STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING AND ELECTRIC TRANSMISSION

Application of OXBOW HILL SOLAR, LLC for a Major Renewable Energy Facility Siting Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 140-Megawatt (MW) Solar Energy Facility Located in the Town of Fenner, Madison County

Matter No. 23-02998

APPLICANT'S RESPONSE TO ISSUES STATEMENTS, PARTY STATUS REQUESTS, MUNICIPAL STATEMENTS OF COMPLIANCE AND PUBLIC COMMENTS ON DRAFT PERMIT

Dated: April 21, 2025

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I. INTRODUCTION

In accordance with the *Combined Notice of Availability of Draft Permit Conditions*, issued by the Office of Renewable Energy Siting and Electric Transmission ("ORES" or the "Office") on January 14, 2025 ("Combined Notice"), Oxbow Hill Solar ("Oxbow Hill" or "Applicant") hereby submits its response to Madison County's *Petition for Party Status and Statement of Issues* filed on March 31, 2025, and the Town of Fenner's *Combined Petition for Party Status, Issue Statement and Statement of Compliance with Local Laws* filed on March 31, 2025. In addition, the Applicant's responses to public comments submitted during the public comment period, including at the Public Statement Hearing are included in **Attachment B**, Public Comment Response Matrix, and discussed in Section V below.

As explained further below, no substantive and/or significant issues were raised in Madison County's Petition, the Town of Fenner's Petition or in public comments and therefore, the Administrative Law Judges should find that no adjudicatory hearing is warranted.

II. PROCEDURAL BACKGROUND

On April 23, 2024, Oxbow Hill submitted an Application to the Office pursuant to Section 94-c of the New York State Executive Law and the Office's regulations[1] ("Application").[2] On May 16, 2024, the Applicant filed Appendix 7-A: Table T-2216-020323-A: Substation Transformer and Inverter Sound Power Level Deriviations, which was inadvertently omitted from Appendix 7-A when the Application was filed.[3] Supplemental material was submitted by Oxbow Hill on September 20, 2024[4] and November 11, 2024[5] to address the *Notice of Incomplete*

[1] 19 NYCRR § 900-3.2(a) *et seq.*
[2] Application, Record DMM Item Nos. 16-27.
[3] Application, Record DMM Item No. 31. On June 4, 2024, the Applicant also filed additional redactions requested by ORES related to Exhibit 2 and Exhibit 9 and associated appendices, Record DMM Item No. 32.
[4] Supplemental Application Materials, Record DMM Item Nos. 34-38.
[5] Supplemental Application Materials, Record DMM Item No. 39.

Application issued by ORES on June 24, 2024.[6] Thereafter, ORES issued a *Notice of Complete Application* on November 18, 2024.[7]

On April 24, 2024, ORES issued a *Notice of Application Filing and Availability of Local Agency Account Funds*, indicating that $140,000 in local agency account dollars that had previously been deposited by the Applicant were available for local agencies and potential community intervenors to request. On March 26, 2025, the Administrative Law Judges ("ALJs") in this proceeding granted the Town of Fenner $105,000.

During the pendency of the Application review by ORES, on April 20, 2024, the Renewable Action through Project Interconnection and Deployment ("RAPID") Act repealed Section 94-c and enacted Article VIII. The RAPID Act transferred ORES from the Department of State to the Department of Public Service ("DPS"), continuing all existing functions, powers, duties, and obligations under the former Section 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.[8]

In addition, as a result of the migration of the electronic case file in this matter from the ORES Permit Application Portal to the DPS Document and Matter Management ("DMM") system, the case number was changed from ORES Permit Application No. 23-00060 to ORES DMM Matter No. 23-02998. Accordingly, effective February 3, 2025, the caption for this matter was modified to reflect the matter number change.

On January 14, 2025, ORES issued a *Draft Permit*[9] to Oxbow Hill pursuant to Article VIII of the Public Service Law ("PSL") and its implementing regulations at 16 NYCRR Parts 1100-1 through 1100-15. A *Combined Notice*[10] was also issued with the *Draft Permit*, instructing potential parties to submit requests for Party Status, including identification of the substantive and significant issues each proposed Party sought to adjudicate. The *Combined Notice* also directed the host municipalities, to submit a *Municipal Statement of Compliance* outlining the proposed

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[6] *Notice of Incomplete Application*, Record DMM Item No. 33.
[7] *Notice of Complete Application*, Record DMM Item No. 40.
[8] *See* RAPID Act § 7. Conforming changes required by the RAPID Act were filed with the Secretary of State and became effective July 17, 2024.
[9] *Draft Permit*, Record DMM Item No. 41.
[10] *Combine Notice*, Record DMM Item No. 43.

Facility's compliance with substantive provisions of local laws. ORES was subsequently granted permission to file an *Amended Draft Permit* (hereinafter referred to as the *Draft Permit*) on February 28, 2025,[11] and the deadline to respond to said Party status requests was set by the ALJs as April 21, 2025.[12] The Applicant responds to these submissions below.

To ensure the public was informed regarding the *Draft Permit*, the Applicant arranged for the Combined Notice to be published in full in the *Cazenovia Republican* (Town of Fenner) on January 22, 2025, in the *Hi, Neighbor Pennysaver* newspaper (Free Weekly Publication) on January 20, 2025, and the *Oneida Daily Dispatch* newspaper (Town of Fenner) on January 19, 2025 (see Affidavits of Publication dated January 23, 2025 [*Cazenovia Republican*], January 22, 2025 [*Hi Neighbor, Pennysaver*], and January 20, 2025 [*Oneida Daily Dispatch*], DMM Item No. 43); the Applicant emailed the Combined Notice in full to the Party List as it existed on January 15, 2025, the Application Service List, and state legislators in whose districts any portion of the Facility is proposed to be located ("State Legislators"), as well as the Town Clerk of the Town of Fenner ("Town Clerk") (see Affidavits of Service dated January 15, 2025, DMM Item No. 43); the Applicant mailed the Combined Notice in full to the Application Service List and State Legislators, as well as the Town Clerks, on January 27, 2025 (see Affidavit of Service dated January 27, 2025, DMM Item No. 43); and the Applicant mailed the *Combined Notice* in full to all persons residing within one (1) miles of the proposed Facility site on January 23, 2025 and January 31, 2025 (see Affidavits of Service DMM Item No. 45). The *Combined Notice* was also posted to the dedicated project website.

An in-person Public Statement Hearing was held on March 18, 2025, at the Hampton Inn & Suites Cazenovia, in the Town of Cazenovia, New York. Opportunities for public comment remained open through March 28, 2025, and members of the public wishing to comment were able to submit comments to the ORES DMM docket for this proceeding. **Attachment B**, Public Comment Response Matrix, and Section V of this submission respond to the public comments received during the public comment period.

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[11] *Amended Draft Permit*, Record DMM Item No. 47.
[12] Permission to File *Amended Draft Permit*, Record DMM Item No. 48.

III. PARTY STATUS AND SUBSTANTIVE AND SIGNIFICANT ISSUES

A. Standards for Party Status and Adjudicable Issues Under Article VIII

Article VIII requires an adjudicatory hearing to resolve substantive and significant disputed issues; if no such issues are raised, no hearing is required.[13] An issue is subject to adjudication at an evidentiary hearing where it is both "substantive and significant".[14] The burden is on a potential party to demonstrate that the issues raised are substantive and significant.[15] An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry".[16] An issue is significant "if it has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the *Draft Permit*, including uniform standards and conditions".[17] Importantly, issues for adjudication at a hearing must be questions of **fact**—questions of law or policy are not factual issues appropriate for an evidentiary hearing.[18]

ORES has stressed that the purpose of the issues determination procedure is to identify whether disputed factual issues exist; under 16 NYCRR § 1100-8.3(b)(2), this process is intended:

> "(i) to receive argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and (v) to decide any pending motions."[19]

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[13] 16 NYCRR § 1100-8.3(c)(5).
[14] 16 NYCRR § 1100-8.3.
[15] 16 NYCRR § 1100-8.3(c)(4).
[16] 16 NYCRR § 1100-8.3(c)(2).
[17] 16 NYCRR § 1100-8.3(c)(3).
[18] *Application of Heritage Wind, LLC* (Matter 21-00026) Ruling on Issues and Party Status at 5, (July 8, 2021), DMM Item No. 47 [hereinafter "Heritage Issues Ruling"].
[19] *Id.*

Furthermore, "[a]n issues conference is not meant to merely catalogue areas of dispute, but rather is used to make qualitative judgments as to the strength of the offers of proof and related arguments."[20] Where a party seeks adjudication of a proposed factual issue, the issues determination procedure is similar to a summary judgment proceeding, wherein "the proponent of an issue has the burden of persuading the ALJs that a disputed issue of fact exists."[21] Importantly, "where [ORES] staff has determined that a component of the proposed project, 'as proposed or as conditioned by the draft siting 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.'"[22] This requires that the issue proponent "provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or the challenged condition is required by law and supported by the record such that a reasonable person would inquire further."[23]

When considering whether a proposed issue meets the standards for adjudication, the ALJs will consider the factual or technical foundation provided for claims made by the proposed party.[24] Generalized but unsubstantiated claims, such as claims made without any evidence or the requisite offer of proof, are insufficient—the potential party must provide a factual or scientific foundation for the assertions made.[25] "Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. . . Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the *Draft Permit* and proposed conditions, [Agency] staff's analysis, or the record of the issues conference, among other relevant materials and submissions."[26] Importantly, with respect to local laws, where

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[20] *Application of ConnectGen Chautauqua County, LLC* (Matter 21-00750) Ruling of the Administrative Law Judges on Issues and Party Status, (October 12, 2022) [hereinafter "South Ripley Issues Ruling"], *citing Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, pp. 10-11 (NYSDEC), DMM Item No. 87.
[21] South Ripley Issues Ruling at 10, DMM Item No. 87.
[22] Heritage Issues Ruling at 7, DMM Item No. 47.
[23] South Ripley Issues Ruling at 11, DMM Item No. 87.
[24] South Ripley Issues Ruling at 10, DMM Item No. 87.
[25] South Ripley Issues Ruling at 8, citing *Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, pp. 10-11 (NYSDEC), DMM Item No. 87.
[26] *Id*.; Heritage Issues Ruling at 8, DMM Item No. 47.

a proposed party does not identify any concern with the Applicant's ability to meet the statutory or regulatory criteria in the *Draft Permit*, but rather takes issue with ORES staff's decision to waive a local law, no adjudicable issue has been raised.[27]

Where a potential party seeks full party status, it must file a petition in accordance with the provisions of 16 NYCRR § 1100-8.4 (c)(1) and (c)(2). Pursuant to 16 NYCRR § 1100-8.4 (c)(2) a petition must identify an issue that meets the standards for adjudication under 16 NYCRR § 1100-8.3(c) and must include an offer of proof "specifying the witness[es], the nature of the evidence the person expects to present and the ground upon which the assertion is made with respect [to] each issue identified."

Based on these standards, and as discussed in greater detail below, the County and Town have failed to identify substantive and significant fact issues for adjudication, as required by 16 NYCRR § 1100-8.3(c)(1)(ii) and (iv), 8.4-(c)(2)(i) and (f)(1)(ii). The issues raised in the petitions are (1) issues which are not substantive or significant; (2) legal issues for which adjudication at an evidentiary hearing is unnecessary, and which can be resolved by the ALJ through a ruling on the merits under 16 NYCRR § 1100-8.3(b)(5)(iii); (3) general objections to the Facility, Article VIII and its implementing regulations, including uniform standards and conditions; and/or (4) bare claims unsupported by facts or testimony insufficient to satisfy the burden under 16 NYCRR § 1100-8.3(c)(4). Therefore, as outlined in greater detail below, neither the County nor the Town have achieved the prerequisite step of identifying substantive and significant issues sufficient to support the granting of Full Party Status under 16 NYCRR § 1100-8.4(f)(1)(ii) let alone warrant an evidentiary hearing.

B. Standards of Proof, Witnesses and Scientific Credibility

A proposed party seeking Full Party Status is required to make 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 each issue identified".[28] The offer of proof requires that

[27] Heritage Issues Ruling at 34-35, DMM Item No. 47.
[28] 16 NYCRR § 1100-8.4(c)(2)(ii).

a proposed party present competent evidence that makes a "credible showing that such a defect is present and likely to affect permit issuance in a substantial way".[29] "[A] conclusory statement without a factual foundation is not sufficient to raise issues" for adjudication.[30]

Conclusory statements and speculative allegations unsupported by the offered proof do not raise adjudicable issues.[31] "Although a potential party is not required to present proof of its allegations sufficient to prevail on the merits, conclusory or speculative statements without a factual foundation are not sufficient to raise an adjudicable issue."[32] "Conducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, or where such a hearing would dissolve into an academic debate is not the intent of the . . . hearing process."[33] "Offers of proof may take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application."[34]

Generalized comments and observations of non-expert lay witnesses are not sufficient to raise issues for adjudication--potential parties are required to submit evidence of qualified experts which factually supports the allegations made in a petition for Party Status.[35]

> *"If a potential party cannot adequately explain the nature of the evidence that it expects to present and the grounds upon which its assertions are made, no issue is raised. Furthermore, the issues conference is not the point where a potential party should be deciding what experts or qualified witnesses it will need to substantiate the allegations that it has made in its petition (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). The potential parties' offer of proof*

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[29] *Custom Compost, Inc*., 2004 NY ENV LEXIS 18 (N.Y. Dept. Env. Conserv., Mar. 25, 2004).
[30] *Id.* at 10-11, *citing* Halfmoon Water Improvement Area No. 1, 1982 NY ENV LEXIS 34 (N.Y. Dept. Env. Conserv., Apr. 2,1982).
[31] *Custom Compost, Inc.*, 2004 NY ENV LEXIS 18 (N.Y. Dept. Env. Conserv., Mar. 25, 2004), *citing* Matter of Halfmoon Water Improvement Area No. 1 1982 NY ENV LEXIS 34, 4 (N.Y. Dept. Env. Conserv., Apr. 2, 1982).,
[32] *Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 11 (N.Y. Dept. Env. Conserv., Nov. 17, 2008), *citing* Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2.
[33] *Seneca Meadows, Inc.*, 2012 NY ENV LEXIS 76, 4 (NY Dept. Env. Conserv., Oct. 26, 2012).
[34] *Frontier Stone, LLC.*, 2016 NY ENV LEXIS 46, 20-21 (N.Y. Dept. Env. Conserv., July 27, 2016); Matter of Buffalo Crushed Stone, Inc., 2008 NY ENV LEXIS 78, 6 (N.Y. Dept. Env. Conserv., Nov. 17, 2008); *see also* Halfmoon Water Improvement Area No. 1, 1982 NY ENV LEXIS 34 (N.Y. Dept. Env. Conserv., Apr. 2, 1982).
[35] *Buffalo Crushed Stone, Inc.*, 2008 NY ENV LEXIS 78, 12 (N.Y. Dept. Env. Conserv., Nov. 17, 2008).

should be based upon the opinions of experts or other qualified witnesses already identified."[36]

As discussed below, the issues identified by the Town of Fenner and Madison County in this proceeding are unsupported by sufficient offers of proof. The County has not offered any expert witnesses, and the Town has only attached a report from C&S Companies that reviewed the Application for "completeness and appropriateness", a determination that has already been made by ORES in this proceeding and cannot be a basis for adjudication.[37] Overall, the submissions amount to "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" which ORES precedent has routinely rejected as insufficient to raise a triable issue of fact for hearing. "A shadowy semblance of an issue, or bald conclusionary assertions, even if believable are not enough to raise a triable issue of fact."[38]

In conclusion, the issues raised by the potential parties are not accompanied by competent evidence, fail to identify who would testify regarding the issues raised, and amount to conclusory or speculative statements without a factual foundation, which are not sufficient to raise a triable issue of fact in this proceeding.

C. Compliance with Local Laws

As explained in response to the Town and County below, ORES staff appropriately reviewed the Application, considered the local laws, and found that the local laws requested to be waived by the Applicant were unreasonably burdensome because the Facility as proposed will directly contribute to New York's Climate Leadership and Community Protection Act ("CLCPA") targets by producing up to 140 MW of renewable solar energy directly to New York's energy market and "and the associated environmental benefits of the Facility, which will produce enough zero-emissions energy to power approximately 23,093 homes and reduce greenhouse gas

[36] *Buffalo Crushed Stone, Inc.,* 2008 NY ENV LEXIS 78, 12 (N.Y. Dept. Env. Conserv., Nov. 17, 2008).
[37] 16 NYCRR § 1100-8.3(c)(6) The completeness of an application, as defined in this Part, shall not be an issue for adjudication.
[38] *Application of Horseshoe Solar Energy*, (Matter No. 21-02480) Ruling on Issues and Party Status and Order of Disposition at 9-10, DMM Item No. 56, *citing Metropolitan Bank of Syracuse v Hall*, 52 AD2d 1084 (4th Dept.1976),

emissions in New York State."[39] The Facility will also create job opportunities, support economic growth, and protect public health, safety and the environment by significantly reducing greenhouse gas emissions. Local laws, such as the Town of Fenner's ban on utility scale solar facilities, were appropriately found to be unreasonably burdensome by ORES staff because of the environmental and social benefits the prohibition in the law would preclude.

Article VIII provides ORES with the discretion to waive local laws that, in its view, would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility. Accordingly, the determination of what constitutes an unreasonably burdensome local law falls within the purview of ORES staff, a determination that should not be disturbed unless a petitioner has identified an error of law or fact, or an abuse of discretion with respect to the waiver determination.[40]

As demonstrated below, the potential parties to this proceeding have failed to identify any errors of law or fact or establish that ORES abused its discretion with respect to the waivers granted. Instead, the Town and County simply argue that the waiver of local laws is *per se* adjudicable, a position that has be rejected in other proceedings.

Finally, ORES correctly determined that relief from other identified local laws was not necessary as those local laws are not applicable to the Facility.[41] The Town of Fenner has banned utility scale solar facilities such as the proposed Facility. Land use regulations governing permitted uses are inapplicable to uses that are expressly prohibited.[42]

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[39] *Amended Draft Permit* pg. 4, Record DMM Item No. 47.

[40] *Application of Horseshoe Solar Energy,* Ruling on Issues and Party Status and Order of Disposition at 36-37, DMM Item No. 56.

[41] The responsibility of interpreting local laws lies with ORES. *See Application of Alle-Catt Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10*, Case No. 17-F-0282, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, Issued and Effective: June 3, 2020.

[42] *See generally*, *Matter of McLiesh v Town of Western*, 68 AD3d 1675, 1676-1677, 891 NYS2d 825 [4th Dept 2009] ("It is well settled that a zoning ordinance must be interpreted to give effect to all of its provisions, and an interpretation that nullifies any provision of an ordinance is irrational and unreasonable"); *Biggs v. Zoning Bd. Of Appeals of the Town of Pierrepont*, 52 Misc. 3d 694, [NY Sup. Ct. 2016].

IV. RESPONSE TO PARTY STATUS REQUESTS AND MUNICIPAL STATEMENTS OF COMPLIANCE

A. Response to Madison County

On March 31, 2025, Madison County filed a *Petition for Party Status and Statement of Issues* ("County Petition"). The County's Petition raises two issues (1) Municipal Home Rule and (2) Snowmobile Trails. As discussed below, the County has failed to meet their burden of proof and has not shown any substantive and significant issues exist with respect to the issues raised. No offer of proof or other evidence is submitted with the County Petition, nor was further factual evidence submitted to contradict the Record before ORES, which fully supports the issuance of a final Siting Permit to Oxbow Hill Solar with no further changes.

1. Municipal Home Rule

The County correctly notes that in the absence of local law waivers the project could not be sited in the current proposed location and argues this alone is a substantive and significant issue for adjudication in this proceeding. The County offers no support from the law or regulations for the position that local law waivers are *pre se* adjudicable other than the County "supports the Town of Fenner's fundamental right to regulate land uses within its jurisdiction"[43] and "opposes the issuance of a final Permit incorporating any waiver of the Town of Fenner Land Use Regulations"[44] on the principle that the local municipality should "retain preeminent power to regulate land use subject to the State's preemptive rights only in the clearest of circumstances".[45]

The County's disagreement with ORES staff's recommendation to waive local laws is insufficient to raise a substantive and significant issue for adjudication.[46] An evidentiary hearing is not required for every challenge to waiver of local laws, when Article VIII provides for an adjudicatory hearing *only* upon the raising of a substantive and significant issue.[47] In order for

[43] County Petition ¶21, Record DMM Item No. 55.
[44] County Petition ¶25, Record DMM Item No. 55.
[45] County Petition ¶20, Record DMM Item No. 55.
[46] *Application of Hemlock Ridge Solar, LLC* (Matter 21-00748) Ruling on Issues and Party Status (August 19, 2022)(hereinafter "Hemlock Ridge Issues Ruling") at 13.
[47] *Application of Tracy Solar Energy Center, LLC* (Matter 21-00962) Ruling on Issues and Party Status (December 1, 2022)(hereinafter "Tracy Solar Issues Ruling") at 26.

the County to raise a substantive and significant issue with respect to the waiver, it must provide evidence that the waiver does not meet the requirements of 16 NYCRR § 1100-2.25(c). In this case, aside from a general disagreement to ORES's well-grounded waiver authority, the County has failed to do so. ORES's exercise of its duly granted authority is not, in and of itself, a basis to adjudicate an issue.

The County's position is incorrect on the law in New York State. Courts have repeatedly upheld the State Legislature's right to withdraw local home rule authority away from municipalities, as the State Legislature has done with the RAPID Act. Particularly, the Courts have rejected home rule challenges to the discretionary authority granted by the Legislature to State agencies to preempt local laws in the context of electric generation siting.[48] Thus, the County has failed to raise an adjudicable issue with ORES's waivers of local law.

In addition to objecting on its face to the local law waivers, with zero evidence or support, the County concludes that "[t]here remain adjudicable issues pertaining to the mitigation of county-wide or intercommunity impacts, namely including impacts to agriculture secondary to the siting of this Project and consideration of the cumulative effect of multiple pending and constructed renewable energy facilities within the County. County Planning personnel are available and will testify that significant impacts to existing farming uses, agricultural significant soils and agricultural markets will result from the siting of this Project and that these effects are counterproductive to local comprehensive planning efforts."[49] Again, the County provides no offer of proof for this assertion other than stating that County Planning personnel are available to testify.

The County's conclusory and unsupported statement is belied by the Record in this case, which demonstrates that the Applicant has avoided, minimized and mitigated potential significant adverse environmental impacts including agricultural resources to the maximum extent

[48] Tracy Solar Issues Ruling at 26; *Town of Copake v. New York State Office of Renewable Energy Siting*, 216 AD3d 93 (3d Dept. 2023)*; Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt.,* 281 AD2d 89, 95 (3d Dept 2001); *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99 (1983).
[49] County Petition ¶ 24, Record DMM Item No. 55.

practicable.[50] Counter the County's claim, the Application details how the siting of the Project has minimized potential impacts to agricultural lands and soils. In addition, as supported in the Application, the Applicant has worked with landowners to coordinate continuing agricultural activities and the siting of the Facility.[51] The County has failed to raise any substantive and significant issues with respect to local law waivers or county-wide agricultural impacts.

2. <u>Snowmobile Trails</u>

Next, the County argues that snowmobile trails are governed by 16 NYCRR §1100-6.3(c) and are akin to vehicular traffic on public highways, and therefore "ORES should consider coordination of snowmobile trails and access under the same section"[52] and that the placement of "snowmobile trails and planning to address the minimization and mitigation impacts to recreational traffic presents an adjudicable issue."[53]

As an initial matter, recreational snowmobile trails on private property are not the type of vehicular traffic contemplated by 16 NYCRR §1100-6.3(c). Section 1100-6.3(c) is specifically intended to address vehicular traffic impacts on public roadways. This section requires coordination between the permittee and State, county, and local highway agencies to respond to and apply applicable traffic control measures to public roadways that may experience traffic flow or capacity issues during construction or operation of the Facility. Traffic impacts have been thoroughly addressed in Exhibit 16 of the Application. Aside from snowmobile trails the County has not identified any other public traffic or transportation concerns related to County roads or road use and the Applicant will consult with town and county highway supervisors prior to construction as part of the Traffic Control Plan, submitted as a pre-construction compliance filing, pursuant to 16 NYCRR §1100-10.2 (e)(8).

Moreover, the County does not maintain, operate, control or own the snowmobile trails,

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[50] Exhibit 15 Agricultural Resources, Revision 1, Record DMM Item No. 37; Figures 15-1 through 15-7, Record DMM Item No. 27; Appendix 15-A Agricultural Plan, Record DMM Item No. 25; Appendix 15-C Solar Initial Agricultural Co-Utilization Assessment, Record DMM Item No. 24; Appendix 15-B Solar Drainage Remediation Plan, Record DMM Item No. 23.

[51] Exhibit 15 Agricultural Resources, Revision 1, pg. 6, Record DMM Item No. 37; Appendix 15-D Agricultural Landowner Surveys, Record DMM Item No. 18.

[52] County Petition ¶ 26, Record DMM Item No. 55.

[53] County Petition ¶ 30, Record DMM Item No. 55.

such that coordination with the County would even be necessary *if* Section 1100-6.3(c) was arguably applicable, which it is not. The snowmobile trails are on private land and are maintained voluntarily by the Snow Valley Riders and Chittenango Polar Bears, two private snowmobile clubs, who obtain permission from landowners to place trails on private property.[54] It is the landowners' right to decide whether or not they want to continue having snowmobile trails on their property. That said, the Applicant has committed to working with the local clubs and the landowners to reroute the trails, if needed, to accommodate continuation of the trail system.[55] Decisions about continuing to host snowmobile trails ultimately rest with the landowners, as neither the County, ORES, the Applicant nor the snowmobile clubs have the authority to mandate the landowners host trails on their property.

The County has failed to raise any substantive and significant issues with respect to snowmobile trails.

For all the foregoing reasons, the County's Petition for Party Status should be denied.

B. Response to Town of Fenner

On March 31, 2025, the Town of Fenner filed a *Combined Petition for Party Status, Issue Statement and Statement of Compliance with Local Laws* ("Town Petition").[56] The Town Petition states the Town "opposes the Facility in its entirety"[57] and raises three main issues (1) compliance with local laws, (2) agricultural impacts, and (3) land control, in addition to a number of "other issues" raised in the Town's Petition and in the Town's engineering report offered by C&S Companies. The Applicant addresses each of the Town's issues below.

1. <u>Compliance with Local Laws</u>

[54] Exhibit 3 Location of Facilities and Surrounding Land Use (Revision 1), pg. 30, 33, Record DMM Item No. 25.
[55] Exhibit 3 Location of Facilities and Surrounding Land Use (Revision 1), pg. 30, 33 Record DMM Item No. 25.
[56] Note, the Town's Petition is not paginated making citations difficult, the Applicant has attempted to properly number the pages of the Town's Petition, but numbering may differ between responses.
[57] Town Petition, pg. 16, Record DMM Item No. 56.

With respect to compliance with local laws, the Town of Fenner has failed to meet its burden of proof and has not demonstrated that a substantive or significant issue exists as to the determinations and waivers granted by ORES staff. Mere disagreement with the determinations and waivers is insufficient. The Record supports granting Oxbow Hill the waivers and relief granted in the *Draft Permit*, as those provisions are unreasonably burdensome on the Facility in a manner inconsistent with the CLCPA's renewable energy targets and/or are otherwise inapplicable to the Facility. The ORES determinations are reasonable, supported by the Record and consistent with precedent, and the Town's comments fail to provide any factual or legal basis to overturn that determination or to render it a substantive or significant issue. Nevertheless, the Applicant addresses each of the Town's arguments below.

(a) Town's Prohibition on Solar Farms

The Town argues that the Facility does not comply with the Town's prohibition on Solar Farms in the Town's Land Use Regulations.[58] Land Use Regulations §§ 100.4(d), 301.4, 302.4, 303.4, 409(f)(2), Appendix 1.

As the Applicant stated in Exhibit 24, Appendix 24-C "[s]ince the Solar Law eliminates the "use" as an allowed use in the town, there are no design changes that Oxbow can make to comply with the law. Given that the Project cannot comply with the prohibition and the prohibition would prevent the project from being constructed, the Applicant is required to request the Office of Renewable Energy Siting (ORES) to waive the town's utility scale solar ban, as the ban is unreasonably burdensome in view of the Climate Leadership Community Protection Act (CLCPA) targets and environmental benefits of the proposed Facility."

The Town attempts to argue that the Applicant failed to meet its burden under 16 NYCRR § 1100-2.25(c) because the Applicant referred to the law as a ban on "renewable energy development" which the Town argues is too broad of a characterization of the law.

However, the Applicant clearly stated its request for the waiver was because the "use prohibition bans utility scale solar in the town and would prevent Oxbow Hill Solar from being

[58] Town Petition pg. 20, Record DMM Item No. 56.

constructed and operated."[59] Contrary to the Town's assertion, the Applicant did not argue that the Town bans renewable energy development generally, but that the Town's ban on utility scale solar would prevent Oxbow Hill Solar from being constructed and operated. The Town does not dispute that they have banned utility scale solar facilities such as the proposed Facility. Local laws which prevent a project from being constructed are unreasonably burdensome *per se*, and similar prohibitions and limitations inconsistent with state law and policy have been considered unreasonably burdensome.[60] Banning the Project would eliminate 140 MW of renewable energy, directly in conflict with the goals of the CLCPA, which the Town does not dispute.

Generalized criticisms of the Applicant's request do not adequately raise an issue for adjudication and the Record supports grating Oxbow Hill the waiver of the Town's prohibition of utility scale solar. As judges have routinely ruled in Section 94-c and Article VIII matters, "the Town's disagreement with ORES staff's recommendation to waive local laws is insufficient to raise a substantive or significant issue for adjudication."[56]

(b) Structure Height

Next, the Town argues that the Facility does not comply with the Town's maximum structure height requirements in the Town's Land Use Regulations.[61] Land Use Regulations §203, Table 1, for business, professional, or industrial uses.

The Applicant sought a determination that the height limitation in the Town's Land Use Regulations §203 Table 1, Land Use Schedule, of 35 feet is not applicable to the structures within the Interconnection Facilities and/or sought a waiver of the height limit as it applies to those structures.[62]

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[59] Appendix 24-c, Statement of Justification, Revision 1 pg. 3, Record DMM Item No. 37.
[60] *See* Application of *High River Energy Center*, Case 17-F-0597, Order Granting Certificate of Environmental Compatibility and Public Need, with Condition, Issued and Effective March 11, 2021, pg. 110; Application of *Flint Mine Solar*, Case 18-F-0087 Order Granting Certificate of Environmental Compatibility and Public Need, with Condition, Issued and Effective August 4, 2021, pg. 70; Application of *Hecate Green*, Case 17-F-0619, Order Granting Certificate of Environmental Compatibility and Public Need, with Condition, Issued and Effective September 28, 2021, pg. 16.
[61] Town Petition, pg. 20, Record DMM Item No. 56.
[62] Appendix 24-c, Statement of Justification, Revision 1 pg. 5, Record DMM Item No. 37.

ORES appropriately determined that the height requirement was not applicable to the structures within the Interconnection Facilities. ORES's determination is well supported by the Record. As outlined above, the Facility as a whole is a prohibited use within the Town, and as the Interconnection Facilities are part of the Facility, these components are also prohibited. Therefore, the provisions of the Land Use Regulations are inapplicable.

Even assuming, *arguendo*, that the Interconnection Facilities could be considered independently from the overall Facility, the provisions of the Town's Land Use Schedule would still not be applicable to the Interconnection Facilities under the Town's regulations.[63] Section 100.4 of the Town's Land Use Regulations expressly limits the application of height, density and setback requirements to "buildings". However, the structures within the Interconnection Facilities do not qualify as "buildings" under the Town's Land Use Regulations which define buildings as any structure other than a boundary wall or fence which covers or encloses a space.[64]

Additionally, they do not fall under the plain meaning of "business, professional, or industrial" uses, as they do not involve manufacturing or processing or the sale of goods and services. The closest category of uses in the Town's Land Use Regulations that the Interconnection Facilities could be considered is public utility, however public utility is not listed in the Land Use Schedule, despite being permitted as a special use, suggesting there is no height limit for public utility uses like the Interconnection Facilities. Therefore, ORES correctly determined that the Town's Land Use Regulations §203, Table 1, was not applicable.

Although the Town argues ORES erred in denying relief to the Applicant, i.e. in finding that the height restriction was applicable, it fails to clearly specify the basis for this claim. The Town does not explain how the height restriction would apply to structures that are not buildings, nor does it offer a legal or factual rationale for treating Interconnection Facilities as subject to regulations that explicitly exclude them. Instead, the Town generally argues ORES failed to consider the Town's intent in prohibiting utility scale solar facilities.

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[63] Oxbow Hill Appendix 24-c, Statement of Justification, Revision 1, Record DMM Item No. 37.
[64] Oxbow Hill Appendix 24-b, Town Land Use Regulations Appendix I, Definitions, Record DMM Item No. 37.

Again, generalized criticisms of the Applicant's request and ORES's determinations do not adequately raise an issue for adjudication and the Record supports ORES's determination that Land Use Regulations §203, Table 1 is not applicable to the Facility.

(c) Fence requirements

The Applicant sought a waiver of the Town's fencing requirement in Local Law No. 1 of the Year 2017 which limits fence height to 6 feet in any front yard.

The National Electrical Code ("NEC") requires a seven-foot height fence or more, which is consistent with the Article VIII regulations, which also require a 7-foot height fence.[65] The 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.

Nevertheless, the Town argues that the fencing at the substation will present a "safety issue as the Facility is situated among properties that are improved with residential housing."[66] The Town further argues that fencing around the PV arrays will "have a significant detrimental impact on both residents and wildlife".[67]

The Town did not provide any support or Offer of Proof for these statements. The Town also makes a baseless claim that the Applicant is proposing electric agriculture fencing, which it is not. The fencing proposed by the Applicant is consistent with the Article VIII regulations and NEC requirements and must be a minimum of 7 feet, to comply with these provisions. The fencing proposed for the Facility also takes into consideration the rural character of the Town and includes wood fence posts and agricultural mesh, as opposed to chain link fencing.[68] In addition, as described in Exhibit 8, the fencing will be behind landscaping and existing vegetation is many areas such that the Facility, which includes the fencing, will not have a significant visual impact.

Generalized criticisms of the Applicant's request do not adequately raise an issue for adjudication and the Record supports granting Oxbow Hill the waiver of the Town's fence height limitation.

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[65] Oxbow Hill Appendix 24-c, Statement of Justification, Revision 1 pg. 7, Record DMM Item No. 37.
[66] Town Petition, pg. 23, Record DMM Item No. 56.
[67] Town Petition, pg. 23, Record DMM Item No. 56.
[68] *See* Appendix 8-A, Visual Impact Assessment, Revision 1, Oxbow Hill Solar Project, Section 2.2.2, Record DMM Item No. 37.

(d) Setback Waiver

As stated above, the Facility is a prohibited use within the Town, and therefore the provisions of the Land Use Regulations are inapplicable. Given that the Facility is prohibited, it cannot be a "business, professional or industrial use" that is permitted by the Town's Land Use Regulations, and thereby governed by the Town's Land Use Regulations including Table 1, Land Use Schedule, as these categories of uses are designated for activities and development permitted in the Town. Nevertheless, out of an abundance of caution, the Applicant sought a waiver of the Town's setback requirements to the extent the Town or ORES determined they should apply. As with the Interconnection Facilities, ORES determined that the Town's setbacks were not applicable to the Facility. ORES's determination is supported by the Record as the Facility is a prohibited use within the Town, and therefore, the provisions of the Land Use Regulations are inapplicable.

The Town does not argue in its Petition that the Town's setbacks are applicable, instead the Town raises concerns with the "close proximity of the Facility to public roadways and the resulting inability of the Town (and County) Highway Department to safely maintain roadways during winter conditions".[69] The Town states that its concerns "regarding setback, snow clearance and safety are legitimate concerns which need to be addressed by the Applicant."[70] Nevertheless, the Town acknowledges that "the 50-foot setback from the centerline of a public road imposed by ORES will serve to reduce the Town's concerns for vehicular safety on roadways adjacent to the Facility"[71] and requests that the "as a condition of the *Draft Permit*, the Applicant be required to work with the Town Highway Department to allow and accommodate the use and installation of such standard highway maintenance measures (i.e., snow fencing), to ensure the public's safety and welfare."[72]

In preparing the Application, the Applicant consulted with the Town and Madison County Highway Department, regarding the locations of snow fencing in relation to the Facility. As a

[69] Town Petition, pg. 24, Record DMM Item No. 56.
[70] Town Petition, pg. 25, Record DMM Item No. 56.
[71] Town Petition, pg. 26, Record DMM Item No. 56.
[72] Town Petition, pg. 26, Record DMM Item No. 56.

result of those discussions, the Applicant understood that the Town of Fenner does not install snow fencing, instead Madison County installs snow fencing along portions of Cody Road and Nelson Road.[73] Based on those consultations, Oxbow believes that the Facility's location and setbacks do not interfere with the County's snow fencing installation. As with any development in the Town, the Town and County will maintain their right-of-way and the County will be able to continue to install any snow fencing as they deem appropriate to ensure the public's safety and welfare, there is no need to add a condition to the Siting Permit.

The Town also argues that ORES should enforce setbacks between participating parcels "in the event there is a future breach of the lease agreement between the Applicant and a property owner or a property owner chooses not to renew or extend its lease with the Applicant (or its successor), the absence of any setbacks between parcels will negatively impact public safety and welfare (i.e., the lack of interior access for emergency response vehicles or the installation of firebreaks to prevent the spread of fire)."[74] However, the Town's argument is premised on the assumption that a parcel which ceases to participate in the project would somehow retain its status as a "participating" parcel for the purpose of applying setbacks. In reality, if a lease is terminated or not renewed, the parcel will no longer be part of the Facility. At that point, the Applicant would be required to seek a modification of the Siting Permit pursuant to 16 NYCRR § 1100-11.1, and the Facility layout would need to be revised accordingly. Moreover, it is standard practice to waive setbacks to participating parcels. Requiring setbacks between participating properties in anticipation of a hypothetical future change in participation status would be inconsistent with established precedent and unnecessarily constrain projects without a corresponding benefit.

In summary, the Town has not provided any credible or specific factual grounds sufficient to demonstrate that a substantive or significant issue exists as to ORES's determination with respect to the Town's setback provisions. The Town's arguments are largely based on conjecture, not a genuine factual demonstration of impacts justifying different setbacks or site specific conditions. The *Draft Permit* sufficiently avoids and minimizes significant impacts, and ORES

[73] Appendix 2-B, Local Engagement and Outreach Efforts, Part 4 of 5 on page 8, Record DMM Item No. 16.
[74] Town Petition, pg. 26, Record DMM Item No. 56.

staff determined that the setbacks in 16 NYCRR § 1100-2.6, Table 2 are reasonable and supported by the Record.

(e) Landscape Screening

As stated above, the Facility is a prohibited use within the Town, and the provisions of the Land Use Regulations are therefore inapplicable, and as with the height and setback requirements, ORES found the landscape provisions of the Town's Land Use Regulations §203, Table 1, Note e, are not applicable to the Facility.

Again, the Town of Fenner does not argue that the landscape provisions are applicable; instead the Town contends that the Applicant's proposed landscape screening is insufficient and "[i]f landscaping screens are not uniformly installed and maintained around all PV panels, the Town's quintessential rural viewshed and its panoramic scenery which support County and local tourism and culture, will either be compromised or destroyed."

The Town states that the "[t]he applicant does not plan to install any landscaping screening on parcels that do not currently have occupied residential structures on them" and that this fails to undermine the value of the adjacent parcels. The Town goes on to state that the *Draft Permit*'s failure to require the Applicant to maintain and replace screening that is proposed throughout the life of the permit utterly fails to provide the benefit intended.[75]

Again, the Town has offered no proof to substantiate its assertions regarding adjacent parcel values or how the *Draft Permit* "utterly fails" to provide the benefit intended. The Town has not demonstrated, with factual evidence, any of its claimed impacts or that the *Draft Permit* or Application fails to adequately address those impacts.

The Applicant prepared a comprehensive Visual Impacts Minimization and Mitigation Plan (Appendix 08-B [Revision 1]) as part of the Application. The Plan includes a Conceptual Landscape Mitigation Planting Plan that uses six different planting schemes (modules) that are applied along the perimeter of the Facility as appropriate to screen and/or soften the appearance of the Facility in views from the surrounding area. The proposed landscape screening is robust and all non-participating residences with anticipated views of the Facility have existing vegetation or

[75] Town Petition, pg. 28, Record DMM Item No. 56.

planting modules situated between their locations and the proposed panels. The Town has failed to demonstrate how the visual screening proposed does not avoid, minimize and mitigate potential significant adverse visual impacts to the maximum extent practicable. Nor has the Town demonstrated how the *Draft Permit* fails to provide the benefit intended.

(f) Ground Mounted Solar Provisions

As with all of the other provisions of the Town's Land Use Regulations, ORES determined that the provisions of the Town's Solar Law, intended for small-scale solar, were not applicable to the Facility. The ground mounted solar provisions were not adopted with the intention of regulating the design criteria for utility scale solar facilities. Nor had the Town asserted in consultations with the Applicant that these provisions were appliable to the Facility prior to filing the Application. The Record supports that these provisions are not applicable to the Facility.

Nevertheless, the Town again argues that ORES "erred in failing to consider the purpose and intent of the Town's solar regulations, and ignores the Facility's noncompliance, in denying relief from the Applicant's request for a waiver."

Again, the Town does not present a legal or factual basis for how ORES erred in finding that these provisions are not applicable but instead reiterates its desire to prohibit large scale utility solar in the Town. The Town argues that the Applicant's deviation from the Town's intention to keep solar on a residential scale undermines the Town's objective to preserve the Town's rural character, ensure environmental protection and safeguard public welfare.

The Town goes on to express particular concern regarding water resources and decommissioning impacts, both of which have been adequately addressed by the Application and *Draft Permit*.

With respect to groundwater and surface water impacts the Facility is not anticipated to result in any significant impacts to groundwater quality or quantity, or to private drinking water supply wells, aquifer protection zones, or groundwater aquifers within the Facility Site.[76] The Applicant developed a preliminary Stormwater Pollution Prevention Plan ("SWPPP")[77] consistent

[76] Exhibit 13, Water Resources and Aquatic Ecology, Revision 1, Record DMM Item No. 38.
[77] Appendix 13-C, Preliminary SWPPP, Record DMM Item No. 25.

with New York State Department of Environmental Conservation State Pollutant Discharge Elimination System Permit, utilizing the New York State Erosion and Sediment Control manual, in order to minimize and avoid impacts to the greatest extent practicable. Prior to construction, the Applicant will need to obtain coverage under the New York State Pollution Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity (GP-0-25-001) pursuant to Section 402 of the CWA and Article 17 of the Environmental Conservation Law. As part of this request for coverage, the Applicant will prepare a final SWPPP and additional documentation necessary to disturb more than 5 acres of soil at one time, including a phasing plan. As indicated in the Appendix 5-D (Phasing and Compliance Filing Plan)[78] – Supplement, a copy of the final SWPPP will be provided as a pre-construction compliance filing.

The Town has failed to demonstrate how the Application and *Draft Permit* fail to avoid, minimize, and mitigate adverse impacts to ground and surface waters.

With respect to Decommissioning, the Applicant prepared a Decommissioning and Site Restoration Plan consistent with the requirements of 16 NYCRR § 1100-2.24. Decommissioning will include, among other activities, removing all above-ground structures and removal of all below ground infrastructure including buried collection lines and foundations at a depth of up to 48 inches in agricultural land and 36 inches in non-agricultural land. In addition, financial assurance will be provided prior to the start of operation in the form of a letter of credit or other form of security for the benefit of the Town of Fenner. The financial assurance will be set at 115% of the total decommissioning and site restoration cost, minus the estimated salvage value of equipment and materials. The financial assurance will be updated every fifth year specifying changes due to inflation or other cost increases.

The Town has failed to demonstrate how the *Draft Permit*, Application and the Applicant's Decommissioning Plan fails to address the Town's decommissioning concerns.

2. <u>Agricultural Impacts</u>

The Town's Petition argues that "if all renewable energy projects proposed within the Town are approved, approximately 30% of the entire land situated within the Town's jurisdictional

[78] Appendix 5-D, Phasing and Compliance Filing Plan Supplement, Record DMM Item No. 35.

boundaries will be improved and encumbered by large scale, industrial-sized utility renewable energy projects" and that "of the 1,594 acres sited for the Facility, 810 acres, or 51%, is classified prime farmland… 386 acres (24%) sit on soils of Statewide Importance". In addition, the Town states the Project will cut down 140 acre of mature hardwoods "negating the carbon footprint savings".

The Town avers that under Article XIV § 4 of the New York State Constitution it has an obligation to protect and preserve farmland and that the "loss of active farmland, particularly the loss of crop production and the availability of farmland for production purposes, on the local agricultural economy will be devastating" and that the "Applicant has failed to meet its burden to demonstrate, using facts and analysis, that the impacts of the Facility on community character have been avoided, mitigated or minimized, specifically pursuant to Town's rurality and agriculture".

As an initial matter, the Town's estimation of impacts is an overestimate of actual Project impacts to agriculture lands, as it is based on the Facility Site parcel acreage and is not based on actual area of impact. There will be areas within the Facility that will remain available for ongoing farming operations.[79]

Additionally, Article VIII requires applicants to avoid, minimize and mitigate potential significant adverse impacts to the maximum extent practicable to various environmental impacts while balancing the need to efficiently advance major renewable energy facilities. The Applicant's pre-application consultations informed the Facility design, and the Applicant balanced the various environmental constraints consistent with Article VIII's overall intent to design a project that avoids, minimizes and mitigates various environmental impacts including agricultural impacts, wetland impacts, wildlife impacts, and others.

Based on the location of the Facility there are limited alternatives to siting the Facility outside of agricultural lands and the Town has not offered any evidence or alternatives that suggest the Applicant could have further avoided agricultural impacts other than not building the Facility. Article VIII does not require an applicant to demonstrate complete avoidance of impacts, but rather

[79] Exhibit 15, Agricultural Resources, Revision 1, Section (a)(7), Record DMM Item No. 37.

that potential significant adverse impacts be avoided or minimized to the extent practicable, as the Applicant has done so here.

The Facility has been sited to avoid impacts to a variety of sensitive resources, including wetlands and streams, wildlife habitats, cultural resources, and prime agricultural areas, to the maximum extent practicable.[80] While some impacts to active agricultural lands within Mineral Soil Groups (MSGs) 1 through 4 are unavoidable, portions of the Facility were able to be sited outside of these areas such as in the southeastern portion of the Facility. However, the Applicant is limited to developing the Facility on lands identified by participating landowners and has designed the Facility in relation to the location of sensitive resources, land availability, and feasibility of construction, while maintaining a design for a 140-megawatt capacity, as stipulated in the System Reliability Impact Study.

To address agricultural impacts the Applicant has prepared an Agricultural Plan[81] to avoid, minimize, and mitigate impacts to active agricultural lands within NYS Agricultural Land Classified Mineral Soil Groups (MSGs) 1 through 4 during the construction, post-construction restoration, monitoring and remediation, and decommissioning phases of the Facility. In addition, the Applicant has prepared a Drainage Remediation Plan (Appendix 15-B) required pursuant to 16 NYCRR Section 1100-2.16(d) to address inadvertent damages to surface or sub-surface agricultural drainage features. Finally, the *Draft Permit* also includes Site Specific Condition (5)(f)(1) which requires the Applicant to develop and implement an Agricultural Co-Utilization Plan to mitigate potential significant adverse impacts to agricultural resources to the maximum extent practicable. With these measures in place the Application and *Draft Permit* avoid, minimize and mitigate significant adverse impacts to agricultural resources to the maximum extent practicable.

3. <u>Land Control</u>

[80] See Exhibit 9, Cultural Resources, Revision 1, Record DMM Item No. 37; Exhibit 11, Terrestrial Ecology, Record DMM Item No. 25; Exhibit 12, Threatened and Endangered Species, Revision 1, Record DMM Item No. 37; Exhibit 13, Water Resources, Revision 1, Record DMM Item No. 38; and Exhibit 14, Wetlands Record DMM Item No. 25.
[81] Appendix 15-A, Solar Agricultural Plan, Record DMM Item No. 25.

The Town Petition states, "several landowner easements are still *in the process"* and "the Applicant has failed to meet its burden to demonstrate that it has obtained title to or a leasehold interest in the Facility site, including ingress and egress access pursuant to 16 NYCRR § 1100-2.5(c)".

16 NYCRR § 1100-2.5(c) does not require that the Applicant obtain all easements required for the facility site prior to filing an application. In fact, 16 NYCRR § 1100-2.5(c) clearly states "[a] demonstration that the applicant has obtained ***or can obtain***" such interest. ORES reviewed the Application and was satisfied that the Applicant met its burden under 16 NYCRR § 1100-2.5(c) when it issued its completeness determination. The Applicant will provide "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" as required by 16 NYCRR § 1100-10.2 and *Draft Permit* Condition 6.1(h).

4. <u>Other Issues</u>

(a) Fire Code

The Town states "The Applicant has proposed emergency access roads that are in direct conflict with the 2020 Fire Code of New York State (Applicant has proposed access roads that are 14 feet wide, with three (3) foot shoulders on either side, while the State Fire Code requires access roads that are 20 feet wide, not including shoulders)" and "the Applicant has failed to meet its burden to demonstrate, using facts and analysis, that such a discrepancy is acceptable pursuant to 16 NYCRR § 1100-2.3(a), and such relevant provisions of 16 NYCRR Part 1100."

Pursuant to 16 NYCRR § 1100-6.1(d)(3), the Office has authorized the pertinent local agency to implement the New York State Uniform Fire Prevention and Building Code which includes the Fire Code. The Applicant has identified the Town of Fenner as the pertinent local agency and the Applicant anticipates providing funding for the town to retain an independent consultant to aid in reviewing Facility compliance with the New York State Uniform Fire

Prevention and Building Codes and the Energy Conservation Code of New York State, to the extent applicable to a solar facility.[82]

With respect to fire apparatus access roads, Chapter 5 of the NYS Fire Code states "where approved by the fire code official, fire apparatus access roads shall be permitted to be exempted or modified for solar photovoltaic power generation facilities."[83] The current access road design provides sufficient access for emergency personnel to quickly access emergencies anywhere on the site without obstruction. The Applicant has consulted with the local fire departments to provide information regarding Facility safety and generally reviewed the design of the Facility with local emergency service providers.[84] The Applicant anticipates continuing these discussions with local emergency service providers as part of final Facility design and will ensure that the access roads are sufficient to accommodate the size and type of emergency vehicles used by fire departments in the Facility Area. Local emergency department consultations commenced in January 2024, when the Applicant shared proposed safety and security plans with fire departments and the New York State Department of Homeland Security, and they will continue as necessary to address any remaining questions from those departments.[85]

(b) State Route 13

The Town raises concerns with transportation along State Route 13 specifically pertaining to the "transportation route within the Village of Canastota" and references a letter issued by the New York State Department of Transportation ("NYSDOT"), dated February 19, 2025, which states "NYSDOT *requires* state routes to be added…and analysis of intersections around the route to ensure vehicles can safely turn without impeding other lands [sic] of traffic."

With respect to the letter from the NYSDOT, and State Route 13, the Office expressly authorizes NYSDOT to administer permits associated with oversize/overweight vehicles and deliveries, highway work permits, and associated use and occupancy approvals as needed to

[82] *See* Exhibit 24 Local Laws and Ordinances, Revision 1, Section (e), Record DMM Item. No. 37.
[83] New York State Fire Code, Section 503.1.1(2).
[84] Appendix 2-A, Solar Community Engagement Plan, Record DMM Item No. 21.
[85] *See* Exhibit 6 Public Health Safety and Security, Revision 1, Record DMM Item No. 35.

construct and operate the Facility.[86] Prior to construction the Applicant will work with NYSDOT to obtain any necessary permits.

The section of roadway referenced by the Town is a section of road north of SR-5 to Exit 34 of the New York State Thruway (I-90) along State Route 13. The Applicant's proposed Transportation Route (Figure 2 Appendix 16-A) does not include turns along this Route, so it is unclear what concerns the NYSDOT has with respect to turns, but the Applicant will coordinate, as required with NYSDOT, prior to construction to understand what, if any, concerns there may be.

Route 13 is a State Route and would meet NYSDOT standards which would be adequate to transit standard construction traffic (non-oversized or overweight loads). Exhibit 16 of the Application states, "[t]he major highways and interstates that will be used prior to reaching local highways do not require special analysis, as they are suitable for all intended uses and will not require alterations in traffic patterns due to their size." For Exhibit 16, it was assumed that roads under NYSDOT jurisdiction were adequate for non-permitted loads, such as WB-67 flatbed trucks, concrete and aggregate dump trucks, and pickup trucks.[87]

Exhibit 16 of the Application includes a discussion of the assessment and permitting requirements for any Oversize/Overweight (OS/OW) vehicles that may utilize the roads under NYSDOT jurisdictions.[88] If required, the OS/OW permit, including load analysis for any bridge, will be obtained by the contractor or transportation company once the vehicle, final route, and loads have been determined.

The Town has failed to raise any adjudicable issues with respect to transportation along State Route 13.

(c) Proximity to Turbines

The Town's Petition raises concerns with ice thrown from turbines and resulting damage to solar panels.

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[86] 16 NYCRR § 1100-6.1(c)
[87] Exhibit 16, Appendix 16A: Route Evaluation Study, pg. 5, Record DMM Item No. 25.
[88] Exhibit 16, Appendix 16A: Route Evaluation Study, Table 4, Record DMM Item No. 25.

During Facility design the Applicant worked closely with the existing Fenner Wind Farm to ensure safe and efficient operation of both the existing Fenner Wind Farm and the proposed Facility. Through consultation with Enel Green Power a circular exclusion zone of 455 feet from the center of the existing wind turbines was drawn around each turbine. These exclusion areas are designed to ensure safe operation of both the existing wind turbines and the proposed solar Facility, accounting for factors such as turbine blade throw distance, wake effects, and maintenance access requirements. Additionally, the design ensures compliance with safety standards and optimizes the integration of multiple renewable energy technologies on the site.[89] The Town has offered no evidence that these setbacks are not protective and that something more is needed to prevent damage to the solar panels.

(d) Response to C&S Report

As stated above, the Town Petition attaches a report prepared by C&S Companies. The report purports to be a "technical review" of the application for "completeness and appropriateness". The report is organized by exhibit topic and provides comments on the application materials for the Town's consideration. The report in essence is a completeness review, not unlike the technical review already completed by ORES staff during their review of the application. 16 NYCRR § 1100-8.3(c)(6) explicitly states the completeness of an application is not an issue for adjudication. Therefore, the C&S report cannot be used to raise an issue for adjudication.

Even if the C&S Report goes beyond just completeness, the comments in the report do not provide a sufficient evidentiary basis and amount to general criticism and expression of concern. An issue proposed for adjudication must include 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." 16 NYCRR § 1100-8.4(c)(2). "Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. . .Even where an offer of proof is supported by a factual or scientific foundation,

[89] Exhibit 5, Solar Design Drawings, Record DMM Item No. 25.

it may be rebutted by the application, the *Draft Permit* and proposed conditions, [Agency] staff's analysis, or the record of the issues conference, among other relevant materials and submissions."[90]

The C&S Report does not provide a sufficient evidentiary basis to rebut the Application. Nevertheless, the Applicant has prepared a response to the C&S Report attached hereto as **Exhibit A**.

5. Amicus Status

The Town states that if full party status is not granted, then the Town seeks amicus status for the "right to trial brief and to have the opportunity to present oral argument on the issues identified in the ALJ's ruling on its party status."

A potential party who cannot demonstrate entitlement to Full Party Status may nevertheless be permitted to participate in proceedings by showing entitlement to Amicus Status. To be granted Amicus Status, a party must submit an acceptable petition for Amicus Status under the regulations; must identify a "legal or policy issue which needs to be resolved by the hearing"; and must demonstrate that it has "sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue"[91] The rights of Amicus parties are different than Full Parties, and primarily involve the right to brief issues and, at the discretion of the Administrative Law Judge ("ALJ"), present oral argument, but not the right to submit fact evidence or testimony, or to engage in disclosure or examination of witnesses[92].

Based on these standards, the Town of Fenner should not be granted Amicus Status.

V. RESPONSES TO PUBLIC COMMENTS

An in-person Public Statement Hearing was held on March 18, 2025, at the Hampton Inn & Suites Cazenovia, in the Town of Cazenovia, New York. Opportunities for public comment

[90] Heritage Issues Ruling at 8, DMM Item No. 47.
[91] 16 NYCRR § 1100-8.4(f)(2)(i)-(iii).
[92] 16 NYCRR §1100-8.4(g)(2).

remained open through March 28, 2025, and members of the public wishing to comment were able to submit comments to the ORES DMM docket for this proceeding.

The Applicant responds to all public comments made in writing through March 30, 2025 and at the public comment hearing in the attached **Attachment B**. In summary, there were a total of 47 comments received.

Some of the comments received were not directly relevant to the content of the *Draft Permit*, apart from general criticisms about local law waivers granted by ORES. However, the Applicant has endeavored to provide responses to the substance of these comments, while not required to do so where the comments are not relevant to the *Draft Permit*.

In general, adjudicable issues can only be raised by potential parties, ORES or the applicant. However, under 16 NYCRR § 1100-8.3(c)(1)(ii), an issue may be adjudicable if a public comment "on a draft siting permit condition published by the office raise a substantive and significant issue." Based on the text of the regulations, public comments which are unrelated to conditions in the *Draft Permit* cannot raise adjudicable issues. In general, aside from statements in support of the project, the most common issues raised in the public comments included visual impacts, agricultural impacts, property values, and consistency with local laws. Each of these common issues are addressed in Attachment B. As discussed herein, comments which merely provide an opinion disagreeing with ORES's decision to waive local laws raise legal issues which are not sufficiently substantiated to warrant adjudication at an evidentiary hearing. Further, disagreements with general statewide renewable energy policies or implementation of those policies are not factual issues appropriate for adjudication at an evidentiary hearing in a specific permit proceeding.

Overall, the matters raised by public comments in this proceeding are not substantive—they do not involve an inquiry into whether the Applicant can meet applicable standards—nor are they significant—they do not have the potential to result in the denial of the permit or imposition of additional permit conditions. Therefore, the public comments do not raise adjudicable issues under 16 NYCRR § 1100-8.3(c)(1)(ii).

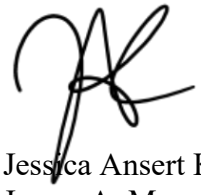
VI. CONCLUSION

For the reasons set forth herein, the potential parties' submissions fail to raise substantive or significant issues requiring adjudication in this proceeding. Moreover, no substantive or significant issues for adjudication have been raised by the public comments submitted on the *Draft Permit*.

Therefore, the Applicant respectfully requests that the ALJs find that no disputed issues of fact exist, that no adjudicatory hearing is needed in this proceeding, and that ORES staff can continue processing the Application to issue the requested siting permit consistent with 16 NYCRR § 1100-8.3(c)(5). Further, we do not believe any remaining legal issues require briefing or further development. However, to the extent the ALJs feel limited briefing is required to further address the merits of any remaining legal issues, the Applicant respectfully requests that the ALJs set a schedule for such briefing without delay.

Submitted by:

YOUNG/SOMMER LLC



Jessica Ansert Klami, Esq.
James A. Muscato II, Esq.
Attorneys for Applicant
500 Federal Street, 5th Floor
Troy, New York, 12207
Phone: (518) 438-9907

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