

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 20-01406

Petitioners,

– against –

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

Respondents.

BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT OF MATERIAL FACTS

This case pits demonstrable environmental values against aspirational environmental values. The communities being asked to host the Alle-Catt Wind Energy project (“Alle-Catt”, or “ACWE”) seek to protect, preserve and develop the local environment, including their community character. All municipal governments in Cattaraugus County, where half the project area lies, oppose the project as at odds with their plans to preserve and enhance rural land for tourism, recreation and rural amenities for their residents, and to reserve industrial components for more developed urban areas.

The State seeks to provide a societal and planetary benefit by reducing greenhouse gas emissions in the electric sector, and by making the shift away from fossil fuels. The Coalition agrees with those goals. However, the state electric system is unable to advance these goals without substantial infrastructure changes. The ability of the state and the private sector to make these changes during the anticipated lifetime of this project is speculative.

Both sides of this dispute have laudable goals. However, the question presented is whether the State’s position as applied in this case is supported by record evidence and is rational, and not arbitrary. To determine the question it is necessary to consider (1) whether the State acts rationally when it orders a power

plant to be sited without regard to how it operates during 29 of its expected 30 years; (2) how the grid operator can manage the new source, (*see* 16 NYCRR 1000.8); and (3) whether important long-established local environmental and community values should be disregarded in the process.

The Coalition demonstrated that New York’s grid cannot beneficially utilize electricity generated by Alle-Catt. *See* PSL § 168(3)(a) or, if wind farms are deemed beneficial, this project’s climate benefits—its *sine qua non*—are so modest as to fail the Board’s required public interest test. PSL § 168(3)(b). The Siting Board agreed that the condition of New York’s electric system constrains the ability of Alle-Catt to provide climate benefits, but found that is irrelevant. R.399-1, 83. The Board went farther in (1) disregarding the First Amendment rights of an Old Order Amish settlement in Farmersville; (2) disregarding consistent and well-grounded official opposition in Cattaraugus County; (3) disregarding the overwhelming sentiments of the residents; and (4) discounting the serious adverse environmental impacts of the project, including its impacts on community character. It was not reasonable for the Siting Board to conclude that project approval is in the public interest. PSL § 168(3)(b).

QUESTIONS PRESENTED

1. Did the State Siting Board on Electric Generation Siting and the Environment rationally balance competing local and state interests when approving the Alle-Catt wind farm?
2. Was the Siting Board authorized to overrule declaratory judgments of the State Supreme Court in order to avoid application of the Town of Freedom's wind energy facilities law?
3. Did the Siting Board violate the First Amendment of the U.S. Constitution when it disregarded an Amish settlement's request for a religious hardship?
4. Did the Siting Board lack sufficient evidence to conclude the Alle-Catt project proposal would provide a "beneficial" addition of capacity to the state's electric grid?
5. Did the Siting Board lack sufficient evidence to conclude the Alle-Catt project proposal would under the circumstances be in the public interest?

SCOPE OF REVIEW

Petitioners have brought this appeal pursuant to CPLR Article 78 and PSL § 170, which includes Article 78’s standard of review, (*see* PSL § 170 (2)), and further limits review to objections brought by a petitioner to the Siting Board “in his or her application for rehearing before the board”. PSL § 170 (1). Petitioners’ application for rehearing is found at R.407-2.¹

PSL ARTICLE 10

A PSL Article 10 siting proceeding includes three stages, a pre-application stage, review of the application including an evidentiary hearing, and a post-approval compliance stage. The second stage is subject to a 12-month statutory time limit, which can be extended by up to six months by the Siting Board. The first and third stages have no required time limits.²

In this case, the Siting Board issued an Order granting a “Certificate of Environmental Compatibility and Public Need” to Alle-Catt, (R.399-1, “Cert.

¹ A Record of Schedule supplied by the State for this case provides “Public Documents” numbered in column B referenced within as “R. __”; and numbered “Public Comments” referenced within as “R.C. __”. The Presiding Hearing Examiner below authorized official notice of “agency polic[ies], guidance documents, things like that”. R.332-1, 23:18-19.

² For further details on the procedures governing Article 10 proceedings, the Coalition relies on the Brief submitted in support of the related Petition in Case No. OP 20-01406, by the Town of Farmersville.

Order” hereafter), without specific turbine models, siting locations, noise predictions or wildlife mitigation studies, leaving these to the compliance stage.

POINT I

THE SITING BOARD ERRED IN FINDING THAT ALLE-CATT COMPLIES WITH THE TOWN OF FREEDOM’S LOCAL LAW GOVERNING WIND ENERGY FACILITIES

The Siting Board disregarded the plain judgment of the Cattaraugus County Supreme Court, which nullified a new law designed to accommodate the Alle-Catt project in the Town of Freedom. Without authority, the Siting Board overruled the court and determined to apply the new law.

PSL § 168(3)(e) prohibits a Siting Board from issuing a Certificate for a project that is not “designed to operate in compliance with applicable . . . local laws and regulations issued thereunder”. For the reasons discussed below, Local Law No. 3 of 2007, (R.277-6), applies in the Town of Freedom. The Siting Board’s basis for the contrary conclusion is that civil litigation over which Freedom local law is applicable “had not been resolved”. R.399, 9. The Siting Board asserts that Freedom’s 2019 local law was applicable at the time it made its final decision because “Supreme Court or other appellate court had [not] determined otherwise”. *Id. Cf.* R.279-2 (Coalition letter reply to motion); R.311-1 (Corresp.).

This Siting Board's conclusion is belied by the plain terms of two Cattaraugus County Supreme Court declaratory judgments. The first judgment, in *Freedom United v. Town Board of the Town of Freedom*, Case No. 87572 (Catt. Co.), dated October 21, 2019, "DECLARED, that Town of Freedom Local Law No. 3 of 2007 remains in effect". R.352-2, at 8. Coalition member Freedom United filed the petition in that case on December 13, 2018 seeking nullification of Town of Freedom Local Law No. 1 of 2018, and a declaratory judgment that Local Law No. 3 of 2007 remains in effect. Supreme Court granted the requested relief.

A second judgment in a related lawsuit, *Alle-Catt Wind Energy LLC v. Town Board of the Town of Freedom*, No. 89035 (Catt. Co.), was issued on April 30, 2020, declaring "Town of Freedom's Local Law No. 3 of 2007 remains in effect." R.387 (Corresp. fr. Alle-Catt, attaching the April 30, 2020 Judgment and Order). Cf. R.408-3, 12.n.27 (Coalition Pet. for Rehearing, citing same). *See also* R.387, Ex. A, 7:15-17 (Tr. of Appearances in Case No. 89035, March 5, 2020).

The November 2019 local election of town board members occurred in the time between these two judgments and changed the policy of the Town Board regarding large-scale wind energy facilities. *See* R.298-1 (Corresp.).

The second judgment was upon a Petition and Complaint filed on January 31, 2020, *Alle-Catt Wind Energy LLC v. Town Board of the Town of Freedom*, No.

89035 (Cattaraugus Co.). Supreme Court Justice Parker, who also issued the first judgment. ~~Justice Parker also~~ determined that all appeals in Case No. 87572 have been disposed, based on January 13, 2020 orders by the Fourth Department Appellate Division. R.352-5; R.352-6.³

If the plain terms of these judgments were not enough to show that at all times relevant here, Freedom's 2007 local law was in effect, the Siting Board also could have considered the context of the dispute about Freedom's local laws *post* evidentiary hearing. In their December 16, 2019 correspondence, two Town of Freedom councilpersons and one councilman-elect discussed (1) conflicts of interest among other town officials, (2) a fine by the New York State Attorney General against Alle-Catt's parent company Invenergy for violating a Code of Conduct Agreement in the Alle-Catt matter, (3) the close working relationship between Alle-Catt and the Freedom Town Supervisor (who has remained in office since 2018), (4) numerous violations of state laws and procedures by the 2019 Freedom Town Board, and (5) the sentiments of the Town's voters as indicated by the results of the November 2019 local election. R.298-1.

³ On March 18, 2020, Alle-Catt obtained an Order to Show Cause requesting permission to intervene in *Freedom United v. Town Board of the Town of Freedom*, No. 89172 (Cattaraugus Co.), filed on March 11, 2020 seeking a declaratory judgment that the Town's 2019 local law is *void ab initio*, based on the October 21, 2019 judgment in Case No. 87572. Alle-Catt's request to intervene in Case No. 89172 is pending the outcome of discovery and briefing.

The Siting Board's view that, were it to recognize Supreme Court's declarations, the Article 10 proceeding would have been left "in a legal limbo until resolution of the issue before the courts, possibly years into the future", (R.419-1, 9), is plainly in error, since as shown above, the record before the Board shows that whether Freedom's 2007 local law is in effect was resolved by two orders of Supreme Court predating the Siting Board's Certificate Order. The idea of a "legal limbo" refers to Alle-Catt's unsuccessful effort to overcome the two judgments of Cattaraugus County Supreme Court.

After Alle-Catt's and the 2019 Town Board's effort to create a dispute about Supreme Court's first declaratory judgment was finally dismissed by this Court, (R.352-5), Alle-Catt brought a plenary proceeding against the 2020 Freedom Town Board based on the slim reed, that Supreme Court had failed to directly determine the 2019 local law when it declared that Freedom's 2007 law is in effect. *Alle-Catt Wind Energy LLC v. Town Board of the Town of Freedom*, No. 89035 (Catt. Co.) (filed January 31, 2020). At an appearance in that case, on March 5, 2020, Supreme Court Judge Parker acknowledged that his October 21, 2019 decision fails to determine the 2019 law but pointed to dictum there, finding that while the 2018 local law had been improperly referred to the county planning agency in violation of Gen. Muni. L., Section 239-m, the 2019 local law had not been referred at all,

and failure to do so would also be violation of Section 239-m. *Cf.* R.352-2, at 7.

Those “observations . . . may telegraph the Court’s thoughts regarding [the validity of the 2019 law].” R.387-1, Ex. A (Tr. in Case No. 89035, March 5, 2020, 7:15-17). Judge Parker states that although the validity of the 2019 local law was “never, ever in contention . . . my [initial] decision should not in any way be used as evidence or a determination as to the validity of that law” *Id.*, at 7:11-14. Judge Parker then affirms his previous decision (for the third time), stating that “the 2007 law remains in place”. *Id.*, at 9:21-22. This conclusion is so-ordered in an April 30, 2020 declaratory judgement in that case. *See Exhibit A* hereto.

The Siting Board’s contrary assertion, that Freedom’s 2019 local law was in place at the time the Board made its decision, is therefore plainly in error.

POINT II

THE SITING BOARD DECLINED TO BALANCE THE PROJECT’S THEORETICAL BENEFITS AGAINST DEMONSTRABLE ADVERSE LOCAL IMPACTS.

Given the very modest climate benefits of Alle-Catt, discussed in Point IV, the Coalition emphasized the record of adverse impacts on the environment.

Regarding the human environment, despite specific requirements, (*see, e.g.*, 16 NYCRR §§ 1001.2; 1001.4(c), (i), (j), (k), (p); 1001.9), Alle-Catt provided only superficial information about the character of the community.

Based on the record, the Hearing Examiners issued a Recommended Decision to the Siting Board with the following conclusions:

- At least 41 bald eagles will be killed by the project over 30 years, attributed to just one active nest, and there are “six other active breeding nests in close proximity”. R.358-1, 72-73, 75.
- Between 26,000 and 39,500 bats will be killed by the project over 30 years, including two species listed as threatened or endangered. *Id.*, 58-59, 65.
- Grassland habitat of the threatened Upland Sandpiper would be adversely affected. *Id.*, 87.
- The project would cross 174 streams creating 1,982 linear feet of permanent stream impacts, and 6,911 linear feet of temporary stream impacts. *Id.*, 41.
- Over half the project is unbroken “interior forest” and the project would remove 1,550 acres of interior forest, and fragment the rest. *Id.*, 25-26, 29.
- The project requires nine miles of overhead 345 kV interconnection line, 69 access roads, three permanent meteorological towers, and a concrete batch plant. *Id.*, 3.
- 116 wind turbines would be mounted with night-operated FAA warning lights, fundamentally altering the night sky for miles. *Id.*, 140.
- “[S]ome property value decline is possible”. *Id.*, 166-167.

- The project would be sited over a federally designated sole source of drinking water for several municipalities in western New York. *Id.*, 37.
- The project would be sited over an active earthquake fault system. R.399-1, 70-73. *See also* R.374-1, 1-5 (Coalition Br. on Exceptions).

“Community character” must be considered under Article 10, but in the statute the concept is not defined. See PSL § 168(4)(f). The statute’s implementing regulations state that community character “includes defining features and interactions of the natural, built and social environment, and how those features are used and appreciated in the community.” 16 NYCRR § 1001.4(p). The regulations also anticipate that an applicant will provide “[a] qualitative assessment of the compatibility of the facility . . . with . . . current and planned uses”, and will “identify the nearby land uses of particular concern to the community . . .” 16 NYCRR § 1001.4(i). The Recommended Decision (incorporated into the siting Board’s Certificate Order unless stated otherwise) notes that “[m]any comments opposing the Project were related to the environment, health, financial, and community impacts”. R.358-1, 13.

In the absence of a clear regulatory definition, a host municipality’s definition of its community character is an important source for evaluating the issue. *Matter of Palumbo Block Co.*, DEC No. 4-1020-00035/00001, 2001 N.Y.

ENV LEXIS 14, *53-55 (Interim Decision of the Commissioner, June 4, 2001). “If a zoning ordinance or other local land use plan exists, it would be evidence of the community’s desires for the area and should be consulted when evaluating the issue of community character as impacted by a project.” *Matter of Dailey, Inc.*, 1995 WL 394546, *7 (DEC Interim Decision, June 20, 1995). “Reduction of property values and other economic-related matters standing alone are not considered to be environmental impacts”, but when accompanied by environmental issues, or issues regarding the loss of revenue derived from tourism or diminution of property values, economic-related matters become relevant to impacts on community character. *Matter of St. Lawrence Cement Co., LLC*, DEC No. 4-1040-0001/00001, Second Commissioner’s Interim Ruling (September 8, 2004), 121, available at <https://www.dec.ny.gov/docs/legal_protection_pdf/stlawrencedid2.pdf>.

Based on the application, beyond “vacant land” and “farming”, (R.169-6, at 4-1, 4-4), one would never know the value of scenic vistas, quiet, recreational resources, clear night skies, and local Amish settlements. (Little of the project area in Cattaraugus County is devoted to farming; most is forested. *See* R.299-1 (land coverage map)). The application asserts the project is consistent with the Cattaraugus County comprehensive plan, (R.299-1; R.299-2; R.299-3), but that

assertion was refuted by the county planning board and the county legislature.

R.214-6.

The Coalition also offered the testimony of an expert on Amish life and religion. Another intervenor party offered the testimony of a landscape architect with extensive experience preparing visual impact assessments, and the testimony of a local real estate broker. Each expert concluded that the Alle-Catt project's adverse impacts in each subject area would be significant.

The voters in the two Cattaraugus County host towns voted out project boosters and voted in project opponents. R.298-1, R.298-3. The county industrial development authority determined the project should require demonstrable support from the host communities before financing is approved. R.214-3, 6. Hundreds of public comments assert that, as proposed, the project would cause several nuisance impacts. R.374-1, 41-47. As discussed below, these include scores of hours during which homes would be exposed to "shadow flicker", the strobing of sunlight as it passes behind moving wind turbine blades, affecting homes about a mile away from turbines; wind turbine noise approved at levels 20 decibels higher than ambient sound levels, especially at night (R.223-13, 5); and blinking red FAA-warning lights on 116 turbines, visible throughout the community. The aesthetic degradation of the visual setting, now dominated by scenic vistas, and the discord

and division within the community caused by allowing project “participants” to accept (by contract) greater noise and visual impacts than their neighbors, was frequently said to adversely affect the character of the community.

Very little of this record is addressed in the Siting Board’s Certificate Order. Yet the Board determines the project will have no significant adverse effects on the natural or human environment. The following shows that the record supports the opposite conclusion.

1. No local or regional land use plan supports the Alle-Catt project.

To discern the character of the community in which the Alle-Catt project would be built, one may look to the community’s land use plans. The Cattaraugus County Comprehensive Plan is expressly aligned with and “incorporate[s] by reference” several regional development plans previously prepared for the three-county region (Chautauqua, Cattaraugus, and Allegany counties) and the five-county region (Erie, Niagara, Chautauqua, Cattaraugus and Allegany counties) that include Cattaraugus County. R.299-3, 1-2. The Western New York Regional Economic Development Strategic Plan is a five-county plan that identifies energy development among its targeted industries, but in light of the need for local “smart growth”. R.299-3, 11. The Western New York Regional Sustainability Plan is

another five-county plan, this one funded by NYSERDA “under the Cleaner, Greener Communities program.” *Id.*, at 12. One goal of the Plan is to:

[i]ncrease renewable energy generation in the region, including technologies listed in the NYS Renewable Portfolio Standard [“RPS”]. Applications would include solar water heating, photovoltaic, landfill gas, wind, biomass, hydroelectric, fuel cells, anaerobic digestions, tidal energy, wave energy, ocean thermal, ethanol, methanol, biodiesel, and fuel cells using renewable fuel, and geothermal.

Id., at 12. The identified technologies, adopted from the state RPS, give no priority to wind energy development. The emphasis is on preserving the “quality of life” in the County. R.299-2, 6.

The Comprehensive Economic Development Strategy for the Southern Tier West Region is a three-county plan. R.299-3, at 14. No priority for wind energy projects is identified in the plan.

Cattaraugus County Comprehensive Plan seeks to “maintain[] an appropriate balance” between development of “agriculture, mining and forestry” and “the visual and cultural character of the County, and to the lifestyles and enjoyment of the residents”. *Id.*, 3. The cultural character of the County is

understood in light of “the importance of communities, farmland, forested land, scenic vistas and other elements of ‘Country Life’ that contribute to the County’s rural character.” *Id.*, Ch. X, at 3. This is stated as one of the objectives that would achieve “Goal #1”, to “encourage municipalities to target growth primarily within existing cities, villages and town centers, where there is already development and infrastructure to support it. This approach . . . directs growth away from sensitive areas.” R.299-3, 11. This goal was emphasized by over 62% of County residents who participated in three Public Information Meetings. *Id.*, Appx. A, at 1; Appx. B, at 6 of 27 (“Survey Results”). Not everyone identified “country life” for its intrinsic value; some saw “country life” as an economic value because it promotes tourism. *See* R.299-3, last page (under the heading “Opportunity – selling nostalgia”).

Nowhere in the Cattaraugus County Comprehensive Plan or in any of the three regional development plans it incorporates is large-scale wind energy encouraged. While renewable energy is encouraged, to be compatible with the Plan, forms of energy technology must be small-scale in order to preserve rural culture and amenities, the leading values expressed in the Plan.

2. The State Historic Preservation Office found significant adverse impacts on community character.

Community character is adversely affected by the Alle-Catt project, according to the State Historic Preservation Office:

[The project] will have an *Adverse Effect* on cultural resources.

The introduction of the sleek, ultramodern, approximately 590-foot tall kinetic wind turbines (up to 124 proposed) throughout this scenic landscape forever alters and changes the rural setting, which itself is a significant element in much of the survey area and serves as the backdrop for the architectural, cultural and scenic tourism heritage of these communities.

It should also be noted that this project is the latest of several wind generation projects to be constructed in this region and the cumulative effects of adding additional turbines to this area must be considered. We note that the proposed turbines for this project will be roughly one-third taller than those used in the surrounding three wind power projects. At nearly 55-stories tall, the new units associated with this undertaking will be unprecedented in scale.

R.218-19 (Ex. ACD-4, 2) (emphases in orig.).

3. Local governments do not support the project.

In addition to regional land use plans, a town's local laws reflect a land use plan. In all five Alle-Catt host towns, local laws in effect before the Alle-Catt proposal limited the height of wind turbines to 425-450 feet. In all five towns, Alle-Catt successfully lobbied to change local law to allow 600-foot tall turbines. Three towns adjacent to the five-town project area and two proposed host towns (Farmersville and Freedom) adopted resolutions opposing the Alle-Catt project or supporting the application of the Town of Freedom's 2007 local law governing wind energy facilities on the grounds that the project will have unacceptable adverse impacts on the area's rural character. *See* R.327-2, 36-38.

4. Overwhelming public opinion finds adverse impacts on community character would be significant.

Residents of the community are an important source for identifying the character of the community. The 2016 Supplemental Environmental Impact Statement prepared to support the state's goal of achieving 50% reduction in emissions from the power sector by 2030 states: "Community character . . . is not defined only by patterns in population and development. Residents often describe community character in terms associated with more intangible community quality

such as visual landscape, demographics, open space, noise, air quality, or traffic patterns.”⁴

Those commenting from the community frequently identified the character of the community with its scenic beauty, asserting that its visual degradation harms community character. 105 public comments specifically discuss the damaging visual impact on an area of scenic beauty. *See* R.C. (Comments numbers), 1, 8 (pp. 1 and 4), 9, 10, 11, 18, 20, 22, 23, 24, 31, 34, 39, 41, 49, 50, 52, 57, 65, 69, 92, 94, 100, 103, 111, 114, 119, 120, 123, 144, 153, 167, 168, 171, 175, 176, 177, 181, 188, 227, 230, 233, 234, 236, 239, 247, 253, 270, 277, 278, 279, 280, 328, 331, 340, 355, 356, 358, 360, 366, 368, 369, 370, 373, 374, 376, 384, 385, 386, 388, 389, 390, 393, 394, 395, 396, 397, 426, 431, 435 page 1, 439, 448, 475, 478, 487, 504, 509; R.163-1, at 29, 49, 54, 59, 69, 78, 85, 96, 112, 117; R.163-2, at 55, 73, 75, 76, 101, 110, 118, 122. The intervenor party “Three Towns” (representing three towns adjacent to the project area) provided a collection of photographs of typical scenic views in the community. R.251-1; R.251-2.

⁴*See* PSC Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, and others*, Final Supplemental Environmental Impact Statement (May 19, 2016). Documents filed with PSC are available by entering the case number on the “search” link at <<https://www3.dps.ny.gov/>>.

Seasonal properties are a common feature of the community, and among those it is common to convert the property to permanent use, for example, for retirement. *E.g.*, R.223-5, 6; R.163-1, 29, 53-55, 84-87, 92, 94-97, 117. Many properties have scenic vistas that would be degraded. *E.g.*, R.C.27, 57, 92, 114, 153, 181, 230, 234, 243, 277, 347, 356; R.163-1, 78, 114; R.214-3, 10:19-21 (emphasizing Cattaraugus County's moniker, "The Enchanted Mountains"; *cf.* R-299-3).

Recent arrivals to the community "wanted to escape the blighted urban landscape, to take that daily, hourly commute, through unpolluted scenic views, to sleep in a quiet home, sit on their decks, view a starlit landscape, safe from the infrasound[], light flicker and the constant sound of industrial turbines." R.C.163-1, 95-96. *See also* R.C.57, 230, 347; R.163-1, 29, 53-55, 84-87, 92, 94-97, 117. "The area where we own a small tract of land is not only extremely quiet, with beautiful views. Now, with the proposed wind energy project, the quiet nature and wonderful views will be in our opinion, destroyed, by noisy, unattractive windmills, that God surely never intended to have as a disruption, and unattractive addition to what He created." R.C.11. "I've remained in this area of Western New York not only because it is home but, largely due to the beauty of the country. The wild life, the woods, the camping, trees, hunting, fishing, the over all beauty of

where I was raised. [The towns of] Bliss, Pike, and Weathersfield are just over the hill from where I grew up. It horrif[ies] me every time I drive east out of Arcade on route 39 and see how the enormous windmills [operating there] have raped the once beautiful countryside that I grew up in.” R.C.22. (Alle-Catt notes the presence of two wind farms in Bliss and Wethersfield, R.169-14, sec. 24.c.).

Other comments express concerns about the impact of the project’s development and associated infrastructure on the area’s habitat, biodiversity, built heritage and long-term impact on tourism development: “I am opposed to the Alle-Catt Wind as the rural area to be deforested and changed forever can not be replaced. Health concerns from both flicker and infrasound will make it impossible for my 87 year old mother to live comfortably. Our property values will decrease and rural quiet, darkness and wildlife lost forever.” R.C.471. *See also* R.C.118, 277; R.220-7, 4; R.223-5, 3-4.

Implicit in many of these comments is a judgment that siting the Alle-Catt project in such a scenic community lacks balance. Thus: “We are in favor of wind generated power, but not at the expense of the health and well being of the local population as a whole.” R.C.527.

At least 88 public comments express concerns about the impact of the project’s development and associated infrastructure on the area’s habitat,

biodiversity, built heritage and long-term impact on tourism development. *See* R.C.6 (p. 2), 8 (pp. 2-3), 11, 24, 45, 61, 79, 93 94, 100, 109, 111, 118, 119, 120, 131, 133, 134, 142, 144, 147, 153, 160, 163, 167, 168, 169, 176, 177, 179 (p. 2), 182 (p. 2), 188, 194, 223, (p.p. 1-9), 233, 234, 238, 239, 243, 244 (p. 2), 247, 256 (p. 1), 269, (p. 3), 270, 272, 277, 280, 285, 287, 302, 303, 318 (p. 2), 327, 329 (p. 1), 346, 368, 369, 376, 385, 386, 388, 389, 390, 393, 394, 395, 396, 397, 405, 421, 426, 431, 439, 448, 452, 472, 474, 475, 476, 483, 487, 491, 492, 502, 504, 506, 509, 527, 535.

Many comments assert that the adverse environmental impacts of the project will have a negative impact on tourism, and that tourism characterizes the community. Thus: “How many tourists are going to flock to a region where they have 600 foot wind turbines, just to go see the wind turbines? I don't think so. How about new golf courses, new state parks, new recreation areas, bed and breakfast -- bed and breakfast or upscale resorts are going to move into an area that has 600 foot wind turbines. I don't think so. How many private developers are floating innovative land use proposals or filing business -- building permits near 600 foot wind turbines. No one's looking at those figures.” R.163-2, 68. *See also* R.163-2, 16, 114; R.163-2, 43, 68 (project would harm tourism).

Comments also express a judgment that the environmental benefits do not outweigh the environmental harms of the project: “There should be some sort of tree conservation plan in place to offset the impacts of 5,900 acres of interior forest before project and 4,350 acres of interior forest after construction. This will cause a reduction in carbon absorption.” R.C.525. “[Y]ou will in the long run lose agriculture, tourism, property values, communications will all have to be redone. Those are -- those are concerns that are never considered in the cost-benefit analysis. So, no real cost-benefits analysis has been done. Your cost will be more than what they pay you. Economically, it is not a viable thing.” R.163-1, 16.

Comments also frequently express concerns about the impact of the project’s development and associated infrastructure on the area’s habitat, biodiversity, built heritage and long-term impact on tourism development. R.C.6 (p. 2), 8 (pp. 2-3), 11, 24, 45, 61, 79, 93 94, 100, 109, 111, 118, 119, 120, 131, 133, 134, 142, 144, 147, 153, 160, 163, 167, 168, 169, 176, 177, 179 (p. 2), 182 (p. 2), 188, 194, 223 (p. 1-9), 233, 234, 238, 239, 243, 244 (p. 2), 247, 256 (p. 1), 269 (p. 3), 270, 272, 277, 280, 285, 287, 302, 303, 318 (p. 2), 327, 329 (p. 1), 346, 368, 369, 376, 385, 386, 388, 389, 390, 393, 394, 395, 396, 397, 405, 421, 426, 431, 439, 448, 452, 472, 474, 475, 476, 483, 487, 491, 492, 502, 504, 506, 509, 527, 535; R.163-2, 43, 68; R.163-1, 16, 114. Several comments address adverse impacts on habitat and impact

to wildlife. R.C.45, 93, 111, 120, 188, 233, 234, 243, 247, 285, 287, 302, 405, 474, 475, 476, 483, 487, 491, 492, 502. Specific concerns were raised about impacts on biodiversity. R.C.24, 169, 131, 147, 153, 160, 270, 369, 385, 386, 389, 393, 394, 395, 396, 397, 421, 472, 504, 506, 509. Specific concerns were raised about impacts on the area's natural heritage. R.C.11, 24, 100, 109, 111, 118, 119, 188, 194, 239, 272, 303, 327, 346, 431.

Tourists to the area commented on the adverse effects the project will have on their recreation. R.C.61, 133, 134, 277, 318 (p. 2), 385, 386, 389, 393, 394, 395, 396, 475, 487, 527, 535; R.163-1, 16, 114; R.163-2, 43, 68.

Many commenters report that division and discord in the community have resulted from Alle-Catt's successful effort to persuade the host towns to distinguish project "participants" from "non-participants" under local law. R.163-2, 10, 46, 52, 68, 77, 82, 103, 104, 119, 135, 277, 25, 307, 387, 511, 553; R.163-1, 42, 125-126, 132-133. "Participants" are "[p]roperty owners that have entered into lease, easement, purchase option, or setback agreements with ACWE that will allow construction of Project facilities on or near their property." R.169-6 (sec. 4.13). The comments cited above complain that the impacts of the project cannot be contained, since avoiding unwanted impacts on "non-participating" neighbors is impossible.

Prior to project development, the host towns limited allowable turbine height to 425 or 450 feet, consistent with wind farms to the north. *See* R.86-3. As a condition of receiving host benefit payments, Alle-Catt persuaded all towns to change their local laws allowing a 600 foot height and accommodating setbacks and noise limits, and a waiver of these standards (or explicitly more lax standards) for “participants”. This is arguably an illegal attempt to waive health, welfare and safety standards by contract. *See Lochner v. New York*, 198 U.S. 45, 53, 25 S. Ct. 539, 541, 1905 U.S. LEXIS 1153, *13-14 (1905). *See PPM Atlantic Renewable v. Fayette County Zoning Hearing Board*, 93 A.3d 536, 2014 Pa. Commw. Unpub. LEXIS 311 (Pa. Commw. Ct. 2014) (allowing more lax height and setback requirements for “participants” compared to “non-participants” in a wind project project is an improper restriction on health, safety and welfare protections). Commenters commonsense complaints about this arrangement were therefore aligned with well-settled law.

Twenty years ago, rural parts of the Hudson Valley were undergoing a transition from farming to heritage tourism, recognized as a transition in community character worthy of protection. *See In re Concerned Homeowners of Rosebank*, 2001 N.Y. Misc. LEXIS 530, *15-16, 2001 NY Slip Op 40096(U) (Richmond Co. 2001) (citations omitted) (“Obviously, the building of an electric

generating facility in close proximity to a residential property owner will affect the value and enjoyment of his real property.”). That same transition is occurring in western New York and should have been more seriously considered by the Siting Board. In the absence of any substantial evidence on the character of the community, the statements of members of the community together with the statements and actions of the towns of Farmersville and Freedom, the Cattaraugus County Planning Board, the Cattaraugus County Legislature, and the Cattaraugus County IDA should be given appropriate weight.

POINT III

THE SITING BOARD REFUSED TO EXEMPT THE AMISH FROM THE SITING OF ALLE-CATT IN VIOLATION OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

1. The First Amendment issue was raised throughout the Article 10 proceeding.

Religious infringement of the Farmersville Amish religion in violation of the First Amendment was raised early in the Article 10 proceeding by the Coalition’s expert. Professor Steven Nolt, an expert on Amish religion and life at the Young Center for Pietist Studies at Elizabethtown College, identified the issue in his pre-hearing Issues Statement. R.192-3, 2-7; **Exhibit B** hereto (inadvertently omitted from the record).

Since 1969, the Young Center has studied Amish communities in the U.S. in collaboration with colleagues “at Ohio State University and other Amish contacts”. R.339-2, 1588:18 to 1589:3. *See* R.223-28 (Prof. Nolt’s resume). *See also* R.56-2; R.148-1 (Prof. Nolt’s scope of investigation for this matter). Prof. Nolt has conducted his own extensive research on Amish communities across the United States. R.339-2, 1517-1518. The only information in the record about the religious life of the Farmersville Amish was provided by Prof. Nolt, (*id.*, 1512-1594, which includes R.223-8; R.250-3), and by two letters from the Amish. R.250-5, attachments; R.302-4. *Cf. also* R.248-30; R.248-32 (inf. requests). Record Exhibit 547, (R.317-1 (referencing Exhibit 547)), includes additional discovery related to this issue, inadvertently omitted from the Schedule of Record provided by the State. That is provided here as **Exhibit C**. For general background *see* Donald Kraybill (ed.), *THE AMISH AND THE STATE* (2003) (excerpted in Exhibit C).

2. The Alle-Catt project would displace the entire Amish settlement in Farmersville.

The Swartenztruber settlement in Farmersville is the most conservative, tradition-minded among Amish sects. [cite] “There are 155 Amish church districts in New York State and they are clustered in 57 geographic areas that the Amish call settlements.” R.339-2, 1589:6-9. Only a few of these are Swartzentruber and there

are no “Swartzentruber . . . Amish settlements in New York State that are located in somewhat close proximity to an existing wind farm.” *Id.*, 1590:23 to 1591:5. The Farmersville settlement is a discrete “church community”. *Id.*, 1523:1-15. “There are not church buildings, worship services are hosted by households in their homes”, (*id.*, 1523:10-11), or their “barns”. *Id.*, 1532:18-20. The 22 Swartzentruber families comprising the Swartzentruber settlement in Farmersville are all within the Alle-Catt project area. [cite]

By diminishing “the availability of land in a -- in a geographically proximate area” to the Farmersville Amish, (*id.*, 1561:20-21), the Alle-Catt project can be expected to displace the Swartzentruber, to the point where “Swartzentruber Amish will leave the area”. *Id.*, 1535:3-4.

Amish families moved to Farmersville beginning in 2011 because they believed the area offered the possibility of sustaining a growing community. For the community to persist, they need the possibility of acquiring additional acreage in relatively close (buggy-driving) proximity. The development of the Invenergy project would effectively end that possibility. If pressed into such circumstances, Swartzentruber Amish will leave the area. For example, in

2012, after several years of conflict with officials in Cambria County, Pennsylvania, over the illumination of buggies and other matters, as well as the rising cost of land due to the development of the Marcellus Shale industry that suddenly put land out of reach, the Swartzentruber Amish of Cambria County all moved away to other Swartzentruber settlements. The settlement there dissolved and no longer exists. At least one household move to Farmersville, New York.

It is not an “empty threat” to say that the Farmersville Amish settlement could be forced out of existence.

Id., 1534:19 to 1535:11. The reason the Farmersville Amish would be forced out by Alle-Catt is the conflict between an intrusive industrial project in their midst and their religion.

In a May 7, 2018 letter from Amish elder Andrew Hershberger read into the record on his behalf at the Public Statement Hearing, [cite Tr.], the Swartzentruber stated they are “religiously opposed to having these turbines on their property.” R.250-5, attachment. However, the Swartzentruber’s religious objection extends to living in proximity to wind turbines, and to living in the midst of the vehicle traffic required to construct the Alle-Catt project. *Id.* (stating their concerns extend to

having “the Wind Project in our area”); R-339-2, 1521:11 (“they seek places to live where motorized traffic is lite [sic]”). *See also* R.339-2, 1560:2-3 (for religious reasons the Swartzentruber must live away from “motorized traffic”).

Hershberger’s letter says that if wind turbines are sited on nearby agricultural land, the Swartzentruber will be limited in their ability to acquire land and maintain a healthy growing, community that is geographically compact. Indeed, this is the reason the Swartzentruber migrated to Farmersville from Ohio: fertile farmland in their Ohio communities became unaffordable. *Id.*, 1520:11-17.

The Swartzentruber’s concern for available farmland on which their settlement can grow, and their commitment to an agrarian way of life are religious imperatives. Rural residence is dictated by the Swartzentruber “Ordnung”, or “church discipline”. *Id.*, 1519, 4:12-13; 1521:5-18. The Ordnung dictates the details of daily life, down to the size and shape of doors and windows of their homes, (*id.*, 1533-1534 *et passim*; 1580:2 to 1582:7), and **he** manner of lighting for their buggies, “reflecting Swartzentruber rejection of worldly symbols and emphasis on devotion to God.” *Id.*, 1531:10-13. They have “given themselves up to living as they believe God requires”. *Id.*, 1528:12-13.

A religious aversion to life in proximity to a wind farm does not occur for non-Swartzentruber Amish, for example in “Lewis County, New York”. *Id.*,

1571:10-11.⁵ In Centerville, for example, within the Alle-Catt project area, “the Fillmore settlement” allows “certain economic decisions that they tend to leave up to the individual”, based on that settlement’s Ordnung. *Id.*, 1572:9-23. “The Swartzentruber church decided, as a group, not to execute wind leases, good neighbor agreements or setback waivers offered by Invenergy, believing that a utility-[scale] wind project will adversely affect their ability to continue to live in harmony with the land and with God.” R.250-5, 1534:4-7. Members of the Fillmore settlement have leased land to Alle-Catt, but their Ordnung allows “an individual economic decision.” *Id.*, 1571:23-25, 1572:19-23. The Farmersville Swartzentruber “would not share communion [with the Centerville Amish] in like a church sense. Their children would not intermarry.” *Id.*, 1579:10-12. *See also id.* 1756:16-17.

Farmersville Local Law No. 1 of 2019, Section 13(E)(5), requires wind turbines to be set back “2,200 feet or more from the property line of any school, church, hospital, or nursing facility”. R.277-4. Farmersville Local Law No. 1 of 2020, Section 17(C)(4), requires a one mile setback from schools and churches.

⁵The Lewis Co. wind farm is the Maple Ridge project in an around Lowville, New York; *see* Helen O’Neill (AP), “Bitter wind blows in N.Y. town”, printed by Brattleboro Reformer (August 18, 2008), available at <https://www.reformer.com/local-news/bitter-wind-blows-in-n-y-town/article_dea5351b-36e5-51b5-aae9-af8e3f374b66.html>.

R.357-3, 26. *See also* R.388-2, 25 (Local Law No. 4 of 2020, Section 17(C)(4).

(This provision would not limit turbines near town borders in adjacent towns; *cf.* R.339-2, 1605:12-13.) Such setbacks are needed because “[t]he location, noise, and sight of the turbines in proximity to their homes and barns, which necessarily serve as their places of worship, disrupt their religious ritual and practice.” *Id.*, 1532:18-20.

3. Decisions made under Article 10 are not generally applicable and thus are not shielded against strict scrutiny under the First Amendment.

The Free Exercise Clause of the First Amendment to the United States Constitution provides that the state may not infringe upon the free exercise of religion. The First Amendment states in pertinent part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” and is applicable to the states and their subdivisions through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). The free exercise of religion is also guaranteed by the Constitution of the State of New York. N.Y. Const. Art. I, § 3.

Based on a detailed record of the nature of their religious practices and beliefs, the U.S. Supreme Court found that the Old Order Amish (aka Swartzentruber) established “a free exercise claim”, “one that probably few other

religious groups or sects could make”. *Wisconsin v. Yoder*, 406 U.S. 205, 233 and 236 (1972). “Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents.” *Yoder*, 406 U.S. at 210. The Old Order Amish “confine their vocational training program to preparation for life in an agrarian society”. *Brock v. Wendell’s Woodwork, Inc.*, 867 F.2d 196, 1989 U.S. App. LEXIS 1117 (4th Cir. 1989) (citing *Yoder*). As Prof. Nolt demonstrated, these statements describe the Old Order Amish of Farmersville today.

Where the free exercise of religion is substantially burdened by government action, the government must demonstrate a compelling interest to do so. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Yoder*, 406 U.S. at 205. However, if the burden results from the application of a neutral law of general applicability, then the compelling interest test or “strict scrutiny” does not apply. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). Thus, even a substantial burden on the free exercise of religion may be justified, if the burden is the result of implementing a neutral, generally applicable law. *City of Boerne v. Flores*, 521 U.S. 507, 514, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). Thus, “neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause.” *Rector, Warden & Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 355,

1990 U.S. App. LEXIS 1600, *20 (2d Cir. 1990) (citing *Smith*, 494 U.S. 872 (1990)).

There are two exceptions to the *Smith* rule: (1) the state has in place a system of individualized exemptions to the law, (494 U.S. at 884), or (2) the substantial burden involves another constitutionally protected right, a “hybrid” claim (494 U.S. at 884). Where either of these exceptions apply, strict scrutiny must be applied. Both exceptions apply in the case at bar. Because Article 10 provides individualized exemptions (as discussed below), and because the Swartzentruber’s claim to a religious exemption involves their freedom to associate in the exercise of their religion. Freedom of association protects association for the purpose of exercising other First Amendment liberties including “speech, assembly, petition for redress of grievances and the exercise of religion.” *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984).

The compelling interest test requires consideration of the least restrictive alternatives. *See Sherbert*, 374 U.S., at 407, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (“[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights.”).

“The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices.” *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990) (citing and discussing *Lyng v. Northwest Cemetery Protective Ass’n*, 485 U.S. 439, 108 S. Ct. 1319, 1326, 99 L. Ed. 2d 534 (1988)). See also *Hernandez v. Commissioner*, 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

In this case it has been established that living in the Alle-Catt project area would be so at odds with Farmersville Amish settlement’s “devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life”, (*Yoder*, 406 U.S. at 210, 32 L. Ed. 2d at 22, 92 S. Ct. at 1530)), that it is likely the settlement will migrate out. However, “the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts. . . .” *Id.* at 878-79. Religious practices are not protected under the Free Exercise Clause because a society that protects religiously motivated conduct under a compelling interest test is “courting anarchy, [and] that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.” *Id.*, at 888. Under *Smith*,

religious freedom in a “cosmopolitan nation” is a “luxury”, (*id.*), unaffordable because it renders “each conscience . . . a law unto itself”, (*id.* at 890), and encourages demands for religious exemptions “from civic obligations of almost every conceivable kind.” *Id.* at 888.

The challenge to the siting of very large industrial wind turbines by the Swartzentruber Amish in Farmersville does not present such concerns. The Amish do not assert that, among them, each conscience is a law unto itself but rather that their religion dictates where they may live.

Smith reinterpreted (but did not overrule) *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that South Carolina could not withhold unemployment compensation benefits from a woman who had refused work for religious reasons), as holding that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Once it embraces secular reasons for a “good cause” exemption, the regulatory system is no longer generally applicable and is thus not entitled to be shielded from infringement claims under *Smith*. *Sherbert*, 374 U.S. at 400-01. *See Smith*, 494 U.S. at 546 (“once a law fails to meet the Smith requirements” the strict compelling interest test applies). Therefore, government officials who, in the exercise of discretionary authority reject a religiously

motivated hardship claim, will be required to justify their decision under strict scrutiny and the compelling interest test. “Official action ‘burdening religious conduct that is not both neutral and generally applicable, . . . is subject to strict scrutiny.’” *Agudath Isr. v. Cuomo*, Nos. 20-3572, 20-35902020, U.S. App. LEXIS 40417, *19 (2d Cir. December 18, 2020) (quoting *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014)). In other words, when a government official rejects a claim that religious hardship results from application of an individualized system of regulations, the burden is on the government to justify its decision by establishing that it is necessary to achieve state interests of the highest order and that its decision is “narrowly tailored in pursuit of those interests.” *Church of the Luimi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993) (quoting *Smith*, 494 U.S. at 888).

Article 10 has in place a system of individualized exemptions embodied in the series of required “findings” a Siting Board must make. PSL §§ 168(2), (3). Article 10 allows the Siting Board to issue a Certificate for a facility upon “any terms, limitations or conditions contained therein”. PSL § 162(1). The Board may also depart from a determination “that the applicant’s proposal is preferable to alternatives” “for good cause”. PSL § 168(1). A decision to adopt alternatives to an applicant’s proposal must also be informed by “explicit findings regarding the

nature of the probable environmental impacts of the construction and operation of the facility” on “cultural . . . resources”. PSL § 168(2)(c). The Siting Board’s refusal to exempt the Farmersville Amish settlement from Certificate conditions that apply elsewhere in the Alle-Catt project area is therefore subject to strict scrutiny.

“Courts apply strict scrutiny to assess whether a government policy impermissibly “devalues religious reasons” for congregating “by judging them to be of lesser import than nonreligious reasons.”” *Agudath Isr. v. Cuomo*, U.S. App. LEXIS 40417, at *21 (citing *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614, 207 L. Ed. 2d 1129 (2020) (Kavanaugh, J., dissenting) (quoting *Lukumi*, 508 U.S. at 537-538)).

Even an across-the-board policy that does not contain explicit exemptions will require strict scrutiny where the agency or administrators of the policy grant discretionary exceptions on an ad hoc basis. *Rader v. Johnston*, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (university violated the Free Exercise Clause when it “created a system of ‘individualized government assessment’ of the students’ requests for exemptions” from the housing policy, but had “refused to extend exceptions to freshmen who wished to live [off campus] for religious reasons”).

In *Black Hawk v. Pennsylvania*, 225 F. Supp. 2d 465 (M.D. Pa. 2002), aff'd, 381 F.3d 202 (3d Cir. 2004), Dennis L. Black Hawk, a Native American “holy man”, wished to keep two black bears on his land in order to conduct “spiritual ceremonies for other Native Americans.” 225 F. Supp. 2d at 467. Under the Pennsylvania Game Code, the annual permit fee for possession of black bears was \$200, a sum that was prohibitively expensive for Black Hawk. *Id.* at 469. However, the Pennsylvania law provides that the fee may be waived by the director of the Pennsylvania Game Commission for “hardship or extraordinary circumstance” so long as the waiver is “consistent with sound game or wildlife management activities.” *Id.* at 470 n.3. The court held that the waiver provision created a system of individualized and discretionary judgments concerning what constitutes “hardship or extraordinary circumstances” and “sound game or wildlife management” such that *Smith* did not apply and strict scrutiny was required under *Sherbert*. *Id.* at 473. The Third Circuit affirmed, holding that “a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.” *Sub nom.*, 381 F.3d 202, 209 (3d Cir. 2004). The Third Circuit concluded that *Sherbert* establishes a *per se* rule that triggers strict scrutiny based

upon the existence of an individualized, discretionary system of exemptions. No proof of actual discriminatory application is required, because the discretionary system “provides an opportunity for the decision maker” to treat secular reasons for exemptions as more important than religious reasons. *Id.* at 208. “The ‘system of individualized exemptions’ need not be a written policy, but rather the plaintiff may show a pattern of *ad hoc* discretionary decisions amounting to a ‘system.’” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004).

Similarly, landmark preservation laws that restrict the right to assemble on private property for worship or religious ministry have been struck down under the *Sherbert* rule. *See, e.g., Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992).

In *Sherbert*, it was the Employment Security Commission’s denial of Sherbert’s claim for a religious exemption from the eligibility requirement that violated Sherbert’s rights under the Free Exercise Clause. In *Thomas v. Review Board*, 450 U.S. 707 (1981), Thomas was given an opportunity at an administrative hearing to argue that he had terminated his employment for “good cause” due to his religious convictions against producing weapons for war. *Id.* at 710-712. As

Chief Justice Burger, together with Justices Powell and Rehnquist, explained in their plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986):

The statutory conditions at issue in [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, “without good cause,” he had quit work or refused available work. The “good cause” standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be “without good cause” tends to exhibit hostility, not neutrality, towards religion.

Id. at 708 (plurality opinion) (emphasis added).

Thus, where government officials or agencies allocate benefits or burdens by means of an *ad hoc* system of discretionary application, strict scrutiny applies to ensure that decision makers have no opportunity to determine whether religious reasons are part of the decision. Discretionary review creates a risk of

discrimination and bias against unpopular or minority religious beliefs and practices great enough to warrant strict scrutiny.

4. The Siting Board impermissibly disregarded the religious claims of the Farmersville Amish

The Siting Board exceeded its authority by determining that the home religious practices of the Farmersville Amish do not warrant application of a local law protecting “churches”, or any other less restrictive means to achieve its siting goal. The Board made it clear that a “real” church would receive the protection of an extended setback under the local law. “It is unreasonable to interpret the term ‘church’ to include what is in essence a full-time residence”, according to the Siting Board; “we interpret the plain language of the term ‘church’ to be inapplicable to residences in the Amish community.” R.399-1, 76. This implies that a residence cannot be a church, a view that is clearly foreign to Amish life and religion, and is inaccurate. “In the same manner, we would not call an individual’s residence a ‘church’ under the local law definition simply because they held a prayer meeting or religious study group in that residence on some periodic basis,” the Siting Board explains. *Id.*, at 76.n.172. This too is a prejudicial view of the matter, since a baptism, wedding, funeral or worship service in a Farmersville Amish home is more than “[holding] a prayer meeting or religious study group in

that residence on some periodic basis”. *Id.* The uncontested testimony is that the conduct of these community services, including their times and places, is dictated by the Swartzentruber religious code. The Board’s determination “is merely an indirect way of preferring one religion over another.” *Fowler*, 345 U.S. 67, 70 (1953).

Accordingly, the Swartzentruber should be able to object to the location of wind turbines so close to their homesteads as to interfere with exercise of their religion. Once lodged, the objection should require the government to demonstrate a compelling interest in the project to justify interfering with the Swartzentruber’s religiously motivated conduct. Since Article 10 has in place “a system of individual exemptions”, (*Smith*, 494 U.S. at 884), the Siting Board must either grant the religious exemption or be prepared to pass strict scrutiny. *See also, Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879. 886 (D. Md. 1996) (historic preservation ordinance creates a system of individualized exemptions; compelling interest test applied); *First Covenant Church v. City of Seattle*, 840 P. 2d 174. 181 (Wash. 1992) (strict scrutiny applies where landmark ordinance contained “mechanisms for individualized exceptions”).

As discussed in Point IV, based on the State’s energy goals, the need for Alle-Catt is less than compelling. Even if achieving climate benefits, however

small, were deemed compelling, siting this project as a means to that end is not.

The religiously prescribed land use needs of the Swartzentruber Amish of Farmersville competes with the apparent land use needs of siting of industrial wind turbines, under a system allowing a multitude of individualized exceptions.

A Siting Board may apply or waive local land use standards, (PSL § 168(3)(e)), may impose conditions “for good cause shown” embracing “alternatives” to “the applicant's proposal”, (PSL § 168(1)), may determine that a project proposal will, on balance, “serve the public interest”, (PSL § 168(3)(b)), and may, if “the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located”, impose conditions on the Certificate that “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”. PSL § 168(3)(d). Under *Sherbert* and *Thomas*, Article 10 is therefore an individualized system of discretionary assessments for allocating some benefit or burden, and should on that account be subject to strict scrutiny.

In this case, the Siting Board rejects a request for greater setbacks by Amish who say they are religiously opposed to industrial wind turbines on their land or other land in Farmersville. Andrew Hershberger’s May 7, 2018 letter to the

Hearing Examiners asserts that siting the Alle-Catt project near the settlement infringes its “Free Liberty [of] Conscience”, asks that protection of that liberty be “extended” to the settlement by the State. However, the Siting Board failed to address the evidence that their request not to have wind turbines near their settlement has a religious basis. The Board addressed a narrow issue, whether the use of Amish homes and barns for worship warrants application of the Town of Farmersville’s setback from wind turbines for churches. It does not, the Board reasons, for then “a prayer meeting or religious study group in [a] residence on some periodic basis” would justify classifying a home as a church, requiring greater setbacks. R-399-1, 76.n.172. That is, according to the Siting Board, the Swartzentruber (among whom are found no conventional churches) hold religious services in “what is in essence a full-time residence”. *Id.*, 76.

The Town of Farmersville’s decision to apply the setback for churches to the Amish grew out of the public outcry to preserve their settlement, shown earlier in this Brief. The Siting Board concludes that applying the setbacks for churches to the Amish “was a litigation position with no historical application prior to this case.” *Id.* Alternatively, according to the Siting Board, the Town’s position does not matter because “the ultimate responsibility of interpreting Farmersville’s local law

lies with the Siting Board and we interpret the plain language of the term ‘church’ to be inapplicable to residences in the Amish community.” *Id.*

These conclusions are erroneous because Amish religious services include more than regularly scheduled worship services. Weddings, baptisms, and funerals are also conducted in Amish homes and barns. The basis for the Board’s conclusion is a mathematical annual averaging of the number of regular bi-weekly worship services per home, assuming 22 homes. This is erroneous as a matter of fact because the record demonstrates many more religious services occur among the Farmersville Amish.

A more serious error is the Siting Board’s failure to acknowledge in any way the distinctive manner in which religion pervades Amish life. The Siting Board’s failure is embodied in its wooden focus on what is a “church”. The Board applies a conventional definition of “church” that plainly is out of place, and exogenous to Amish religion. The Amish have no religious claim, in effect, because they have no churches. As explained at great length by the Coalition’s Amish expert, it is a religious imperative to provide farms for the next generation, and this motivation led the Swartzentruber to settle in Farmersville. The religious motivation for the creation and long-term maintenance of a Swartzentruber settlement in the Town is completely lost on the Siting Board, which avoids discussing the settlement, how

or why it differs from the Centerville Amish settlement, or the role their religiously motivated way of life plays in the Town of Farmersville's determination to apply the Town's setback for churches to the Amish.

Religion infuses the day-to-day life of the Farmersville Amish. R.339-2, 1532:14-15. But one would never know that by reading the Siting Board's Certificate Order. If reading only the Order, one would not discern that a request for a religious exemption from the siting of wind turbines in Farmersville is at issue. The Siting Board relies on Alle-Catt's entirely inapposite citation of caselaw supporting the proposition that "it would be unreasonable to reclassify ordinary properties for tax purposes based on temporary or minimal uses of property" to conclude that "the term 'church' [is] inapplicable to residences in the Amish community." R.399-1, 75 (citing cases from R.382-2, 12-13). No case relied on by the Siting Board addresses religious infringement.

The record shows the religious use of homes and barns is not temporary or minimal; Swartzentruber life is permeated by their religion. Intrusion on their home religious services by industrial noises and sights, (R.339-2, 1530:6-20; R.1532:17-20), is not the full extent of the Alle-Catt's probable intrusion on their religion. Their religion underlies the Swartzentruber's "need [for] rural environments that hold the possibility of obtaining more land for future

generations.” *Id.*, 1520:19-20. [O]btaining more land for the rising generation is uppermost in the minds of the Swartzentruber Amish households in Farmersville.” *Id.*, 1522:10-12. “Their lifestyle and their livelihood depends upon having between 40 and 60 acres of productive farmland per family . . . and [they] always locate new settlements in places where land is available.” *Id.*, 1533:16-21. Because of their religious commitment to a life away from industry, the siting of wind turbines nearby makes land unavailable to them. *Id.*, 1561:18-21. See also *id.*, 1559:4-7 (“the land they need to grow] will become unavailable if the project moves forward”). “Swartzentrubers leave places where land is unavailable or has become undesirable.” *Id.*, 1534:1-2.

The Siting Board’s position is constitutionally suspect because it plainly “[j]udg[es] the centrality of different religious practices”. *Smith*, 494 U.S. at 887. By its terms, the Siting Board’s position would apply the setback for churches to houses of worship so used by non-Amish Christians, but not to Amish houses of worship. This is akin to saying religious use of their homes is not central to Amish religious practices. And this, in turn, is a constitutionally impermissible evaluation of the merits of their religious claim to a greater setback than that afforded to homeowners who are not religiously required to live away from industrial

influences. *Smith*, 494 U.S. at 887 (holding that government inquiry into the “centrality” of specific religious beliefs is constitutionally suspect).

Where, as here, the State forces the Swartzentruber to choose between obedience to their religion and migrating to a non-industrial area, the First Amendment requires the State to extend to the religious minority a “good cause” exemption, unless the State has a compelling reasons not to. The Siting Board’s approach violates the First Amendment under a strict scrutiny test, because not only is that approach not narrowly tailored to achieve the State’s goal, it is not tailored at all.

POINT IV

BASED ON SPECULATION, THE SITING BOARD DETERMINED CLIMATE BENEFITS WOULD BE BENEFICIAL

For its conclusion that the project would be “a beneficial addition of capacity” to the state’s grid, (PSL § 168 (3)(a)), the Siting Board relies on a model of the project’s climate benefits in the first year of operations only. As discussed below, this model fails to provide sufficient information to support the Siting Board’s conclusion.

Alle-Catt provided the results (but not the underlying analysis) of two model runs of the emissions consequences of the project and its impact on electricity costs

in each of New York's grid zones and on other generators on the state grid, by its consultant Leidos. R.86-36, Attachment (Leidos, "Alle-Catt Wind Energy Center Electric System Production Modeling Report", Exec. Summ.) (redacted); R.99-6, Attachment (same, confidential). Leidos' modeled effects of the project for 2023, the first year of anticipated Alle-Catt operations, showing^s that in that year the project would make a modest contribution to the state's energy goals, reducing CO² elsewhere on the grid by 1.2%. R.99-6, Attachment, 1.

For the reasons discussed below, the Coalition's expert witness found that Leidos substantially overestimates Alle-Catt's anticipated climate benefits. The Coalition's witness Dr. Thomas Kreutz recently retired from the Andlinger Center for Energy and the Environment at Princeton University, where he led research into "various pathways to deep decarbonization of domestic power grids by mid-century, a condition necessary for the U.S. to fulfill its commitments to reduce greenhouse gas (GHG) emissions under the 2015 Paris Agreement and display international leadership on mitigating global climate change." R.295-1, 3. This research involves modeling the PJM regional transmission system (serving New Jersey), a larger grid system than New York's, which is operated by the New York System Operator ("NYISO"). *Id.* "There is considerable overlap between our

research and the analysis performed by Leidos in the attachment to Exhibit 8 of the ACWE [Alle-Catt] Application.” *Id.*, 3-4.

DPS staff negotiated with Leidos to approve the assumptions used in its model and its scope. R.86-36, 2 (“step 1”). According DPS staff, “[t]he assumptions are based on publicly available information, NYISO data sources, and DPS Staff’s internal knowledge of the development and operational status of these generation and transmission facilities.” R.223-24 (information request, Question 4). “[T]o verify the reasonableness of the Applicant’s production cost modeling”, DPS staff ran its own model, “a similar production simulation software”. *Id.* (Question 5).

Dr. Kreutz noted that in subsequent years, emissions displacement ~~to~~ declines, imposing additional burdens on the grid that increase system costs. “[B]ecause the climate benefit is highest in year 1, the analysis significantly overstates Alle-Catt’s ability to reduce NYCA’s [New York Control Area’s] CO2 emissions.” R.295-1, 7. Additional information supplied in NYISO reports and submissions to PSC and by Dr. Kreutz shows that New York’s grid operates under substantial constraints compared to PJM, further reducing Alle-Catt’s climate benefits. These constraints erode Alle-Catt’s anticipated climate benefits further.

A critical but realistic assessment of Leidos' estimate supports the conclusion that Alle-Catt can make only a very modest contribution to the state's energy goals. However, even if that result could be reasonably deemed beneficial under PSL § 168(3)(a), when the significant local and regional adverse environmental impacts are considered, the project's very modest contribution to the state's energy goals do not support the Siting Board's conclusion that the project "will serve the public interest" under PSL § 168(3)(b).

1. Alle-Catt's model of climate benefits is substantially overstated.

The Coalition's expert testified that intermittent generators of electricity ordinarily have a declining ability to displace carbon in a grid system in transition to decarbonization, because there is less and less carbon to displace over time. However, the Coalition also emphasized the importance of recent analyses from NYISO, that New York's grid system is "bottled", with the upstate segment virtually disconnected from the downstate segment. Referring to the state's goal to achieve 50% reduction in emissions from the power sector by 2030, NYISO commented to the PSC in 2016:

In order to achieve 50% by 30, the bulk power transmission system must have the capability to deliver all renewable resources' energy production simultaneously. . . . If the

system is undersized at any point between the renewable generator locations and the load centers, renewable generation may likely be curtailed, jeopardizing achievement of 50% by 30 based on the projected build-out in the DPS [Final] SEIS [Supplemental Environmental Impact Statement in support of the goal].

R.374-1, 37. Thus, under bottled grid conditions, the challenge of decarbonizing the grid by adding a large-scale intermittent power project is exacerbated. The ability of Alle-Catt to provide climate benefits is constrained by “the physical capability of the system”. *Id.* These constraints all have non-beneficial effects on the ability to reduce emissions. However, there is no information in the record that helps assess whether those constraints will be resolved, in what time frame, and at a feasible cost, or what effect these constraints are likely to have on Alle-Catt.

One such constraint is that Alle-Catt will need to improve on the performance of an electric grid upstate that is already substantially decarbonized. Because Alle-Catt cannot provide power for downstate demand, it must inject its power into the upstate grid, where electricity is already 88% emissions-free today (down from 90% in 2019). NYISO, *Power Trends 2020*, 29; *Power Trends 2019*, 27. 41% of upstate power is provided by hydropower and 41% is provided by

nuclear power; six percent is provided by wind power. *Id.* NYISO reports that in 2019, wind power in New York operated at 5% of capacity 64 times. *Power Trends 2020*, 16. In that year, in order to manage the upstate grid, it ordered wind power to reduce operations (curtail) by 70 GWh (70,000 MWh), or 1.4% of wind power in New York. NYISO, *Power Trends 2019*, 28. This is comparable to Alle-Catt’s modeled total delivered production for one month. R.99-6, Table 8 (confidential). “Analysis performed by the NYISO in 2018 indicates that further wind development upstate could lead to increased levels of wind curtailment without additional transmission upgrades, including targeted enhancements to certain local transmission networks.” *Id.*, 45. The rate of curtailment has generally increased every year since 2010 as more and more wind power has been injected into the grid. *Power Trends 2020*, 16, Fig. 7.

Another system constraint that Leidos’ model neglects also grows over time. Adding Alle-Catt increases the amount of generation capacity that must be kept in reserve in order to ensure system reliability—the avoidance of blackouts and brownouts. Currently, NYISO maintains an installed reserve capacity (“IRM”) of 17.5-26% of total system generation capacity. Adding large scale wind and solar power will require the IRM to be increased to 40-45%. “The increased capacity requirement will be largely met by the additional capacity contribution of the

proposed renewable resources.” R.374-1, 31 (Coalition Br., discussing and quoting NYISO 2016 comments to PSC). Thus, renewable capacity must be overbuilt to maintain reliable power. Overbuilding renewables to ensure idle capacity is in reserve will diminish the expected environmental benefit of all new renewable additions to the system. R.295-1, 11-14. In response to an information request, Leidos acknowledged that its model does not indicate “that additional capacity would be required” over time. R.223-21 (Question 9).

Leidos also overestimated Alle-Catt’s production by assuming it would operate at an above-average rate. Alle-Catt’s 340 MW capacity is established by design, but it cannot generate at that capacity unless the weather cooperates, and the system operator allows it to. Accordingly, Leidos assumes a “capacity factor”, a percentage of Alle-Catt’s design capacity that reflects anticipated actual performance. R.99-6, Appx. at 4 (confidential). According to NYISO, large scale wind energy projects actually generate, on an annual basis, 26% of their design capacity. NYISO, Power Trends 2019, 28. That is, Alle-Catt can be anticipated to operate with a 26% capacity factor. The capacity factor of New York’s hydropower is 78%; for nuclear power it is 91%. *Id.* Leidos assumes a substantially higher capacity factor, but provided no independent support for this modeling assumption.

Another way Leidos overestimated Alle-Catt's climate benefits is by assuming only two other new large-scale wind energy projects will be in service during its operation. R.96-6, Table 1 (confidential) (same as R.86-36, Table 1 (redacted)). Because over 5,000 MW (5 GW) of renewable capacity is currently on the NYISO interconnection queue, waiting for approval to connect to the grid, including over 2 GW of wind power capacity, over time Alle-Catt would operate in the context of a grid with much more capacity in service than assumed in Alle-Catt's model. R-295-1, 8. Since "high penetration levels of intermittent renewable generation severely challenge traditional power grids and markets by, for example, creating reduced grid stability, increased reserve margins, and depressed energy market prices," (R.295-1, 10-11 (citations omitted)), the Leidos model is not an accurate reflection of system conditions, and provides an inaccurate and exaggerated estimate of the project's ability to displace carbon in the system.

Dr. Kreutz testified without challenge that NYISO will be less able "to ensure the Project's real environmental attributes" (compared to its theoretical attributes under more optimum conditions) "when other low-carbon ~~and~~ generators are curtailed in order to accommodate operation of increased renewable generation." R.223-6, 3-4. Leidos acknowledged that Alle-Catt could face higher curtailment risk over its operational lifetime due to "changing system conditions or

NYISO market rules.” R.223-23 (information request, Question 1). However, curtailment risk over time is necessarily ignored in its model because system impacts were limited to the first year of operations.

Leidos’ model is limited to “hourly average power output”, neglecting the real-time burden it contributes to managing the grid and the emissions consequences of that burden. R.223-6, 4. Sub-hourly variation in generation rates is “a key distinguishing characteristic of wind generation”, determining “how it interacts with and affects the grid, and the problems it poses for managing the electrical system.” *Id.* Leidos’ model does not simulate how Alle-Catt’s output would be managed in real time, as it is limited to “the hourly day ahead (‘DA’) market”. *Id.*, 5. “In the Day-Ahead Market, wholesale electricity and ancillary services are auctioned and scheduled one day prior to use. . . . Real-Time Markets address changes in operating conditions relative to what was anticipated in the day-ahead market.” NYISO, *Power Trends 2019*, 67. “The NYISO signals suppliers in the regulation services market to adjust their output every six seconds in response to real-time changes in system conditions.” *Id.*, 51. Fast-start, generally fossil-fueled power plants compete in the DA market; weather-dependent sources cannot. “To balance lower capacity factor, intermittent resources, and shorter-duration resources like energy storage, bulk power system operators will require a full

portfolio of resources that can be dispatched in response to any change in real-time operating conditions to maintain bulk power system reliability. The ability to dispatch resources to reliably meet ever-changing grid conditions and serve New York's electric consumers will always be paramount." *Id.*, 29.

Leidos' approach, by neglecting sub-hourly variations in output, fails to consider the added emissions that result when "NYISO is forced to handle in a real time [such variations] by dispatching or ramping up/down other generators."

R.223-6, 5.

DA forecasts are, by definition, erroneous. When wind generation is small compared to load, predictive uncertainty is generally negligible. But, when wind power becomes a significant contributor to NYISO's entire generation fleet, such uncertainty is a serious problem. By ignoring the problem - assuming that the future is completely known -

Leidos makes a key error in their analysis.

Id., 5. DPS staff agreed, noting that that Alle-Catt's modeling of the day-ahead market does not provide information about how the project's "real time load and generation changes" will be managed. R.223-24 (information request, Question 6).

This deficiency in Alle-Catt's modeling method magnifies the "effects on system

efficiency that will result from operations in later years, when several intermittent generators now on the NYISO interconnection queue ahead of Alle-Catt are operating.” *Id.*

2. The Siting Board’s response

During the discovery phase of this administrative proceeding, the Coalition directed three information requests to Alle-Catt and one to DPS staff regarding the project’s impacts on the energy system over the anticipated operational life of the project. R.223–21, -22, -23, and -24. Alle-Catt conceded that New York’s electric system may “change significantly on a year-to-year basis” during its operational life. R.223–21 (Question 1). However, Alle-Catt asserts that the inputs to its model for later years would be speculative and, at any rate, it is not feasible to do so because of costs. *See* R.223–6, 6-11 (summarizing information requests by the Coalition and responses). The Coalition’s expert refuted Alle-Catt’s assertion of speculation, noting that the effect of injecting new intermittent renewable power into a traditional grid system is the subject of “active research” by energy systems analysts all over the world. R.295-1, 11. DPS staff refuted Alle-Catt’s assertion of infeasibility, stating that based on its experience modeling carbon displacement, modeling for later years is not infeasible. R.223–24 (information request, Question 3). Alle-Catt provided no independent support for its two refuted assertions. A

motion to compel production of the requested modeling and for sanctions was submitted indicating, among other things, that in subsequent negotiation, (*cf.* R.202-1), Alle-Catt represented the modeling would cost \$15,000, compared to the project cost of \$500-600 million. R.200-1, 9.n.3. The motion was denied. R.227-1.

The Siting Board concluded that information about Alle-Catt's performance in later years is irrelevant and speculative. R.399-1, 84 ("such an analysis, which would certainly be very time-consuming and expensive, would [not] produce anything other than speculative results").

The Siting Board's response to the Coalition's concerns relies in part on the State's 2015 Energy Plan, which was in effect during the pendency of this Article 10 proceeding. R.399-1, 82. The Board finds that the Plan "emphasize[s] the importance of renewable generation." R.399-1, 82. However, even a cursory review of the 2015 Energy Plan shows that the Plan emphasizes a wide range of measures to achieve the State's *emissions reduction goals* and does not single out large-scale renewable energy projects for emphasis. "Central power plants and the transmission network are, and will remain, the backbone of our electric system", according to the Plan. R.218-1, Ex. SPP-1, 38. In its chapter titled "This Plan Includes Many Distinct Initiatives", "Renewable Energy" is one among several initiatives. In its discussion of renewable energy, the Plan emphasizes 37

“renewable energy solutions”, (*id.*, 67-103), one of which is a “Large-Scale Renewables Strategy”. *Id.*, 69-71. In its discussion of large-scale renewables (“LSRs”), the Plan emphasizes “[p]airing LSRs with dynamic DERs [smaller distributed energy sources] such as demand response and energy storage in order to “maximize the benefits of both kinds of resources.” *Id.*, 69. Nothing in the record indicates Alle-Catt would be paired with DERs. Large-scale solar projects, which have a much smaller footprint than projects like Alle-Catt, are also emphasized. *Id.*, 71.

The Siting Board’s response relies in part on the Recommended Decision (“RD”) of the Hearing Examiners. R.399-1, 84. However, the RD dismisses the Coalition’s offers of proof as an attack on the state’s energy policy, and accordingly they are not considered in the RD. The Coalition approves of and relies on the emission reduction goals of the state. The Coalition’s position does not challenge the state’s policy. R.374-1, 29, 32 (“the issue the Coalition proposes relies on the emission reduction goals of the state”). The Coalition emphasizes the failure of the Examiners and the Board to acknowledge that physical constraints imposed by deficiencies in New York’s grid seriously limit Alle-Catt’s ability to advance the state’s goals. Because these constraints were not meaningfully considered in the

RD, only speculation supports the Examiners’s belief that these constraints “can and will be resolved”. R.358-1, 19.

Both the Siting Board and Alle-Catt agreed that “CCC’s description of transmission constraints is accurate”. R.399-1, 82. DPS staff also agreed. R.223-24 (information request, Question 5) (“transmission system constraints . . . would likely exist [beyond 2023] due to the evolution of the generation and transmission system in those future years”). However, the Board mischaracterizes the Coalition’s argument as “call[ing] for a much more detailed analysis of transmission constraints”. *Id.* The Coalition provided that analysis through expert testimony and through NYISO’s analyses of transmission constraints.

The Coalition’s argument was and is different. The Coalition argued that, to determine Alle-Catt’s potential to reduce emissions, the project’s “average climate benefits over Alle-Catt’s entire lifetime” must be considered, taking into account “the annual average carbon intensity of the entire grid”, a non-speculative and feasible exercise. R.295-1, 5-8. *See* R.374-1, 38 (issue is “the efficiency with which the project can contribute to the states emissions reduction goals”), 39 (“the amount of emissions ACWE’s project could reduce over its lifetime is surely at the heart of the Board’s public interest inquiry”); R.408-3, 4 (“Siting Board should consider and weigh the degree of climate benefits the project would provide”).

Without that, the Siting Board lacks sufficient information in the record to rationally make its required finding under PSL § 168(3)(a).

Finally, the Siting Board relies on new state legislation enacted after the record closed that “includes measures to expedite transmission upgrades”. R.399-1, 84. However, by its terms the transmission planning provisions in the legislation will take substantial time, will involve several agencies, owners and developers of competitive transmission projects, and “other pertinent studies or research relating to modernization of the state’s power grid”. R.408-3, 8 (Coalition Pet. for Rehearing, quoting the legislation). *Cf. id.*, 6-10 (discussing the legislation’s transmission planning provisions). The legislation, by itself, does not support the Siting Board’s optimism that the constraints the Coalition identified in state’s energy system “can and will be resolved” in time to make Alle-Catt’s capacity a truly beneficial contribution to the state’s climate mitigation goals, (R.358-1, 19) and to avoid the reasonable prospect that “its impact on the grid in 2040 will be to largely displace other zero carbon generators.” R.223-22, 1.

3. Conclusion

PSL Article 10 requires the Siting Board to consider “[a]n analysis of the potential impact that the proposed facility will have on the wholesale generation markets, both generally and for the location-based market in which the facility is

proposed”, (PSL § 164(1)(k)), the “economics of reasonable alternatives”, (PSL § 168(4)(b)), and any “additional social [or] economic . . . considerations deemed pertinent by the board”. PSL § 168(4)(g). No limitation on the time scale for the required simulations of a project’s energy system impacts is found in the regulation. *See* 16 NYCRR § 1001.8. The requirement to discuss “the benefits and detriments of the facility on ancillary services and the electric transmission system, including impacts associated with reinforcements and new construction necessary as a result of the facility” also has no such limitation. 16 NYCRR § 1001.5(c).

The applicant declined to analyze any of these potential effects of the project after 2023, depriving the Siting Board of the required information. The Coalition demonstrated that these effects are predictable and serious—so serious that the project’s ability to meaningfully reduce emissions is in doubt.

CONCLUSION

For the reasons set forth above, this Court should grant the declaratory and injunctive relief requested in the Petition.

DATED: January 29, 2021
Humphrey, New York



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Dated: January 29, 2021

EXHIBIT A

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CATTARAUGUS

ALLE-CATT WIND ENERGY LLC and NATHAN
WHITEHEAD,

Petitioners-Plaintiffs,

For Judgment Pursuant to Article 78 of the CPLR and for a
Declaratory Judgment Pursuant to CPLR § 3001

Index No.: 89035
Hon. Terrence M. Parker

-against-

TOWN BOARD OF THE TOWN OF FREEDOM, NEW
YORK, TOWN OF FREEDOM, NEW YORK, and GEOFFREY
MILKS,

Respondents-Defendants.

ORDER AND JUDGMENT

WHEREAS, Petitioners-Plaintiffs Alle-Catt Wind Energy LLC and Nathan Whitehead (“Petitioners”) commenced this combined Article 78 proceeding and declaratory judgment action by filing a Verified Petition and Complaint on January 31, 2020 (the “Verified Petition”); and

WHEREAS, Respondents-Defendants the Town of Freedom, the Town Board of the Town of Freedom (collectively, the “Town”), and Geoffrey Milks (collectively, “Respondents”) filed and served an Answer to the Verified Petition on February 24, 2020 and subsequently served their Amended Answer to the Verified Petition and opposition papers on February 28, 2020; and

WHEREAS, Petitioners filed and served their Reply papers on March 3, 2020;
and

WHEREAS, upon reading and considering: (1) the Notice of Petition, dated January 31, 2010, the Verified Petition with exhibits, dated January 31, 2020, and Petitioners' supporting Memorandum of Law, dated January 31, 2020; (2) the Town's Verified Answer, dated February 21, 2020, the Town's Amended Verified Answer, dated February 28, 2020, and the combined Memorandum of Law and Affirmation of Eric M. Firkel, Esq., with exhibits, in Opposition to the Verified Petition, dated February 28, 2020; and (3) Petitioners' Reply Memorandum of Law in Further Support of the Verified Petition, dated March 3, 2020, and

WHEREAS, the Court hearing argument on March 5, 2020 and appearances having been made by HODGSON RUSS LLP (Charles W. Malcomb, Esq. and Aaron M. Saykin, Esq.) on behalf of Petitioners, and SHANE & FIRKEL, PC, as Town Attorney for the Town of Freedom (Eric M. Firkel, Esq.) on behalf of Respondents, and during argument, the Court issued a decision from the bench, a transcript of which is attached hereto as **Exhibit A**;

NOW, upon all of the pleadings, affidavits, papers, and proceedings had herein, and deliberation having been had thereon, it is hereby:

ADJUDGED AND DECLARED that the validity or invalidity of Town of Freedom Local Law Number 1 of 2019 was not part of the Court's October 21, 2019 Decision and Judgment (the "Decision") in *Freedom United and Stephanie Milks v. The Town of Freedom Town Board and Randy Lester*, Index No.: 87572 ("*Freedom United*"), which was not

challenged by Petitioners in *Freedom United* and, therefore, was not before the Court in that case; and it is further

ADJUDGED AND DECLARED that, the Decision determined that the Town of Freedom's Local Law No. 1 of 2018 was void; and the provisions of the 2018 law which invalidated or repealed Town of Freedom's Local Law No. 3 of 2007 are therefore void and Town of Freedom's Local Law No. 3 of 2007 remains in effect; and it is further

ORDERED, ADJUDGED, AND DECREED, that Petitioners' second cause of action is hereby granted, and the Court annuls the Town of Freedom Town Board's January 6, 2020 Resolution regarding Local Law No. 1 of 2019 for all purposes regarding whether that law is valid or invalid; and it is further

ORDERED, ADJUDGED, AND DECREED, that Petitioners' third cause of action regarding Geoffrey Milks is hereby denied and dismissed as moot and without prejudice; and it is further

ORDERED, ADJUDGED, AND DECREED, that this shall constitute the final Order and Judgment of the Court.

SO ORDERED:



Hon. Terrence M. Parke A.S.C.J.

GRANTED:

GRANTED
April 30, 2020
Thomas Ryz
COURT CLERK

EXHIBIT B

LAW OFFICE OF GARY A. ABRAHAM

4939 Conlan Rd.
Great Valley, New York 14741
716-790-6141

gabraham44@eznet.net
www.garyabraham.com

June 17, 2019

VIA EMAIL TO: Dakin.Lecakes@dps.ny.gov, Michael.Caruso@dec.ny.gov

Hon. Dakin Lecakes
Administrative Law Judge
Department of Public Service
Three Empire State Plaza, Third Floor
Albany, NY 12223

Hon. Michael Caruso
Administrative Law Judge
NYS Dept. of Environmental Conservation
625 Broadway, First Floor
Albany, NY 12233-1550

Re: Case 17-F-0282 - Application of Alle-Catt Wind Energy;
PUBLIC STATEMENT HEARINGS

Dear Judges Lecakes and Caruso:

Please accept three documents accompanying this transmission for purposes of the public statement hearing in this matter last week:

- (1) My own statement, a truncated version of which was read at the evening session;
- (2) A statement by Steven M. Nolt, Senior Scholar at the Young Center for Anabaptist and Pietist Studies, at Elizabethtown College (Elizabethtown, PA), in support of comments regarding the Schwartenstruber Amish of Farmersville; and
- (3) A statement by Madelynn Fatelewitz of Centerville, provided to me last August. Ms. Fatelewitz specifically requested that I offer her statement at the public statement hearing, as she could not attend.

I have taken the opportunity to revise my statement by adding supporting information in the footnotes.

Respectfully submitted,

Gary A. Abraham
Attorney for the Coalition of Concerned Citizens



1. My name is Steven Nolt and I am Professor of History and Anabaptist Studies at Elizabethtown College and Senior Scholar at the Young Center for Anabaptist and Pietist Studies. I visited Amish households of Farmersville, New York, during February 4-6, 2019. Based on those conversations, my observations in the area, and my extensive knowledge of Amish society, I submit the following:
2. The Old Order Amish community centered in northeast Cattaraugus County, New York is part of the Swartzentruber Amish affiliation, the most tradition-minded Amish group in North America; within that affiliation, this community is part of the so-called "Andy Weaver" Swartzentrubers, which is the most conservative Swartzentruber subgroup.
3. Group members are committed to traditional methods of farming, occasionally supplemented by small, farm-based enterprises, such as woodworking, in the winter months. Their farms not only provide the sole means of feeding the members of their community, but also provide food to local stores and restaurants. Their lifestyle and their livelihood depends upon having between 40 and 60 acres of productive farmland per family, *and* upon the availability of land for the next generation. Swartzentruber families are large, with an average of 9.3 children per completed family. Thus, although traditional farming methods mean that a household might immediately need only 40 to 60 acres, families acquire and hold larger amounts for the rising generation and

always locate new settlements in places where land is available. Conversely, Swartzentrubers leave places where land is unavailable or has become undesirable. For example, most households in the Farmersville settlement moved here from suburbanizing Wayne County, Ohio.

4. Old Order Amish may be the most significant private landholders in Farmersville. Their settlement consists of approximately 22 families owning hundreds of acres of productive farmland.

5. The Old Order Amish conduct themselves as a self-governing community that is part of a network of Swartzentruber Amish settlements. The local community is constrained in its ability to change by its commitment to maintain the *Ordnng* (church order/way of life) shared with other Swartzentrubers. Should the Farmersville group modify their lifestyle, they would effectively cut themselves off from the wider Swartzentruber diaspora and render their children unable to find marriage partners in this endogamous society.

6. The Swartzentruber Amish hold church services in the homes of church members. They do not have church buildings as such; rather, each member's home functions as a church meetinghouse since Sunday morning worship rotates from one home to another in a systematic way throughout the settlement and throughout the year. Families take turns hosting worship (in the house or, in the hotter months of summer, perhaps in the barn) by totally rearranging or removing furnishings and setting up benches to create a worship space. Unlike Christian congregations that own a meetinghouse, parsonage, or other church property, the only church property of the Swartzentrubers are the benches ('pews') and hymnals, which are transported from one home to

another. Sunday morning worship, weddings, and funerals all take place in member's homes. In this way, Swartzentruber religion is not only a pervasive way of life, but also a pattern of distinct rituals that involve all members' homes. These rituals resist modification and are essential to the practice of their sincerely held beliefs, having been carried on in this way for centuries.

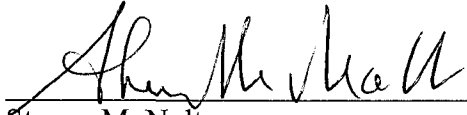
7. The effects of the Invenergy project disrupt the ability of the Swartzentruber community to practice their religion.

a) The location, noise, and sight of the turbines in proximity to their homes and barns, which necessarily serve as their places of worship, disrupt their religious ritual and practice.

b) The Alle-Catt project proposal would have serious potential safety impacts on Swartzentruber horse and buggies. Horse and buggies are the Swartzentubers' sole means of travel over the roads. The location of the turbine project will increase traffic, increasing the safety risks to their horses and buggies. Their religious beliefs prohibit Swartzentruber church members from installing a windshield or a safety marker triangle on their buggies. Buggies also have no other lighting than basic kerosene lanterns, reflecting Swartzentruber rejection of worldly symbols and emphasis on devotion to God. Additionally, the Swartzentruber Amish make extensive use of local roads to get between Amish settlements to assist each other in harvest times, medical emergencies, and for any other reason, as the community exists for each other and to assist each other. Increased traffic, large concrete and transport trucks, as well as a significant increase in the number of drivers unfamiliar with the roads puts the Swartzentruber Amish at greater risk for deadly vehicular accidents, especially for the children who walk or drive buggies to and from school.

c) The Farmersville Swartzentruber church decided, as a group, not to execute wind leases, good neighbor agreements or setback waivers offered by Invenergy, believing that a utility-wind project will adversely affect their ability to continue to live in harmony with the land and with God. As such, the project would effectively bring the future of their community here to an end, since it would dramatically limit their future ability to acquire additional land for the next generation. The project as proposed would remove their ability to obtain further land, buy more land in the area and expand their community since alternative local sites for the Swartzentrubers' community are not readily available owing to the difficulty in finding fertile farmland.

8. Life in proximity to an industrial project such as the Alle-Catt wind farm violates the Swartzentrubers' religiously-dictated adherence to an agrarian lifestyle and their ability to peacefully gather for worship.



Steven M. Nolt

June 11, 2019

EXHIBIT C

**NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT**

----- X
In the Matter of: :
: :
Application of Alle-Catt Wind Energy LLC for a Certificate of : Case 17-F-0282
Environmental Compatibility and Public Need Pursuant to Article :
10 for a Proposed Wind Energy Project, Located in Allegany, :
Cattaraugus, and Wyoming Counties, New York, in the Towns of :
Arcade, Centerville, Farmersville, Freedom, and Rushford. :
: :
: :
: :
----- X

**ALLE-CATT WIND ENERGY LLC
INTERROGATORY/DOCUMENT REQUEST ACWE-SCHRODER-01**

Date of Request: August 29, 2019

Request No.: ACWE-Abraham-01

Requested of: Gary Abraham, Esq.

Subject: Representing Company

1. Provide a list of the businesses, organizations and individuals you have been retained to represent in connection with Siting Board Case 17-F-0282 – Alle-Catt Wind Energy LLC.

I have been retained by the following unincorporated associations:

Centerville’s Concerned Citizens
Freedom United
Farmersville United
Rushford United

In addition, I have been retained by the following New York Not-for-Profit corporation:

Concerned Citizens of Cattaraugus County, Inc.

In addition, I have been retained by Ginger Schröder, Esq. to represent her client, a church organization:

Old Order Amish of Farmersville (aka Swartzentruber Amish)

For purposes of this proceeding all these businesses, organizations and individuals are joined as the Coalition of Concerned Citizens as a single intervenor party.

2. Provide a list of the businesses, organizations and individuals you are providing pro bono representation to in connection with Siting Board Case 17-F-0282 – Alle-Catt Wind Energy LLC.

I am providing no business, organization or individual with pro bono representation in this case.

Name of Person(s) Preparing Response: Gary A. Abraham, Esq.

Date: September 10, 2019

**NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT**

----- X
:
In the Matter of: :
:
Application of Alle-Catt Wind Energy LLC for a : Case 17-F-0282
Certificate of Environmental Compatibility and Public :
Need Pursuant to Article 10 for a Proposed Wind :
Energy Project, Located in Allegany, Cattaraugus, and :
Wyoming Counties, New York, in the Towns of :
Arcade, Centerville, Farmersville, Freedom, and :
Rushford. :
----- X

**ALLE-CATT WIND LLC RESPONSE TO CCC-10
INTERROGATORY/DOCUMENT REQUEST**

CCC-10: Environmental Justice (Coalition of Concerned Citizens – Gary Abraham, Esq.)

1. ACWE is required to develop information sufficient for the Siting Board to make findings regarding the nature of project impacts on “cultural . . . resources”, (PSL § 168(2)(c)), and must determine further whether “the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located”. PSL § 168(3)(d). The Siting Board must also consider “the impact on community character” that would result from the Project, and “such additional social, economic, visual or other aesthetic, environmental and other considerations deemed pertinent by the board.” PSL §§ 168(4)(f), (g). In IR Coalition-9, we noted that in addition to direct impacts on the Old Order Farmersville Amish (Swartzentruber Amish), this Amish community is a cultural resource for the non-Amish community. As indicated in IR Coalition-9, questions 1 through 4 the Application fails to identify all Old Order Farmersville Amish homesteads and the out-buildings within which they practice their religion, and fails to show the proximity of these locations to any Project components.

Thus, the Farmersville Amish may suffer disproportionate impacts, most importantly to their religiously-dictated way of life, and the non-Amish community may suffer adverse impacts on community character owing to the loss of Swartzentruber Amish who could migrate out of the area should project components intrude on their way of life. Accordingly, your response to IR Coalition-9, that “pursuant to 16 NYCRR 5.8(c) ACWE is not required to develop information for another party”, is insufficient to avoid the Applicant’s burden to provide sufficient information for the Siting Board to make its required findings.

As indicated in IR Coalition-9, question 5, the Application fails to identify the schools within which the Old Order Farmersville Amish educate their children. We identified for your information the Amish school on Rogers Road and the Older Hill school used by the Amish. In your response you state you “examined the routes used by the Amish school children to travel to

their schools” and, “[f]or the specific roads identified in the Item 5 see the discussion on pp.25-3 and 25-4.” However, the Application does not indicate that the routes to these two schools were considered. Moreover, Application Exhibit 25(rev1), at pp. 25-3 and 25-4, fails to identify the Rogers Road school and the Older Hill school. Although you indicate that “[d]river instructions identified in Section 25.d.1 will be expanded to include awareness of school locations and hours”, we did not see any action to avoid or minimize collision risk as a result of such awareness. The driver instructions are limited to the second of the following two sentences, found at the conclusion of Section 25.d.1:

During construction, the increased truck traffic from dump trucks, equipment delivery trucks, concrete trucks, and WTG delivery vehicles will present an additional collision risk on Project Area roads. To minimize the risk of accidents ACWE will require contractors to drive at safe speeds and install warning signs for oncoming traffic in areas where construction or local traffic is particularly high (e.g., the entrance to the construction laydown yard).

Since you acknowledge “addition collision risk” would result during construction, and you acknowledge the need to expand the scope of minimization of that risk, would you avoid the roads we identified in IR Coalition-9 during school hours?

RESPONSE:

As stated in Section 25.d.1, ACWE acknowledges that any additional traffic can present an additional collision risk (Project related or not). ACWE will ensure road safety through managed speeds and routing contractors to minimize risks to all road users and providing additional route information and awareness to drivers about potential routes used by the local Amish community.

2. In IR Coalition-9, we identified eight parcels owned by Swartzentruber Amish missing from the map you provided in response to our request, IR Coalition-1, question 1, and we requested a revised map that includes these eight parcels. See IR Coalition-9, question 2. In your response you state: “The requested map is not in ACWE’s possession”. However, the map you provided in response to IR Coalition-1, question 1, was not presumably in your possession prior to our request. Accordingly, we reiterate our request for a revised map that includes these eight parcels.

RESPONSE:

ACWE is not required to develop information for another party.

Name of Person(s) Preparing Response: Eric Miller

Dated: September 5, 2019

**NEW YORK STATE BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT**

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 In the Matter of: :
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 :
 Application of Alle-Catt Wind Energy LLC for a : Case 17-F-0282
 Certificate of Environmental Compatibility and Public :
 Need Pursuant to Article 10 for a Proposed Wind Energy :
 Project, Located in Allegany, Cattaraugus, and :
 Wyoming Counties, New York, in the Towns of Arcade, :
 Centerville, Farmersville, Freedom, and Rushford. :
 :
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 ----- X

**ALLE-CATT WIND LLC RESPONSE TO CCC-9
INTERROGATORY/DOCUMENT REQUEST**

CCC-9: Environmental Justice (Coalition of Concerned Citizens – Gary Abraham)

1. *In response to IR Coalition-1, ACWE has provided a “map depicting properties identified as Amish-owned by owner surnames, style of dress and mode of transportation using the designations ‘Centerville Amish’ and ‘Schwartzentruber Amish’ to distinguish between the properties in Centerville and Farmersville.” However, while the map identifies by color-coding parcels owned by members of these two communities, respectively, the specific owners of the parcels are not identified. Nor are any facility components depicted. Please provide a revised map identifying parcel owners who are Schwartzentruber Amish and facility components similar to the manner in which parcel and component information is provided in Application, Figure 4-4. Please also include on the revised map the additional information requested below, in major items 2 through 4. Please ensure the map provided is at 1:24,000 resolution in PDF, suitable to enlarge 400% without loss of resolution.*

2. *The Swartzentruber Amish Church District is centered in Farmersville but includes the adjacent towns of Freedom, Machias, and Delevan where some member families live. At least eight parcels owned by the Swartzentruber Amish are not identified on the map provided in response to IR Coalition-1. Parcels omitted include the following:*

1. *John A. Slabaugh, 1448 Rogers Road, Parcel 32 001-1-1.29;*
2. *Emmanuel Miller Family, Route 98 and Route 243, Farmersville;*
3. *Peter Gingerich Family, Route 98 and Route 243, Farmersville;*
4. *Andy E. Schrock 4475 Roszyk Hill Road Machias, parcel 21.003-2-1-3.1, Machias;*
5. *Jonas A. Weaver, 656 Hardy Corners, Farmersville;*
6. *Dan Herschberger, Hardy Corners Road, Farmersville (adjacent to Jonas A. Weaver);*
7. *Mahlon Swartzentruber Family, Weaver Road, Delevan;*
8. *Sam Miller Family, Weaver Road, Delevan*

Please provide the information requested above on the revised map.

3. *Swartzentruber Amish spend a large part of their time out of their houses and in their greenhouses, barns, stables, saw mills, wood work shops, roadside shops & milk dumping stations. Both their homes and their barns are used for religious services. See Nolt public statement (June 11, 2019), ¶¶6, 7(a), 8. The previously provided map does not depict the location of both homes and out-buildings. Please show the location of both homes and outbuildings for Swartzentruber Amish parcels on the revised map.*

4. *Travel within the community, owing to its extent and manner, expose Swartzentruber Amish in the Project Area to disproportionate risk of traffic accidents with Project equipment. See Nolt public statement (June 11, 2019), ¶7(b). Accordingly, in order to fully evaluate potential Project impacts, please modify the previously provided map by identifying Swartzentruber Amish barns and out-buildings, proposed buried collection lines, laydown yard, concrete batch plant, O&M Building, transmission line, wind turbine sites, and construction routes.*

1-4 RESPONSE:

ACWE objects to IR CCC-9, items 1-4. The requested map is not in ACWE's possession and pursuant to 16 NYCRR 5.8(c) ACWE is not required to develop information for another party.

5. *The application states that Amish children walk to school. Many do, but children from Reynolds Road or Route 98 drive to the school on Rogers Road by horse and buggy; Tarbell Road children travel by buggy to the Older Hill School; and children from Elton Road travel by buggy to the Older Hill Road School. Please provide an evaluation of transportation accident risk to these children during the construction phase of the Project as proposed, and any measures the Applicant will consider to avoid and minimize such risk.*

RESPONSE:

Please refer to the discussion in Section 25.b.2 of Exhibit 25, under the heading "Amish Schools and Traffic." ACWE has not conducted an evaluation of accident risk but has examined the routes used by the Amish school children to travel to their schools and has identified the routes that would be likely to be used during construction. Driver instructions identified in Section 25.d.1 will be expanded to include awareness of school locations and hours. For the specific roads identified in the Item 5 see the discussion on pp.25-3 and 25-4.

Name of Person(s) Preparing Response: Eric Miller

Dated: July 23, 2019

**NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT**

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In the Matter of: :
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Application of Alle-Catt Wind Energy LLC for a : Case 17-F-0282
Certificate of Environmental Compatibility and Public :
Need Pursuant to Article 10 for a Proposed Wind :
Energy Project, Located in Allegany, Cattaraugus, and :
Wyoming Counties, New York, in the Towns of :
Arcade, Centerville, Farmersville, Freedom, and :
Rushford. :
:
----- X

**ALLE-CATT WIND ENERGY LLC
INTERROGATORY/DOCUMENT REQUEST ACWE-CCC-01**

Date of Request: October 25, 2019

Request No.: ACWE-CCC-02

Requested of: Steven M. Nolt, Ph.D

Subject: Nolt Testimony

1. On page 3 of his direct testimony, Mr. Nolt states that he visited the community in February 2019, and spoke with Amish landowners.

a. Please provide the names and contact information for all of the Amish families that Mr. Nolt has contacted and spoke with in the Project Area.

RESPONSE:

- Mose S. Miller, 9412 Older Hill Rd, Franklinville, NY 14737*
- Andy Hershberger, 9482 Older Hill Rd., Franklinville, NY 14737*
- Enos and Sevilla Swartzentruber, 1644 Elton Rd., Franklinville, NY 14737*
- Jonas Weaver, 656 Hardy Corners Road, Franklinville, NY 14737*
- Sam Swartzentruber, 10232 Blue Street, Delevan, NY 14042*
- Enos and Katie Hershberger, 1529 Rogers Road, Franklinville, NY 14737*
- Andrew Shrock, corner of Rt. 242 and Roszyk Hill Road, Machias, NY 14101*

b. Please provide the dates and locations of Mr. Nolt's meetings with the members of the Amish families in the Project Area.

RESPONSE:

On Tuesday, February 5, 2019, I visited seven Farmersville Amish households, from early morning to dusk.

c. Please provide notes, letters, work papers, articles and any other documentation pertaining to all of Mr. Nolt's meetings and interactions with the Amish families in the Project Area.

RESPONSE:

Regarding notes, see field notes from November 5, 2019, attached.

Regarding letters, I have none from the Farmersville Schwartzentruber community except those already submitted.

Regarding work papers, I have no work papers relevant to my interaction with families in the Farmersville area.

Regarding articles, attached are relevant pages from my co-authored book The Amish (Baltimore: Johns Hopkins University Press, 2013).

Regarding other documentation, I have none beyond what I have already provided.

d. Please provide the means of communication Mr. Nolt had with Amish landowners:

i. How did Mr. Nolt approach Amish landowners in the area? Was it through mail, telephony or other means?

RESPONSE:

My contact was direct and in person.

ii. How did the Amish communicate with Mr. Nolt?

RESPONSE:

Verbally, and in person.

2. Provide the name and contact information for the "Swartzentruber Amish leader from Kentucky who visited the Young Center on November 7, 2012," as mentioned on page 3 of Mr. Nolt's direct testimony.

RESPONSE:

Jacob U. Gingerich, 176 Grant Lane, Mayfield, KY 42066.

3. Provide a copy of the Henry S. Miller letter dated October 17, 2018 mentioned on page 13 of Mr. Nolt's testimony.

RESPONSE:

A copy of the requested letter is attached.

4. Identify and list all Amish members of the Coalition for Concerned Citizens.

RESPONSE:

I do not possess that information.

5. Please provide the basis and research associated with the comment beginning on page 6 line 17: "Swartzentruber Amish are keen to live in undeveloped rural areas that hold the promise of retaining that character so that there will be possibilities for rising generations."

RESPONSE:

This fact is well-known to everyone who has spent any meaningful time studying and understanding the Swartzentruber Amish. The Young Center for Anabaptist and Pietist Studies at Elizabethtown College has tracked Amish migration since 1969. As of mid-2019 there were 54 Swartzentruber settlements in 14 states and 2 provinces (all subgroups, but not counting the Abe Miller group in Tennessee). The Swartzentrubers' settlement behavior demonstrates that they prefer sparsely populated areas. In New York, that has included the following towns or areas: Brier Hill, Somerville, Nicholville, and Heuvelton in St. Lawrence County; Farmersville in Cattaraugus County; LaFargeville in Jefferson County; Poland in Herkimer County; Port Henry in Essex County; and the Williamstown area in Oswego County. The constraints on the Swartzentruber lifestyle described in my direct testimony are similar for all these communities.

6. Please provide the names of the Farmersville Amish members associated with the comment beginning on page 11 line 20: "based on what I heard from the Farmersville Amish, ACWE never met with church-community leaders."

a. Please provide names and locations of the meetings with the Amish members.

RESPONSE:

See response to 1.a., above.

b. Please provide any notes or work papers prepared by Mr. Nolt, or under his supervision, as a result of his meetings with the Amish members.

RESPONSE:

See response to 1.a., above. Additionally, I wish to clarify the statement on page 11, line 20 of my direct testimony. In their letter of October 17, 2018, two Amish lay members report a meeting with ACWE representatives. My

understanding of that meeting is that it was not a meeting designed to engage the church-community leadership in a way that took into account the community social structure. Rather, ACWE employees met with Mssrs. Miller and Hershberger as they would any landowner in the area.

7. Please provide the name and contact information of the Farmersville Amish who “makes wooded window sashes for all Swartzentruber homes all over the county” as mentioned on page 15, starting line 20 of Mr. Nolt’s Testimony.

RESPONSE:

Andy Hershberger, 9482 Older Hill Rd Franklinville, NY 14737.

8. On page 15, line 15 of his Direct Testimony, Mr. Nolt refers to “studies that assume a house with closed windows or commercial available insulated (*sic*) windows do not represent a real Amish scenario” Please provide the copies of the studies Mr. Nolt is referring to in this comment.

RESPONSE:

The quotation referenced in the questions is found on page 15, lines 19-20 (not line 15). Studies referred to are ACWE’s sound study, found in the Application, Exhibit 19 as revised, and all supporting exhibits found in the Application; the Canisteo wind project’s noise study (Case 16-F-0205), based on my attendance at the evidentiary hearing, during DEC’s cross-examination.

9. On page 16, starting line 9, Mr. Nolt states “The location of the turbine project will increase traffic, increasing the safety risks to their horses and buggies.” Please provide the basis for and any calculations associated with this comment. If Mr. Nolt conducted any traffic studies, please provide copies and associated work papers.

RESPONSE:

Increased traffic due to project construction all around them was a concern voiced by Amish families when I visited them in February 2019 and it was one of the concerns they included in their May 7, 2018 letter. I understand that the Project as currently proposed requires 21,560 construction trips, and these would adversely affect the Swartzentruber Amish community.

10. On page 18, starting line 22, Mr. Nolt states that “Swartzentrubers leave places where land is unavailable or has become undesirable.”

a. Please provide the basis and rationale associated with this comment.

RESPONSE:

This fact is well-known to everyone who has spent any meaningful time studying and understanding the Swartzentruber Amish. Swartzentrubers move in search of accommodating locations and leave when local conditions become undesirable (see

RESPONSE to the next question). The Young Center has tracked Amish migration since 1969, and statistics reveal the formation and dissolution of Swartzentruber settlements. During the past twenty years, there has been significant out-migration from the Etheredge, Tennessee, and Heuvelton, New York Swartzentruber settlements as land in those areas has become more difficult to acquire. As I noted in my pre-filed testimony, in 2011 the Swartzentruber settlement near Ebensburg, Cambria County, Pennsylvania, disbanded for a number of reasons, including development pressures imposed by oil fracking moving into the area, and at least one household moved to Farmersville.

b. Please explain why Mr. Nolt believes that the land in the Project Area will become unavailable or undesirable for Amish communities?

RESPONSE:

Swartzentruber Amish place a premium on family-community connections and thus desire relatively compact settlement. They also have large families, so they look for areas that appear to have potential for settlement growth via land purchase. Typically, they move to rural areas with declining local populations. An area may become undesirable if local or state government takes action that would force them to compromise their religiously-infused way of life. An area may become undesirable if motorized traffic becomes too heavy. An area may become undesirable if land in the area becomes encumbered with easements, since the Swartzentruber Amish cannot buy such land as it places them in a legal relationship with a non-church party (pursuant to their reading of 2 Corinthians 6:14-18). Thus, an area in which much of the land is under easement would become unavailable to them, it would be difficult to acquire more land for future generations, and these difficulties would signal an impending end to the settlement. This is confirmed by their letter of May 7, 2018.

11. Do Amish communities consume any types of energy in emergency situations?

a. If they do, what forms of energy consumption is typical for Amish communities?

RESPONSE:

With regard to the Andy Weaver Swartzentruber Amish – the group in question – emergency situations are medical emergencies or medical situations when time is critical, including, for example, getting a woman who is pregnant and prematurely in labor to a midwife. (Normally, midwives come to the home, when summoned.) In such situations, a trusted non-Amish neighbor would provide motor vehicle transport, thus in a gasoline or diesel car or light truck. Ridership in private cars is restricted to such emergency situations. Otherwise, travel is by buggy or, for longer trips, public transportation in the form of a bus (e.g., Greyhound). Public transport would be used, for example, to attend weddings and funerals out of state.

b. Do Amish communities prefer passive types of energy, like solar or wind, versus fossil fuel combustion?

RESPONSE:

The building practices of the Andy Weaver Swartzentrubers are dictated by their Ordnung, as I've previously testified, which makes no provision for passive solar energy. Accordingly, they have no general preference for passive types of energy. Some farms may have small windmills connected to an old-fashioned water pump water; other employ hand pumps and gravity flow tanks.

12. Regarding Mr. Nolt's testimony on page 15, lines 7 through 20:

a. Please identify Mr. Nolt's professional qualifications to understand, interpret, analyze, and comment on acoustic studies of noise impacts of commercial wind turbines on residential buildings.

RESPONSE:

I have not offered testimony as an acoustician. My expert testimony is that this particular community is composed of distinctive and culturally invariable architectural features which must be taken into account if a noise study is to have any application to the community.

b. Please provide the basis and calculations associated with this comment.

RESPONSE:

Not applicable.

c. Please provide the turbine dimensions and types used in any calculations and studies that were conducted by Mr. Nolt.

RESPONSE:

Not applicable.

Name of Person(s) Preparing Response: Steven M. Nolt, Ph.D
Date: November 22, 2019

Feb. 5

- ① Mose Miller Older Hill Senior minister talked in barn
- Upset by windfarm
 - "I guess that's farther than we've been taught to go."
 - gave book

- Andy Hershberger wood shop Older Hill
- Windows for Settlements - they tell him how many new homes and he knows how many windows to make.
 - wooden trays for restaurant in Buffalo.
 - talked about a Chinese design he saw on a tray
 - Not happy about turbines. "pushy" "demands"

Enos + Sevilla (sp.?) Swartzentruber Elton Rd. house near the road

- Warm kitchen Talkative whole family there
- Enos teased Sevilla about not giving him the bread she baked.
- Have bee hives, sells honey. Has had some colonies die. Reads up on beekeeping. Has considered getting the Plain beekeepers' news letter but doesn't know.
- Quite concerned about easements and pressure to sign things. They stop by and "put pressure on" "We want to work with people, but must it be

like this?"

Jonas Weaver talked outside He was working by the road Has concerns but doesn't want to get "mixed up with the law." Also concern about a non-Hutch person who neglects his horse.

- Sam Swartzentruber Blue Street
 - Older couple. Knew Pauli, Indiana
 - Selling syrup, honey, canned goods.
 - Concerned about turbines "But what can we do?" traffz

Continued talking even though another customer came

- Andrew Schroder corner of 242 + Roszylz Rd. Far west
 - western edge of settlement, also young couple who are renting.
 - Want to move closer to the settlement "But will we be able to?"

Enos + Katie Hershberger back along lane off Rogers Rd. Moved here from Ohio. Didn't ride in a car or truck to move here. "We wouldn't do that." Things + animals came in a truck.

- Moved here for open space / less crowded. Turbines "would change that." Too much traffz
- Son (maybe 7 years old) really sick. I said I would take them to Olean Hospital Clinic.
- Asked to put the windows down "We're not used to this being closed up like you people are"

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THE AMISH

Donald B. Kraybill
Karen M. Johnson-Weiner
Steven M. Nolt

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Swartzentruber Amish

The Swartzentruber Amish coalesced in 1913 in eastern Ohio around a particular interpretation of church discipline. Although shunning ex-members remained a common Amish commitment, the manner in which it was carried out had come to vary. Traditionally, anyone who was excommunicated was shunned until he or she repented. For those who refused to recant, shunning was lifelong. This traditional view was known as *streng Meidung*, or "strict shunning."

By 1900, however, many midwestern Old Orders were drawing a distinction between how they would shun members excommunicated for defecting to related Anabaptist churches and how they would shun those excommunicated for major sins or persistent disobedience. In either case, the ex-member had reneged on his or her baptismal vow, but some leaders thought that quietly leaving the Amish faith for a conservative Mennonite church was a less serious matter and that shunning in such situations could cease if the person became a faithful member of another Anabaptist group. When most leaders in Holmes County, Ohio, signaled their desire to relax strict shunning along these lines, Bishop Samuel E. Yoder (1872–1932) balked. By 1917 Yoder's church district, which upheld strict shunning no matter what the offense, had broken fellowship with neighboring Amish congregations. A group of Amish mediators from Indiana and Illinois were unable to mend the breach. The disagreement over shunning may well have provoked the division, but historical accounts point to other factors that played a key role.¹⁵

Beyond retaining strict shunning, the new Swartzentruber group staunchly refused to alter the traditional *Ordnung* in any way and soon became known for resisting innovation in household technology, farming practices, dress customs, and worship ritual. This traditional tribe eventually launched daughter settlements in Ohio, Tennessee, and New York; by 2012, it had spread to thirteen states and Ontario.

New Order Amish

The New Orders also emerged in Holmes County, though nearly fifty years after the birth of the Swartzentrubers. The roots of this movement go back to the late 1940s and 1950s. During World War II and the Korean and Vietnam Wars, Amish men who were drafted typically declared themselves conscientious objectors and, in lieu of military service, served in Civilian Public Service work camps (during World War II) or as orderlies and maintenance staff in public hospitals and mental institutions, at minimum wage.¹⁶ These experiences exposed them to the outside world and in some cases led them to question their religious tradition. Simultaneously, Mennonites and other Protestant revivalists were active in Holmes County and publicly questioned

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isters. Thus, the committee could never, in any formal sense, speak for the church. It could, however, voice Amish concerns and in unobtrusive ways hammer out amiable resolutions with government officials.²⁴ With the end of the military draft, the Steering Committee's work broadened into a wide range of issues. For example, in the early 1970s, the committee quietly negotiated an exemption from the hard-hat requirement in the new Occupational Safety and Health Act, allowing Amish construction workers to wear their church-stipulated straw hats or knit caps instead.²⁵

Third-Party Litigation

Alongside the evolution of an Amish liaison group committed to behind-the-scenes negotiation, conflicts with the state sometimes took a more litigious turn as third-party civil liberties groups pressed lawsuits on Amish behalf. The role of outside advocates was never more prominent than in the Supreme Court case of *Wisconsin v. Yoder et al.* involving the refusal of Amish parents to send their children to high school. By the mid-1960s, most states with larger Amish populations had struck some sort of compromise that balanced state truancy law and Amish objections to high school education (see chapter 14). Yet resolution was elusive in Iowa, Kansas, and Wisconsin, and protracted disputes in those states drew the attention of William C. Lindholm, a Lutheran pastor in Michigan. He spearheaded the National Committee for Amish Religious Freedom (NCARF), which included lawyers, academics, and Christian and Jewish religious leaders.²⁶

By the time NCARF formed, conflicts in Iowa had cooled, but in the fall of 1968, Wisconsin authorities arrested three Green County fathers for keeping their children out of high school. Lindholm engaged a Harrisburg, Pennsylvania, attorney, William Bentley Ball, to prepare a legal defense for the three men. In the spring of 1969, NCARF lost its case in Wisconsin's lower courts, but it pressed its appeal through the state judicial system and eventually to the U.S. Supreme Court.²⁷ In 1972 Chief Justice Warren Burger handed down the high court's unanimous opinion, ruling that the state could not deny the Amish the right to practice their faith even if it precluded certified high school work.²⁸

In recent years, third party litigation on behalf of Amish concerns has included cases involving New York state building codes. The Becket Fund for Religious Liberty, a Washington, D.C.-based law firm, has challenged the codes requiring, among other things, smoke detectors, which Swartzentruber Amish residents of the state oppose because they believe such devices betray a lack of faith in God.²⁹ The first of these conflicts began in 2006 when Swartzentrubers in a new settlement near Morristown, New York, were refused building permits because they would not install smoke detectors.³⁰ The town's newly hired code enforcement officer began issuing

tickets after the Amish started to build without permits. Eventually, the case became a federal lawsuit based on the Amish claim that Morristown was violating their First Amendment rights. As the lawyers for the Amish argued, complying with the requirements of the building code would force the Swartzentrubers in Morristown to change their Ordnung, thrusting them into conflict with other church districts. Furthermore, they argued, “a home that is built in accordance with architect-certified plans or with electronic smoke detectors will be unable to host [church].” Thus the building code violating their Ordnung would have prohibited Swartzentrubers from building homes that could be used as houses of worship.³¹

Third-party litigation is not common, but it often involves high-stakes contests and attracts media attention because advocacy groups for the Amish understand the value of public opinion and are not restrained by humility like their Amish clients.

Stubborn Subjects and Ambivalent Citizens

The spirit of submission cuts both ways when it comes to government relations. On the one hand, Amish people do not clamor for rights or ask for financial entitlements. Yet when they believe a matter of conscience is at stake, they can be remarkably stubborn subjects. As the range of Amish conflicts with the state has grown over the years, it has followed some clear patterns. The Swartzentrubers and the conservative Swiss Amish have scuffled with local zoning officials over ordinances that limit the number of households on single parcels of land or restrict outhouses. Other issues such as tighter photo identification requirements since September 11, 2001, affect groups across the gamut of Amish life. Obtaining a passport to visit relatives in Ontario or simply opening a bank account was already difficult for those without driver’s licenses even before states stopped issuing non-photo identity cards. The National Amish Steering Committee typically takes up matters like photo identity that represent broad Amish interests rather than ones like zoning that affect only a small slice of their constituency.³²

In recent decades, the federal government has been more accommodating of the Amish than state governments have been, likely because at a national level the Amish are such a tiny group and any special treatment is not so politically costly. In 2004, for example, Congress loosened child labor laws to allow fourteen- to seventeen-year-old Amish children to work in many aspects of family businesses.³³ Likewise, the 2010 Patient Protection and Affordable Care Act allowed the Amish to forego purchasing commercial health insurance, as noted in chapter 18. In contrast, local officials responsible for municipal affairs in areas with a sizable percentage—perhaps even a plurality—of Amish have sometimes been the most inflexible because bending zoning, land use, or sanitation rules for the Amish could set problematic

**Application of Alle-Catt Wind Energy LLC for a Certificate of Environmental Compatibility
and Public Need Pursuant to Article 10 for a Proposed Wind Energy Project**

INTERROGATORY/DOCUMENT REQUEST

Request No.: DEC-13
Requested By: NYS Department of Environmental Conservation
Directed to: Coalition of Concerned Citizens
Date of Request: October 9, 2019
Subject: Farmersville Swartzentruber Amish Letters

Please provide the March 7, 2018 and October 17, 2018 letters signed by members of the Farmersville Swartzentruber Amish community that Dr. Nolt refers to in his testimony.

RESPONSE:

The requested letters are attached.

Name of Person(s)
Preparing Response: Gary A. Abraham, Esq. **Date:** October 25, 2019

A letter from the Amish Families in Town of Farmersville Consisting of 15 Families all on small Family Farms Living off the land as much as possible,

We havnt talked to everyone but seems we all share the same concerns. The following is a list of concerns we have on the Wind Turbine Project in our area.

- #1: The health of ourselves, our animals, & the life of our soils including earthworms. (We cant grow healthy crops without a living soil)
- #2: Safety: We've heard of ice chunks flying long distance from the turbines. (Sounds dangerous!) Heavy Construction Traffic & our horse & buggies may not mix well, also the safety of our children.
- #3 Liability: Concerns came up about oil spills spreading over our land & us being responsible for clean up under State Regulations, should the turbine fail or things go wrong we wouldn't want to be responsible for destruction.
- #4 Property Value & Land Destruction: we are concerned about our property values should a turbine be too close. Property damage & Power line easements we would definitely expect full payment including property damage do to construction.
- #5 Set Back: A 3000' setback doesn't seem extreme to us.

Being that we are religiously opposed to having these turbines on our properties it also causes some concern of wind turbines going on farms that we were hoping to purchase if we can prosper in the area. We have been informed that if we don't speak up it is considered that we arent opposed to wind turbines. This letter is to let you know we are opposed to wind turbines & if you do continue we'd like the above concerns considered.

Our Town Government has provided us so graciously with Free Liberty Conscience & we kindly beck to have this extended,

Sincerely,
Andrew P. Herschberger May 7, 18

We the Amish community of Farmersville consisting of 15 families restate our letter of May 7, 2018. which is attached.

We met with Inverenergy representatives Vanessa Kline and Eric Miller on October 17, 2018 and we have not changed our opposition to the wind turbines.

October 17, 2018

Henry S. Miller
Andrew P. Heuberg