

2/14/2023 - Siting Board - 20-F-0043

NEW YORK STATE BOARD ON
ELECTRIC GENERATION SITING AND
THE ENVIRONMENT

CASE 20-F-0043 - Application of Garnet Energy Center, LLC
for a Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct and
Operate a Solar Generating Facility and Energy Storage
System in the Town of Conquest, Cayuga County.

Siting Board Meeting

Date: Tuesday, February 14, 2023 @ 1:00 p.m.

TAMMY MITCHELL, alternate to the Chair

LOUIS ALEXANDER, alternate to the Commissioner of the
Department of Environmental Conservation.

DR. ELIZABETH LEWIS-MICHL, alternate to the Commissioner
of the Department of Health.

VINCENT RAVASCHIERE, alternate to the Commissioner of the
New York State Department of Economic Development

JOHN WILLIAMS, alternate to the Chair of the New York
State Energy Research and Development Authority

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2 (The meeting commenced at 1:00 p.m.)

3 CHAIR MITCHELL: Good afternoon. My
4 name is Tammy Mitchell. I'm the director of the
5 Office of Electric Gas and Water at the Department of
6 Public Service. I have been designated to serve as
7 the alternate representing the chair of the New York
8 State Board on Electric Generating Siting and the
9 Environment or as it is also known the Siting Board.

10 I call this meeting of the siting
11 board to order. Before moving on to the agenda, I'd
12 like to introduce the alternates representing the
13 permanent members of the siting board.

14 Louis Alexander representing the
15 Commissioner of the Department of Environmental
16 Conservation.

17 Dr. Elizabeth Lewis-Michl, alternate
18 representing the Commissioner of the Department of
19 Health.

20 Vincent Ravaschiere, alternate
21 representing the Commissioner of the New York State
22 Department of Economic Development, and John
23 Williams, alternate representing the Chair of the New
24 York State Energy Research and Development Authority.

25 Secretary Phillips, are there any

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2 changes to the agenda?

3 SECRETARY PHILLIPS: There are no
4 changes to the agenda.

5 CHAIR MITCHELL: Thank you. We will
6 begin with Case 20-F-0043 Application of Garnet
7 Energy Center, L.L.C. for a certificate of
8 environmental compatibility and public need pursuant
9 to Article 10, to construct and operate a solar
10 generating facility and energy storage system in the
11 Town of Conquest, Cayuga County presented by Maureen
12 Leary, administrative law judge, Department of Public
13 Service, Dakin Lecakes, chief administrative law
14 judge, Department of Public Service, Jason Zehr,
15 chief of environmental certification and compliance,
16 Office of Electric Gas and Water, Department of
17 Public Service and Robert Rosenthal, general counsel
18 are available for questions. Judge, Leary, please
19 begin.

20 A.L.J. LEARY: Thank you. Good
21 afternoon, Chair Designate Mitchell and members of
22 the siting board. The proposed order on rehearing
23 before you denies the petition brought by Intervenor
24 the Rural Preservation and Net Conservation Benefit
25 Coalition which I will refer to during my

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2 presentation as Rural Preservation.

3 The rehearing petition challenges the
4 siting board's October 28th, 2022 order that issued a
5 certificate of environmental compatibility and public
6 need with conditions to Garnet Energy Center, L.L.C.
7 pursuant to Article 10 of the Public Service Law.

8 The siting board certificate order authorized Garnet
9 -- authorizes Garnet to construct and operate a 200
10 megawatt commercial scale solar generation facility
11 which includes a 20 megawatt energy storage facility,
12 12.3 miles of access roads, 25.5 miles of underground
13 collection system lines, a 2.7 acre switch yard, a
14 collection system substation, parking areas,
15 construction laydown yards, point of interconnection
16 facilities and other associated facility components.

17 The facility will be located on 2,288
18 acres in the Town of Conquest, Cayuga County of which
19 approximately 901 acres will be used for the solar
20 panel and associated component installation and will
21 be surrounded by fencing. I want to go through the
22 siting board's initial October 28th, 2022 certificate
23 order.

24 As the siting board may recall, its
25 order approved the project -- approving the project

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2 was based on an extensive and fully-developed record
3 with participation from staff of the Department of
4 Public Service, the Department of Environmental
5 Conservation, the Department of Agriculture and
6 Markets, the Town of Conquest and multiple
7 intervenors including Rural Preservation.

8 The certificate order includes 149
9 conditions and a detailed site engineering and
10 environmental plan or SEEP plan provisions. Those
11 documents are designed to address and or minimize or
12 avoid the project's potential environmental and other
13 impacts.

14 In its order, the siting board
15 expressly found that the project's potential impacts
16 had been adequately identified and with the
17 certificate conditions and SEEP provisions, those
18 impacts would be minimized or avoided to the maximum
19 extent practical -- practicable. This includes
20 impacts to protected, threatened and endangered avian
21 species and of note, as you will hear later in my
22 presentation, the rehearing petition focuses on those
23 impacts.

24 In the certificate order, the siting
25 board also expressly found that the project is

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2 designed to comply with applicable substantive
3 requirements of state laws and regulations including
4 laws governing the protection of threatened and
5 endangered species which are set forth in
6 Environmental Conservation Law Article 11 and the
7 underlying implementing regulations set forth in 6
8 N.Y.C.R.R. Part 182.

9 I turn now to the proposed order on
10 rehearing, which -- that is before you today, which
11 affirms the findings set forth in the siting board's
12 underlying certificate order insofar as they are
13 relevant to the issues raised in Rural Preservation's
14 rehearing petitions.

15 Let me go through some of the
16 assertions in the rehearing petition and identify
17 what the proposed order on rehearing addresses.
18 As a threshold matter, the proposed order before you
19 finds that the rehearing petition does not meet the
20 criteria for granting rehearing under Article 10,
21 specifically Public Service Law Section 170 and the
22 Article 10 rehearing regulations in 16 N.Y.C.R.R.
23 Section 1000.15. Those provisions require a
24 petitioning party to show that the siting board
25 committed an error of law or fact that would justify

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2 the reversal in whole or in part of the certificate
3 order.

4 The rehearing petitioner must also
5 show or may show that new circumstances warrant a
6 different determination than that which the siting
7 board reached in the certificate order. The proposed
8 order on rehearing before you finds that Rural
9 Preservation has failed to substantiate any error of
10 law or fact and fails to present new circumstances
11 justifying the siting board changing its
12 determination.

13 Although the order on rehearing finds
14 that Rural Preservation has not made the required
15 showing for rehearing, it nevertheless addresses the
16 substantive merits of the claims raised in the
17 petition.

18 First, the rehearing petition asserts
19 that the project's impacts to avian species have not
20 been adequately identified. Specifically, the
21 petition asserts that Garnet's avian surveys that
22 were included in its application were flawed and did
23 not accurately identify either the avian species in
24 the project area or the project's potential impacts
25 on such species. The rehearing petition alleges that

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2 Garnet underestimated the number of species that
3 would be killed or injured as a result of the project
4 and that the siting board improperly relied on
5 Garnet's flawed application.

6 Rural Preservation, in support of this
7 claim, repeats the testimony presented by its avian
8 experts during the proceeding. That testimony
9 discussed several avian mortality studies undertaken
10 at solar facilities located in California. These
11 California studies documented higher fatality
12 incidences than those that were initially estimated
13 before those projects were built.

14 Rural Preservation concludes here that
15 the same will occur for this project. It all --
16 Rural Preservation's experts also assert that the
17 project would have a, quote, lake effect impact on
18 avian species -- avian and aquatic species. So, for
19 example, ducks and other aquatic species would
20 perceive the solar panels to be a water body and
21 would land by -- on them thereby resulting in injury
22 or death.

23 In rebuttal Garnet's experts refuted
24 the applicability of these studies because they were
25 done primarily in California desert environments with

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2 different kinds of species. Those environments were
3 much different than the eco system in which this
4 project will be located, according to Garnet. Garnet
5 also asserts that Article 10 does not require precise
6 mortality estimates.

7 Garnet argues that Rural Preservation
8 did not, on the record, present its own studies of
9 avian or surveys of avian impacts in the project area
10 in order to prove the potential for greater site-
11 specific mortality numbers. Garnet also argues that
12 Rural Preservation had a full and fair opportunity
13 during the proceeding to present such evidence of
14 site specific impacts -- potential impacts and yet
15 failed to do so.

16 The rehearing order before you today
17 agrees with Garnet's position in this regard and
18 notes that nothing in the record supports Rural
19 Preservation's comparison of the California
20 facilities with this project. Nothing supports its
21 claims of a potential lake effect impact from the
22 project's solar panels.

23 As the siting board did in the order
24 granting the certificate, the proposed rehearing
25 before you today relies on record testimony including

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2 that of the Department of Environmental
3 Conservation's threatened and endangered species
4 witness who indicated that occupied habitat for any
5 threatened and endangered species has not been
6 documented in the project area. As the rehearing
7 order notes, this testimony undercuts Rural
8 Preservation's arguments that avian species in the
9 project area have not been accurately identified.

10 The rehearing order also finds that
11 Rural Preservation's claims of unidentified project
12 impacts are speculative. The rehearing petition next
13 claims that avian impacts have not been sufficiently
14 minimized or avoided to the maximum extent
15 practicable. Rural Preservation asserts that
16 additional protective measures should be required as
17 a part of the certificate.

18 Rural Preservation specifically
19 challenged -- challenges Certificate Condition 105
20 which provides for Garnet to submit, as a compliance
21 filing, a post-construction avian monitoring plan and
22 to implement the plan over a 3 year period. As noted
23 in the application and the certificate order, the
24 avian monitoring plan is intended to gather
25 information and data regarding the project's

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2 potential post-construction avian impacts and to
3 document the use of the area -- of the project area
4 by threatened and endangered breeding and wintering
5 avian species.

6 Condition 105 in the certificate
7 requires the plan to include detailed breeding and
8 wintering bird surveys and studies and numerous other
9 details associated with those surveys and studies.
10 The rehearing petition argues that the siting board
11 should have identified more details in the
12 methodology and substance of the post-construction
13 avian monitoring plan required in Condition 105. In
14 response, Garnet argues on rehearing, that Rural
15 Preservation's argument, if accepted, would be both
16 sweeping and costly.

17 The rehearing order before you finds
18 that both Department of Public Service staff and
19 D.E.C. staff have extensive expertise and experience
20 to determine the plan's details in consultation with
21 Garnet. It rejects the premise that greater detail
22 is required in Condition 105. The rehearing order
23 also notes that the plan will be provided to Rural
24 Preservation as a compliance filing at which time it
25 will have the opportunity to provide input to both

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2 Garnet and the involved agencies.

3 As part of its challenge that project
4 impacts have not been minimized or avoided to the
5 maximum extent practicable, the rehearing petition
6 focuses on one sentence in Condition 105 which
7 indicates that the findings from the avian monitoring
8 plan, quote, will not trigger additional surveys or
9 additional mitigation and will not result in changes
10 to operations of the project.

11 The rehearing petition argues that
12 this sentence prevents D.P.S. and D.E.C. from
13 imposing additional post-construction mitigation
14 measures to protect avian species at the project site
15 if the monitoring plan indicates that further action
16 is necessary and should be required.

17 The proposed rehearing order rejects
18 Rural Preservation's narrow reading of this sentence
19 in Condition 105. It reviews several related
20 certificate conditions that each separately and
21 together provide for specific minimization, avoidance
22 and/or mitigation measures to be implemented at all
23 phases of the project's development and operation if
24 threatened and endangered species are observed in the
25 project area.

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2 These measures are required during
3 construction and restoration activities or during
4 post-construction facility operation and maintenance.
5 The order on rehearing notes that Condition 105
6 should be viewed in the context of these other
7 applicable certificate conditions. They are
8 specifically Conditions 99 through 104. These
9 conditions, when reviewed together with Condition
10 105, require further action to minimize or avoid
11 project impacts during all phases.

12 For example, these conditions require
13 the cessation of activities in certain areas if
14 threatened or endangered species are discovered or
15 observed including if they are observed displaying
16 what is called, quote, essential behaviors such as
17 breeding, nesting, roosting, feeding, foraging, et
18 cetera.

19 These conditions provide that the
20 certificate holder must report the discovery to
21 D.E.C. and identify the minimization, avoidance and
22 or mitigation measures that will be taken or have
23 been taken. Once a species is observed, construction
24 and other nearby activities cannot recommence without
25 D.E.C. approval.

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2 The rehearing order reviews other
3 certificate conditions that require minimization and
4 avoidance measures including the preservation of
5 trees in areas where roosting of species is observed.
6 The avoidance of those areas and the establishment
7 and posting of buffer zones, creation of visual
8 barriers, the avoidance of blasting and other loud
9 activities during specific time frames.

10 These conditions also require the
11 certificate holder to train project personnel, that
12 is, the employees involved in construction,
13 restoration, operations and maintenance activities.
14 They will be trained to identify listed species and
15 take appropriate action as required by the
16 certificate conditions.

17 The conditions also provide that
18 Garnet may propose - it is not required - --, may
19 propose and implement additional minimization,
20 avoidance and or mitigation measures to protect the
21 species with D.E.C.'s approval. In addition to these
22 measures, the rehearing order notes that the
23 certificate conditions also require Garnet to retain
24 an environmental monitor to assure compliance with
25 the conditions including those related to threatened

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2 and endangered species.

3 The environmental monitor is empowered
4 to issue stop-work orders as necessary to protect,
5 for example, threatened and endangered bat species.
6 These certificate conditions and the SEEP guide also
7 require Garnet to submit an environmental compliance
8 and monitoring plan with additional requirements
9 noted to protect avian species. Again, Rural
10 Preservation will have the opportunity to comment on
11 this plan in the compliance phase.

12 The rehearing order before you
13 concludes that when viewed together, the relevant
14 certificate conditions and SEEP provisions support
15 the siting board's finding that the project's
16 potential adverse environmental impacts, including
17 those to threatened and endangered avian species will
18 be minimized and avoided to the maximum extent
19 practicable.

20 Based on the findings in the siting
21 board's prior order and the record as a whole, we
22 recommend the siting board's adoption of the proposed
23 order on rehearing before you today. This concludes
24 my presentation. We are, of course, available to
25 respond to any questions that the members of the

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2 siting board may have. Thank you.

3 CHAIR MITCHELL: Thank you, Judge
4 Leary for your comprehensive summary of this item
5 before us. I believe the proposed order denying
6 Rural Preservation's rehearing petition is
7 appropriate in that the petition did not meet the
8 standard for rehearing, and I'll be supporting the
9 item. Let me turn to my fellow board members for any
10 comments or questions. Mr. Alexander.

11 COMMISSIONER ALEXANDER: Thank you. I
12 would like to express my thanks to A.L.J. Leary for
13 her presentation today. I particularly appreciate
14 the overview of the interplay of the certificate
15 conditions that are applicable here. Like her
16 presentations in our prior proceedings, A.L.J.
17 Leary's presentation today has provided me with a
18 very helpful review. And I'm sure. I have no further
19 comments.

20 CHAIR MITCHELL: Thank you. Dr.
21 Lewis-Michl.

22 DR. LEWIS-MICHL: No comments or
23 questions.

24 CHAIR MITCHELL: Mr. Ravaschiere.

25 COMMISSIONER RAVASCHIERE: No

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2 questions or comments.

3 CHAIR MITCHELL: Mr. Williams.

4 COMMISSIONER WILLIAMS: No questions
5 or comments.

6 CHAIR MITCHELL: I now call for a
7 vote. My own vote is in favor of the recommendation
8 as described. Mr. Alexander, how do you vote?

9 COMMISSIONER ALEXANDER: I vote in
10 favor.

11 CHAIR MITCHELL: Dr. Lewis-Michl?

12 DR. LEWIS-MICHL: In favor.

13 CHAIR MITCHELL: Mr. Ravaschiere?

14 COMMISSIONER RAVASCHIERE: In favor.

15 CHAIR MITCHELL: Mr. Williams?

16 COMMISSIONER WILLIAMS: In favor.

17 CHAIR MITCHELL: The order is approved
18 and the recommendation is adopted. Secretary
19 Phillips, is there anything further to come before us
20 today?

21 SECRETARY PHILLIPS: There's nothing
22 further.

23 CHAIR MITCHELL: Thank you. We are
24 adjourned.

25 (The meeting concluded at 1:19 p.m.)

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2 STATE OF NEW YORK

3 I, MONIQUE HINES, do hereby certify that the foregoing was
4 reported by me, in the cause, at the time and place, as
5 stated in the caption hereto, at Page 1 hereof; that the
6 foregoing typewritten transcription consisting of pages 1
7 through 17, is a true record of all proceedings had at the
8 hearing.

9 IN WITNESS WHEREOF, I have hereunto
10 subscribed my name, this the 16th day of February, 2023.

11

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13 MONIQUE HINES, Reporter

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