To be Argued by:
GARY A. ABRAHAM
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

COALITION OF CONCERNED CITIZENS and
DENNIS GAFFIN, as its President,

Docket No.:
OP 20-01405

Petitioners,

– against –

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING
AND THE ENVRIONMENT, ALLE-CATT WIND ENERGY LLC,

Respondents.

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Coalition here replies to the Siting Board's Brief. Respondent Alle-Catt filed its Brief on April 12, 2021. Petitioners reserve their opportunity to timely reply to Alle-Catt's Brief.

ARGUMENT

POINT I

THE STANDARD OF REVIEW FOR CLAIMS OF STATUTORY VIOLATIONS IS DE NOVO.

Courts must give appropriate deference to agency decisions that are based on *factual* evaluations by the agency, provided that the agency demonstrates a rational basis for its decision. *Flacke v. Onondaga Landfill Systems, Inc*., 69 N.Y.2d 355, 507 N.E.2d 282, 514 N.Y.S.2d 689 (1987); *Matter of UPROSE v. Power Auth.*, 285 A.D.2d 603, 606, 729 N.Y.S.2d 42, 45 (2d Dep't 2001).

However, little or no deference is due to the Siting Board's interpretation and application of its authorizing statute, PSL Article 10. "The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Nicholas v. Kahn*, 47 N.Y.2d 24, 31, 389 N.E.2d 1086, 1090, 416 N.Y.S.2d 565, 569 (1979). "Laws are made by the law-making power, and not by administrative officers acting solely on their

own ideas of sound public policy, however excellent such ideas may be." *Barry v. O'Connell*, 303 N.Y. 46, 52-53, 100 N.E.2d 127, 130 (1951).

Where agency decisions are rooted in a broad general grant of "authority to impose any permit condition that is rationally related to protecting the environment" rather than in any specific statutory standard-setting, little deference is due and a court may determine the rationality of the agency's action. *C.I.D. Landfill, Inc. v. New York State Department of Environmental Conservation*, 167 A.D.2d 827, 561 N.Y.S.2d 936, 937 (4th Dep't 1990). Where a court is asked to review questions of pure statutory construction "dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence" judicial review is not restricted. *Kurcsics v. Merchants Mut. Ins. Co.*, 403 N.E.2d 159, 163, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454 (1980).

Neither Article 10 nor its predecessors provide a comprehensive and detailed regulatory scheme for the siting of power plants. Almost all of Article 10 is procedural, and its substantive prescriptions are limited to Section 168. Section 168 prescribes general standards for a Siting Board's findings and considerations. Section 168 provides no detailed standards to guide a Siting Board's findings and considerations.

Several considerations and findings that are applicable to a Siting Board, (PSL §§ 168(2), (3) and (4)), are not standard-setting measures and in this case do

not cabin judicial review. None of the four findings required by PSL 168, Section 2, before a Siting Board may approve a project are specific. Each are primary standards for which no deference is due.

Among the five determinations required by PSL 168, Section 3, whether "the construction and operation of the facility will serve the public interest", (PSL § 168(3)(b)), lacks sufficient specificity to support judicial deference. The same is true for PSL § 168(3)(d), requiring a determination that "the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the certificate is issued to the maximum extent practicable using verifiable measures" where, as here, "the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located".

Finally, among the seven considerations required by PSL 168, Section 4, when making the decisions required by Sections 2 and 3, one, "the impact on community character, (PSL § 168(4)(g)), involves no exercise of agency expertise. On that subject, expert testimony was offered by an intervenor, (R.217-7, R.251-1), by the State Historic Preservation Office, (R.218-19, Ex. ACD-4); and by local agencies opposing the project. R.214, 6-7; R.216-6; R.298-1; R.298-3. *See also* R.374-1, 39-47 (Petitioners' Brief). The Board's rejection of those opinions was not grounded on alternative information.

The Legislature's reluctance to engage in specific statutory standard-setting, and its intent to create a unified procedural scheme for siting power plants is evident in the history of New York power plant siting legislation. Article 10 renewed PSL Article X, which expired on December 31, 2002, and Article X's predecessor PSL Article VIII, which expired on January 1, 1989. *See* L. 1978, ch. 708, § 4, as amended by L. 1983, ch. 721, § 2. All three siting laws have the same intent and have parallel structure and content. *Cf. Massachusetts v. New York State Board on Electric Generation Siting and the Environment*, 197 A.D.2d 97, 101-102, 610 N.Y.S.2d 341, 344-345 (3d Dep't 1994), *appeal dismissed without op.* 83 N.Y.2d 999, 640 N.E.2d 147, 616 N.Y.S.2d 479 (1994).

The State policy declared by the Legislature enacting Article 10 and its predecessors is to unify the procedures for siting power plants:

> In approving the [Art. VIII] bill, Governor Rockefeller noted that "the establishment of a unified certificating procedure under the jurisdiction of the new State Board" was to "replace the current uncoordinated welter of approvals, procedures and agencies that have virtually paralyzed the construction of needed new power plants."

Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105-106, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983) (quoting McKinney's Session Laws of NY, 1972, p.

3391). "When article VIII was re-enacted in 1978, the Legislature again asserted that its purpose was to have the Siting Board balance all interests, including local interests, on a State-wide basis in a single proceeding." *Id.* at 106 (quoting L. 1978, ch 708, § 1). However, neither Article VIII, Article X, nor Article 10 provide a comprehensive and detailed regulatory scheme for how this balance is to be struck.

POINT II

THE PUBLIC INTEREST DETERMINATION UNDER PSL § 168(3)(B) REQUIRES BALANCING ALLE-CATT'S BENEFITS AND DETRIMENTS.

In its Brief, the Siting Board argues that "Petitioners make a conclusory claim that the Siting Board declined to balance the project's benefits against adverse local impacts" and it asserts that nothing in Article 10 requires an analysis of such a balance. Siting Board Br., 24.

As shown above, the Legislative intent in enacting Article 10 and its predecessors is that Siting Board decisions balance the benefits and detriments of power plant siting. *See also* R.374-1, 40; R.408-3, 15, text at n.32.

The Siting Board itself has regularly acknowledged its obligation to balance the benefits of siting power plants and the adverse impacts of doing so. In an Article X siting case, the Board approved the hearing examiners' conclusion that "a balancing is called for between aesthetic and developmental interests", and further approved the hearing examiners' conclusion that "the Board must undertake a

fundamental balancing between this proposed facility's social and environmental benefits and detriments". PSC Case 97-F-1563, *Application by Athens Generating Company, L.P. for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 1,080 Megawatt Natural Gas-fired Combined Cycle Combustion Turbine Generating Facility, in the Town of Athens, Greene County*, Opinion and Order Granting Certificate, 2000 N.Y. PUC LEXIS 457, *89, *163 (June 15, 2000), *determination confirmed, Citizens for the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting*, 281 A.D.2d 89, 723 N.Y.S.2d 532 (3d Dep't 2001).

In another Article X case, the Siting Board recognized "its overall balancing function". PSC Case 99-F-1164, *Application by Mirant Bowline, LLC (Formerly Southern Energy, LLC) for a Certificate of Environmental Compatibility and Public Need to Construct and Operate Bowline Unit 3, a 750 Megawatt Generating Facility in the Town of Haverstraw, Rockland County*, Order Concerning Interlocutory Appeals, 2001 N.Y. PUC LEXIS 443, *13 (June 21, 2001). "After adding reasonable mitigation measures relating to other (non-DEC) matters and assuring that overall environmental impacts have been minimized, the Board then balances a proposed project's benefits against adverse impacts, and determines whether construction and operation would be in the public interest." *Id.*, *43 (citing Case 97-F-1563, Athens Generating Company). "[T]he public

interest finding is a separate, overall assessment, taking into account all of the environmental and other considerations bearing on the question whether [the applicant] should be permitted to construct and operate the proposed facility." *Id.*, at *18, *Cf.* PSL § 168(3(b).

POINT III

CHALLENGES TO FACTUAL CONCLUSIONS ARE SUBJECT TO CPLR ARTICLE 78'S STANDARD OF REVIEW.

An agency's factual determinations may be challenged as lacking substantial evidence in the record, or lacking adequate basis. CPLR §§ 7803(3), (4). Substantial evidence means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact". *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180, 379 N.E.2d 1183, 1187, 408 N.Y.S.2d 54, 56 (1978).

A factual determination of the Siting Board challenged here is whether Alle-Catt's capacity to generate electricity would be a beneficial contribution to the state's electric system under the circumstances. PSL § 168(3)(a). The Coalition argues that Alle-Catt failed to carry its burden, (SAPA, § 306(1)), to demonstrate that the project's capacity would be beneficial, for two principle reasons. First, Alle-Catt's "capacity", (PSL § 168(3)(a)), provides very modest climate benefits under the best circumstances. Alle-Catt's design capacity does not reflect the

ability to inject its maximum power into the grid. Nuclear and hydropower demonstrate this ability because they operate with 81-95% capacity factors. Over the course of a year they generate between 81 and 95 percent of the maximum power they are designed to produce. Wind generates at a 29% capacity factor, so Alle-Catt could theoretically generate 29% of 340 MW, (R.169-4), or 864 GWh ([340 MW X .29 X 8,760 hours] X 0.001 (MWh to GWh conversion)). In 2020, nuclear power upstate generated 28,093 GWh; nuclear power downstate generated 16,695 GWU; hydropower upstate generated 27,525 GWh; hydropower downstate generated 2,616 GWh. NYISO, *Power Trends 2020*, 29, available at <https://www.nyiso.com/library> under "Corporate Reports". These generation sources are reliable, but Alle-Catt would be dependent on the weather, further diminishing its ability to provide climate benefits.

Alle-Catt's theoretical actual capacity would not be achieved because to manage its intermittency, NYISO must curtail generation. Some curtailment is already ordered by the Siting Board to minimize mortality to bats. Cert. Order, Appx. A, Conds. 60-62. If complaints about noise or shadow flicker are made during operations, generation may be further reduced. R.399-1, 66; *id.*, Appx. A, Cond. 71. Alle-Catt's emissions benefit will be reduced further by the loss of 1,550 acres of atmospheric carbon-reducing forests. R.358-1, 25. None of these facts in the record were explicitly considered by the hearing examiners or the Siting Board

when assessing the project's climate benefits. Only Alle-Catt's model was considered. *See* R.86-36, Appx.

Second, there is no evidence that Alle-Catt could sustain the modest climate benefits it could provide for its first year of operations. *Cf.* SAPA, § 306(1). The Siting Board improperly fills that gap in information with little more than hope. *See* Petitioners' Br., Point IV.

The Siting Board agrees with the Coalition that transmission congestion throughout the New York grid prevents utilization of Alle-Catt's generation capacity in New York's load centers, which are located downstate. R.399-1, 83. However, the Board disregards the absence of evidence about the likelihood of timely congestion relief in order to conclude that, if Alle-Catt is built as proposed, developers of transmission will appear in time for Alle-Catt's capacity to be beneficial. *Id.* The Siting Board rejects the need to predict anything about Alle-Catt's future benefits, despite the State's energy plan, which requires a progressive reduction in emissions.

The Siting Board argues against a position the Coalition did not express, that "all growth of renewable generation throughout New York should be halted until the transmission constraints are resolved." Siting Board Br., 37. The Coalition's actual position is that to be beneficial under PSL § 168(3)(a), Alle-Catt must provide climate benefits. R.374-1, 29-34; R.408-3, 3-5. If the Board finds that

climate benefits are minimal, the project's adverse environmental and community impacts should weigh against siting. R.374-1, 34 (discussing legislative intent); Petitioners' Br., 4. But that is not to say that no new wind energy project should be sited until Statewide transmission issues are resolved.

Under the circumstances, the Siting Board should have called for more information to support its optimism that, if Alle-Catt is sited as proposed, transmission developers will arrive to unbottle the grid from western New York to the state's load centers downstate. Since at least 2016, NYISO has repeatedly concluded that failure to relieve transmission congestion throughout the electric system will jeopardize the state's ability to achieve its energy goals. *See* R.374-1, 36-37; Petitioners' Br., 57. More recently, NYISO has had to act on the failure of transmission developers to arrive by increasing its curtailment of wind energy projects. NYISO, *Power Trends 2020*, 16, Fig. 7 (reporting that in 2019, upstate wind farms had to be curtailed 64 times). *See also* R.223-22, Q1 (Alle-Catt discovery response, acknowledging that energy output could be curtailed in later years to a greater degree than in the first year of operations due to transmission constraints); R.374-1, 31-32 (Coalition Brief on Exceptions). The State's 2015 Energy Plan echoes NYISO's concern that substantial investment in new and upgraded transmission will be needed in order to accommodate new large-scale renewable energy projects:

> New York's aging energy transmission and distribution infrastructure requires substantial investment in repair and modernization over the coming years. As previously noted, central generation facilities will continue to be the foundation of the State's energy system for the foreseeable future—the transmission network must be well maintained, secure, and in some cases enhanced in order to provide reliable service and to accommodate the addition of new large-scale renewable resources.

R.218-1, Ex. SPP-1, 36.

To support its view that the needed transmission upgrades will appear, the Siting Board points to a Governor's press release about a 56.5-mile transmission project in another part of the state approved after the Siting Board issued its Order in this case. Siting Board Br., 38-39. This is not evidence that transmission congestion affecting Alle-Catt will be relieved. More importantly, it says nothing about why it was reasonable to limit the inquiry to the first year of Alle-Catt's operations when the record shows climate benefits vary substantially over time.

The Siting Board argues that we put "the cart before the horse" because the planning of transmission upgrades requires information about "the siting and size of generational facilities" as "essential inputs" to the transmission planning

process. Siting Board Br., 37. *See* R.399-1, 83. Whether siting comes "before" transmission is not a question that was ever developed on the record. In support, the Board merely cites to its own conclusion in the Order on Rehearing. *Id.* (citing R.419-1, 17). As shown above, a contrary "cart before the horse" position is taken by NYISO and the 2015 Energy Plan: before new renewable generation resources can be accommodated, new transmission upgrades will be needed. NYISO, *Power Trends 2020*, 16, Fig. 7; R.218-1, Ex. SPP-1, 36. *See also* R.374-1, 34-37. Neither in its Brief or Certificate Order does the Siting Board identify any basis for putting generation siting before transmission improvements.

When the PSC established the Clean Energy Standard ("CES"), which informs the 2015 State Energy Plan's emissions reduction goals, NYISO commented that "The Commission must consider next steps now for transmission development to align with the CES timeframes", as the Commission had begun a "study to identify the system impacts of additional renewable resource build-out" the CES may require, "but there are, as of this date, no findings for the Commission, the NYISO, and the other affected stakeholders to consider and critique." Case 15-E-0302, *CES Proceeding*, NYISO Supplemental Comments, 6-7. The situation has not changed today. The Accelerated Renewable Energy Growth and Community Protection Act ("AREGCPA") enacted in 2020 mandates

a transmission planning process just now getting underway. *Cf.* R.399-1, 84 (relying on the AREGCPA).

Recent NYISO reports emphasize that "generation and transmission projects are interdependent." *NYISO Market Monitoring Unit Review of the 2019 CARIS Phase 1 Study*, 15 (reviewing NYISO's annual Congestion Assessment and Resource Integration Study ["CARIS"]), available at <https://www.nyiso.com/documents/20142/13246341/MMU_Review_of_2019_CARIS_Phase_1 – 20200622.pdf>. NYISO also reports that needed transmission upgrades have been identified across all eleven NYISO control zones and, without these, during the winter transmission congestion will make "an average of 3,565 MW of renewable power in each hour unable to help meet load requirements (this is equivalent to 9.4 percent of total NYCA [state-wide] load)." P.J. Hubbard et al., *Climate Change Impact Phase II: An Assessment of Climate Change Impacts on Power System Reliability in New York State* (September 2020), 28, available under under "Planning Reports" at <https://www.nyiso.com/library>. NYISO also reports that transmission upgrades would depend on where the renewable resources are placed and would be "less beneficial" if offshore wind is built to serve downstate areas. *NYISO Market Monitoring Unit Evaluation of the Proposed AC Public Policy Transmission Projects* (February 2019), available at

<https://www.nyiso.com/documents/20142/5172540/04d AC Transmission ApnxE MMU Report.pdf/113062e4-4ae4-9b7d-46a5-3eec40ad739d>.

Thus, the cart and the horse must go forward together in an iterative process over time. Without substantial evidence, for the Siting Board to insist that a new generation proposal go forward without knowing whether transmission upgrade proposals adequate to ensure the climate benefits estimated by the generator is arbitrary.

POINT IV

THE COALITION'S STANDING IS ESTABLISHED BY PSL ARTICLE 10, AND BY HARMS TO ITS MEMBERS ESTABLISHED IN THE RECORD.

Article 10 provides a private right of action against the Siting Board for "[a]ny party aggrieved" as a result of the Board's final decision. PSL § 170(1). The right to judicial review of the decision may be based on issues preserved as set forth in the statute. *See A.V.A. Carting Inc. v. Browning-Ferris Indus.*, 211 N.Y.L.J. 37, 1994 N.Y. Misc. LEXIS 703, *22-23 and cases cited in *23.n.6 (N.Y.Co. 1994). We discuss the preservation of issues in the next section of this Brief.

The Coalition has associational standing. "[A]ssociational or organizational standing" involves a three part test in which a petitioner must demonstrate: (1) that one or more of its members has standing to sue; (2) that the interests advanced in the proceeding are sufficiently germane to petitioner's purposes to show that it is

an appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert petitioners claims or to afford petitioner complete relief. *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 775, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

Injury in fact to the Coalition's members is established by the record, which reveals that the Alle-Catt project would result in several adverse impacts affecting large portions if not the entirety of the land comprising the project area, including property Coalition members own. These impacts include exposure to wind turbine noise at levels the state Department of Health ("DOH") testified would not be healthy, (R. 338-2, 1010-1011, 1012-1014); exposure to shadow flicker at times and durations DOH testified would not be healthy, (R.219-7, 18-19; R.215-5, Ex. 5, at ES-12, -27, and -31); degradation of the natural environment in ways NYSDEC would not approve (Petitioners' Br., 10); diminished property values, (R.358-1, 166-167; R.220-7); and adverse effects on the character of the community in ways the Cattaraugus County Legislature, (R. 214-6), the Cattaraugus County Planning Board, (R. 214-6), and the Cattaraugus County IDA, (R. 214-3, 6), would not approve. Two towns in the project area, three adjacent towns, and the State Historic Preservation Office agreed. R.298-1; R.298-3; R.218-19 (Ex. ACD-4, 2). *Cf. also* R.217-1 through R.217-7; R.248-6; R.252-1, 3-4.

The Coalition asserted in the evidentiary hearing, (R.322-1, 131-132, 137-138, 142, 145-146, 165-166, 246-247, 604, 612, 615-617, 634-651), that these established impacts are relevant to community character and together would seriously harm their community even if minimized by adherence to the final Certificate conditions. *See* R.374-1, 39-47 (Coalition Br. on Exceptions). Indeed, such demonstrable impacts would be considered a nuisance at law. *Cf. Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 129 Nev. Adv. Rep. 9 (2013) (considering similar impacts of one 75-foot-high wind turbine to be a legal nuisance); *Town of Falmouth v. Town of Falmouth Zoning Board of Appeals*, 34 Mass. L. Rep. 408; 2017 Mass. Super. LEXIS 144 (Mass. Super. Ct. 2017) (same, considering two 240-foot-high wind turbines); *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879, 889, 220 W. Va. 443, 453 (W.Va.App. 2007) (same, considering up to 200 wind turbines, each 210 to 450 feet in height, after NedPower was granted a state siting certificate, noting that "[b]ecause the rights of nearby landowners are not a primary consideration in the PSC's siting determinations, we believe it is necessary to preserve the traditional rights of these landowners to seek appropriate remedies in the circuit courts", and awarding an injunction against the construction and operation of the wind project); *Doggett v. National Energy Solutions*, No. 1:14-cv-02328, 2015 U.S. Dist. LEXIS 140953 (N.D.Ala. 2015) (considering 5 to 30 wind turbines approximately 570 feet tall to be a legal nuisance based on noise impacts).

Most public comments discussed at Point II.4 in Petitioner's Brief describing concrete harms that would result from the Siting Board's Certificate Order were written by members of the Coalition. *Cf.* Petitioner's Br., Ex. C (Interrogatory ACWE-SCHRODER-01, listing Coalition member groups); R.163-2, 120:7-14 (counsel's account of Coalition member groups). Concrete harms are described in affidavits by Bruce Aquard, Erin Lord, Mark Heberling, Dennis Galluzzo, Stephanie Milks, and Barry Yavener "on behalf of the Coalition". R.223-2, 118:16; R.343-1, 2292:5; R.322-1, 142:7; *id.*, 130:9; *id.*, 181:16; *id.*, R.245:14. *See also* R.250-5 (Heberling rebuttal testimony, describing meeting with the Farmersville Amish). Heberling was the president of Farmersville United, and Milks was president of Freedom United, Coalition member groups. R.322-1, 151:1-8, 181:18-20. Dennis Gaffin, president of Coalition member group Centerville's Concerned Citizens, also testified. *See id.*, 147:13-15. (Evidentiary hearing transcript cover pages incorrectly list Dr. Gaffin as a member of a different group.)

Bruce Aquard testified that based on his review of the Alle-Catt application, the blades of one 600-foot-high wind turbine would extend 160 feet onto his property, and that "will impair our enjoyment of the land forever and our ability to safely use a good portion of it". R.223-2, 125-126. Erin Lord testified that she had done considerable research on harms to human health and the environment that result from living in proximity to a large-scale wind energy project, and is

specifically concerned about the aesthetic impacts of the Alle-Catt project and its effects on the value of her property. R.343-1, 4-7. Among other things, Mark Heberling stated: "This project will industrialize what is rural, threaten our way and the Amish community's way of life and ruin the pristine landscape of Farmersville for decades" and he adopted the comments of 26 others identifying "impaired viewsheds due to increased turbine heights". R.322-1, 146:1-12, 155:12-15. Dennis Galluzzo stated: "If the project goes forward and two of these proposed industrial turbines are built within 1200 feet of my Rushford home, I will be forced to leave my dream retirement home, due to the turbines' well known intrusive effects, including viewshed impairment, noise and shadow flicker." R.322-1, 131:13-16. Based on her review of the application, Stephanie Milks testified: "The back portion of my property would experience over 30 hours of flicker per year where my berry patches are and where my family and I enjoy evening walks and berry picking on summer evenings." *Id.*, 186:11-13. Barry Yavener testified: "This project will destroy our landscape and peaceful lifestyle. It will destroy my enjoyment of my property and the Amish community's way of life and ruin the landscape of Farmersville." *Id.*, 247:18-20.

The record also shows that the Farmersville Amish belong to the Coalition. Because the Amish on religious grounds maintain their distance from the State, (R.223-8, 4-5; R.339-2, 1528, 1539:17-23; Petitioner's Br., Ex. C, excerpting D.

Kraybill et al., THE AMISH (2013)), expecting them to have testified on their own behalf in order to establish their standing here is prejudicial to their right to be represented by counsel and appropriate experts. In any case, by letters submitted to the hearing examiners by the Swartzentruber specify their religious objections to the Alle-Catt project's effects on their health, safety, land, property values and their religion. *See* R.302-4. *See also* R.339-2:3-5.

Based on a statement of purpose required to be included in the Coalition's request for application-stage intervenor funding ("RFIF"), the Siting Board argues that the Coalition's stated interest in "a balanced assessment of the potential beneficial impacts of the proposed Project", and "the adverse impact of the project proposal on the character of the community", is not "germane to its purposes." *Id.*, 15-16 (quoting Coalition RFIF at R.148-9). However, the Coalition's Statement of Issues at the beginning of the application review clearly asserts these interests. R.189-2. The Coalition's pre-application-stage RFIF also identifies these interests. R.56-6. Their interests in preserving the environment and community amenities is also identified in the mission statements of Coalition member organizations. *See* R.62-1, 1; R.69-1, 1; R.69-3, 1.

Finally, the Siting Board argues that the religious exercise rights of the Farmersville Amish are not germane to the Coalition's purposes. Siting Board Br., 15. However, in its pre-hearing "Statement of Issues", (*see* 16 NYCRR §

1000.12(a)(1)), the Coalition stated, "The Swartzentruber Amish should be deemed a religious minority within the Project Area, subject to the environmental justice provisions of Article 10." R.189-2, 3 (discussing *Wisconsin v. Yoder*, 406 U.S. 205, 233 and 236 (1972)). Prior to its Statement of Issues, at the hearing examiners' procedural conference, the Coalition stated:

> we're asking . . . the State to accommodate the Amish by avoiding them entirely. And, if it turns out that the Amish use most of the project area, we'll bring a religious infringement claim because they will be extruded, displaced and migrated away from the community. And, as -- as you also heard last night, there are many people in the community who find the presence of the Amish to be a positive feature of the community character. So, that will degrade the community character for everyone, if the Amish leave.

R.159-1, 44:11-21. The Coalition added that, because the Siting Board must find the project would comply with the U.S. Constitution, (PSL §§ 162(1), 170(2)(a)), the Farmersville Amish "must be accommodated under the U.S. Constitution". *Id.*, 44-45. *See also* R. 163-2, 121-122.

The non-economic injuries identified here are sufficiently concrete, and affect the property of Coalition members distinct from the public at large, to satisfy

the test for associational standing. *See Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 6-7, 11 N.E.3d 188, 192, 988 N.Y.S.2d 115, 119 (2014) (citing *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773-774, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991)) (other citations omitted)). This is not "a lawsuit to advance someone else's cause" claiming only the "abstract or speculative injury" of a "judicial dilettante or amorphous claimant". *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 812, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (2003). Nor is it a case where the members of the Coalition live outside the project area. *Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 N.Y.3d 297, 311, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009) (Pigott, J., concurring).

This Court should not reject the Coalition's case on standing grounds because all three elements of the test for associational standing are met here, as well as statutory standing.

POINT V

THE COALITION PRESERVED THE ISSUES OF ENERGY SYSTEM IMPACTS AND FIRST AMENDMENT INFRINGEMENT ON AMISH RELIGION RAISED IN ITS PETITION AND BRIEF.

1. First Amendment claim

The Siting Board contends that the Coalition failed to raise its First Amendment argument in its brief on exceptions, (*see* R.374-1), that it raised the

argument "for the first time on rehearing", (R.408-3), and therefore the Coalition failed to preserve the issue in accordance with the applicable administrative procedures. Siting Board Br., 25-26 (citing 16 NYCRR § 4.10(d)(2)). However, the Coalition's brief on exceptions argues at length that Amish "households" are "particularly sensitive to traffic, dust and noise", (R.374-1, 3); "[j]ust as the Swartzentruber would find compliance with local fire codes to be an intrusion on their religious way of life, which dictates their architecture, they find the siting of wind turbines in their community to raise 'religious issues' where 'other people are trying to change their way of life'", (*id.*, 48-49); and the hearing examiners' reliance on a calculation of annual time spent in home worship services is "prejudicial" to Amish religion. *Id.*, 50-51. As shown previously, the Coalition raised the issue of Alle-Catt's impacts on the ability of the Swartzentruber to practice their religion from the beginning of the administrative proceeding. Petitioner's Br., Point III.

The Siting Board next argues that even if it preserved the issue, the Coalition's First Amendment argument fails on the merits. The Board acknowledges that the Alle-Catt project as approved may result in incidental or indirect impacts on the Farmersville Amish. Siting Board Br., 31 ("the project's alleged impacts on religion would be, at most, incidental"). However, relying on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the

Board argues that "devastating effects" of Alle-Catt on Amish religious practices do not implicate the First Amendment because the Siting Board's decision to deny relief to the Amish in this case has no "tendency to coerce individuals into acting contrary to their religious beliefs". Siting Board Br., 29-30 (quoting *Lyng*, 485 U.S. at 451-452. However, "indirect coercion or penalties on the free exercise of religion", (*Lyng*, 485 U.S. at 450), would be a consequence of the Siting Board's Certificate Order because siting the Alle-Catt project in Farmersville would not allow the Farmersville Amish to remain in the community. In addition, adherence to the Swartzentruber Ordnung makes the noise mitigation measures considered by the Board entirely ineffective. These measures would require, among other things, the use of air conditioners in the summer and double-paned windows in the winter, measures that violate the Ordnung. R.339-1, 1896:9-17; R.339-2, 1582:5-7 ("architecture" is "a religious issue" for the Swartzentruber). Direct payments to compensate the Amish, or indirect payments through property tax relief would also violate the Swartzentruber's religious principles because "Swartzentruber Amish cannot accept government subsidies". R.339-2, 1529. Without the benefit of mitigations available to the non-Amish, the Swartzentruber will be coerced into migrating to another area.

These issues were clearly raised early and often enough, including in the Coalition's brief on exceptions and petition for rehearing, to have preserved those issues for judicial review.

2. Energy system impacts and "beneficial contribution" claim

As shown above, in Point II, the Siting Board accepted and agreed with the Coalition's conclusion that Alle-Catt would not be a beneficial addition to the state's electric system under present circumstances, due to transmission congestion throughout the grid. R.399-1, 83. *Cf.* R.408-3, 5-6. This issue was clearly raised early and often, including in the Coalition's brief on exceptions and petition for rehearing. *Cf.* Coalition Br. of Exceptions, 29-39.

POINT VI

THE TOWN OF FREEDOM'S 2007 LOCAL LAW REMAINS IN EFFECT, AS THE TOWN'S 2019 LOCAL LAW WAS NOT VALIDLY FILED.

The Siting Board argues that the Town of Freedom's 2007 local law was not in effect at the close of the evidentiary hearing in this matter despite a declaratory judgment from Cattaraugus County Supreme Court to the contrary, (R.283-1, Ex. ACD-8), and despite the contrary conclusion of the hearing examiners. R.358-1, 157. *See* Siting Board Br., 17-21. Article 10 requires a Siting Board to *apply* local laws unless it finds them "unreasonably burdensome". PSL § 168(3)(e); R.399-1, 78 ("we apply the Town of Freedom's 2019 law"). But Article 10 does not

authorize a Siting Board to *determine* what laws are in effect. Here, by purportedly determining which law in the Town of Freedom is in effect, the Siting Board avoided the need to analyze the burdensomeness of each of Alle-Catt's three requests for waivers of Freedom's 2007 law, as discussed below. *Cf.* PSC Case 16-F-0328, *Application of Number Three Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Project Located in Lewis County*, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions (November 12, 2019), 2019 N.Y. PUC LEXIS 561, *101-120 (analyzing the burdensomeness of each of eight requests for local law waivers). The Board thereby shielded Alle-Catt from its burden to "demonstrate to the Siting Board that the local laws and regulations are unreasonably restrictive." PSC Case 01-F-0761, *Application by KeySpan Energy for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 250 Megawatt Combined Cycle Electric Generating Facility to be Developed in the Town of Huntington, Suffolk County*, Order Denying Petition for Rehearing, 2003 N.Y. PUC LEXIS 489, *8-9 and *9.n.14 (September 4, 2003) (quoting *Koch v. Dyson*, 85 A.D.2d 346, 372-373, 448 N.Y.S.2d 698 (2d Dep't 1982) and noting "PSL Article VIII, § 146(2)(d), is substantively similar to PSL Article X, § 168(2)(d)").

Alle-Catt determined as a matter of its litigation strategy not to request waivers from any provisions of Freedom's 2007 local law. R.322-1, 665-680, especially at 671-673; R.358-1, 152. Alle-Catt acknowledged that the determination of what law is in effect in Freedom is "outside the authority of the Siting Board". R.322-1, 672:2. Alle-Catt relied on the theory that Supreme Court's declaration that the 2007 local law in the Town of Freedom "remains in effect", is mere "dictum". R.335-1, 8-9. *See also* R.322-1, 673:15-16.

The hearing examiners agreed with the Coalition that Supreme Court's judgment is a holding, not dictum, (R.332-1, 676:10-14; R.358-1, 152), and admonished Alle-Catt's attorney that his client should make a request for waivers of burdensome restrictions found in the 2007 law and agree to extend the proceeding in order to allow the request to be adjudicated. R.322-1, 665-680; R.358-1, 152. Soon after December 5, 2019, when live hearing sessions concluded, Alle-Catt requested that the 2007 law's restriction on guy wires, the restriction on turbine height, and the restriction on hours of construction under the 2007 law be waived by the Siting Board. R.305-2; R.305-1, 2:1-4. *Cf.* R.306-1. Soon thereafter, Alle-Catt withdrew its request. R.313-1.

Alle-Catt's qualification for waivers is questionable, as its project manager admitted that "custom turbines" could be obtained to comply with the 450-foot height limit on turbines, restrictions on hours of construction would add costs but

would not necessarily be prohibitive, and restrictions on guy wires could be accommodated. R.305-1, 4-5. However, the waiver requests were not adjudicated. The hearing examiners recommended "that the Siting Board adopt a certificate condition that ACWE must comply with the Town of Freedom's 2007 wind law." R.358-1, 157. The Siting Board rejected the recommendation. R.399-1, 77-78.

At that point, the Coalition determined it would not rely solely on briefing in the proceeding, and a petition should be filed with Supreme Court to determine the validity of the Town of Freedom 2019 local law. As the Siting Board notes, the 2018 local law invalidated by the court is identical to the 2019 local law. R.399-1, 77. *See also* R.394-1 (comments on the point by Freedom United President Stephanie Milks). However, the Board fails to note that at a preliminary hearing on the new lawsuit Supreme Court signaled that, since the 2019 local law had not been referred to the County, in violation of GML § 239-m, it should be apparent how the court would rule. R.387-1, Exhibit A at 7. That lawsuit remains pending on account of very broad discovery demands by Alle-Catt, two new lawsuits brought by Alle-Catt against the towns of Farmersville and Freedom, and the pause in court proceedings over the last year. *See* NYSCEF, Cattaraugus Co. Sup. Ct., Nos. 89035, 89082. Nevertheless, on April 30, 2020, Supreme Court issued an interim ruling in that case, affirming its previous declaratory judgment that the 2007 local law "remains in effect". R.387-1, attached Order and Judgment, at 3. The interim

ruling says no more than this: "What is the relation between the 2007 and the 2019 laws is an issue that has not yet been determined." *Id.*, 21 (quoting the decision). Into this gap, which remains to this day, the Siting Board inserts itself in order to make that determination. *See id.* ("Local Law #1-2019 was the most recent *validly-enacted* law in force at the time the Siting Board evidentiary record closed.") (emphases added).

No deference is due the Siting Board's determination that Freedom's 2019 local law was validly enacted. Until a court of competent jurisdiction declares otherwise, two judicial declarations declaring that Freedom's 2007 local law is in effect are entitled to respect. Alle-Catt's machinations in Supreme Court, designed to confuse issues, (*see* Petitioners' Br., 6-9), provides no basis for a different view. Article 10 provides no authority to a Siting Board to determine local laws.

CONCLUSION

This administrative proceeding did not occur in a vacuum. In the background was the retreat of the federal government from action on climate change, which in turn moved environmentalists to assert that climate change is an existential threat to humanity. In the spring of 2019, when the application stage of this proceeding was beginning, Governor Cuomo called for a "New York Green New Deal" and a few months later the CLCPA was passed by the Legislature with very little debate. *Cf.* R.408-3, 6-10. On September 20, 2019, 16 year-old Swedish

climate activist Greta Thunberg led a demonstration in New York City, stating: "We are facing an existential crisis . . . it will have a massive impact on our lives in the future, but also now, especially in vulnerable communities". <https:// flaglerlive.com/143896/global-climate-strike/>. On January 27, 2020, after legislative testimony by Environmental Conservation Commissioner Basil Seggos was interrupted by "dozens of climate change protesters" demanding climate be considered an "emergency", the Commissioner agreed, calling climate change an "existential crisis". Nick Reisman, Spectrum News, "Climate Change Activists Want More In State Budget", <https://spectrumlocalnews.com/nys/central-ny/politics/2020/01/27/climate-change-activists-want-more-in-state-budget>. In April of 2020 the AREGCPA was passed with no legislative debate, as it was introduced in a late budget amendment added by the Governor.

Calls to do something to address an "existential crisis" tend to preclude careful debate about how effective various technologies are in reducing carbon emissions, or whether equal or more emphasis should be placed on long-term planning.

The State Legislature and past Siting Boards have consistently required a balancing of competing interests to support power plant siting decisions. Although the Siting Board recites this balancing rule, (R.399-1, 79 (the Siting Board "mak[es] the complex balance of competing interests that must be made in

generation siting cases")), in this case its final decision is impermissibly imbalanced. The evidence of significant, serious adverse impacts on the communities and the environment within the project area are arbitrarily discounted, and positive environmental impacts of the project (*i.e.*, its climate benefits) are elevated without substantial evidence.

The Siting Board's Certificate Order and its determination of petitions for rehearing, (see PSL § 170(1)), thus lack a basis in substantial evidence in the record and are arbitrary and capricious.

DATED: April 22, 2021
Humphrey, New York

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