NEW YORK STATE BOARD ON
ELECTRIC GENERATION SITING AND
THE ENVIRONMENT

CASE 17-F-0282 - 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.

Siting Board Meeting via Webex Connection

Wednesday, June 3, 2020 @ 10:30 am

JOHN B. RHODES, Chair
LOUIS ALEXANDER, alternate of Basil Seggos, Department of
Environmental Conservation
DR. ELIZABETH LEWIS-MICHL, alternate of Dr. Howard Zucker,
Department of Health
VINCENT RAVASCHIERE, alternate of Eric Gertler, Empire
State Development Corporation
JOHN WILLIAMS, alternate of Richard Kauffman, New York
State Energy Research and Development Authority
Christopher Mueller, Ad Hoc Member
CHAIRMAN RHODES: Good morning. My name is John Rhodes. I’m Chair of the Public Service Commission and also Chair, in this case, of the Board on Electric Generation Siting and the Environment and I’d like to call this meeting of the Board on Electric Generation Siting and the Environment to order.

Before we get started, I’d like to note our arrangements for the meeting today. In line with the guidelines concerning social distancing and minimizing large gatherings and in keeping with the Executive Order, suspending provisions of open -- the Open Meeting Law on an emergency basis, we are conducting today’s meeting remotely. I’d like to remind those who are participating by phone, to please mute their lines, except when they are speaking. The public will have the opportunity to listen to the meeting, by going to the Department’s webcast page. We will also record and transcribe the meeting, as has been our practice. These arrangements have been reviewed by our general counsel and he has found that they meet the requirements of the Executive Orders and that they meet my own expectations of honoring the intent of
the Opening Meetings Law.

Before moving to the agenda, I would like to introduce the alternates, representing the permanent members of the Siting Board and as I call your name and introduce you, could you please say here or present or some other confirmation that you’re -- you’re on the call. Louis Alexander, alternate of Basil Seggos, Department of Environmental Conservation.

MR. ALEXANDER: Present.

CHAIRMAN RHODES: Thank you. Dr. Elizabeth Lewis-Michl, alternate of Dr. Howard Zucker, Department of Health.

DR. LEWIS-MICHL: Present.

CHAIRMAN RHODES: Thank you. Vincent Ravaschiere, alternate for Eric Gertler, acting Commissioner of New York State Department of Economic Development and President and Chief Executive Officer Designate Empire State Development.

MR. RAVASCHIERE: Present.

CHAIRMAN RHODES: Thank you. John Williams, alternate of Richard Kauffman, New York State Energy Research and Development Authority.

MR. WILLIAMS: Present.
CHAIRMAN RHODES: Thank you. And, I’d also like to introduce the Ad-hoc member of the Alle-Catt Article 10 Siting Board, Christopher Mueller.

MR. MUELLER: Present.

CHAIRMAN RHODES: Thank you very much. Secretary Phillips, are there any changes to the agenda?

SECRETARY PHILLIPS: There are no changes to the agenda.

CHAIRMAN RHODES: Thank you very much. So, we’ll proceed to that -- to the agenda, the regular agenda. Case 17-F-0282, Application of Alle-Catt Wind Energy, L.L.C., for a Certificate of Environmental Capability and Public Need, pursuant to Article 10, for a Proposed Wind Energy Product, located in Allegany, Cattaraugus and Wyoming Counties, New York, in the Towns of Arcade, Centerville, Farmersville, Freedom and Rushford, presented by Dakin LeCakes, Chief Administrative Law Judge, Department of Public Service and Gregg Sayre, Administrative Law Judge, Department of Public Service. Michael Caruso, Administrative Law Judge, Department of Environmental Conservation, James McClymonds, Chief Administrative Law Judge,
Department of Environmental Conservation and Robert Rosenthal, General Counsel, are available for questions. Mr. LeCakes and Mr. Sayre, please begin.

A.L.J. LECAKES: Thank you Chairman. Good morning, Chairman Rhodes and members of the Siting Board. You have been provided with a Draft Order that, if adopted, will grant a Certificate to Alle-Catt Wind Energy, to construct and operate a wind generating facility in parts of Allegany, Cattaraugus and Wyoming Counties.

The Certificate is conditioned on the developer’s compliance with certain requirements, that have been established in precedent, dating back to when I first appeared before the Board in the Cassadaga Wind matter, in January 2018.

Specifically, the Board’s environmental and public health and safety conditions in areas such as wetlands, endangered species, noise and operational matters, continue to be applied to ensure that the interests of New York State residents, are protected, as this State moves toward achieving its renewal energy goals.

Appearing in this case, as an issue of first impression, is the seismology of the project
area, which is situated on the Clarendon-Linden Fault System. The Order requires further study in Alle-Catt Winds pre-construction geotechnical report of that fault system and its potential impacts on the wind turbines, thereby ensuring to the maximum extent practicable, the facility’s ability to withstand seismic events.

Another area of first impression for this project, concerns its proximity to a designated environmental justice community. Environmental justice considerations include, ensuring the fair treatment and meaningful involvement of all people, regardless of race, color or income, with respect to the development implementation and enforcement of environmental laws, regulations and policies.

The Draft Order adopts the recommended decision’s finding, that the environmental justice community will not be subjected to a disproportionate impact, by locating the project facilities, therein and that any impacts there, have been minimized and mitigated to the maximum extent practicable.

Turning to environmental considerations, for State forests, the Draft Order establishes minimum setbacks of 1.1 times the turbine
tip height, from the forest boundary, to minimize the potential adverse risk from a turbine collapse or ice throw condition, to the public enjoying the use of the State forest.

As an additional benefit, this setback results in the project meeting all applicable noise standards at the forest boundary, as the sound attenuates over the intervening distance. Thus, the Order determines that no additional noise limit at the forest boundary is required.

With respect to bats, following Siting Board precedent, the Draft Order provides Alle-Catt Wind, an opportunity to demonstrate during the compliance phase, that the Board’s 6.9 meters per second curtailment regime, should be modified where the Applicant demonstrates that that regime jeopardizes project viability and where Alle-Catt can provide a satisfactory net conservation benefit plan, in consultation with both the Department of Public Service and the Department of Environmental Conservation.

Finally, the Draft Order concludes that based on the entire record of this proceeding, the Applicant has satisfactorily demonstrated that
the threatened Upland Sand Piper, is not present in
and is unlikely to reoccupy areas that D.E.C. had
previously identified as occupied habitat, pursuant
to the State Endangered Species Law. This conclusion
supports a finding that the construction of the four
turbines in that area, will not result in any take of
Upland Sandpiper occupied habitat and thereby
eliminates any need for a net conservation benefit
plan to address that formerly occupied habitat.

Accordingly, the Order concludes that
the project will comply with all applicable State and
Environmental laws and that the environmental and
operational impacts will be avoided or minimized to
the maximum extent practicable.

My co-presiding examiner, Judge Gregg
Sayre, will now briefly address other issues
discussed in the Draft Order. Judge Sayre?

A.L.J. SAYER: Thank you Judge. Good
morning Chair Rhodes and members of the Siting Board.
I’m going to address three hotly contested issues in
this case, the outreach to the Amish community,
whether the project is a beneficial addition to the
State’s generation capacity and compliance with local
laws.
The Towns of Freedom and Farmersville, took the position that the project should be rejected because there was ineffective outreach to the Amish community in Farmersville. There is a separate Amish community in another town, some members of which signed participating leases but no one in the Farmersville community signed.

The Draft Order before you, notes that in addition to the usual meetings -- mailings and newspaper notices, Alle-Catt met face-to-face with members of the Farmersville community, met one of their residents and discussed the project and took the concerns raised by the Amish representatives. Under these circumstances, the Draft Order finds the outreach was sufficient for that community to become aware of the project and to participate in the project or the proceeding, if they chose to do so.

I’ll turn to the issue of whether the project is a beneficial addition to the State’s generation capacity, just one of the findings required by the Article 10 statute. The Concerned Citizens Coalition, argued that the project will not be a beneficial addition to capacity because transmission bottlenecks between Upstate and
Downstate, will if not resolved in the future, the capacity of the Alle-Catt Project and caused its output to merely displace the output of other Upstate wind projects, thus not adding to the State’s generation capacity or clean energy goals.

The Draft Order rejects this position. It acknowledges that there are transmission constraints, that will need to be addressed in the future but determined that the need to add transmission in the future, is not a reason to reject new, renewable energy projects now.

Requiring transmission to be built before a generation project is approved, would be putting the cart before the horse. Transmission must be expanded in the future but to do that economically, the Public Service Commission and the Independent System Operator, need to know where the generation sits.

The Draft Order also recognizes that the transmission constraints are being addressed in compliance with the recently enacted Accelerated Renewable Energy Growth and Community Protection Act, which provides for expedited transmission upgrades. The Draft Order, therefore, includes the finding,
that the project will be a beneficial addition to the State's generation capacity.

One of the most hotly contested issues in this proceeding, is the application of local laws and I'm sorry for the length of -- of this presentation but it's a -- please bear with because it's very complicated. Under the statute, the Siting Board applies substantive local laws to project but may decline to apply any local law provisions that it finds to be unreasonably burdensome, with the Applicant bearing the burden of proof, if the law is unreasonably burdensome.

In this case, the local laws in the Towns of Freedom and Farmersville, have changed a number of times, complicating the situation. I'll start with the Town of Farmersville. It was uncontested at the time of the hearings, that Farmersville 2019 local law regarding wind projects applies. The 2019 law has setback requirements, between wind turbines and various types of properties, with a much larger setback requirement for churches, than for residences.

In this proceeding, the Town argued that all Amish residences are churches because the
Amish community holds worship services on a rotating basis, in the homes or barns of its households. The examiners rejected this argument as unpersuasive, in light of the fact that any particular residence on a rotating basis, would host a worship service, only approximately once every ten months. The Draft Decision agrees with the examiners.

The Town argues that its interpretation of its own law, must control but the Draft Order states that it is up to the Siting Board to interpret the law, in this case, and that the Siting Board is not bound by the litigating position that the Town takes.

The Town of Farmersville made a number of changes to its local wind farm laws after the close of the hearings. Local Law Number One of 2020, which contains many substantive changes and stated that it superseded the 2019 law, was enacted on February 10th, 2020, two months after the close of the record on December 5th and ten days after the filing of the reply briefs to the examiners.

Farmersville enacted yet another substantive wind farm law on April 13th, 2020, which purported to supersede all prior local wind farm
laws, including the February 10th, 2020 law. This occurred three days before the filing of briefs opposing exceptions, the final round of briefs to the Siting Board in this case and more than four months after the record closed.

The Draft Order before you, declines to enforce these new local laws because they gave the parties, the examiners and the Board, no reasonable chance to litigate the issue of whether some or all of these laws are unreasonably restrictive. To fully air those issues, would require a request by Alle-Catt for an override testimony on that request, including a rebuttal round, hearings, briefs, reply briefs, a decision by the examiners, briefs on exceptions to the -- to the Siting Board and briefs opposing exceptions. The Town enacted its legislation, far too late for this process and the statute requires the Siting Board to make its decision, based on the record.

The Town argues that the Siting Board could have extended the proceeding under the statute for up to six months, however, even if the Board did so, possibly with serious repercussions to the project, due to the long delay. Nothing would
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prevent the Town Board opposed to a project, from
enacting yet another piece of restrictive legislation
near the end of the extension, leaving the Siting
Board with no time, at all.

The Draft Order before you, therefore
follows the Siting Board decision in the Blue Stone
Wind proceeding, that it will not apply local
legislation enacted after the close of the record in
the proceeding. In this case, the record closed on
December 5th, 2019 and the legislation in February
and April of this year, is not timely.

The Draft Order also rejects the
argument that the Siting Board has no choice but to
apply whatever legislation is enforced, at the time
of the Siting Board’s decision, with apparently no
discretion and no record, to determine whether the
legislation may be unreasonably burdensome. That
argument is rejected in the Draft Order because it
would make a Town’s decision paramount over the
Siting Board’s jurisdiction, which is inconsistent
with the statute.

I’ll turn to the Town of Freedom and
the issue for Freedom, is which wind farm local law
to apply, the one enacted in 2007 and the other,
which was less restrictive in 2019. Alle-Catt took the position, that the 2019 law applies and did not request any overrides of that law. The 2019 law, was essentially a duplicate of a local law enacted in 2018. The 2018 law, was challenged in a Court proceeding and a Court Order in October 2019, invalidated the 2018 law on procedural grounds. That Court decision was ultimately upheld.

The 2019 law, is also subject to a Court challenge, which at this point, is unresolved. The examiners applied the 2007. The Draft Order before you, reverses that decision and applies the 2019 law. Again, following the Blue Stone decision, the Draft Order recognized that the Siting Board must make its decision, on the basis of the record and the record shows, that the 2019 law was in effect, on the record closed.

Both the Towns of Freedom and Farmersville, passed a series of resolutions on January 6th, 2020, a month after the record closed. These resolutions, although they substantively addressed wind farms, were not enacted as local laws and do not have the force of local laws and for those reasons, as well as the fact that they were passed
after the record closed, the examiners declined to consider them. The Draft Order agrees with the examiners on this point. That concludes my part of the presentation and we welcome any questions.

CHAIRMAN RHODES: Thank you. This is John Rhodes. I hope I’ve unmuted. Can someone please confirm they can hear me?

THE REPORTER: You’re good, Judge.

CHAIRMAN RHODES: Thank you very much. So, thank you very much, Judges LeCakes and Sayre.

My own comments are to -- to support your findings. In these cases, we have to consider all of the -- all of the topics that you’ve -- that you raised, the environmental, public health and safety, concerns of the community, species preservation, etcetera. And, I appreciate and -- and -- and applaud the careful study and investigation of potential concerns, in this case and then the resulting findings and recommended -- recommendations, that really do lead to avoidance, mitigation, minimization, to the maximum extent possible.

I -- I appreciate, also, the -- the -- the very transparent discussion of the -- the three prominent, as you said Gregg Sayre, hot -- hotly
contested issues. On the Amish community, I -- I appreciate and am persuaded by the finding of fact, on the question of the beneficial addition to the generation fleet. I support the conclusion, just as a matter of how -- how the system was coming into being and I was really guided by a couple of the statutes that you mentioned. And, I just note that the local laws are always -- the topic of local laws, are always difficult, they’re always complex and I find that in this case, the recommendation is judicious, it’s correct, it’s fair and it’s faithful to the record. And, more broadly, I just appreciate the steadiness of the rulings that this Siting Board is -- is -- is making, where from case to case, we maintain the same standards. I think that’s -- it’s simply a matter of good practice and it’s good for outcomes and it’s good for the process. So, I’m going to support this item. Thank you very much. Let me ask my colleague -- Siting Board members, if they have any comments or questions. Given it’s a conference call, what I will do is, call -- call on you by name and you will either have a comment or a question or tell -- tell us that you don’t and then I’ll proceed to call for a vote, in the same -- with
the same mechanic. Any comments or questions from Mr. Alexander?

MR. ALEXANDER: I found the proposed Order, to be comprehensive. I have no questions.

CHAIRMAN RHODES: Thank you very much. Dr. Lewis-Michl?

DR. LEWIS-MICHL: I have no questions.

CHAIRMAN RHODES: Thank you. Mr. Ravaschiere?

MR. RAVASCHIERE: No questions.

CHAIRMAN RHODES: Thank you very much. Mr. Williams?

MR. WILLIAMS: No questions.

CHAIRMAN RHODES: Thank you. Mr. Mueller?

MR. MUELLER: No questions.

CHAIRMAN RHODES: Thank you very much. With that, I will proceed to call for a vote. My own vote, is in favor of the recommendation to approve the Application of Alle-Catt Wind Energy, L.L.C. for a Certificate of Environmental Compatibility and Public Need, as just described and for -- I -- I’m Mr. John Rhodes, casting that vote in favor. Mr. Alexander, how do you vote?
MR. ALEXANDER: I vote in favor.

CHAIRMAN RHODES: Thank you. Dr. Lewis-Michl, how do you vote?

DR. LEWIS-MICHL: In favor.

CHAIRMAN RHODES: Thank you. Mr. Ravaschiere, how do you vote?

MR. RAVASCHIERE: In favor.

CHAIRMAN RHODES: Thank you. Mr. Williams, how do you vote?

MR. WILLIAMS: In favor.

CHAIRMAN RHODES: Thank you. Mr. Mueller, how do you vote?

MR. MUELLER: In favor.

CHAIRMAN RHODES: Thank you very much.

The matter is approved, and the recommendation is adopted. Secretary Phillips, is there anything further to come before us today?

SECRETARY PHILLIPS: This is Secretary Phillips. There is nothing further today.

CHAIRMAN RHODES: Thank you very much, with that, I adjourn us and wish you all the best and please everybody stay safe. Thank you.

(The meeting concluded.)
STATE OF NEW YORK

I, TRACY WILLIAMS, do hereby certify that the foregoing was reported by me, in the cause, at the time and place, as stated in the caption hereto, at Page 1 hereof; that the foregoing typewritten transcription consisting of pages 1 through 19, is a true record of all proceedings had at the hearing.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this the 4th day of June, 2020.

TRACY WILLIAMS, Reporter