NEW YORK STATE OFFICE OF
RENEWABLE ENERGY SITING

Application of Hecate Energy Columbia County for a 94-c Permit for Major Renewable Energy Facility

Matter No. 21-02553

TOWN OF COPAKE
MOTION TO DISMISS APPLICATION OR ADJOURN PUBLIC COMMENT HEARING AND ISSUES PROCEDURE PENDING MAJOR REVISION TO APPLICATION

Dated: January 2, 2023
Webster, New York

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INTRODUCTION AND RELIEF REQUESTED

The Town of Copake moves to dismiss Hecate's Application because, as of January 2, 2024, almost 60 acres of the Project's footprint are no longer under Hecate's control and are now unavailable for inclusion in the Project. In its Application for a 94-c Permit, Hecate consistently identified 59.73 acres of vacant land with tax parcel identification number 155.-1-56.120 (the "Property") as participating in the Shepherd's Run Solar Project (the "Project"). The Property is proposed to host about 20% of the entire Project's solar panels[1], a laydown area, and the sole access road for adjacent facility parcels, among other components. A map showing the location of the Property and proposed facility components is attached as **Exhibit 1.**

On January 2, 2024, Craryville Farms LLC, purchased the Property from Main Farm LLC. The new owner of the Property asserts that, "the Option Agreement the Seller entered into with Hecate Energy Columbia County 1, LLC ("Hecate") expired on September 17, 2023, and there are no other leases, options to lease, purchase agreements, options to purchase, or rights of tenants or occupants with respect to the Property, written or oral . . . ." Letter from Craryville Farms LLC to Benjamin E. Wisniewski, Esq. (attached as **Exhibit 2**). The new owner further asserts that, "[a]ny person or entity intending to use the Property for a solar energy facility **cannot** obtain from Purchaser title to or a leasehold interest in any solar energy facility site, including for ingress and egress access to a public street." Finally, **the new owner requests, "the Property not be considered as a potential site for any aspect of Hecate's proposed Shepherd's Run Solar Facility.**" *Id* (emphasis added).

Exhibit 2 demonstrates Shepherd's Run Solar is infeasible because the current layout is not viable. The loss of the Property requires Hecate to redesign the project in a manner that uses

[1] *See* Application Exhibit 24, Table 24-3 (DMM Item No. 96).

new, previously unidentified parcels, or redistributes project components across parcels that have already been optimized for reducing impacts. In its own application, Hecate asserts that, "[t]he current Project layout represents the smallest possible Project Footprint that avoids, minimizes, and mitigates, to the maximum extent practicable, impacts on sensitive resources and was developed through a multi-year iterative process . . . ." Exhibit 24, pg. 11. Indeed, in Hecate's own words, a redesign like the one now required, "would prohibit the construction of the Project altogether." *Id.*

It is unclear why Hecate failed to disclose the expiration of the lease option for the Property when it occurred, in September of 2023. As recently as December 15, 2023, Hecate distributed a project map to prospective parties and the ALJ's that represents the Property as participating in the facility. Since September, Hecate has remained silent, while ORES and prospective parties have expended significant time and financial resources reviewing the impacts of a project that can no longer be built. If Hecate's failure to disclose this information was intentional, dismissal of Hecate's 94-c Application may be warranted based on the issue of Hecate's corporate character alone.[2]

Regardless of the reasons for Hecate's failure to disclose a material change in project feasibility, Exhibit 2 forecloses any possibility of the Property being part of the Project. **The Town therefore respectfully requests the Administrative Law Judges dismiss the application based on new evidence demonstrating the Applicant is not able to obtain**

[2] *See* Public Service Commission, Application of Empire Offshore Wind LLC for a Certificate of Environmental Compatibility and Public Need, Case No. 22-T-0346, Ruling Addressing Violations of Protective Order (DMM Item No. 198), November 15, 2023 ("EOW2 is also cautioned that, as an applicant for a Certificate of Environmental Compatibility and Public Need, the Commission is evaluating not only whether the record supports the required legal findings for the grant of a Certificate, but also whether such grant is in the public interest. In so doing**, the Commission may consider the character and fitness of an applicant** to own and operate a facility in the State of New York. If EOW2 cannot demonstrate its ability to follow the rules while its application is pending, it may not reflect favorably on its ability to understand and comply with the terms and conditions governing the construction and operation of its proposed facility.")

property rights necessary for the Solar Project, because the current design is no longer feasible, and because a major revision to the application is now required.

In the alternative, given that a major redesign of the project is now required, the public comment hearing scheduled for January 9th and 10th should be cancelled, the issues identification process adjourned, the notice of complete application should be withdrawn, and a notice of incomplete application should be issued requiring Hecate to submit the required major revisions to its application. This alternative relief is the minimum necessary to protect prospective parties, the public, and numerous state and local elected officials from having to expend financial resources in reviewing a project that is no longer viable.

STATEMENT OF FACTS AND BACKGROUND

The Town of Copake is a prospective party in the Office of Renewable Energy Siting ("ORES") proceeding on the Application of Hecate Energy Columbia County 1, LLC ("Hecate" or the "Applicant"), Case 21-02553 ("Shepherd's Run Solar" or the "Project").

On March 8, 2022, Hecate filed Application Exhibit 4, Real Property, (DMM Item No 8) pursuant to Rule 900-2.5. In section 4(c) of the Exhibit, Hecate asserts the following:

> **All parcels within the Project Area that are needed for the Project are secured under options to lease that are held by the Applicant.** The options allow for the properties to be leased for 20 years, with options for extensions. The Applicant has also obtained an easement for the right to the POI. **Appendix 4-2: Status of Land Interests demonstrates that the Applicant has obtained the necessary property rights in the Project Area.** The Applicant is not a transportation corporation and does not have the ability, or intend to pursue the ability, to acquire land through eminent domain.
>
> **There are 8 locations where new ingress and egress access to a town road, county road, or state highway will be required to access the Project site for construction, operation, and**

> **maintenance of the facility. The Applicant's lease or easement options include all areas needed to access the site from public roadways.** Prior to construction, the Applicant or the contractor will obtain highway permits needed to utilize the new entrances to the Project Site. Additionally, the Project will need an easement to cross the future alignment of the Harlem Valley Rail Trail with linear Project components, which is owned by the state of New York.

Application Exhibit 4, p. 2 (DMM Item No. 8) (emphasis added).

Application Exhibit 4 further notes that, "Construction laydown areas are proposed to be located . . . in the southern portion of the Project Area near Inverters 3 and 4 . . . ." *Id.* at 2. The parcel referred to is the Property now owned by Craryville Farms LLC.

Finally, on page 2 of Application Exhibit 4, Hecate asserts, "Appendix 4-1 provides survey maps of properties within the Project Area, all of which are under option to lease by the Applicant." *Id.* at p. 1.

On May 4, 2022, Hecate filed Appendix 4-2, Status of Land Interest (DMM Item No. 34). In Appendix 4-2, Hecate claims that it has an "Option to Lease" for the property with Parcel ID No. 155.-1-56.120, owned at the time by Main Farms LLC.

On June 26, 2023, Hecate filed Application Exhibit 04, Revised June 2023 (DMM Item No. 92). In the revised exhibit, which only included a cover page and glossary, Hecate again asserted that the Project Area includes, "those privately-owned parcels under option to lease, purchase, easement or other real property interests with the Applicant in which all Project components will be sited . . . ." *Id.* Hecate fails to disclose the impending expiration of options to lease, or leases, in the revised application it filed in June of 2023.

Finally, also on June 26, 2023, Hecate filed a revised Figure 4-1, Real Property Map (DMM Item No. 93). On pages two and three of the maps, Hecate shows Parcel 155.-1-56.120, owned by Main Farm LLC (the "Property"), as part of the project. Project components planned

for the Property include about 20% of the solar panels proposed for the entire Project, the project laydown area for the southern portion of the project, four inverters, project fencing, and two access roads (including one access road that provides the sole means of ingress and egress for two other project parcels: 155.-1-5 and 155.-1-4.111).

On January 2, 2024, Craryville Farms LLC, purchased the Property from Main Farm LLC. A copy of the deed demonstrating the sale of the property is attached as **Exhibit** 3 to this motion. The new owner of the Property asserts that, "**the Option Agreement the Seller entered into with Hecate Energy Columbia County 1, LLC ("Hecate") expired on September 17, 2023, and there are no other leases, options to lease, purchase agreements, options to purchase, or rights of tenants or occupants with respect to the Property, written or oral . . . ."** Exhibit 2. The new owner further asserts that, "[a]ny person or entity intending to use the Property for a solar energy facility **cannot** obtain from Purchaser title to or a leasehold interest in any solar energy facility site, including for ingress and egress access to a public street." Finally, the new owner requests, "the Property not be considered as a potential site for any aspect of Hecate's proposed Shepherd's Run Solar Facility." *Id.*

Upon information and belief, Hecate's property interest in other project parcels has also expired and Hecate is now unable to obtain the required interest in other project parcels in addition to the Property.

Hecate's inability to obtain necessary property rights is material to both ORES' determination of application completeness, and ORES' issuance of a Draft Permit for a project that is no longer feasible. Concerningly, Hecate was aware, or should have been aware, of the impending expiration of its own interest in the Property. Nonetheless, Hecate's revised application documents filed in June 2023 fail to disclose the impending expiration of the option

to lease the Property. Further, from September 2023 to the present, Hecate has failed to inform ORES of any uncertainty over obtaining property rights for a key portion of the Project, instead allowing the ORES process to proceed on a fatally flawed Application. Administrative Law Judges, ORES staff, and prospective parties have thus continued to expend significant time and resources preparing for public comments and issues determination.

In light of Hecate's failure to disclose a material change in the facts underlying its Application, and for the reasons that follow, the Application should be dismissed with prejudice. Further, Hecate's lack of transparency, whether intentional or negligent, may indicate bad corporate character that disqualifies it from holding any Siting Permit in New York State.

STANDARD

ORES regulations do not provide specific rules for a motion to dismiss. However, Rule 900.8.5(c)(5) states, "[w]here a standard of review applicable to a motion or request [in an ORES proceeding] is not otherwise provided for in this Part, other sources of standards, including statutory law such as SAPA and the CPLR, case law, and administrative precedent, may be consulted." 19 NYCRR 900-8.5(c)(5).

Motions to dismiss are common in other administrative energy siting proceedings conducted in New York. Administrative precedent in proceedings before the New York State Board on Electrical Generation Siting and the Environment provides that, "an application may be dismissed upon the motion of any party if it shall appear in the absence of any genuine issue as to any material fact that the statutory requirements for a certificate cannot be met." New York

State Board on Electric Generation Siting and the Environment, In Re Keyspan Energy, No. 01-F-0761, 2002 WL 32694607 (June 5, 2002) (internal quotation marks omitted).[3]

ORES is required to make numerous findings and determinations prior to issuing a siting permit, including the following:

> To issue a siting permit, the Office must make a finding that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary site-specific conditions, and applicable compliance filings:
>
> 1) complies with Executive Law § 94-c and applicable provisions of the Office's regulations at 19 NYCRR part 900 (Part 900);
>
> 2) complies with substantive provisions of applicable State laws and regulations;
>
> 3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the facility;
>
> 4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and
>
> 5) achieves a net conservation benefit with respect to any impacted threatened or endangered species.

[3] *See also* Application of Glenville Energy Park, LLC, for A Certificate of Env't Compatibility & Pub. Need to Construct & Operate A 520-Megawatt Nat. Gas-Fueled Generating Facility in the Town of Glenville, Schenectady Cnty., New York., No. 99-F-1835, 2004 WL 5669354, at *10 (Aug. 27, 2004) ("We conclude that the Applicant's proposed amendment of its certificate application would require substantial additional review, tantamount to the consideration of a new application. As a result, the equivalent of a new compliance determination would be required before the review of the certificate application could resume. We also conclude that the intervening parties have been substantially prejudiced by the unreasonable delay in reviewing the Applicant's certificate application, consistent with the criteria outlined in Cortlandt Nursing Home. Based on the foregoing discussion, we therefore terminate consideration of the Applicant's certificate application."); Application of Upstate Ny Power Corp. for A Certificate of Env't Compatibility & Pub. Need for A 50.6 Mile 230kv Transmission Facility from Galloo Island in the Town of Hounsfield, Jefferson Cnty., to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego Cnty.., No. 09-T-0049, 2013 WL 2298316, at *1 (May 22, 2013) ("We adopt the reasoning of the February 26 ruling and conclude that this application should be dismissed in the interests of fairness to potentially affected landowners, without prejudice to the Applicant to file an updated or new application, should its circumstances change.")

State of New York Office of Renewable Energy Siting, Application of Bear Ridge Solar, Matter Number 21-02104, Decision of the Executive Director, July 31, 2023, pp. 8-9. (DMM Item No. 79) (the "Bear Ridge Order").

Of particular relevance to this motion, ORES Rule 900-2.5(c) requires, "A demonstration that the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or is under binding contract or option to obtain such title or leasehold interest, or can obtain such title or leasehold interest." 19 NYCRR §900-2.5(c).

Finally, even where a motion to dismiss is denied, an applicant's failure to disclose information material to an agency's decision, or information necessary to the public's meaningful participation in the siting process, requires adjournment of the proceeding and amendment of an application. *See* Application of Galloo Island Wind LLC for A Certificate of Env't Compatibility & Pub. Need, Case No. 15-F-0327, Ruling Denying Motion to Dismiss and Granting Motion to Postpone Proceeding (DMM Item No. 294), 2018 WL 5631406, at *8 (Oct. 26, 2018) ("[We] deny the motion to dismiss and grant the motion to postpone, to the extent described above. We also direct Galloo to amend its application materials and submit a statement indicating whether it will consent to a commensurate extension of the statutory timeframe for the Siting Board to render its decision in this proceeding.")

For the reasons that follow, the Application should be dismissed because (1) ORES cannot hold, in issuing a permit, that Hecate has obtained, or can obtain, all property rights necessary for the facility; (2) the impossibility of acquiring property rights requires a major revision to the facility layout, ORES regulations expressly prohibit any such modification at this stage of the proceeding, and Hecate has already asserted any further major revisions would

result in the project not being built; and (3) given the current layout is infeasible and any future layout unknown, it is now impossible for ORES to make all findings and determinations necessary for issuance of a Final Siting Permit.

ARGUMENT

I. The Application must be dismissed because ORES cannot hold that the Applicant has obtained, or can obtain, all necessary property rights, or make other necessary findings and determinations in support of a Final Siting Permit.

ORES should dismiss the Application because Hecate's inability to obtain rights in the Property necessary for nearly 20% of the proposed solar panels renders ORES unable to make the findings and determinations necessary for issuance of a final siting permit. ORES cannot hold that Hecate has obtained, or can obtain, all necessary property interests. Further, because the loss of the Property necessitates a major redesign of the project, and because the scope and impacts of a potential redesign remain unknown, ORES cannot hold that the current Draft Siting Permit would minimize or avoid a modified project's impacts, comply with local laws, or comply with all applicable ORES regulations. Finally, as a point of procedure, the Application must be dismissed, or the issues determination process adjourned, because ORES regulations expressly prohibit amendment of an application after a notice of complete application is issued.

A. ORES cannot hold the Project complies with Executive Law § 94-c and applicable provisions of the Office's regulations.

Exhibits 2 and 3 to this motion provide incontrovertible evidence that Hecate is now unable to obtain all property rights necessary for the Project. As noted above, Rule 900-2.5(c)

requires, "[a] demonstration that the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or is under binding contract or option to obtain such title or leasehold interest, or can obtain such title or leasehold interest." 19 NYCRR §900-2.5(c). Because it is now impossible for ORES to hold that, "the proposed project . . . complies with Executive Law § 94-c and applicable provisions of the Office's regulations at 19 NYCRR part 900 (Part 900)", including Rule 900-2.5(c) concerning Hecate's interest in real property, the Application must be dismissed. *See* New York State Board on Electric Generation Siting and the Environment, In Re Keyspan Energy, No. 01-F-0761, 2002 WL 32694607; 19 NYCRR §900-2.5(c); Bear Ridge Order, pp. 8-9; Exhibits 2 and 3 to this motion.

B. ORES cannot hold the Project avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility.

The loss of a 60 acre parcel hosting about 20% of the project's solar panels, a laydown area, and an access road (among other facility components), will require a major redesign of the project resulting in a major amendment to the application. *See Argument II infra*. The redesign will create new impacts, require additional impact study, and necessitate additional or different avoidance and mitigation proposals including unique certificate conditions. *See id.* With so many unknowns, ORES cannot hold that, "the proposed project . . . avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility", and the Application must therefore be dismissed. *See* New York State Board on Electric Generation Siting and the Environment, In Re Keyspan Energy, No. 01-F-0761, 2002 WL 32694607; Bear Ridge Order, pp. 8-9; Exhibit 2 to this motion.

C. ORES cannot hold the Project complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome

Given the high number of local law waivers Hecate requested for the current infeasible layout (*see* Exhibit 24), it is likely that Hecate would need to request additional waivers of local law in support of whatever new facility it might choose to design, if any. Because ORES cannot know what waivers will be requested in support of an unknown, but necessary, major application amendment, ORES cannot hold that, "the proposed project . . . complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome . . . ." *See* Bear Ridge Order, pp. 8-9; Application Exhibit 24; Exhibits 2 and 3 to this motion. For this reason alone, there can be no dispute that ORES will be unable to make necessary findings of compliance with local law in support of issuing the Final Siting Permit, and the Application must therefore be dismissed. *See id.*

D. ORES must dismiss the Application because ORES Regulations prohibit amendment of an application during the issues determination phase.

ORES Rule 900-7.1(a) states, "[p]ending applications may only be amended prior to issuance of a notice of complete application." Here, the notice of complete application was issued on August 25. 2023 (DMM Item No. 115), and therefore amendment of the Application is impossible. Because Exhibit 2 to this motion provides incontrovertible evidence that a major amendment to the Application is required (*see also* Argument II *infra*), and because the required amendment is expressly prohibited by Rule 900-7.1(a), ORES is unable to hold that the project "complies with Executive Law § 94-c and applicable provisions of the Office's regulations at 19 NYCRR part 900", and the Application must therefore be dismissed.

In the alternative, at a minimum, the new evidence provided in Exhibit 2 to this motion voids the determination of complete application because the Record now contains a demonstrably false assertion that Hecate has obtained the title or leasehold interest necessary in the facility site. *See* rule 900-2.5(c); Motion Exhibit 2; Application Exhibit 4. The issues determination phase in this proceeding should therefore be adjourned, the scheduled public hearings cancelled, and a notice of incomplete application issued. *See also* Rule 900-7.1(b), (c), (d), and (e). However, given Hecate's failure to notify ORES or the parties of a material change in the facts underlying the Application, the Town respectfully requests that the Application be dismissed with prejudice.

II. The Application must be dismissed because a major application revision is necessary, and Hecate has already admitted that further major revisions would result in no project being built.

There can be no genuine dispute that the loss of the Property, which includes nearly 20% of the solar panels proposed for the Project, will require a major redesign of the facility. Hecate has already unequivocally stated that such a redesign is impossible. The loss of the Property is therefore fatal to the Shepherd's Run Solar Project, and ORES should dismiss the Application, with prejudice.

In requesting waiver of Copake's local solar zoning law, Hecate asserted, time and again, that the project size is the minimum practicable; that the project footprint has been minimized; that further reduction in size of the project would make the Project impossible; that redesign is impossible given the numerous impact constraints that resulted in the current layout; and that any further redesign of the project would require negotiation of new lease options, resulting in delay that would prohibit construction and frustrate Hecate's ability to meet its NYSERDA REC obligations.

Based upon Hecate's own words, there can be no genuine dispute that the loss of the Property makes the project impossible to construct. ORES can only hold that either (1) a major redesign of the project is necessary, and since Hecate admits redesign of the project is impossible, the application must therefore be dismissed; or (2) if further redesign of the project is possible (contrary to Hecate's assertions), then Hecate's current requests for waivers are denied, and Hecate must also redesign the project in a manner that complies with the town of Copake's local laws.

A. Hecate has stated unequivocally that it cannot reduce the size of the project.

In Application Exhibit 24, Hecate asserts multiple times that "[t]he Project's size has been minimized to the maximum extent practicable while still achieving the Applicant's contractual obligations; **any further reduction would make the Project impossible and in effect prohibit its construction**." *See e.g.* Third Revised Exhibit 24, pg. 61, Minimum Lot Size.

Hecate uses the same "impossible" language with regard to other local law waiver requests:

- "**Further reducing the size of the Project** to avoid soils classified as prime farmland, prime farmland if drained, or farmland of statewide importance **would** create a burden on the Applicant without ensuring resulting benefits for the community, and **render the Project impossible**." Exhibit 24, p. 51 (emphasis added).
- "**Further reducing the size of the Project** to avoid grading more than twenty (20) cubic yards of earth materials **would render the Project** – or any large-scale

renewable energy project -- **infeasible** without ensuring resulting benefits for the community." Exhibit 24, p. 45 (emphasis added)

- "**Any further sizing down of the Project** because of increased setback requirements beyond what is required by the Office and its regulations **would make the Project impossible and effectively prohibit its construction."** Exhibit 24, p. 30.

Hecate's position is unambiguous—further reduction in the size of the project is impossible. Yet, Motion Exhibit 2 provides incontrovertible evidence that a 60 acre parcel hosting about 20% of the Project's solar panels has now been eliminated. Based on Hecate's own position, the loss of the Property makes the project impossible, and would effectively prohibit its construction. The Application must therefore be dismissed. *See* Exhibit 2 to this Motion; Application Exhibit 24.

At a minimum, the loss of the Property will require a major redesign of the Project to relocate the lost components, the likes of which Hecate has already stated would be equally fatal to the Project.

B. Hecate has stated unequivocally that any further redesign of the project is impossible.

In Exhibit 24 to the Application, Hecate provides a lengthy discussion of why any further redesign of the current project would be impossible:

> **The current Project layout represents the smallest possible Project Footprint that avoids, minimizes, and mitigates, to the maximum extent practicable, impacts on sensitive resources and was developed through a multi-year iterative process that incorporated the comments and concerns of the Town, its residents, and the Working Group**. As more specifically described in Exhibit 2, Section 2(b); Third Revised Exhibit 8, Section 8(d); and depicted in Appendices 5-1, 24-6, and 2-4**, the Applicant redesigned the Project at least four times** to: (1)

reduce the overall acreage of the Project inside the fence from approximately 480 acres to 220 acres; (2) accommodate requests for additional vegetative screening; (3) relocate panels proposed to be sited in the southern portion of the Project Area to the northern portion of the Project Area due to concerns from local residents regarding viewshed impacts on County Routes; and (4) to avoid sensitive resources documented within the Project Area, including wetlands and streams, cultural and historic resources, and visual impacts to the extent possible. Each time, the Applicant considered alternative layouts that would avoid sensitive resources while addressing the Town's, residents', and the Working Group's comments. At the time of providing this Third revised Exhibit the Applicant has redesigned the Project a fifth time to include additional vegetative screening. **Each redesign has required significant work by the Applicant's consultants and engineers**.

To comply with this provision of local law, the Applicant would need to completely redesign the Project layout to meet an average 3-acre lot size and 20% lot coverage limitation on each parcel. **Given the diversity of parcel sizes throughout the Project Site, the location of sensitive resources within the Project Site, landowner preferences for their use of their parcels, and other micrositing considerations derived from over a year of site-specific wetland, stream, species, agricultural, soils, and other resource related impact studies, there are no alternative parcels in the Project Area that could be utilized to comply with these requirements.** As detailed in Table 24-3, within the four parcels that do not meet the 20% lot coverage restriction, **approximately 79 acres of land area coverage under and between system components would need to be redistributed amongst the nine parcels** that do comply with the 20% lot coverage restriction. Without even considering the other siting constraints that would need to be considered within these non-conforming parcels, **there only exists approximately 40 acres of land (while maintaining conformance with this provision on the 9 conforming parcels) in which to redesign 80 acres of non-conforming land area coverage**. 50% of the approximately 40 acres of land is associated with parcels 155.-1-56.111 and 166.-1-73 which, as previously described in this Exhibit and Exhibit 8, the Applicant had previously proposed for siting of system components which were relocated to the northern portion of the Project Area due to concerns from local residents regarding viewshed impacts on County Routes. **Considering this hypothetical scenario does not even account for the avoidance of sensitive resources, landowner preferences for continued use of their parcels, and visual minimization efforts already**

> **undertaken by the Applicant, any obligation to comply with this provision of this local law would place an exorbitant burden on the Applicant and would prohibit the construction of the Project altogether, for the additional reasons set forth below.**"

Exhibit 24, pp 11-12.

Hecate's position is again unambiguous—any further redesign of the project would be impossible given the numerous issues that require consideration and that have led to what Hecate asserts is "the smallest possible Project Footprint." Exhibit 24 indicates that the facility components currently planned for the Property cannot simply be redistributed to other parcels currently under Hecate's control. New land must be brought under contract, and the project must be completely redesigned in a manner that minimizes impact. The Town agrees with Hecate that any such redesign would be onerous and time consuming given the large number of adverse impacts the Shepherd's Run Project is likely to have on the environment, the local economy, and the community.

Based upon the forgoing, elimination of the Property from Hecate's current layout requires a major modification to the project that makes the project impossible, and would effectively prohibit its construction. *See* Exhibit 2 to this Motion; Application Exhibit 23.

C. Hecate has stated unequivocally that any further redesign of the project would cause it to be in default of its contractual obligations to NYSERDA.

Hecate asserts numerous times that, "[t]he Project's size has been minimized to the maximum extent practicable while still achieving the Applicant's contractual obligations." Third Revised Exhibit 24, p. 12, 20, 30, 42, 51, 66, 71, 76, 81. Given that nearly 60 acres of the project have now been eliminated, there can be no genuine dispute that the project cannot be redesigned in a manner that would avoid Hecate's default with regard to its contractual obligations to NYSERDA.

For Example, in the Third Revised Exhibit 24, pg. 56, Soils (Why Burden Should Not Be Borne), Hecate recognizes that the requirement for renegotiation of lease options would result in project delays, that would in turn result in default:

> The Applicant's NYSERDA REC contract requires that the 60 MW Project achieve Commercial Operation by December 31, 2023. If **the Applicant were required to comply with this provision of local law, it would have to go back to the drawing board with its project design, which could include the need to obtain new lease options, which would cause significant delay in the Project development schedule and frustrate the Applicant's ability to meet its NYSERDA REC obligations**.

Third Revised Exhibit 24, pg. 56. *See also id*. at 81.

Here, given that a new lease option is not only required, but impossible (*see* Exhibit 2 to this motion), there can be no genuine dispute that Hecate will be unable to meet its obligations to NYSERDA, and therefore the project is no longer feasible, and the application must be dismissed.

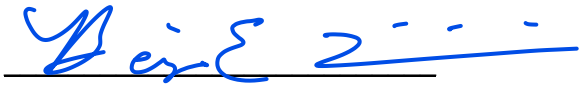
Conclusion

For the forgoing reasons, the Town of Copake respectfully requests ORES and the Administrative Law Judges assigned to this proceeding: (1) dismiss the application with prejudice and cancel further proceedings; or, in the alternative (2) cancel the scheduled public hearings, adjourn the issues determination process, reverse and withdraw the notice of complete application, and issue a notice of incomplete application directing that if Hecate chooses to proceed they must submit a revised application with a feasible project layout that complies with all applicable local laws.

Dated: January 2, 2024

Webster, New York

Respectfully submitted,



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