STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING

ORES Permit Application No. 22-00032 – Application of AES CLEAN ENERGY DEVELOPMENT, LLC, for a Declaratory Ruling that its Proposed Repowering Projects Are Exempt from Section 94-c of the New York State Executive Law.

DECLARATORY RULING CONCERNING JURISDICTION
OVER PROPOSED REPOWERING PROJECTS

(Issued September 27, 2023)

HOUTAN MOAVENI, Executive Director:

INTRODUCTION

By letter filed on September 28, 2022, AES Clean Energy Development, LLC (AES), requests a declaratory ruling from the Office of Renewable Energy Siting (ORES or Office) that its proposed repowering of six wind energy facilities (wind facilities), which were originally sited in or around 2008 pursuant to the State Environmental Quality Review Act (SEQRA), are not subject to review and approval by ORES under Executive Law § 94-c.[1] The subject wind facilities are the facilities known as the Bliss and Wethersfield Windparks in Wyoming County, the Altona, Clinton, and Ellenburg Windparks in Clinton County, and the

[1] See Portal Item No. 1, letter from AES to ORES dated September 28, 2022, requesting a declaratory ruling (AES request).

Chateaugay Windpark in Franklin County (proposed repowering projects). For the reasons that follow, I conclude that the proposed repowering projects are subject to Executive Law § 94-c and hereby issue a declaratory ruling to that effect.

BACKGROUND

According to AES, the subject wind facilities have a total nameplate capacity, based on the New York Independent System Operator (NYISO) interconnection agreements, of 612 megawatts (MW). The six wind facilities include the facilities known as the Bliss Windpark (67 turbines, 100.5 MW) in the Town of Eagle, Wyoming County; the Wethersfield Windpark (84 turbines, 126 MW) in the Towns of Eagle and Wethersfield, Wyoming County; the Chateaugay Windpark (71 turbines, 106.5 MW) in the Town of Chateaugay, Franklin County; and the Altona Windpark (65 turbines, 97.5 MW) in the Town of Altona, the Clinton Windpark (67 turbines, 100.5 MW) in the Town of Clinton, and the Ellenburg Windpark (54 turbines, 81 MW) in the Town of Ellenburg, Clinton County.[2] The wind facilities were originally approved and permitted by the local town boards in or around 2008, following completion of SEQRA reviews for the projects under 6 NYCRR 617.6.[3] The Altona, Clinton, and Ellenburg wind facilities were jointly reviewed in a single SEQRA review process, which included completion of a joint

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[2] See AES request at 1-2; see also Portal Item No. 9, oral argument transcript at 6; Portal Item No. 11, email from AES to Chief Administrative Law Judge (ALJ) McClymonds dated Dec. 14, 2022.

[3] See Portal Item No. 28, AES initial brief dated Jan. 13, 2023, at 12-15.

final environmental impact statement (FEIS) and a joint findings statement for all three projects. The Bliss, Chateaugay, and Wethersfield wind facilities underwent separate SEQRA reviews, resulting in the completion of separate FEISs and findings statements for each.[4]

The Altona, Clinton, Ellenburg, and Chateaugay wind facilities interconnect with electric transmission facilities owned by the New York State Power Authority (NYPA). The Bliss wind facility interconnects with electric transmission facilities owned by the Village of Arcade, New York, and the Wethersfield wind facility interconnects with electric transmission facilities owned by New York State Electric & Gas (NYSEG).[5]

In November 2021, AES acquired ownership of the six wind facilities and operates the facilities "as competitive wholesale generators in the NYISO-administered wholesale markets."[6] Because the wind facilities are reaching the end of their 20-year useful life beginning in 2028, AES proposes undertaking facility-wide, programmatic repowering projects for the six wind facilities,

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[4] See Portal Item No. 14, Joint FEIS for Altona, Clinton, and Ellenburg Windparks, April 6, 2006; Portal Item No. 13, Joint Statement of Findings; Portal Item No. 16, FEIS for Bliss Windpark, April 27, 2006; Portal Item No. 17, Bliss statement of findings, Aug. 30, 2006; Portal Item No. 20, Chateaugay findings statement and FEIS for Bellmont and Chateaugay Windparks; Portal Item No. 33, FEIS for the Wethersfield Windpark, Aug. 20, 2007. I note that the findings statement for the Wethersfield Windpark was not made available for posting to the Portal.

[5] See AES initial brief at 4-6.

[6] See AES initial brief at 2-4.

referred to by AES as the "proposed replacement projects," instead of decommissioning. The proposed repowering projects involve, among other things, the replacement of existing GE 1.5-77 turbine equipment with new GE 1.62-97 or GE 1.62-91 turbine drivetrains, hubs, and blades for all 408 turbines, and the increase in blade size of up to approximately 10 meters (or approximately 33 feet). As a result of the proposed repowering projects, each turbine's nameplate generating capacity would be increased from 1.5 MW to 1.62 MW. Overall, the proposed repowering projects have the potential to raise the total capacity for all six wind facilities from 612 MW to approximately 661 MW, an increase of approximately 49 MW, if all refurbished turbines were to be operated simultaneously without powerplant system controls at their full 1.62 MW capacity.[7]

On September 28, 2022, AES filed its request for a declaratory ruling pursuant to New York State Administrative Procedure Act (SAPA) § 204. In its request, AES seeks a ruling that the proposed repowering projects do not require review and approval from the Office under Executive Law § 94-c, which became effective on April 3, 2020.[8] Instead, AES would submit permit modification applications to the respective town boards that issued the original permits for review pursuant to local law and SEQRA.[9]

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[7] See AES request at 3; AES initial brief at 4; Portal Item No. 28, Fleenor affidavit ¶ 7; Portal Item No. 30, ORES staff response at 2-3.

[8] L 2020, ch 58, part JJJ, § 15, as amended by L 2021, ch 55, part BBB.

[9] See AES request at 1-2, 6-7.

On October 24, 2022, the Chief Administrative Law Judge issued a notice of request for declaratory ruling, public comment period, and oral argument. The notice set a deadline of November 18, 2022, for the filing of written comments on the request. The notice also scheduled oral argument through the Webex videoconferencing system on November 22, 2022.[10] Appearing and participating at the oral argument were James A. Muscato II, Esq., Young / Sommer LLC, on behalf of AES; Michael Cusack, Esq., and Cassandra A. Partyka, Esq., Office of General Counsel, ORES, on behalf of ORES staff; and David DiMatteo, Esq., DiMatteo & Roach, on behalf of the Town of Wethersfield. Also appearing but not participating was Sita Crouse, Esq., Office of General Counsel, New York State Department of Environmental Conservation.[11]

On January 13, 2023, AES filed its initial post-argument brief with affidavits from Jimmy Fleenor, Director of Wind Engineering for AES, and Logan Winston, Director of Development for AES.[12] In support of its arguments, AES also filed letters from the five town supervisors for the Towns of Eagle, Altona, Clinton, Ellenburg, and Chateaugay where the six wind facilities are located, two town council members for Ellenburg, and Senator Patrick M. Gallivan, New York State Senate District 59 — all of whom support the towns' review and approval of the proposed repowering projects in accordance with local town laws and SEQRA

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[10] See Portal Item No. 2, notice of request for declaratory ruling, public comment period, and oral argument.

[11] See transcript at 3-4.

[12] See AES initial brief; Portal Item No. 28, Fleenor and Winston affidavits.

requirements.[13] In further support of its arguments, AES filed a letter from Anne Reynolds, Executive Director for Alliance for Clean Energy New York (ACE-NY), and an affirmation from Eric Gustafson, Esq., Pease and Gustafson, LLP, attorney for the Towns of Clinton, Altona, and Ellenburg.[14] ORES staff filed its response to AES's initial brief on February 13, 2023,[15] and AES filed its reply brief on February 28, 2023.[16]

THE DECLARATORY RULING REQUEST

At issue in this matter is AES's proposal to repower the six existing wind facilities originally approved and permitted by the local town boards in or around 2008 following review of the facilities' potential environmental impacts under SEQRA.[17] According to AES, the repowering would involve replacement of turbine drivetrains, hubs, and blades. With the installation of the new blades, the current maximum turbine height of approximately 389 feet above ground level would increase to approximately 422 feet when the blades are at the top of their rotation. The turbine

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[13] See Portal Item No. 5, letters from Altona, Clinton, Chateaugay, and Ellenburg town supervisors and from Senator Gallivan regarding Bliss and Wethersfield wind facilities.

[14] See Portal Item No. 29, Gustafson affirmation; Portal Item No. 35, Reynolds letter.

[15] See ORES staff response.

[16] See Portal Item No. 34, AES reply brief.

[17] See AES initial brief at 10-11.

generators would not be replaced. Instead, existing generators would be removed, refurbished, and re-used. The existing towers, foundations, and electrical infrastructure would also be reused, although foundations would be reinforced, as necessary, to support the modifications. Access roads and electrical support systems would "only be modified where necessary" as well.[18]

With respect to capacity, AES states in its request that "[t]he nameplate capacity of the individual turbine generators is changing slightly from 1.5 MW to 1.62 MW" and that "there will be a slight increase in the nameplate capacity and rotor diameter of each individual turbine." AES explains that these changes are necessary, in part, "due to the evolution in turbine technology since the original turbines were installed 15 years ago" and that they "will not result in a material change to the [wind facilities] or their operation and will not create the potential for new or different environmental impacts."[19]

In its post-argument initial brief, AES explains that "[w]hile the Proposed Replacement Project will include replacement of existing GE 1.5-77 turbine equipment with new GE 1.62-97 [or GE 1.62-91 equipment], these replacements will not include a change in generators." AES further states that "[w]hile the individual generating capacity of each turbine will be reprogrammed from 1.5 MW to 1.62 MW, this remains within the existing capability of the existing generator." The existing powerplant control system, according to AES, "ensures that coordinated operation of each

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[18] AES request at 2-3; see also AES initial brief at 20; AES reply brief at 3; Fleenor affidavit ¶¶ 7-10.

[19] AES request at 3.

turbine does not exceed the aggregate net output of the project delivered at the point of interconnection. During installation, the control system will be upgraded to allow for the [wind facilities] to operate more efficiently and reliably."[20] The overall result of the proposed repowering projects would be to "increase the efficiency and extend the operating life" of the wind facilities for "up to 30 years upon completion" as an alternative to decommissioning.[21]

Based on the facts stated above, AES requests a declaratory ruling that the proposed repowering projects be deemed exempt from Executive Law § 94-c for three reasons. First, AES argues that "repair and replacement of existing facilities" for the repowering work "is not construction or expansion of a major renewable energy facility that requires a siting permit under Executive Law §94-c(4)(a)." Second, AES argues that Executive Law § 94-c(4)(e)(ii) "provides an exemption for repairs and replacements of existing facilities performed in the ordinary course of business." Finally, AES argues that Executive Law § 94-c(4)(e)(iii) "expressly exempts projects that were permitted prior to the enactment of the statute."[22]

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[20] See AES initial brief at 19, citing Fleenor affidavit ¶ 12.

[21] Fleenor affidavit ¶¶ 5, 6.

[22] AES initial brief at 3-4.

LEGAL AUTHORITY

SAPA § 204 states, in relevant part, that "[o]n petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it."[23] Pursuant to Executive Law § 94-c, the Office exercises its authority by and through the Executive Director.[24]

New York State enacted the Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA)[25] effective April 3, 2020, to further meet the renewable energy targets of the 2019 Climate Leadership and Community Protection Act (CLCPA).[26] AREGCBA established a transparent and efficient permitting process for major renewable energy facilities with a nameplate generating capacity of 25 MW or more, while allowing those projects with nameplate capacities of 20 MW or more to opt-in the Executive Law § 94-c permitting process. To accomplish these goals, the Legislature enacted Executive Law § 94-c and established ORES.

The purpose of Executive Law § 94-c is to provide "a single forum" for ORES to "undertake a coordinated and timely review of proposed major renewable energy facilities to meet the

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[23] SAPA § 204(1)(i).

[24] Executive Law § 94-c(3)(a).

[25] Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA), L 2020, ch 58, part JJJ, as amended by L 2021, ch 55, part BBB.

[26] Climate Leadership and Community Protection Act (CLCPA), L 2019, ch 106.

state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities."[27] A major renewable energy facility is defined in Executive Law § 94-c(2)(h) as "any renewable energy system . . . with a nameplate generating capacity of twenty-five thousand kilowatts or more."[28] Nameplate generating capacity is defined in regulation as "the maximum electrical generating output that the facility is capable of production on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings) as specified by the manufacture of the generating units."[29]

The Legislature charged ORES with the responsibility of "accepting applications and evaluating, issuing, amending, approving the assignment and/or transfer of siting permits" for major renewable energy facilities. While Executive Law § 94-c does not apply to a major renewable energy facility if an application has been made or granted for a license or permit "on or before the effective date of this section," a siting permit must be obtained under Executive Law § 94-c if a person proposes to "increase the capacity of an existing major renewable energy facility."[30]

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[27] Executive Law § 94-c(1).

[28] See 19 NYCRR 900-1.2(ag).

[29] 19 NYCRR 900-1.2(an).

[30] Executive Law § 94-c(3), (4)(a).

DISCUSSION

A. Increase in Capacity of Existing Major Renewable Energy Facility

AES's arguments invoke the principles of statutory interpretation, which are well settled. When presented with a question of statutory interpretation, the primary consideration is to ascertain and give effect to the intention of the Legislature.[31] Because "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof."[32] Where the language of a statute is clear and unambiguous, the plain meaning must be given effect, and resort may not be had to other means of interpretation, such as the rules of construction.[33] Only where a statutory provision is ambiguous may the words of a statute be looked behind and extrinsic indications of legislative intent examined.[34] Moreover, "[w]hen the statutory language at issue is but one component in a larger statutory scheme, it must be analyzed in context and in a manner

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[31] See Matter of Estate of Youngblood v Berry Plastics Corp., 36 NY3d 595, Matter of Lemma v Nassau County Police Officer Indem. Bd., 31 NY3d 523, 528 (2018), quoting Riley v County of Broome, 95 NY2d 455, 463 (2000); McKinney's Cons Laws of NY, Book 1, Statutes § 92.

[32] Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 (1998); Statutes § 94.

[33] See Finger Lakes Racing Assn. v New York State Racing & Wagering Bd., 45 NY2d 471, 480 (1978); Statutes §§ 76, 94.

[34] See id. citing Johnson v Hudson River R. Co., 49 NY 455, 462 (1872).

that harmonizes the related provisions and renders them compatible."[35] "Whenever possible, statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous."[36] Finally, the general spirit and purpose underlying a legislative enactment should also be examined, and the preferred construction is one that furthers the object, spirit, and purpose of the statute.[37]

AES is correct that Executive Law § 94-c does not expressly refer to "repowering" projects. Nonetheless, AES's proposed repowering projects fall squarely within the plain terms of Executive Law § 94-c(4)(a)'s "Applicability" section, which expressly provides that "[o]n or after the effective date of this section, no person shall . . . increase the capacity of an existing major renewable energy facility, without having first obtained a siting permit pursuant to this section." As noted above, "major renewable energy facility" is in turn defined at Executive Law § 94-c(2)(h) as "any renewable energy system, as such term is defined in [Public Service Law § 66-p] with a nameplate generating capacity of [25 MW] or more." Public Service Law § 66-p includes on-land wind electric generating systems in its definition of "renewable energy systems."

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[35] Matter of Mestecky v City of New York, 30 NY3d 239, 243 (2017) (internal quotation marks and citations omitted); Statutes §§ 97 and 98.

[36] Matter of Lemma, 31 NY3d at 528, citing Matter of Mestecky.

[37] See Nostrom v A.W. Chesterton Co., 15 NY3d 502, 507 (2010); Statutes § 96.

Applying the plain terms of these provisions, it is undisputed that the subject wind facilities are existing major renewable energy facilities. As a result of AES's proposed repowering projects, the maximum generating capacity of each wind turbine in the wind facilities would increase from 1.5 MW to 1.62 MW, for a total increase of approximately 49 MW in generating capacity for all six wind facilities at issue.[38] Accordingly, because the proposed repowering projects would increase the capacity of each of the six existing major renewable energy facilities, AES is required by Executive Law § 94-c(4)(a) to obtain a siting permit from ORES for the projects.

While the terms of Executive Law § 94-c(4)(a)'s applicability section are plain and unambiguous and, therefore, require no interpretation, AES nonetheless argues that the term "capacity" should be read to mean "nameplate capacity" or "nameplate generation capacity" because "(b)oth the statutory and regulatory language defining the term 'major renewable energy facility' use the term 'nameplate generating capacity' of the Facility . . . to determine § 94-c's applicability." AES explains that although the repowering projects would result in a "slight" increase in the nameplate generating capacity of each generator, "[i]t is uncommon for all wind turbines in a Windpark to operate simultaneously at their rated capacity." AES further explains that the use of existing powerplant control systems would ensure that the coordinated operation of each turbine would not exceed the aggregate net output delivered at the point of interconnection previously approved for each facility. Accordingly, because each

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[38] See ORES staff response at 7-8.

facility's operational output would be maintained at the same nameplate generating capacity as the original facilities, AES argues the repowering projects would not result in an increase in nameplate generating capacity for any facility and, thus, Executive Law § 94-c does not apply. In other words, AES is essentially contending that because the facility output delivered at the point of interconnection would be maintained at or below the facilities' original nameplate generating capacity, whether as a result of available wind resources or the use of powerplant control systems, the repowering project would not result in an "increase in capacity" under section 94-c(4)(a).[39]

In response, ORES staff argues that "(t)he phrase 'increase the capacity of' is unambiguous on its face," and "(t)he requirement to obtain a siting permit for an increase in capacity . . . in compliance with Executive Law § 94-c(4)(a) is not qualified by 'nameplate capacity,' including without limitation, the Office's regulatory definition of 'nameplate generating capacity.'" Accordingly, ORES staff asserts that "the plain focus of Executive Law § 94-c(4)(a) is an increase in capacity."[40]

I agree with ORES staff that "increase in capacity" in section 94-c(4)(a) is not qualified by the term "nameplate generating capacity" and should not be interpreted so as to include that term as AES suggests. Where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature acts intentionally and purposefully in the disparate

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[39] AES initial brief at 17-19; AES reply brief at 2-3.

[40] See ORES staff response at 2-4, 6 (emphasis in original).

inclusion or exclusion.[41] Here, "nameplate generating capacity" or "nameplate capacity" is used in two places in section 94-c – "nameplate generating capacity" is used in the definition of "major renewable energy facility" in section 94-c(2)(h), and "nameplate capacity" is used in section 94-c(4)(g), which authorizes facilities with a "nameplate capacity" of at least 20 MW but less than 25 MW to opt-in to section 94-c. Because neither "nameplate generating capacity" nor "nameplate capacity" is included in section 94-c(4)(a)'s applicability section, it should be presumed that such terms were not intended to qualify the term "increase the capacity of an existing major renewable energy facility." Accordingly, contrary to AES's assertions, section 94-c applies to any increase in capacity of an existing major renewable energy facility, not just to increases in the "nameplate generating capacity" or "nameplate capacity" of those facilities.

In any event, even assuming without deciding that Executive Law § 94-c(4)(a) is limited only to increases in "nameplate generating capacity," under the factual scenario proposed by AES, the proposed repowering projects would result in an increase in the nameplate generating capacity of each wind facility. Executive Law § 94-c does not provide a definition of "nameplate generating capacity." However, "nameplate generating capacity" is defined in regulation at 19 NYCRR 900-1.2(an) as "the maximum electrical generating output that the facility is capable of production on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings) as specified by the manufacture of the generating units." Here, after

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[41] See Rivers v Birnbaum, 102 AD3d 26, 36 (2d Dept 2012).

the repowering projects are completed, each facility's maximum electrical generating output if not restricted by the powerplant control systems or other "de-ratings" would increase by 0.12 MW per turbine. Thus, under the regulation, AES's proposed repowering projects would result in an increase in each facility's nameplate generating capacity, notwithstanding AES's use of the powerplant control systems to de-rate the maximum output of each facility delivered at the point of interconnection to its originally-approved output.

To the extent AES suggests that only increases in facility output triggers section 94-c(4)(a)'s applicability, nothing in Executive Law § 94-c supports such an assertion. To the contrary, as reflected in the regulatory definition of "nameplate generating capacity," which excludes consideration of powerplant control systems in determining the maximum generation capacity of a facility, section 94-c review is concerned with analyzing the impacts associated with the worst-case scenario of all wind turbines at a facility operating at full capacity full time. Using the facility output to analyze the potential impacts of that facility is at odds with Executive Law § 94-c's requirement that all potential adverse impacts of such facilities be identified and avoided, minimized, and mitigated to the maximum extent practicable, taking into account the CLCPA targets and the environmental benefits of the facility, among other requirements.

AES further argues that because each of the existing, operating turbines are physically capable of operating up to 1.62 MW without any physical modification to the generator, the existing turbines have the same unrestricted maximum capacity as the GE 1.62 MW turbines and, thus, there would be no increase in nameplate

capacity of the turbines.[42] AES's claim is belied by its own expert's affidavit. As explained in the affidavit of Jimmy Fleenor, P.E., after the old model GE 1.5-77 SLE turbine blades, drivetrain, and hubs are replaced with either GE 1.62-97 or GE 1.62-91 equipment, "the individual generating capacity of each turbine will be reprogrammed from 1.5 MW to 1.62 MW." The fact that each turbine's "rated capacity can be adjusted between 1.5 and 1.62 on GE SLE turbines without physical modifications" to the generator does not change the fact that as a result of the equipment upgrades, each turbine would be capable of operating at the increased 1.62 MW rated capacity, a capacity those turbines were not generating with the old model equipment.[43]

AES's argument that "(a)rguably, the [wind facilities] would only become subject to Executive Law 94-c if they added more than 25 MW of additional capacity and became effectively new major wind energy facilities, which is not the case" is rejected.[44] AES is apparently referring to a requirement under article 10 of the Public Service Law (PSL) that existing facilities seeking to increase capacity by more than 25 MW require a certificate from the New York State Board on Electric Generation Siting and the Environment (Siting Board). Under PSL § 162(1), "no person shall . . . increase the capacity of an existing electric generating facility by more than twenty-five thousand kilowatts without having first obtained a certificate issued with respect to such

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[42] See AES initial brief at 19; AES reply brief at 3-4.

[43] See Fleenor affidavit ¶¶ 3 and n 1, 7 and 12; see also ORES response at 2.

[44] See AES request at 4.

facility by the board." The Legislature, however, did not include a 25 MW threshold for existing facilities in Executive Law § 94-c(4)(a)'s applicability section. As noted above, it is presumed that by including a 25 MW threshold in one statute – Public Service Law article 10 – and not in another – Executive Law § 94-c – the Legislature intended that the 25 MW threshold not apply to the latter statute.[45]

B. Exception for Normal Repairs, Maintenance, Replacements, Non-Material Modifications, and Improvements

AES next claims that Executive Law § 94-c(4)(e)(ii)'s exemption for "replacements" and "non-material modifications" performed in the ordinary course of business applies to the proposed repowering projects because the repowering of the wind facilities "are being conducted in the 'ordinary course of business,'" and will not result in a material change in environmental impacts of the facilities. AES asserts that the repowering of wind turbines with newer more efficient turbine blades and equipment has become standard practice in New York instead of decommissioning. Citing a decision of the Siting Board in Matter of Baron Winds, LLC, AES argues that the proposed changes, which include an increase in the height of the turbines, would not result in a significant adverse environmental impact as compared to the originally permitted facilities and, therefore, are "non-material modifications."[46]

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[45] See Rivers, 102 AD3d at 36.

[46] See AES request at 3-4, citing DPS Case 15-F-0122, Matter of Baron Winds, LLC, Order Approving Amendment, May 6, 2020, at

ORES staff disagrees and argues that the proposed repowering project "goes beyond the plain meaning of the terms 'normal' replacement, or 'non-material' modifications under Executive Law 94-c(4)(e)(ii)." ORES staff contends that given the nature and magnitude of the repowering projects, including proposed increases in generating capacity and turbine blade size, and potential modifications to turbine foundations, electrical support systems, and access roads, no record basis exists for concluding at this time that the proposed changes are "non-material." Instead, ORES staff asserts that the repowering project must be evaluated on the merits for potential increases in noise and visual impacts, including shadow flicker, and environmental impacts to avian species before it can be determined that any increased impacts are "nominal." ORES staff further asserts that the Siting Board's decision in Baron Winds is inapposite, inasmuch as that decision was made on the merits based on the developed factual record in that case.[47]

ORES staff has the more persuasive argument. Pursuant to Executive Law § 94-c(4)(e)(ii), Executive Law § 94-c does not apply "to normal repairs, maintenance, replacements, non-material modifications and improvements of a major renewable energy facility, whenever built, which are performed in the ordinary course of business." The apparent purpose of this exception, like similar exceptions contained in other statutes and regulations, is to allow for the regular, customary, or standard repairs and

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7-8, 15 (NYS Siting Board); AES initial brief at 19-21; AES reply brief at 5-6.

[47] ORES response at 7-9.

maintenance necessary to keep a facility operating in its present condition. It does not apply to infrequent and extensive modifications intended to substantially increase a facility's efficiency over its original design capacity, or to extend the life expectancy of the facility.[48]

Applying this interpretation of the exemption here, AES's proposed repowering projects do not involve the routine replacement of GE 1.5-77 turbine equipment with the same model equipment for the purpose of keeping the facilities in ordinary working condition. Rather, AES's repowering involves the use of different turbine models — either GE 1.62-97 or GE 1.62-91 model equipment — with different impact profiles for the stated purpose of increasing the facilities' efficiency and extending their useful life up to 30 years on completion instead of decommissioning. Thus, even if the repowering is conducted in the "ordinary course of business," as AES asserts, it does not fall

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[48] See e.g. DPS Case 02-F-0777, Matter of Long Island Power Authority, Declaratory Ruling, June 28, 2002, at 5-6 (NYS Siting Board) (interpreting "normal repairs, replacements, modifications and improvements" under PSL former § 162[4][c]); 6 NYCRR 200.1(cl) (definition of "routine maintenance, repair, or replacement" for new source review for new and modified facilities under ECL article 19); United States Environmental Protection Agency, Applicability Determination Regarding the Proposed Replacement and Reconfiguration of the High Pressure Section of Two Steam Turbines at Detroit Edison's Monroe Power Plant at 2-4 and enclosure at 8-11, 15-17, 22 (2000) (interpreting the exception for "routine maintenance, repair, and replacement" from the federal Clean Air Act's Prevention of Significant Determination (PSD) program), available at https://www.epa.gov/nsr/applicability-determination-regarding-proposed-replacement-and-reconfiguration-high-pressure.

within the statutory exemption for normal repairs, replacements, or non-material modifications conducted in the ordinary course of business. Moreover, to treat the proposed repowering, with the concomitant increases in generating capacity and changes in impact profiles, as normal repairs, maintenance, and replacements would effectively read section 94-c(4)(a)'s applicability to "increases in capacity" out of the statute, which the rules of statutory construction do not allow.[49] For the reasons stated by ORES staff, I agree that Baron Winds is inapposite to this declaratory ruling request.[50]

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[49] See Matter of Lemma, 31 NY3d at 528, citing Matter of Mestecky.

[50] The above reading of the plain language of Executive Law § 94-c(4)(e)(ii) is consistent with the New York State Public Service Commission's (NYSPSC's) understanding of wind generation facility "repowering." In recent amendments to the State's Clean Energy Standard (CES), the NYSPSC adopted a proposal to encourage existing renewable energy facilities to repower at the end of a facility's useful life rather than decommission by providing eligibility criteria for participation in the New York State Energy Research and Development Authority's (NYSERDA's) Tier 1 funding program. See DPS Case 15-E-0302, Matter of Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard (NYSPSC) (Clean Energy Standards Case). For a repowered wind generation facility to qualify as eligible for Tier 1:

> [t]he repowering must include replacement of each prime mover, and result in an overall increase of 15% or more in the production of the generation unit compared to its projected future output [among other requirements]. For purposes of this requirement, "prime mover" shall be defined as follows: for wind facilities, the wind turbine, including the generator, gearbox (if any), rotor and blades.

C. Exception for Existing Permits

AES further claims an exemption pursuant to Executive Law § 94-c(4)(e)(iii), which provides that Executive Law § 94-c does not apply "if on or before the effective date of this section, an application has been made or granted for a license, permit, certificate, consent or approval from any . . . state, or local commission, agency, board or regulatory body." AES argues that the exemption applies to its proposed repowering projects "since the permits, approvals and licenses pursuant to which these [wind facilities] were constructed and currently operate precede the effective date of Section 94-c." AES contends, accordingly, that it will work with local permitting authorities and seek amendments to the permits, approvals, and licenses for each of the wind facilities as required by applicable local law, including SEQRA. As part of the local permitting process, AES notes that it will provide local permitting authorities with materials supporting its applications, including supporting and supplemental studies addressing visual impacts, shadow flicker, noise impacts, avian studies, and "other environmental studies as may be required to

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Id., Order Adopting Modifications to the Clean Energy Standard, Oct. 15, 2020, at 104-105 (NYSPSC). Here, AES proposes to replace the "prime movers" at its facilities, namely the facilities' turbine drivetrains, hubs, and blades. The replacement of the facilities' prime movers would result in an overall increase in the production of the generation units. Thus, AES's proposed repowering project is consistent with the NYSPSC's definition of "repowering," in contrast to "normal repairs, maintenance, [and] replacements . . . performed in the ordinary course of business."

assess the potential impact of the incremental facility changes as a result of the Proposed Replacements as compared to the existing facility conditions. AES . . . would also update existing plans, including but not limited to fire protection and emergency response plans, lighting plans, landscaping plans, decommissioning plans, and compliant resolution plans to the extent necessary to adjust for the proposed facility equipment replacements." Further, AES assumes the local authorities will classify the repowering projects as Type I actions under SEQRA, requiring consultation with NYS Department of Environmental Conservation (NYSDEC), NYS Agriculture and Markets, the NYS Office of Parks, Recreation and Historic Preservation and its State Historic Preservation Office, and the federal United States Army Corps of Engineers and Federal Aviation Administration, among other federal, State, and local agencies.[51]

ORES staff disagrees that the section 94-c(4)(e)(iii) exemption for existing permits applies to exempt AES's proposed repowering projects, which involve increases in the generating capacity of the existing facilities, from review under Executive Law § 94-c(4)(a). ORES staff argues that the purpose of the section 94-c(4)(e)(iii) exemption is to allow the developers of facilities that were permitted prior to Executive Law § 94-c's effective date to continue to construct and operate those facilities pursuant to existing permits without having to obtain a siting permit from ORES. ORES staff argues that AES's existing permits do not include provisions for the amendments and degree of review AES concedes are required for its repowering projects.

[51] AES request at 4; AES initial brief at 21-24.

Accordingly, ORES staff asserts that the section 94-c(4)(e)(iii) exemption does not apply.[52] I agree.

Under the plain language of Executive Law § 94-c(4)(a), a major renewable energy facility "shall not be built, maintained, or operated [after the section's effective date] except in conformity with [a 94-c] siting permit." As ORES staff correctly notes, the plain language of section 94-c(4)(e)(iii) allows a major renewable energy facility to be built, maintained, and operated pursuant to a permit issued prior to section 94-c's effective date without the need to obtain a section 94-c siting permit. Here, AES concedes that its proposed repowering projects require amendments to its existing permits. Nothing in the plain language of section 94-c(4)(e)(iii), however, applies to permit amendments and, as ORES staff correctly notes, nothing in AES's existing permits address permit amendments. Because AES's proposed repowering projects do not involve building, maintaining, or operating under its existing permits, section 94-c(4)(e)(iii) does not exempt those projects from Executive Law § 94-c(4)(a)'s siting permit requirement for projects that would "increase the capacity of an existing major renewable energy facility" undertaken after the effective date of section 94-c.[53]

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[52] See ORES staff response at 10.

[53] AES's assertion that the corollary provision of PSL § 162(4)(d) did not include language exempting facilities that had been "granted permits" from review under PSL article 10 does not change the analysis. See AES initial brief at 22. It is because AES's proposed repowering projects involve permit amendments, not mere building, maintaining, or operating under its existing permits, that removes the projects from section 94-c(4)(e)(iii)'s exemption. Moreover, the degree of review AES concedes would be required for its permit amendment

Finally, it should be noted that Executive Law § 94-c contains an express provision for amendments to section 94-c siting permits. Under Executive Law § 94-c(4)(c), either a permittee or ORES may initiate "an amendment" to a siting permit approved under Executive Law § 94-c. Given this express provision, Executive Law § 94-c(4)(a)'s applicability to projects that would increase the generating capacity of an existing major renewable energy facility can only mean facilities that were permitted under statutory regimes other than section 94-c, such as AES's existing facilities. To conclude otherwise would render the two statutory provisions duplicative, which the rules of statutory construction do not allow. Given this, AES's argument that amendments to non-section 94-c permits are subject to the section 94-c(4)(e)(iii) exemption for existing permits would render section 94-c(4)(a) a nullity, which the rules of statutory construction also do not allow.

AES unpersuasively relies on Baron Winds to support its position that Executive Law § 94-c does not apply to existing permits or certificates. AES cited Baron Winds at oral argument and in its brief as an example of the Siting Board approving two petitions to amend a certificate issued under PSL article 10 that involved increases in the height of the turbines with allegedly no significant increase in environmental impacts. However, the petitions to amend in Baron Winds were proposed during the pre-construction compliance filing phase of the then-pending article 10 proceeding and, therefore, subject to the section 94-

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applications also undermines its assertion, discussed above, that the amendments constitute mere "normal repairs, maintenance, replacements, non-material modifications and improvements" under section 94-c(4)(e)(ii).

c(4)(e)(iii) exemption for on-going article 10 proceedings. Because the Baron Winds article 10 review process had not yet concluded, and the facilities were not yet constructed and fully operational when the petitions to amend were made, they were not "existing facilities" subject to Executive Law § 94-c(4)(a).[54]

D. Purposes of the Accelerated Renewable Energy Growth and Community Benefit Act

AES, joined by ACE-NY and the affected municipalities, claims that the State's primary objective in adopting Executive Law § 94-c, and the creation of ORES, was to streamline and expedite the siting of new major renewable energy projects. AES further claims that "(t)he 94-c regulations are devoid of any procedures for issuing new siting permits to facilities with pre-existing local zoning approvals."[55]

In response, ORES staff argues that while the Legislature clearly gives the Office jurisdiction over "new" major renewable energy projects, AES's focus only on new projects ignores the connection between the need for repowering existing projects and the attainment of the CLPCA goals, and the need to provide an expedited consolidated permit review process for those repowering

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[54] See AES initial brief at 20; transcript at 13-15; Baron Winds, Order Approving Amendment; see also DPS Case 15-F-0122, Matter of Baron Winds, LLC, DMM Item No. 670, petition for amendment, September 6, 2022; DPS Case 17-F-0282, Matter of Alle-Catt Wind Energy LLC, DMM Item No. 468, petition for amendment, January 30, 2023; DPS Case 18-F-0087, Matter of Flint Mine Solar LLC, Order Approving Amendment, March 28, 2023 (NYS Siting Board).

[55] AES initial brief at 25-30 (emphasis in original).

projects. ORES staff notes that when establishing the State's CES, the NYSPSC noted, as a matter of State energy policy, the need to provide incentives not only to encourage the repowering of renewable energy projects instead of decommissioning, but to incentivize repowering projects to increase their generating capacity to advance attainment of the CLCPA's targets. ORES staff argues that the Legislature intentionally placed repowering projects that result in an increase in generating capacity under the Office's jurisdiction to further these State energy policies. Office staff submits that:

> New York State is pursuing an integrated policy to ensure that the State meets its landmark CLCPA goals of 70% electric generation by renewable energy systems by 2030, and 100% renewable electric generation by 2040, and that integrated approach includes both (A) the potential for qualified incentives to increase the energy production of existing solar and wind facilities; and (B) statutory assurance that the upgrades associated with these repowering projects, if they include an increase in capacity, will have a clear path to consolidated siting permit review by the Office in accordance with Executive Law § 94-c. In this context, inclusion of the phrase "increase in the capacity of an existing major renewable energy facility" in Executive Law § 94-c(4)(a) is deliberate and necessary.[56]

I agree with ORES staff. As noted above, when interpreting a statute, the general spirit and purposes underlying the legislative enactment should also be examined, and the preferred construction is one that furthers the statute's object, spirit, and purpose.[57] Even assuming there is ambiguity in the

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[56] ORES staff response at 11-13.

[57] See Nostrom, 15 NY3d at 507; Statutes § 96.

statutory provisions under Executive Law § 94-c, which there is not, the public policies behind the AREGCBA show the Legislature intended to meet objectives that go beyond expediting and streamlining the review of new facilities. In section 4(a) of the AREGCBA, the Legislature determined that "[a] public policy purpose would be served and the interests of the people of the state would be advanced by . . . expediting the regulatory review for the siting of major renewable energy facilities and transmission infrastructure necessary to meet the CLCPA targets, in recognition of the importance of these facilities and their ability to lower carbon emissions."[58] In contrast to other sections of the Act, the Legislature did not use the term "new" in reference to the siting of "major renewable energy facilities" in section 4(a).[59] In light of the State energy policy makers' recognition in the CES of the role repowering of existing renewable energy facilities has in the attainment of the CPCLA targets,[60] it is entirely consistent with the Act's purposes to apply Executive Law § 94-c's streamlined and consolidated permitting process to the repowering of existing facilities that would result in increases in capacity for those facilities.

In addition to consolidating and streamlining the permitting process of major renewable energy facilities to meet the State's renewable energy goals, the Legislature expressly identified several additional policy goals of the AREGCBA. An

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[58] AREGCGA § 4(a).

[59] Compare AREGCBA § 4(a) with id. § 2(a).

[60] See Clean Energy Standard Case, Order Adopting Modifications at 106.

additional stated purpose of section 94-c is to ensure "the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities."[61] In furtherance of this stated purpose, the AREGCBA expressly states that:

> [a] public policy would be served and the interests of the people of the state would be advanced by:
>
> . . .
>
> (c) developing uniform permit standards and conditions that are applicable to classes and categories of renewable energy facilities, that reflect the environmental benefits of such facilities and address common conditions necessary to minimize impacts to the surrounding community and environment; [and]
>
> (g) implementing the state's policy to protect, conserve and recover endangered and threatened species while establishing additional mechanisms to facilitate the achievement of a net conservation benefit to endangered or threatened species which may be impacted by the construction or operation of major renewable energy facilities."[62]

To meet these goals of the AREGCBA, the Legislature required ORES under Executive Law § 94-c(3)(b) and (c) to develop as part of its regulatory framework uniform standards and conditions (USCs) designed to avoid, minimize, and mitigate, to the maximum extent practicable, any potential adverse environmental impacts related to the siting, design, construction, and operation of major renewable energy facilities that are common

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[61] Executive Law § 94-c(1).

[62] AREGCBA § 4(c), (g).

to each type of facility.[63] In addition, the Legislature authorized ORES during its review of an application for a major renewable energy facility permit to:

> identify those site-specific environmental impacts, if any, that may be caused or contributed to by a specific proposed major renewable energy facility and are unable to be addressed by the [USCs]. The office shall draft in consultation with the [NYSDEC] site specific permit terms and conditions for such impacts, including provisions for the avoidance or mitigation thereof, taking into account the CLCPA targets and the environmental benefits of the proposed major renewable energy facility, provided, however, that the office shall require that the application of [USCs] and site-specific conditions shall achieve a net conservation benefit to any impacted endangered and threatened species.[64]

In response, ORES promulgated Part 900, which includes both permit application requirements and USCs tailored to address the common potential adverse impacts associated with major renewable energy facilities, as directed by the Legislature. In its response to public comments on the USCs, ORES explained that when designing the USCs, it considered "both existing state regulations, as well as past precedents established under [PSL]

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[63] See Executive Law § 94-c(3)(b), (c).

[64] Executive Law § 94-c(3)(d).

Article 10."[65] For example, the USCs related to noise[66] and shadow flicker[67] are both health-based standards developed by the Siting Board in litigation under PSL article 10 and are standards consistent with those established by the majority of other jurisdictions.[68] With respect to application requirements and USCs related to potential adverse impacts to threatened and endangered (T&E) species from wind energy facilities, Part 900's avoidance, minimization, and mitigation measures, including seasonal curtailment requirements related to the protection of T&E bat species and requirements for net conservation benefit plans to address impacts to T&E species, were developed in consultation with NYSDEC and are consistent with standard conditions developed in PSL article 10 proceedings and federal and State guidelines.[69]

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[65] Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 – 900-15, Assessment of Public Comments, Office of Renewable Energy Siting at 113.

[66] See 19 NYCRR 900-2.8 Application Exhibit 7: Noise and Vibration; id. § 900-6.5(a) (operational noise limits for wind facilities).

[67] See 19 NYCRR 900-2.9 Application Exhibit 8: Visual Impacts; id. § 6.4(l)(1)(iii) (operational USC for shadow flicker from wind facilities).

[68] See Assessment of Public Comments at 39-40, 56; see also e.g. DPS No. 14-F-0490, Matter of Cassadaga Wind, LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, Jan. 17, 2018, at 68-71 (NYS Siting Board) (noise standard); DPS Case 16-F-0328, Matter of Number Three Wind LLC, Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions, Nov. 12, 2019, at 74-75 (NYS Siting Board) (shadow flicker standard).

[69] See e.g. Response to Public Comments at 131, 134, 137; see also 19 NYCRR 900-2.13 Application Exhibit 12; NYS Threatened or

AES's argument that Executive Law § 94-c should only apply to new facilities ignores these additional and significant goals of the AREGCBA. Given the Legislature's express interest in the establishment of USCs to address the full range of potential adverse impacts associated with renewable energy projects, and its direction to develop site-specific permit terms and condition to address site-specific and project-specific impacts not otherwise addressed by the USCs, it is reasonable to conclude that the Legislature intended these measures to apply not only to new facilities, but to repowering projects on a going-forward basis. To conclude otherwise would provide a significant competitive advantage to the repowering of AES's projects over not only projects originally sited under Executive Law § 94-c, but also for projects sited under PSL article 10. AES can point to nothing in the AREGCBA that would warrant granting such an advantage to AES's repowering projects simply because they were originally sited under standards less protective of the environment and public health and safety than the Part 900 standards developed under the AREGCBA.[70]

Endangered Species; id. § 900-6.4(o) (USCs for facility construction and operation related to T&E species); Cassadaga Wind, Order at 52-55.

[70] For example, ORES's current noise standard is a maximum of 45 dB(A) Leq (8-hour) at the outside of any non-participating residences, among other standards. See 19 NYCRR 900-2.8(b)(1)(i). However, a majority of the permits issued for the wind facilities allow 50 dB(A) at any residences under the towns' local laws. See e.g. Portal Item No. 17, SEQRA Findings Statement for the Noble Bliss Windpark, LLC, at 44-45. Another example is ORES's visual standard, which allows a maximum of 30 hours per year of shadow flicker, or shadow flicker over 30 hours per year subject to mitigation approved by the affected

AES's argument that "(t)he 94-c regulations are devoid of any procedures for issuing new siting permits to facilities with pre-existing local zoning approvals" is overstated.[71] As correctly noted by ORES staff:

> [t]he permitting framework for the repowering projects is set forth in Executive Law § 94-c and 19 NYCRR Part 900, and the siting permit application for a repowering project can be tailored through the pre-application consultations consistent with 19 NYCRR § 900-1.3 and attention to application requirements.

As noted by ORES staff, regulatory provisions that allow for the tailoring of the siting permit application review process for repowering projects include § 900-2.1(a), which allows for the omission of application exhibits that are not relevant to the particular facility's technology or proposed location, and § 900-1.4(a)(3), which allows an applicant to request site-specific conditions in lieu of any applicable exhibit requirement or USC set forth in 19 NYCRR subpart 900-6. Further, applicants proposing repowering projects are encouraged to engage in pre-application consultations with ORES staff to refine pre-application requirements and the information needed for permit application review in the repowering context so as to avoid the development of

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resident. See 19 NYCRR 900-2.9(d)(6). In contrast, the majority of permits issued for the wind facilities allow up to 60 hours of shadow flicker per year, with mitigation only for impacts that are "problematic for the residents." See e.g. id. at 40-41. None of the wind facility permits required seasonal curtailment for the protection of T&E bat species, nor net conservation benefit plans to address impacts to T&E species or their habitat.

[71] AES initial brief at 25-30 (emphasis in original).

any unnecessary or irrelevant application materials. This would include pre-application and application phase consultations with the affected municipalities by applicants and by ORES staff.[72]

Finally, AES argues that the Executive Law § 94-c permitting process is too cumbersome and expensive to efficiently administer repowering projects, and that proceeding through the local review process under SEQRA is the more efficient approach. However, in enacting the AREGCBA and Executive Law § 94-c, the Legislature struck what it deemed to be the appropriate balance between the need for a streamlined, coordinated, and timely siting permit review process for major renewable energy projects to meet the State's renewable energy goals, and the goal of ensuring the protection of the environment and consideration of all pertinent social, economic, and environmental factors in the decision to permit such facilities.[73] AES's critique of how the Legislature balanced the relevant competing interests does not provide a basis for ignoring the plain terms of the statute or the policy goals and legislative purposes underlying section 94-c's enactment.

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[72] ORES staff response at 13; see 19 NYCRR 900-1.3(i)(2).

[73] See Executive Law § 94-c(1).

CONCLUSION

Upon consideration of AES's request pursuant to SAPA § 201(1)(i) for a declaratory ruling that the proposed repowering projects be deemed exempt from Executive Law § 94-c, IT IS HEREBY DECLARED THAT:

1. The proposed repowering of the 612-megawatt (MW) wind facilities known as the Bliss Windpark (67 turbines, 100.5 MW) in the Town of Eagle, Wyoming County; the Wethersfield Windpark (84 turbines, 126 MW) in Towns of Eagle and Wethersfield, Wyoming County; the Chateaugay Windpark (71 turbines, 106.5 MW) in the Town of Chateaugay, Franklin County; and the Altona Windpark (65 turbines, 97.5 MW) in the Town of Altona, the Clinton Windpark (67 turbines, 100.5 MW) in the Town of Clinton, and the Ellenburg Windpark (54 turbines, 81 MW) in the Town of Ellenburg, Clinton County, constitutes a proposal to increase the capacity of existing major renewable energy facilities within the meaning of Executive Law § 94-c(4)(a) and, therefore, is subject to the New York State Office of Renewable Energy Siting's jurisdiction. Accordingly, AES is required to obtain a siting permit pursuant to Executive Law § 94-c for the repowering projects.

2. This ruling makes no determination on the nature of the modifications to AES's existing permits that might be required, specifically whether AES's siting permit applications will be evaluated as minor or major modifications under Executive Law § 94-c as part of the application review process, or whether the permit amendments constitute major modifications that would require a hearing. In consultation with ORES staff, however, the pre-application and application procedures and materials may be

streamlined to evaluate only relevant impacts, including but not limited to impacts related to wildlife, visual, noise, and shadow flicker.

3. This proceeding is closed.

Houtan Moaveni

Houtan Moaveni
Executive Director
New York State Office of Renewable Energy Siting

Dated: September 27, 2023

cc: Party List – ORES Permit Application No. 22-00032