

17-F-0282 - Siting Board - 6-3-2020

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

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2 CHAIRMAN RHODES: Good morning. My
3 name is John Rhodes. I'm Chair of the Public Service
4 Commission and also Chair, in this case, of the Board
5 on Electric Generation Siting and the Environment and
6 I'd like to call this meeting of the Board on
7 Electric Generation Siting and the Environment to
8 order.

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

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2 the Opening Meetings Law.

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

11 MR. ALEXANDER: Present.

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

15 DR. LEWIS-MICHL: Present.

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

21 MR. RAVASCHIERE: Present.

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

25 MR. WILLIAMS: Present.

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2 CHAIRMAN RHODES: Thank you. And, I'd
3 also like to introduce the Ad-hoc member of the Alle-
4 Catt Article 10 Siting Board, Christopher Mueller.

5 MR. MUELLER: Present.

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

9 SECRETARY PHILLIPS: There are no
10 changes to the agenda.

11 CHAIRMAN RHODES: Thank you very much.
12 So, we'll proceed to that -- to the agenda, the
13 regular agenda. Case 17-F-0282, Application of Alle-
14 Catt Wind Energy, L.L.C., for a Certificate of
15 Environmental Capability and Public Need, pursuant to
16 Article 10, for a Proposed Wind Energy Product,
17 located in Allegany, Cattaraugus and Wyoming
18 Counties, New York, in the Towns of Arcade,
19 Centerville, Farmersville, Freedom and Rushford,
20 presented by Dakin LeCakes, Chief Administrative Law
21 Judge, Department of Public Service and Gregg Sayre,
22 Administrative Law Judge, Department of Public
23 Service. Michael Caruso, Administrative Law Judge,
24 Department of Environmental Conservation, James
25 McClymonds, Chief Administrative Law Judge,

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2 Department of Environmental Conservation and Robert
3 Rosenthal, General Counsel, are available for
4 questions. Mr. LeCakes and Mr. Sayre, please begin.

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

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

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

24 Appearing in this case, as an issue of
25 first impression, is the seismology of the project

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2 area, which is situated on the Clarendon-Linden Fault
3 System. The Order requires further study in Alle-
4 Catt Winds pre-construction geotechnical report of
5 that fault system and its potential impacts on the
6 wind turbines, thereby ensuring to the maximum extent
7 practicable, the facility's ability to withstand
8 seismic events.

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

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

23 Turning to environmental
24 considerations, for State forests, the Draft Order
25 establishes minimum setbacks of 1.1 times the turbine

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2 tip height, from the forest boundary, to minimize the
3 potential adverse risk from a turbine collapse or ice
4 throw condition, to the public enjoying the use of
5 the State forest.

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

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

23 Finally, the Draft Order concludes
24 that based on the entire record of this proceeding,
25 the Applicant has satisfactorily demonstrated that

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2 the threatened Upland Sand Piper, is not present in
3 and is unlikely to reoccupy areas that D.E.C. had
4 previously identified as occupied habitat, pursuant
5 to the State Endangered Species Law. This conclusion
6 supports a finding that the construction of the four
7 turbines in that area, will not result in any take of
8 Upland Sandpiper occupied habitat and thereby
9 eliminates any need for a net conservation benefit
10 plan to address that formerly occupied habitat.

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

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

19 A.L.J. SAYER: Thank you Judge. Good
20 morning Chair Rhodes and members of the Siting Board.
21 I'm going to address three hotly contested issues in
22 this case, the outreach to the Amish community,
23 whether the project is a beneficial addition to the
24 State's generation capacity and compliance with local
25 laws.

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2 The Towns of Freedom and Farmersville,
3 took the position that the project should be rejected
4 because there was ineffective outreach to the Amish
5 community in Farmersville. There is a separate Amish
6 community in another town, some members of which
7 signed participating leases but no one in the
8 Farmersville community signed.

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

19 I'll turn to the issue of whether the
20 project is a beneficial addition to the State's
21 generation capacity, just one of the findings
22 required by the Article 10 statute. The Concerned
23 Citizens Coalition, argued that the project will not
24 be a beneficial addition to capacity because
25 transmission bottlenecks between Upstate and

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2 Downstate, will if not resolved in the future, the
3 capacity of the Alle-Catt Project and caused its
4 output to merely displace the output of other Upstate
5 wind projects, thus not adding to the State's
6 generation capacity or clean energy goals.

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

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

20 The Draft Order also recognizes that
21 the transmission constraints are being addressed in
22 compliance with the recently enacted Accelerated
23 Renewable Energy Growth and Community Protection Act,
24 which provides for expedited transmission upgrades.
25 The Draft Order, therefore, includes the finding,

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2 that the project will be a beneficial addition to the
3 State's generation capacity.

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

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

24 In this proceeding, the Town argued
25 that all Amish residences are churches because the

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2 Amish community holds worship services on a rotating
3 basis, in the homes or barns of its households. The
4 examiners rejected this argument as unpersuasive, in
5 light of the fact that any particular residence on a
6 rotating basis, would host a worship service, only
7 approximately once every ten months. The Draft
8 Decision agrees with the examiners.

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

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

23 Farmersville enacted yet another
24 substantive wind farm law on April 13th, 2020, which
25 purported to supersede all prior local wind farm

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2 laws, including the February 10th, 2020 law. This
3 occurred three days before the filing of briefs
4 opposing exceptions, the final round of briefs to the
5 Siting Board in this case and more than four months
6 after the record closed.

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

21 The Town argues that the Siting Board
22 could have extended the proceeding under the statute
23 for up to six months, however, even if the Board did
24 so, possibly with serious repercussions to the
25 project, due to the long delay. Nothing would

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2 prevent the Town Board opposed to a project, from
3 enacting yet another piece of restrictive legislation
4 near the end of the extension, leaving the Siting
5 Board with no time, at all.

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

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

23 I'll turn to the Town of Freedom and
24 the issue for Freedom, is which wind farm local law
25 to apply, the one enacted in 2007 and the other,

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2 which was less restrictive in 2019. Alle-Catt took
3 the position, that the 2019 law applies and did not
4 request any overrides of that law. The 2019 law, was
5 essentially a duplicate of a local law enacted in
6 2018. The 2018 law, was challenged in a Court
7 proceeding and a Court Order in October 2019,
8 invalidated the 2018 law on procedural grounds. That
9 Court decision was ultimately upheld.

10 The 2019 law, is also subject to a
11 Court challenge, which at this point, is unresolved.
12 The examiners applied the 2007. The Draft Order
13 before you, reverses that decision and applies the
14 2019 law. Again, following the Blue Stone decision,
15 the Draft Order recognized that the Siting Board must
16 make its decision, on the basis of the record and the
17 record shows, that the 2019 law was in effect, on the
18 record closed.

19 Both the Towns of Freedom and
20 Farmersville, passed a series of resolutions on
21 January 6th, 2020, a month after the record closed.
22 These resolutions, although they substantively
23 addressed wind farms, were not enacted as local laws
24 and do not have the force of local laws and for those
25 reasons, as well as the fact that they were passed

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2 after the record closed, the examiners declined to
3 consider them. The Draft Order agrees with the
4 examiners on this point. That concludes my part of
5 the presentation and we welcome any questions.

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

9 THE REPORTER: You're good, Judge.

10 CHAIRMAN RHODES: Thank you very much.
11 So, thank you very much, Judges LeCakes and Sayre.
12 My own comments are to -- to support your findings.
13 In these cases, we have to consider all of the -- all
14 of the topics that you've -- that you raised, the
15 environmental, public health and safety, concerns of
16 the community, species preservation, etcetera. And,
17 I appreciate and -- and -- and applaud the careful
18 study and investigation of potential concerns, in
19 this case and then the resulting findings and
20 recommended -- recommendations, that really do lead
21 to avoidance, mitigation, minimization, to the
22 maximum extent possible.

23 I -- I appreciate, also, the -- the --
24 the very transparent discussion of the -- the three
25 prominent, as you said Gregg Sayre, hot -- hotly

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2 contested issues. On the Amish community, I -- I
3 appreciate and am persuaded by the finding of fact,
4 on the question of the beneficial addition to the
5 generation fleet. I support the conclusion, just as
6 a matter of how -- how the system was coming into
7 being and I was really guided by a couple of the
8 statutes that you mentioned. And, I just note that
9 the local laws are always -- the topic of local laws,
10 are always difficult, they're always complex and I
11 find that in this case, the recommendation is
12 judicious, it's correct, it's fair and it's faithful
13 to the record. And, more broadly, I just appreciate
14 the steadiness of the rulings that this Siting Board
15 is -- is -- is making, where from case to case, we
16 maintain the same standards. I think that's -- it's
17 simply a matter of good practice and it's good for
18 outcomes and it's good for the process. So, I'm
19 going to support this item. Thank you very much.
20 Let me ask my colleague -- Siting Board members, if
21 they have any comments or questions. Given it's a
22 conference call, what I will do is, call -- call on
23 you by name and you will either have a comment or a
24 question or tell -- tell us that you don't and then
25 I'll proceed to call for a vote, in the same -- with

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2 the same mechanic. Any comments or questions from
3 Mr. Alexander?

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

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

8 DR. LEWIS-MICHL: I have no questions.

9 CHAIRMAN RHODES: Thank you. Mr.
10 Ravaschiere?

11 MR. RAVASCHIERE: No questions.

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

14 MR. WILLIAMS: No questions.

15 CHAIRMAN RHODES: Thank you. Mr.
16 Mueller?

17 MR. MUELLER: No questions.

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

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2 MR. ALEXANDER: I vote in favor.

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

5 DR. LEWIS-MICHL: In favor.

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

8 MR. RAVASCHIERE: In favor.

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

11 MR. WILLIAMS: In favor.

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

14 MR. MUELLER: In favor.

15 CHAIRMAN RHODES: Thank you very much.

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

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

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

24 (The meeting concluded.)

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2 STATE OF NEW YORK

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

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

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13 TRACY WILLIAMS, Reporter

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