE fails to meet its obligations under the RUA (increased from \$100,000 per mile to \$200,000, \$300,000, and \$850,000 per mile depending on road type) (Ex. 9, p. 16);
- 2.) Added provisions governing decommissioning road use, as ACWE requires a contract term through the end of decommissioning, but has not offered any terms paralleling the lengthy process, insurance, and security requirements associated with construction, or security that would be in place if the owner/operator goes bankrupt and the town is responsible for decommissioning (Ex. 9, p. 16, 18);
- 3.) Required the County's approval of ACWE's selection of third party contractors responsible for inventorying road conditions (Ex. 9, p. 3);
- 4.) Added a requirement that final haul routes be provided to County with 30 days of execution of the agreement (Ex. 9, p. 6).

None of these provisions are on their face unreasonable. Removing any one of them has the potential to create significant adverse impacts to county roads.

ACWE's request should be considered a Revision as defined by 16 NYCRR §

¹ It is worth noting that Allegany County has not accepted ACWE's road use agreement. Cattaraugus County is not alone in its concern over ACWE's continuing attempts to force unfavorable terms on local government.

1000.2(ak), and ACWE should be required to make an additional payment to the Intervenor Fund of at least \$75,000 in accordance with Rule 16 NYCRR § 1000.10(b)(2). Additional intervenor funding is necessary to offset the cost of adjudicating whether Invenergy's proposed RUA will mitigate or avoid adverse impacts to the maximum extent practicable, as required by PSL § 168.

Finally, the Petition, when stripped of gloss, identifies only three outstanding points of contention in the most recent version of the RUA. First, ACWE is unhappy with the County's attempt to require improvements to the deficient RUA forced on Farmersville and Freedom.

Second, ACWE opposes the County's request that ACWE provide all information normally required in support of a Road Use Permit. To explain further, because ACWE has refused to provide that information prior to execution of the RUA, the County proposed that such information be provided as part of a formal permitting process prior to use of the roads.

Third, ACWE opposes the County's opposition to legal "weasel words" inserted by ACWE's legal counsel in an attempt to create opportunities for future litigation. The County has no interest in expending even more time and resources in defending whether its actions to protect county roads are "reasonable" in the eyes of Invenergy.

Despite a lengthy iterative process that has resulted in numerous material improvements to the RUA, ACWE now seeks to cast the baby out with the bathwater and revert to a supposedly "standard" agreement that fails to include any of the improvements demonstrated by Exhibits 1 through 10 of this response. This reversion would of course then be forced upon Allegany County and all other host municipalities who have not yet entered into an RUA. The Siting Board should reject ACWE's power play, dismiss the petition, and if necessary appoint a mediator to settle this dispute.

For the reasons that follow, Cattaraugus County respectfully requests that the Siting

Board or the Public Service Commission dismiss the Petition on the grounds that it constitutes a request for modification or revision of the CECPN that fails to comply with 16 NYCRR §1000.16(b). At a minimum, a robust hearing or administrative rulemaking proceeding is required to ensure that all stakeholders have input into any “standard” road use agreement adopted by the Siting Board or Public Service Commission—before reversing years of precedent by claiming direct control over the protection and administration of local roads.

LEGAL ARGUMENT

Nearly two years have passed since ACWE initially sought the Siting Board’s intervention in Cattaraugus County’s management of its own roads. Since that time, ACWE has engaged in a halfhearted negotiation with the County, interspersed with attempts to derail negotiations through motion practice, harassing FOIL requests, and *ex parte* communications with the PSC demanding intervention. Indeed, it would be fair to conclude that ACWE has negotiated in bad faith, with the goal of sabotaging negotiations and eventually demanding the state intervention it now seeks.

Despite the headwinds of ACWE’s own making, the County has diligently negotiated in good faith, and stands by the numerous material concessions it has already obtained from ACWE. As demonstrated below, Cattaraugus County respectfully requests dismissal of the Petition because: (1) The petition is an improper request for revision of the Certificate that was not filed or initiated in accordance with Rule 1000.16(b), or an improper petition for rulemaking pursuant to Section 202 of the State Administrative Procedure Act; (2) Cattaraugus County continues to negotiate in good faith, while ACWE has misrepresented the significant progress achieved to date and now seeks the intervention of the Siting Board to scuttle concessions

already made to the County; and (3) ACWE's Petition to over-ride the County's authority to negotiate and execute a Road Use Agreement violates Article IX, Section 2(c)(6) of the New York State Constitution, and is inconsistent with Prior Siting Board orders.

Point I: The Petition Should be Dismissed Because ACWE Improperly Seeks Revision of the Certificate in Violation of Rule 16 NYCRR §1000.16(b).

In its original petition, ACWE argues that Section 172 of the Public Service Law (the supersession clause) should be read to impliedly preempt the County's authority to review, negotiate, and execute an RUA. Significantly, the current supplemental Petition changes ACWE's legal argument. Now, instead of arguing implied preemption, ACWE argues that the Siting Board should withdraw the delegated power to negotiate and execute a road use agreement necessary to avoid or mitigate adverse impacts to County roads. To grant the relief requested by ACWE, the Siting Board would need to modify the CECPN in at least two ways.

First, to remove the asserted delegation of road use authority, the Siting Board would need to modify Certificate Condition 4 to eliminate the requirement for an RUA between the County and ACWE. Attachment A to Appendix A of the Order requires ACWE to file a Road use Agreement between ACWE and the County within 5 days of wind turbine component deliveries:

16. Roads and Equipment Delivery Package

Information report. Must be filed before or within 5 days of the start of wind turbine component deliveries.

Required contents:

- a. Delivery route maps, showing routes on New York state, county, and town roads to be followed for oversize or overweight vehicles delivering wind turbine components to the Facility Site (WTG Deliveries). These route maps shall also identify any weight-limited bridges along the route that are to be avoided.

- b. Road Modification Plans, showing modifications to New York state, county, and town roads planned to accommodate the WTG Deliveries.
- c. Points of contact for NYS DOT, NYS Police Barracks, and county highway departments that can verify their department's awareness of the plans for WTG Deliveries.
- d. Road use agreements between ACWE and towns or counties.**

Order, Appendix A, p. 37 (DMM Item No. 399) (emphasis added).

The key operative word in 16(d) above is “between”. The Order expressly acknowledges an RUA is an agreement between a developer and a local government. ACWE now seeks to modify 16(d) to eliminate local government as a party to the agreement and replace it with the Siting Board or the Commission. If the Siting Board were to deem the County's conduct “unreasonable”, and grant ACWE authority to proceed with construction without an RUA executed by the County, the relief ACWE requests would constitute a modification of Condition 4 in violation of Rule 1000.16(b).

In effect, ACWE asks the Siting Board to replace the requirement in 16(d) with an entirely new certificate condition allowing ACWE to use all county roads, subject to the terms of an agreement the County has not approved, the terms of which were not litigated during the administrative hearing. This addition to the CECPN is the second major Revision sought by ACWE, and should be subject to the procedures set forth in Rule 1000.16(b).

ACWE's proposed change would constitute a major Revision to the CECPN, is inconsistent with all prior Article 10 precedent², and would require modification of the CECPN without first requiring the specific procedures for modification or revision set forth in Rule

² See Argument III *infra*.

1000.16(b). For these reasons, the Petition must be dismissed.

Point II: Cattaraugus County continues to negotiate in good faith, while ACWE has misrepresented the significant progress achieved to date and now seeks the intervention of the Siting Board to scuttle concessions already made to the County;

In the Supplemental Petition, ACWE picks and chooses facts to create a false narrative that a single elected county official controls the entire County government, and has masterminded a complex scheme to foil ACWE's demands for a Road Use Agreement with the County. ACWE's theory is creative, but it is false.

The negotiation between the County and ACWE began in earnest after ACWE's initial request for Siting Board intervention. The County Government created a multi-member working group to begin work on the road use issue. The working group was spearheaded by the County Attorney, Ashley Smith, with the assistance of Special Legal Counsel Benjamin Wisniewski providing background support. Additional members of the working group included the County Director of Engineering Bill Fox, and the following legislators: Public Works Committee Chairman Rick Helmich, Public Works Committee Vice Chairman Don Benson, Public Works Committee member Joe Snyder, Majority Leader Michael Brisky, and Legislator Ginger Schroder.

The working group began meeting at the end of 2021 with the initial goal to determine if a Road Use Agreement was preferable to simply using the County's permitting process. After determining an RUA would be preferable, the working group selected a template based on a road use agreement the County Attorney obtained from Steuben County.

On January 26, 2022, the working group held an initial meeting with ACWE

representatives. After that meeting, the same day, the County Attorney sent an email to ACWE providing an initial draft RUA for ACWE's consideration. The email and draft RUA are **Exhibit 1** to this response.

Subsequently, on May 4, 2022 the County Attorney attended a virtual meeting to discuss Alle-Catt's response to the County's initial proposal. The broader working group's participation ended by the end of May of 2022, at which point County Director of Engineering Bill Fox and the County Attorney took over the negotiation on behalf of the working group.

On June 3rd, 2022, the County Attorney provided an updated RUA addressing some of the concerns raised by ACWE during the May 4th meeting, as well as a list of county owned bridges in the Towns of Freedom and Farmersville. The June 3, 2022 email, and draft RUA, are **Exhibit 2** to this response.

By June 16, 2022 ACWE provided a response to the County's June 3rd draft. The ACWE response rejected all of the County's proposals and raised multiple issues that required internal review by Special Counsel and the Director of Engineering. Apparently unhappy with the pace of the County's review of the June 16th response, in August of 2022 ACWE accused the County of negotiating in bad faith. In response, the County attorney sent an email to ACWE recounting the County's efforts to negotiate in good faith, and further requesting ACWE cease its attempts to scuttle the negotiation through PSC involvement. The August 2, 2022 email from the County Attorney to the ACWE attorney is **Exhibit 3** to this response.

On August 12, 2022, the County responded with an updated draft RUA. As result, on September 15, 2022, ACWE sent an email to the County Attorney demanding a call to discuss the August 12 RUA and outstanding issues listed in the same email. The September 15, 2022 email is **Exhibit 4** to this response.

After a phone call to discuss the issues raised in the September 15th email, the County Attorney sent another email to ACWE further clarifying the County's position. This October 17, 2022 email is **Exhibit 5** to this response.

In response to the County Attorney's October 17 comments, ACWE sent an email on October 27, 2022, stating, "I think a resolution appears possible on these issues." The October 27, 2022 email is **Exhibit 6** to this response.

By November 15, 2022, the County Attorney and counsel for ACWE had another phone call to discuss outstanding issues, and that same day the County Attorney sent an email providing another updated RUA for ACWE's review. The email and draft RUA are **Exhibit 7** to this response.

On November 17, 2022, in response to a request made by ACWE's counsel during the November 15th phone call, the County Attorney sent an email providing a list of county concerns with the existing Freedom and Farmersville RUAs. The November 17, 2022 email is attached as **Exhibit 8** to this agreement.

On January 23, 2023, more than two months later, ACWE responded to the County's November 15th RUA and November 17th email. After providing "[m]y apologies for the hiatus", ACWE's counsel proposed additional changes and provided another draft RUA for the County's review. The January 23, 2023 email and draft RUA are **Exhibit 9** to this response.

A little more than a week later, on February 2, 2023, ACWE's counsel sent an email describing the results of ACWE's earlier harassing FOIL requests, which were made in yet another attempt by ACWE to derail productive negotiations. The County Attorney responded by noting, "I am short staffed right now, and it will probably be a few weeks before I can get you a response on your email and your previous email with the revised RUA." The February 2 and 3,

2023 emails are **Exhibit 10** to this response.

Rather than waiting for a response, or requesting a date certain by which the County would respond, ACWE unilaterally ended negotiations by filing the Supplemental Petition, without prior notice to the County.

The Siting Board and Public Service Commission are urged to carefully review the emails and drafts attached as Exhibits 1 through 10 of this response. The documents speak for themselves. The significant amount of work performed by the county over the past 15 months should not be negated because ACWE now sees an easier path to obtaining more of what it wants. The County has acted reasonably, and given the opportunity, will continue to act reasonably in negotiating an RUA that adequately protects County roads.

Point III: ACWE’s Petition to over-ride the County’s authority to negotiate and execute a Road Use Agreement violates Article IX, Section 2(c)(6) of the New York State Constitution, and is Inconsistent with Prior Siting Board Orders

The Siting Board should acknowledge that Article IX, Section 2(c)(6) of the New York State Constitution vests local government with control over local roads. Contrary to this constitutional mandate, ACWE argues that the Legislature, and by delegation the Siting Board, has the power to over-ride the State Constitution and deprive county government of its authority to manage the use, repair, and safety of local roads. The relief ACWE seeks is extraordinary, unconstitutional, and contrary to the Siting Board’s own regulations and past precedent. *See e.g.* 16 NYCRR 1000.2(r), (t), (u), (ai); 1001.25(d)(5).

The relief sought by ACWE is at odds with the Siting Board’s consistent requirement that Certificate holders demonstrate municipal consent to the use of local roads, and avoidance of

impacts, by filing executed road use agreements prior to commencing deliveries. ACWE has failed to cite to a single example where the Siting Board did not require filing of a road use agreement. On the contrary, the requirement for a locally negotiated Road Use Agreement or Permit is a universal Certificate condition. Examples from just some Article 10 proceedings follow:

- In the Matter of the Application of Cassadaga Wind LLC, Case No. 14-F-0490, the Order Granting Certificate of Environmental Compatibility and Public Need states, “The Applicant will obtain necessary local permits, and will enter a Road Use Agreement providing that any damage to local roads will be repaired at the Applicant’s expense” (p. 86), and Condition 26 requires that, “The Traffic Control Plan shall include copies of Host Community Agreements and/or Road Use Agreements with the County and Towns where the local roads are being used for delivery and construction vehicle transport routes.”
- In the Matter of the Application of Canisteo Wind Energy LLC, Case No. 16-F-0205, the Condition 139 of the Order Granting Certificate requires that, “The Certificate Holder shall comply with the substantive requirements of the local laws ... including those governing . . . road use and traffic safety.” In addition, Condition 16 of Attachment A requires the filing of, “Road use agreements between CWE and towns or counties”, and “[a]n Amish Road Use Report prepared in consultation with representatives of the Amish community and the Town(s) identifying the extent of road use by the Amish community with horse-drawn modes of transportation on the roads in the Project area intended to be used for construction and delivery activities. The Report shall contain mitigation measures to assure the safety of the Amish during

construction activities and delivery of project components.”

- In the Matter of the Application of Number Three Wind LLC, Case No. 16-F-0328, the Order Granting Certificate requires filing of “final executed road use agreements” as a compliance filing (p. 86), Condition 3 authorizes “The Town of Lowville to enter into road use agreements”, Condition 27 of Appendix A requires “a final executed road use agreement with the Town of Lowville”, Condition 51 of Appendix A requires filing of “copies of any Host Community Agreements and/or Road Use Agreements with the County and any affected towns where the local roads will be utilized for delivery or construction vehicle transportation”, and Condition 16 of Appendix A requires filing of “Road use agreements between NTW and towns or counties.”
- In the Matter of the Application of Bluestone Wind, LLC, Case No 16-F-0559, the Order Granting Certificate requires that, “Certificate Conditions 55 and 56 relate to traffic control, local and State permitting, and consultation with local officials regarding construction traffic and deliveries. Bluestone will be required to submit compliance filings including all Road Use Agreements, any crossing agreements with utility companies, and all permits associated with delivery of Facility equipment” (pp. 70-71).
- In the Matter of the Application of Garnet Energy Center, LLC, Case No. 20-F-0043, Condition 37 of the Order Granting Certificate requires the following:

At least 10 days before a distinct construction activity commences, prior to using a route for any Project activities requiring a road/transportation permit, copies of all necessary transportation permits within the Project Area, for that activity,

from the owner of the affected State, County, and/or Town roads shall be submitted to the Secretary as an Information Report upon receipt from the issuing authority. Such permits shall include, if applicable, but not be limited to: Copies of fully executed Road Use Agreements (related to phases or overall construction), Highway Work Permit to Work Within Right-of-Way (ROW), Highway Utility Permit to Work Within ROW, Permit to Exceed Posted Weight Limit Roads, Traffic Signal Permit to Work Within ROW, Special Haul Permit for Oversized/Overweight Vehicles, and Divisible Load Permit, and/or any owner/operator required crossing agreements with utility companies for work being done in an affected utility right of way, shall be provided as Information Reports to the Secretary prior to any work being performed relevant to the specific road or utility right of way in those agreements.

In addition, the proposed SEEP Guide requires “copies of the Road Use Agreements (which may also be provided as stand-alone Information Reports prior to using roads subject to the executed Road Use Agreements with the Town of Conquest and Cayuga County) with Cayuga County and the town” (Order, p. 221).

The above list of examples is not exhaustive, but it demonstrates a long-standing precedent of Siting Board non-interference with local road use issues. The general rule is that the Siting Board acknowledges local control over local roads, and requires CECPN holders to file proof of required road use permits or agreements as compliance or informational filings.

The remedy sought here by ACWE is extraordinary in that it would end this longstanding practice, and instead require the Siting Board to adopt a standard Road Use Agreement that would supplant local permits and agreements. It is respectfully submitted that a change of this magnitude requires an administrative rulemaking proceeding pursuant to SAPA, or at a

minimum, requires amendment of the CECPN with a detailed Order highlighting the facts and analysis demonstrating adverse impacts to roads will be mitigated or avoided by whatever the Siting Board ultimately adopts.

CONCLUSION

For the forgoing reasons ACWE's Petition should be denied. The County has acted reasonably in negotiating and RUA and will continue to do so, although at this point a mediator may need to be appointed as ACWE continues to short circuit negotiation with vexatious motion practice, FOIL requests, and apparent *ex parte* communications with the PSC. Furthermore, ACWE has not demonstrated why a Road Use Agreement must be executed with the County now, before Allegany County has executed an agreement, and at the same time ACWE is actively seeking an extension of the CECPN expiration date through 10 years after issuance.

Finally, if the Siting Board or PSC is inclined to intervene, an evidentiary hearing should be convened as part of a proceeding to consider ACWE's proposed policy changes and Revision of the CECPN. *See* Rule 1000.16(b). Such hearing is necessary to provide the County with a meaningful opportunity to present evidence for and against specific provisions of the RUA, and to mitigate or avoid adverse impacts to County roads.

Dated: March 23, 2021
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