FLAT CREEK SOLAR

Towns of Root & Canajoharie

Montgomery County, New York

Permit Application No. 23-00054

Appendix 24-6

Statement of Justification for Local Law Waiver Requests

Contents

Tables

Local Substantive Requirements Applicant Requests ORES Not Apply

The Applicant has designed the Facility to comply with the local substantive requirements to the maximum extent practicable, nevertheless the Applicant is requesting waivers of applicable substantive requirements and standards contained within certain sections of the local laws as identified below. These requirements and standards are unreasonably burdensome because, if the Facility had to comply, it could not be constructed and operated as proposed. Consequently, the Facility would be incapable of delivering the numerous benefits it brings to the State in the form of clean renewable energy and the overly stringent nature of these local requirements jeopardizes the feasibility and positive environmental impact intended by the proposed 300-megawatt (MW) Facility. In addition, compliance with some of these requirements and standards would impose additional, unnecessary costs which would make the Facility unfeasible to construct and operate. Finally, the requirements and standards are more restrictive than the uniform standards and conditions contained in 16 New York Codes, Rules and Regulations (NYCRR) Part 1100-6.1 et. seq. and Article VIII regulatory standards that have already been determined to minimize potential impacts to public health and the environment. The potential impacts imposed on the community if waivers are granted in these circumstances are minor to nonexistent, and the costs of applying these provisions outweigh any benefits which may be achieved. Waiving the provisions of the local laws identified below ensures renewable energy facilities, such as the proposed Facility, can continue to contribute to the State achieving its climate energy mandates and goals without the limitations and costs of these requirements.

Exhibits 17 and 18 of the Application describe the Facility's environmental benefits, consistency with the state's energy policy, and contribution toward Climate Leadership and Community Protection Act (CLCPA) mandates; those discussions are incorporated by reference herein to support the waiver of the provisions identified below. In adopting the CLCPA, the legislature characterized climate change as an existential threat to the "economic well-being, public health, natural resources, and the environment of New York" (CLCPA Section 1(1)). The environmental and social harms posed by global climate change have long motivated the State's aggressive clean energy policies, as have the potential economic harms, which have gained recent attention in the New York State Department of Environmental Conservation's (NYSDEC's) efforts to estimate the value of carbon as part of the agency's implementation of the CLCPA. For example, experts estimate that air pollution and climate change cost each American on average $2,500 per year in health care, the burden of which fall disproportionately on vulnerable communities. As demonstrated in this Application, renewable energy facilities such as Flat Creek Solar offer

significant environmental, public health, and community benefits, and will aid the State in transitioning from carbon-emitting electric generation which has negative impacts on wildlife, birds, and human health, toward a carbon-free energy future. As further described in Exhibit 17, the Facility will benefit the State of New York in contributing to the CLCPA targets and consumers who will benefit from clean renewable energy generation. It is estimated that at least 206,520 tons of carbon dioxide (CO2) emissions will be offset by the proposed Facility per year, which is enough power to meet the annual electricity needs of 36,975 homes. See Exhibit 17 for further information regarding the Facility's consistency with energy planning objectives.

Pursuant to Section 1100-2.25(c), an Applicant seeking a waiver of local laws must justify, with facts and analysis, that the burden imposed on the Facility by the local law is unreasonably burdensome. This justification requires a discussion of the (1) degree of burden caused, (2) why the burden should not be borne by the Applicant, (3) that the request cannot reasonably be obviated by design changes to the Facility, (4) that the request is the minimum necessary, and (5) that the adverse impacts of granting the request are mitigated to the maximum extent practicable. Requests may be based on existing technology, factors of costs or economics and/or the needs of consumers for the Facility. The Applicant's request for waivers overall is grounded in the need to balance local requirements with broader environmental and regulatory objectives, including real property and environmental constraints and achieving the CLCPA mandates.

A statement of justification for each local substantive requirement requiring a waiver identified by the Applicant is below. The statements of justification demonstrate the degree of burden caused by the requirement, why the burden should not reasonably be borne by the Applicant, that the request cannot reasonably be obviated by design changes to the Facility, that the request is the minimum necessary, and that the adverse impacts of granting the request are mitigated to the maximum extent practicable consistent with applicable requirements set forth in the Article VIII regulations.

Each statement of justification is based upon the exhibits in the Application, which have been prepared by qualified experts in their fields (e.g., sound, visual, and engineering) and upon the experience of Flat Creek Solar.

The Applicant submits that the provisions identified below are unreasonably burdensome in view of the CLCPA targets and environmental benefits of the proposed Facility – some provisions would threaten the feasibility of the Project, while others impose additional costs which are

unnecessary and not in line or in conflict with State standards. By contrast, the burdens imposed on the community if a waiver were granted for these provisions are minor to nonexistent, as described more fully below.

Town of Canajoharie

(1) Solar Energy Law of the Town of Canajoharie

The Applicant notes that the Town of Canajoharie Solar Energy Law defines Tier 4 Solar Energy Systems as solar energy systems greater than 20 MW and/or classified as a system regulated under Section 94-c. Section 9 of the Town of Canajoharie's Solar Energy Law is entitled "Supplementary Regulations for Tier 4 Solar Energy Systems and states that, "All Solar Energy Systems which are regulated under 94-c, shall be subject to any and all applicable provisions of this law and additional Tier 3 provisions." There are no additional Tier 4 provisions within Section 9, therefore the below waivers are for the Tier 3 provisions in the Town of Canajoharie's Solar Energy Law (Section 8) which by virtue of Section 9 are applicable to Tier 4 Solar Energy Systems such as the Facility.

(i) Waiver of Decommissioning Provision: Section 8(B)(2)(j)(ix)(b)

> *Section 8(B)(2)(j)(ix)(b). The provision of a decommissioning security, whether cash, an irrevocable letter of credit or another form acceptable to the Town, which shall adhere to the following requirements: The amount of the bond or security shall be 150% of the cost of removal and site restoration for the Tier 3 [here, Tier 4] Solar Collector System and shall be revisited every 3 years and updated as needed to reflect any changes (due to inflation or other cost changes). Salvage value of the Solar Energy System shall not count toward the decommissioning security.*

The Town's decommissioning requirement that a decommissioning security be 150% of the cost of removal, updated every three (3) years, and prohibiting the inclusion of salvage value are all significantly more burdensome than the Uniform Standards and Conditions (USCs) established by ORES.

The Applicant is seeking a waiver of this provision. The justification for the Applicant to seek a waiver of this provision is based on factors of costs and economics and is further outlined below.

(a) The degree of burden caused by the requirement

The Article VIII regulations require the Applicant to provide a Decommissioning and Site Restoration Plan which shall include an estimate of decommissioning costs with a 15% contingency, to be updated every fifth year due to inflation or other cost increases and allows for the deduction of projected salvage value from the gross estimate. § 1100-10.2(b)(2); § 1100-2.224(a)-(c). On the other hand, the Town's requirements include a contingency that is 35% greater than the one established by ORES, an update requirement that is almost twice as frequent, and does not take into account salvage, which ORES has explicitly chosen to include. ORES chose the specific amounts based on careful consideration of similar projects across the State and the Town's requirements create a significant and unnecessary additional financial burden on the Facility.

In particular, the Town's requirement for a 50% contingency factor and the prohibition of salvage value creates a substantial financial burden and therefore should not reasonably be borne by the Applicant.

(b) Why the burden should not reasonably be borne by the Applicant

The burden should not reasonably be borne by the Applicant because the Applicant has already provided for a 15% contingency in the Decommissioning and Site Restoration Plan. Contingencies for decommissioning account for a level uncertainty that accompanies the calculation of costs to be incurred at some point in the future. Actual costs may be more or less than the estimate prepared depending on the conditions present at the time of decommissioning. A 15% contingency is more than sufficient to cover unexpected costs associated with the decommissioning of a solar facility. By requiring the Applicant to provide a larger contingency, to update the amount every three years instead of five, and to not include salvage value, the Town's provision imposes a significant burden on the Applicant without providing a benefit to the Facility, Town, or local community. The Town's decommissioning requirements would result in a decommissioning bond amount of $8,303,880 compared with the ORES required amount of $1,430,302, which is sufficient to cover costs associated with decommissioning (see Appendix 23-1). It is unreasonably burdensome to require millions of dollars in additional costs to update the numbers more frequently, especially since ORES has already determined that a 15% contingency amount, updated every five years, and to include salvage value is appropriate for solar facilities statewide. Therefore, this burden should not reasonably be borne by the Applicant.

With respect to Town's requirement that the decommissioning amount be reviewed and updated every 3 years, this requirement conflicts with ORES and Town of Root requirements that the decommissioning estimate be updated every 5 years. Requiring the Applicant to update the decommissioning estimate for one of the two towns that the Facility is located within every 3 and 5 years, is an administrative burden that will provide very little benefit to the Town and will require time and resources which would double the effort required for review and updates. This would effectively require updating twice every five years to be compliant with both town laws and ORES requirements.

ORES has determined that 5 years is a sufficient time period for the review and update of the decommissioning estimate. The Applicant should not be required to update the estimate twice as frequently, which involves engaging engineers for cost assessments, conducting cost evaluations, and preparing detailed reports. The ORES 5-year review strikes the balance between ensuring decommissioning costs are arcuate and current, while also minimizing administrative burdens on the Applicant. The 5-year interval provides sufficient time for changes in cost factors to be identified and addressed without excessive repetition involved in a 3-year cycle.

(c) The request cannot reasonably be obviated by design changes to the Facility

The provision cannot reasonably be obviated by design changes because no matter how the Facility is designed, the Town's requirements would significantly increase the amount of financial security required for decommissioning. This is not the type of requirement which could be accommodated by a design change to the Facility.

(d) The request is the minimum necessary

Given that ORES has already determined what is appropriate (i.e., 15% contingency, updates every fifth year, and the inclusion of salvage value), the benefits of applying this provision are negligible. This is not the type of requirement that could be accommodated by a design change to the Facility, nor is there a particular adverse effect of waiving this requirement on the Town and local community. The Applicant will already be required to provide decommissioning financial security to protect the Town in the unlikely event that the Applicant (Facility Owner) does not conduct decommissioning and site restoration on its own. A cost estimate for decommissioning has been provided in Appendix 23-1 (Decommissioning and Restoration Plan). There is no basis to impose additional financial burdens on the Applicant by requiring more financial security than ORES has deemed necessary. Also, applying local laws that conflict with the standards under

Article VIII creates unnecessary uncertainty for developers of renewable energy facilities and works to undermine the standards and conditions promulgated under the regulations, which is contrary to the goals of the CLCPA and the needs of consumers.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

As part of the ORES process, the Applicant has prepared a Decommissioning and Site Restoration Plan (Plan). The Plan includes a detailed protocol for removal of panel arrays in the event of abandonment and a net decommissioning and site restoration estimate to be allocated between the Towns of Root and Canajoharie based on the estimated costs associated with removal and restoration of Facility components within each Town. The Applicant followed the requirements of the ORES regulations when preparing the estimates. Therefore, the Applicant requests ORES elect to not strictly apply this regulation considering the benefits of the Facility and the directives of the CLCPA.

For all of the reasons above, the Applicant requests that ORES grant the requested waiver for Section 8(2)(j)(ix)(b) with respect to the 150% contingency requirement, the three-year update schedule, and the prohibition of the inclusion of salvage value.

(ii) Waiver of Setbacks: Section 8(B)(5)(h)

> *Section 8(B)(5)(h). Tier 3 Solar Collector Systems shall maintain the required setback of five hundred feet (500') from a neighboring property boundary line. Exceptions are at the discretion of the Town Planning Board upon consideration of the entire application. Fencing, collection lines, access roads and landscaping may occur within the setback.*

The Town's Solar Energy Law requires that components of solar facilities be set back 500 feet from a neighboring property boundary line. This setback requirement does not differentiate between participating (parcels with executed lease, easement or other agreements with the Applicant) and non-participating property lines or residences. In addition, the Town's setback requirements significantly differ from the setback requirements under § 1100-2.6 of the Article VIII Regulations and are substantially more burdensome. For non-participating property lines (non-residential), the setback requirement under the ORES Regulations is 50 feet, and for non-participating residential property lines, the setback requirement is 100 feet. The Town's setback

provision, as applied to non-residential non-participating properties, is ten (10) times, and as applied to residential non-participating property lines, five (5) times the minimum setbacks established under the ORES Regulations.

The Facility cannot be designed to comply with this requirement, and the Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

It is impossible to apply the Town's setback requirements to the Facility and maintain the proposed generating capacity of 300 MW for the Facility. As noted above, the 500-foot setback is 10 and 5 times the ORES setbacks to non-residential non-participating and residential non-participating property lines, respectively. The burden Section 8(B)(5)(h) imposes on the Facility is substantial and would result in a significant reduction in buildable area and as a result, associated Facility capacity. Table 24-1, below, provides the remaining PV array at the Facility if the setbacks provided by the Town were applied. Note that Table 24-1 includes separate calculations for the Town of Canajoharie and the Town of Root, which has a similar provision in Section 7.2(Q) of the Town of Root's Solar Law. It should also be noted that a decrease in the total PV array area likely leads to a larger decrease in the actual lost production, as remaining areas may be too small or oddly sized to accommodate viable panel rows.

Table 24-1. Town of Canajoharie PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
272289 110.-1-9	Canajoharie	27.8	9.0	18.8	32.3%
272289 79.-2-12.1	Canajoharie	16.6	1.3	15.2	8.0%

Table 24-1. Town of Canajoharie PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
272289 79.-2-14	Canajoharie	13.3	5.5	7.8	41.4%
272289 79.-2-15.11	Canajoharie	63.9	21.3	42.6	33.4%
272289 80.-2-13.111	Canajoharie	54.9	29.0	25.9	52.9%
272289 80.-2-14.2	Canajoharie	21.5	13.0	8.5	60.4%
272289 96.-1-10.12	Canajoharie	49.5	31.8	17.6	64.4%
272289 96.-1-6	Canajoharie	10.7	9.2	1.6	85.2%
	Total	**258.2**	**120.1**	**138.1**	**46.5%**
273600 111.-1-1	Root	1.0	1.0	0.0	100.0%
273600 111.-1-11.11	Root	28.4	17.2	11.3	60.4%
273600 111.-1-21.211	Root	116.3	41.1	75.2	35.3%
273600 111.-1-24.11	Root	64.5	23.3	41.1	36.2%

Table 24-1. Town of Canajoharie PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
273600 111.-1-24.12	Root	5.4	5.4	0.0	100.0%
273600 111.-1-26.1	Root	11.8	7.8	4.0	66.0%
273600 111.-1-38.12	Root	91.7	54.8	36.9	59.7%
273600 111.-1-48	Root	3.2	3.2	0.0	100.0%
273600 111.-1-5.211	Root	20.3	13.2	7.1	65.0%
273600 112.-1-15.2	Root	34.0	13.3	20.7	39.0%
273600 112.-1-16.111	Root	14.0	2.9	11.1	20.7%
273600 112.-1-16.112	Root	14.9	13.5	1.3	91.0%
273600 112.-1-21.3	Root	52.8	12.2	40.7	23.0%

Table 24-1. Town of Canajoharie PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
273600 112.-1-22.2	Root	9.3	6.3	3.0	67.6%
273600 112.-1-24.11	Root	63.5	23.4	40.1	36.8%
273600 112.-2-10.1	Root	49.3	19.0	30.3	38.6%
273600 112.-2-10.2	Root	13.3	10.5	2.8	79.1%
273600 96.-3-10	Root	1.3	1.0	0.3	75.8%
273600 96.-3-12	Root	12.6	11.8	0.8	93.9%
273600 96.-3-13	Root	2.3	2.3	0.0	100.0%
273600 96.-3-14	Root	5.5	5.5	0.0	100.0%
273600 96.-3-8	Root	3.6	3.5	0.0	99.6%
273600 96.-3-9	Root	16.5	10.7	5.8	65.0%
273600 97.-1-37.11	Root	61.6	52.5	9.1	85.3%
273600 97.-1-38.2	Root	6.9	6.9	0.0	100.0%

Table 24-1. Town of Canajoharie PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
273600 97.-1-6	Root	66.6	57.5	9.1	86.3%
	Total	**770.6**	**419.8**	**350.7**	**45.5%**
	Total (Both Towns)	**1028.8**	**539.9**	**488.8**	**52.3%**

As shown in Table 24-1, in the Town of Canajoharie alone the Facility would lose 46.5% of the total PV array area, including over 50% of PV array in half of all participating parcels in the Town of Canajoharie. This equates to the loss of approximately 120.1 acres of PV array. The buildable area remaining for installation of PV array after applying the Section 8(B)(5)(h) setbacks is very minimal and prohibits the siting of a 300 MW solar energy facility. This equates to nearly 28 MW DC in the Town of Canajoharie alone, and an additional 97 MW DC in the Town of Root. This is a removal of nearly 10% of the Facility's capacity in the Town of Canajoharie alone related directly to PV array loss. This does not take into account portions of panels that would no longer be economically feasible to construct as they would be small, orphaned areas of PV array and may not be feasible at all given technological limitations to string length and panel placement.

The Applicant has carefully sited components within the Town of Canajoharie by using previously disturbed portions of agricultural land, maximizing PV array on each parcel while limiting impacts to environmental resources (e.g., wetlands, streams, adjacent areas, steep slopes, and forested habitat).

The areas utilized for placement of PV array are located 250 feet from Cunningham Road in the Town of Canajoharie, which is 150 feet more than the ORES setback requirement from non-participating property boundaries and 200 feet more than the 50-foot ORES setback from public

roads. This setback of 250 feet is being implemented by the Applicant in this location to allow for reduced visibility and impact to the adjacent Canajoharie Central School District (CCSD) and associated athletic fields. Landscaping mitigation will be applied within this 250-foot setback to further reduce impacts to the adjacent CCSD and is well above the requirements of ORES under Article VIII.

By requiring the Applicant to adhere to a 500-foot setback in the Town of Canajoharie, as shown on Figure 24-1, remaining portions of the Facility Site which contain panels in the Town of Canajoharie become orphaned and no longer feasible to support the installation of PV array. This would, essentially, remove the ability of the Applicant to place panels in these suitable locations when environmental and other constraints have been avoided to the extent practicable.

Requiring compliance with the local setbacks in both towns would force the Applicant to obtain, at a minimum, approximately 540 acres of additional land with no environmental constraints and that can accommodate the 500-foot setback requirement in order to maintain the proposed 300 MW capacity.

Even if the Applicant was able to acquire the additional acres of buildable land, this would greatly expand the footprint of the Facility. The acreage noted here would need to be the acreage of land on which PV array could be placed while avoiding impacts to environmental resources, reducing tree clearing, and balancing the other requirements of Article VIII for siting of a Facility. Therefore, the Applicant would be required to obtain significantly more acreage than the 120.1 acres required in the Town of Canajoharie for panel placement to adequately access and avoid other resources which may be found. Increasing the footprint of the Facility would cause the Facility to be spread out over a broader geographical area while, in effect, increasing and fragmenting impacts over a larger geographical area.

As shown in Exhibit 8 (*Visual Resources*), as well as Appendix 8-1 (*Visual Impact Assessment*), visibility of the Facility in the Town of Canajoharie is limited. The Facility has been sited to limit visibility to non-participating landowners in accordance with Article VIII requirements, and the Applicant is proposing a robust vegetative screening plan in the vicinity of the CCSD, as discussed above. All of these factors combined reduce the impact of the Facility to the extent practicable, while utilizing a setback from Cunningham Road in excess of that required by Article VIII.

Additionally, as described above, if the Applicant applied the setbacks, in order to maintain a 300 MW facility, components of the Facility would need to be moved and would likely encroach upon

local sensitive environmental resources that are currently avoided by adhering to the ORES setbacks and could create additional impacts to resources such as threatened and endangered species, wetlands, visual resources, and others. The Facility has been designed to avoid local sensitive environmental resources to the maximum extent practicable, but if the setbacks required by the Town were enforced, local environmental and agricultural resources could be subject to permanent negative impacts. For instance, setting back 500 feet from parcel boundaries and roads would result in 500 wide strips of land that would likely no longer be farmable. For approximately every 87 feet in length of setback needed, approximately 1 acre of farmland would be lost. The loss of agricultural land has been identified as a concern for the towns.

If the Facility were to comply with the local setbacks to the extent they apply to non-participating and non-residential parcels only, even though the local provision does not distinguish between non-participating and participating parcels, land available for photovoltaic infrastructure placement would be significantly reduced. This decrease in Facility capacity and generation would eliminate the Facility's ability to provide the maximum amount of energy possible within the proposed Facility Site. As a result, this eliminates the Facility's ability to contribute to the state's energy goals identified in the CLCPA and the New York State Energy Plan of having 70 percent of energy generation produced from renewable energy sources by 2030 and 100% zero emission energy generation by 2040.

It's important to keep in mind the context for setback restrictions and limitation and the purpose of a setback, particularly in balancing potential impacts. A 500 ft setback to property boundaries does not adequately balance the limitations to Facility design with the potential reduction of impacts to residents, particularly noting that it is 5 times (or more to non-residential property lines) the setback required under the ORES regulations to property lines. Larger setbacks alone do not equate to "more protective" and there is a point where a setback becomes prohibitive to the project development. As demonstrated throughout this application, adhering to the 500 ft setback would prohibit project development because it would exclude the adequate amount of land necessary to design and operate the project in an economically viable way. In some instances, such as the potential loss of agricultural land, the setbacks may actually increase adverse impacts. The ORES setback of 100 feet to property boundaries strikes a balance between being protective of adjacent landowners and allowing for the most efficient use of participating land. Therefore, the ORES regulations should be adhered to for this Facility and the local requirement waived.

The degree of burden caused by the requirement is substantial, as this loss in generating capacity could result in the need to abandon the project. The Applicant has invested a substantial amount of time and resources to develop a project that minimizes potential impacts to environmentally sensitive resources and adjoining properties, including the CCSD, within the Facility Site. Therefore, the Applicant is requesting a waiver for this provision because it is unreasonably burdensome.

(b) Why the burden should not reasonably be borne by the applicant

The burden (i.e., the loss of Facility buildable area, energy generation capacity, potentially leading to abandonment of the Facility) should not be borne by the Applicant. The Applicant has carefully designed the Facility within the Facility Site to avoid sensitive environmental areas (e.g., wetlands, threatened and endangered species, streams, and archaeologically sensitive areas), such that the buildable area has been reduced within the Facility Site to the minimum size economically feasible.

The Applicant has proposed a 300 MW Facility at this location because of the existing and available 345 kilovolt (kV) transmission line, which allows larger utility scale projects to more readily and economically interconnect to the transmission grid. The 345 kV line allows applicants such as Flat Creek Solar NY LLC to utilize existing, suitable transmission infrastructure that can support larger scale projects, without significant and costly upgrades, thereby helping the State achieve its CLCPA goals more efficiently. Reducing the size of the Facility to comply with the Town setbacks would negate the benefits of the existing transmission infrastructure, penalize the State's consumers, who demand clean renewable energy, and would ultimately require more projects across the State to meet the State's clean energy goals. Ensuring the Facility can meet its proposed 300 MW capacity without unreasonable burdens such as excessive setbacks aligns with the State's clean energy mandates and allows the Applicant to utilize of the existing 345 kV transmission line without upgrades required, allowing a more efficient, timely, and effective path towards fulfilling the CLCPA mandates.

Therefore, the Applicant is requesting a waiver for this provision because it is unreasonable for the burden to be borne by the Applicant.

(c) The request cannot reasonably be obviated by design changes to the facility

No design change could bring the Facility into compliance with these setbacks, since they are tied to property lines and because the local provision imposes setbacks that are significantly large when compared to the ORES Regulations. Additionally, the Applicant is already implementing a setback from Cunningham Road in the Town of Canajoharie, which is 150 feet greater than the required ORES setback.

If the Facility was redesigned to comply with the 500-foot setback, as shown on Figure 24-1, the Facility would lose a significant amount of buildable area. Figure 24-1 illustrates the Facility's buildable area that would be eliminated if the Facility were forced to comply with the Town's setback requirement. As can be seen, only small areas within the portions of each of the parcels in the Town of Canajoharie would remain usable for placement of PV array. This leaves significant previously disturbed, upland areas of participating parcels in which PV array would not be able to be placed. With all of the constraints in play, the loss of suitable buildable area to comply with a setback requirement that is 10 and 5 times the ORES standard is simply an inefficient and unproductive approach to the State's energy goals.

Moreover, the Applicant has carefully designed the Facility to avoid and minimize other environmental impacts including but not limited to wetlands, streams and water bodies, New York State (NYS) threatened and endangered species, visual resources, agricultural resources, and cultural and historic resources. The location of the proposed Facility is constrained by these other environmental resources and other provisions of local laws. Given the area within the Facility Site, design changes are simply not possible to obviate the waiver request for this provision, especially if all other required areas of avoidance and setbacks required by ORES regulations are adhered to. Therefore, the Applicant is requesting a waiver for this provision because the request cannot reasonably be obviated by design changes to the Facility.

(d) The request is the minimum necessary

The request is the minimum necessary as the Facility has been designed to adhere to the setbacks outlined in § 1100-2.6(d) of Article VIII and the local law to the maximum extent practicable. As noted, the Applicant has implemented a 250-foot setback along Cunningham Road, immediately adjacent to the CCSD and associated athletic fields, to further minimize potential impacts to non-participating adjacent properties. Based on the discussions in Exhibit 8 (*Visual Resources*) and the VIA (Appendix 8-1), this setback is more than sufficient to minimize

impacts on the adjoining CCSD property and additional setbacks would have limited if any value in reducing impacts to adjacent properties. The Applicant has adhered to ORES setbacks of 100 feet from non-participating adjoining properties in other areas of Canajoharie as existing topography and vegetation, as well as proposed panel placement locations and landscape mitigation, are sufficient in these areas in accordance with ORES requirements.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

Granting the waiver request for the 500-foot setback would not create any adverse impacts. In fact, granting the waiver would prevent adverse impacts that would result from the relocation of panels and expansion of the Facility Site. Adherence to the setbacks in the ORES regulations are sufficiently protective of public health and safety and property owners' rights and were also based on careful consideration of typical best practices for siting of renewable energy projects, engineering guidelines, past Article 10 and Section 94-c precedent and typical local law requirements across New York[1]. In addition, a setback of 100 feet from non-participating residential property lines and the proposed visual mitigation plan will minimize and mitigate potential visual concerns (see Exhibit 8, *Visual Impacts*) and the Facility will meet noise limits (See Exhibit 7, *Noise and Vibration*). Therefore, no adverse impacts to the community, adjoining landowners, participating and non-participating would result from granting this waiver.

For all of the reasons above, the Applicant requests that ORES grant the requested waiver for Section 8(B)(5)(h) with respect to the 500-foot setback.

(iii) Waiver from Sound Requirements: Section 8(B)(5)(j)

> *Section 8(B)(5)(j). Noise levels from the Solar Energy Equipment/System must be shown to not have adverse or unreasonable noise impacts on surrounding homes or other sensitive receptors. The 1-hour average noise generated from the Solar Energy Equipment/System shall not exceed a noise level, as measured at the outside wall of any non-participating residence or occupied community building, based on current (45dBA) or future recommendations from the World Health Organization. Equipment and component manufactures' noise ratings may be*

[1] Assessment of Public Comments, Office of Renewable Energy Siting pg. 36.

submitted to demonstrated compliance. The Town may require Operating Sound Pressure Level measurements from a reasonable number of sampled locations at the perimeter of the Solar Energy Equipment/System in order to demonstrate compliance. Existing background noise levels shall be taken before there is any modeling of projected noise levels.

The Town's Solar Energy Law requires that the numerical noise limit of a Solar Energy System not exceed 45dBA measured at 1-hour intervals. Although the noise limit of 45 dBA included in the local law is reasonable, the Applicant is seeking a waiver of the compliance with "future World Health Organization (WHO) recommendations" requirement, as the "future WHO recommendations" is a potentially unachievable and shifting standard.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

Requiring the Facility to comply with "future WHO recommendations," is overly broad and unnecessarily vague, essentially creating a moving target requirement for the Facility. This could necessitate the consistent allocation of resources to monitor WHO updates and verify the Facility's compliance with evolving standards. Such a requirement introduces significant unpredictability and operational complexity, as the Applicant must track potential changes and assess the implications on an on-going basis. The undefined requirement to meet future recommendations also opens the door to the Applicant having to come back to the Facility and redesign or rebuild portions to comply with a potential change in noise level standards such as installing sound barriers, upgrading equipment or even altering the site layout. Each of these adjustments could involve considerable costs, engineering efforts, and potential operational disruptions. For example, what happens if WHO issues new recommendations during construction of the Facility or immediately thereafter? Would an applicant be required to decommission the Facility to redesign a new Facility to comply?

Redesigning the Facility to comply with a different average hour requirement and an undefined "future" requirement could cause significant design changes and creates an unreasonable and significant burden for the Applicant.

(b) Why the burden should not reasonably be borne by the Applicant

The burden imposed on the Applicant by the application of Section 8(B)(5)(j) should not reasonably be borne by the Applicant. As noted above, the Applicant has already designed the Facility to comply with the standards established by ORES and has reduced sound impacts as outlined in Exhibit 7: *Noise and Vibration*. The noise standards are a set of standards that ORES has established after careful consideration and evaluation of projects state-wide and determined to be protective of nearby residents. There is no basis to mandate that the Facility comply with different undefined future standards than those already set forth in the ORES regulations.

(c) The request cannot reasonably be obviated by design changes to the Facility

As stated above, complying with an unclear standard, that has the potential to change in the future is not reasonable and design changes are not feasible to address this requirement. With respect to the 1-hour Leq, the Facility as currently designed meets both the (45) dBA Leq (8-hour) and (45) dBA Leq (1-hour).

(d) The request is the minimum necessary

The Applicant is requesting the minimum waiver needed. The Applicant is not requesting a waiver for the 45dBA standard, but simply the potentially changing “future WHO recommendations” standard. The request is for the minimum necessary because the request is for the industry standard, one that ORES has adopted and deemed sufficient for solar energy systems such as the Facility statewide.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Facility is in compliance with all of the ORES requirements on sound. The Facility has been sited in a strategic manner to reduce noise, along with many other types of impacts by centrally locating inverters, the collection substation and the POI switchyard. In fact, the Facility’s sound levels are generally predicted to be relatively low. There are no adverse impacts of granting the Applicant’s request as the Facility’s sound meets the ORES requirements.

(iv) Wavier of Screening Requirements: Section 8(B)(5)(m)(iii)

> *Section 8(B)(5)(m)(iii). The screening and landscaping plan should demonstrate that the landscaped buffer will provide year-round screening so that, to the maximum extent practicable, the Solar Energy Equipment/System is not visible from roadways and adjacent nonparticipating properties. The plan shall specify the locations, elevations, height, plant species and/or materials that will comprise the landscaping, berms, grading, structures, architectural features, or other screening methods that will harmonize with character of the property and surrounding area, mitigate adverse aesthetic effects and screen the system from important views or vistas. The plan shall use native and non-invasive plant species to promote habitat for native wildlife species and foraging habitat beneficial to game birds, songbirds, and pollinators. Evergreen tree plantings may be required to screen portions of the site from residential properties, roadways, and other important natural resources, viewsheds, and/or receptors, as may be identified by the Planning Board. If the buffer utilizes vegetative planting, the plantings shall consist of noninvasive evergreen trees or bushes, deer and weather resistant plant species, or other noninvasive species as otherwise recommended by the landscape architect, planted with sufficient spacing, dependent on the type of species of plantings used, to facilitate for healthy tree growth and at least four feet tall at time of planting, or as otherwise required by the Board or as may be recommended as part of the visual impact assessment. The buffer shall obtain a height of at least 10 feet within five growing seasons. Invasive species shall not be planted as part of the landscape buffer.*

The Facility's Landscaping Plan (Appendix 5-2 of Exhibit 5; see Abbreviated Landscaping Plan in Attachment 7, Plan 7A) demonstrates that the proposed landscaped buffer will provide year-round visual mitigation so that, to the maximum extent practicable, the Facility is visually moderated from roadways and adjacent non-participating properties. The plan specifies the locations, elevations, height, plant species and/or materials that will comprise the landscaping, berms, grading, structures, architectural features, or other screening methods which will blend with character of the property and surrounding area and mitigate adverse aesthetic effects. While the Town does not identify or designate important views or vistas in planning documents or other methods of documentation such as communicative signage, the proposed landscape buffer will mitigate Facility views from sensitive locations to the maximum extent practicable. The plan uses

native and non-invasive plant species to promote habitat for native wildlife species and foraging habitat beneficial to game birds, songbirds, and pollinators. The plan also includes non-invasive evergreen trees or bushes, deer and weather resistant plant species, and other noninvasive species planted with sufficient spacing, dependent on the type of species of plantings used, to facilitate for healthy tree growth and tree plantings will be between 5 and 6 feet tall at time of planting. The buffer is predicted to obtain a height of at least 10 feet within five growing seasons, which satisfies the requirements of the local law. Additionally, invasive species will not be planted as part of the landscape buffer.

Moreover, the Applicant notes that the local law allows the Planning Board to waive screening and landscaping requirements in select locations based on an applicant's demonstration of non-impact or impact mitigation on adjacent parcels. See Section §8(5)(m)(iv).

However, to the extent that the Town or ORES assert that the Town's Solar Energy Law requires the Facility to be "not visible" from roadways and adjacent non-participating properties year-round regardless of the number of viewers, receptor sensitivity, temporal exposure or use of the adjacent parcel (e.g., agricultural land/residential, occupied/vacant, side lot/rear lot), such requirement would be unreasonably burdensome and the Applicant is seeking a waiver of this provision due to technological limitation and economic considerations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

As an initial matter the Applicant has provided year-round mitigation with a mix of evergreens, as well as native deciduous species, that effectively minimizes and mitigates the visual impacts associated with the Facility and complies with the requirements of the local law. As outlined in Exhibit 8, Section 11.11. (Appendix 5-2 of Exhibit 5; see Abbreviated Landscaping Plan in Attachment 7, Plan 7A)

The proposed landscaping plan utilizes different planting modules based on the targeted setting and the proximity of sensitive receptors. Each planting module arrangement utilizes native species to reinforce and replicate the character of regional roadside vegetation and hedgerows. This conceptual planting plan was developed as a site-specific solution appropriate to the scale of the Facility and visual character of the existing landscape.

Nevertheless, to the extent ORES or the Town assert more is needed to comply with Section 8(B)(5)(m)(iii), the additional burden imposed by such an interpretation on the Applicant is substantial and would be unreasonable.

Section 8(B)(5)(m)(iii) requires the installation of a vegetative buffer capable of screening the Facility from view year-round views at all roadways and non-participating property without discretion or consideration of number of viewers, receptor sensitivity, temporal exposure (i.e., fleeting views), land use of the adjacent parcel, and the presence of existing vegetation that abuts the Facility. Currently, robust vegetation screening is tailored to the level of potential impact to sensitive receptors with predicted solar array visibility, including participating and non-participating residences, public and private businesses, and large swaths of existing roadway. Landscaping was added to screen sensitive receptors from unobstructed views of above-ground project components (i.e. panels and substations) while also utilizing and retaining existing tree hedgerows and forest for additional screening benefit. Sensitive receptors include participating and non-participating homes, schools (e.g., Canajoharie High School), regularly used recreational areas (e.g., the Canajoharie High School athletic fields), frequently used town buildings (e.g., the Root Town Justice building and the Root Town Garage), and other visual resources (e.g., the Canajoharie Forest Fish & Game Club). Vegetation screening was not placed at areas with existing vegetative screening, low visibility, a small number of viewers (e.g., seasonal roads, rear and side lots, vacant land), seldom seen areas, or views that are consistent with solar energy such as abutting farming operations.

The application of a robust landscaping buffer alongside every roadway and adjacent non-participating property would require the disturbance of additional land and existing vegetation at a significant increase in cost while providing minimal benefit to a small number of viewers, in the case of adjacent non-participating open land or in the case of adjacent roadways with transient views. The Applicant is currently proposing 30,750 linear feet (approximately 5.82 miles) of screening comprised of 419 deciduous trees, 2,001 evergreen trees, and 1,966 deciduous shrubs in order to screen the Facility from the most sensitive receptors. This includes a total of approximately 6,565 linear feet (1.2 miles) for the portion of the Facility in the Town of Canajoharie. Focused screening of these receptors provides the inherent benefit of screening the project from roadways as well. Fully complying with the Towns' requirement along all roadways and non-participating properties, regardless of visual impacts, would result in approximately 45,000 linear feet (approximately 8.5 miles) of additional vegetative screening. A rough estimate of probable cost for the 300-foot planting template unit has been calculated to be approximately

$12,000 to install. As such, the currently proposed plan, which provides screening for sensitive resources would cost approximately $1,230,000. If screening was provided for all roads and all properties, the cost would increase by approximately $1,800,000 to screen the foreground of the Facility from all passing vehicles, adjacent vacant properties and agricultural fields.

(b) Why the burden should not reasonably be borne by the Applicant

The burden imposed on the Applicant by the Town's requirement should not be reasonably be borne by the Applicant because it has little to no effect on adjacent parcels that are vacant, rural roadways, or parcels used for agriculture. This requirement increases the disturbance of the Facility without creating a significant benefit. An additional 45,000 linear feet of landscaping at a 20-foot width would be 900,000 square feet or 20.66 acres of disturbance and more than double the cost of the currently proposed screening plan. The Applicant's Landscaping Plan effectively minimizes and mitigates visual impacts to the surrounding environment, and additional landscaping would provide little to no benefit as areas without proposed landscaping are those areas where viewers are absent and/or the landscape is rarely viewed. See Exhibit 8, Section 11 for further discussion on the Landscaping Plan.

(c) The request cannot reasonably be obviated by design changes to the Facility

The request cannot reasonably be obviated by design changes because the Facility has already been sited with proposed screening to create a visual buffer to the greatest extent possible, providing careful attention to the sensitivity of the surrounding nonparticipating properties, and in accordance with visual screening requirements under the ORES regulations. Design changes cannot obviate this request because by providing additional screening and visual buffer, the Applicant would potentially create additional and unplanned environmental impacts without adding a substantial benefit. By requiring year-round screening of the Facility from all roadways and adjacent non-participating properties, regardless of receptor sensitivity, the vegetative buffer would result in an additional disturbance of 20.66 acres.

(d) The request is the minimum necessary

This request is the minimum necessary because the Applicant has already proposed and developed a Landscaping Plan that addresses visual buffers for sensitive receptors. The Applicant, as required by Article VIII, submitted a Visual Impacts Minimization and Mitigation Plan

(Attachment 7 of Appendix 8-1) that outlines how the Applicant has minimized and mitigated potential adverse impacts to the maximum extent practicable.

The request is limited to the extent that this provision requires the installation of a landscaped perimeter buffer in areas where vegetative screening already exists, and to the extent that it would require the installation of a landscaped perimeter buffer to screen locations without existing sensitive receptors located proximate the Facility.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Applicant prepared a visual impacts assessment in compliance with the requirements of the ORES regulations, and based on the assessment, visual impacts anticipated within the Visual Study Area (VSA) are very limited. The topography, existing vegetation, and proposed vegetation offer effective screening for the vast majority of areas within the VSA, and specifically with respect to non-participating properties and roadways, the Applicant proposed a reasonable landscaping plan. Therefore, there are no adverse impacts associated with granting this request.

(v) Waiver of Tree-cutting limitations: Section 8(B)(5)(o)(i)

> *Section 8(B)(5)(o)(i). Tree-cutting. Existing on-site vegetation shall be preserved to the maximum extent practicable. The removal of existing non-invasive trees greater than 6 inches in diameter shall be minimized to the greatest extent possible. Clear-cutting of all native and non-invasive trees in a single contiguous area exceeding 20,000 square feet shall be strongly discouraged, but may be left to the discretion of the Town Planning Board to consider along with best practices guidance from NYS Department of Agriculture and Markets for timber production, agricultural and farm management practices. If, in the discretion of the Planning Board, clear-cutting in excess of 20,000 square feet is most protective of farmland resources, or will advance the state purposes of this local law, the Board may consider clearing in excess of the stated limits.*

The Facility has preserved existing on-site vegetation to the maximum extent practicable and has minimized the removal of trees to the greatest extent possible. However, the Town's Solar Energy Law prohibits clear-cutting in a single area in excess of 20,000 square feet which equates to 0.46 acres.

The Applicant is seeking a waiver of this provision due to technological limitations and the need to balance avoidance and minimization efforts with several other constraints at the Facility Site. Additionally, the majority of tree clearing is related to safe construction and operation of underground collection lines as well as removal of trees to prevent shading. The shading impacts are primarily located in areas where the PV array was maximized on a previously disturbed, agricultural upland parcel. In these locations, PV array and other Facility components were sited in the previously disturbed, upland areas to the maximum extent practicable, and the tree clearing is primarily located along the fringes in upland forest communities surrounding the array locations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

Currently the Applicant is proposing approximately 36 acres of tree clearing (i.e., clear-cutting) in the Town of Canajoharie for the placement of PV array and to avoid panel shading. Of this, approximately 28 acres occurs in 14 locations where the contiguous tree clearing will be greater than 20,000 square feet (0.46 acres). Ten (10) of the 14 locations are between 0.47 acre and 0.85 acre of tree clearing. Most of the impacts are limited to two locations; one of which is approximately 1 acre of contiguous tree clearing and one location which requires approximately 5.8 acre of contiguous tree clearing, and one location requires approximately 13.9 acres of tree clearing.

The degree of burden caused by this requirement is significant in that it prevents the Facility from being designed in a way to meet generation capacity goals and would therefore require the Facility to sign on a larger number of parcels and spread the proposed Facility out across a larger area in order to meet the necessary generation capacity goals. This could increase forest fragmentation resulting from the need for additional collection line corridors connecting arrays and decrease the amount of each previously disturbed, upland field available to be utilized for the placement of Facility components resulting from avoidance of shading impacts if trees cannot be removed. If this were required of the Applicant, up to 6 acres of PV array located within currently forested areas would be directly lost. Additionally, removal of these arrays would potentially leave smaller, orphaned areas of panels that would no likely no longer be used for the Facility. For instance, the loss of these 6 acres of panels directly would orphan approximately 1.4 acres of PV array in the central portion of the Facility Site and another 1.6 acres of PV array on the southwestern portion of the panels in the Town of Canajoharie. These would no longer be beneficial economically and technologically for the Facility and would also be lost.

This restriction would also remove the ability of the Applicant to install an access road (requiring approximately 0.5 acres of tree clearing) to access the northern parcels of PV array. Without this access, the Facility would lose an additional 13.6 acres of PV array sited on previously disturbed agricultural land suitable for the Facility. While the Applicant could potentially access these panels from Cunningham Road, this would add more disturbance immediately adjacent to the school and ballfields and require tree clearing of existing hedgerows and forested area closer to the school.

This provision also severely restricts the Applicant's ability to design a facility in a manner that avoids and minimizes potential environmental impacts to other resources, without expanding the footprint of the Facility and requiring more impacts to an increased number of adjacent, non-participating landowners.

(b) Why the burden should not reasonably be borne by the Applicant

This request should not be borne by the Applicant as the Facility has already been designed to comply with this requirement to the maximum extent practicable while still maintaining generating capacity of 300 MW. The Applicant has already sited the Facility to avoid as much tree clearing as possible, particularly to core forest blocks; however, some clearing is needed to site Facility components and ensure the safety of equipment and personnel. Prohibiting tree clearing over excess of 20,000 square feet would make at least 6 acres of land in the Facility Site directly unavailable for PV array (approximately 1.4 MW DC), with the potential for more due to shading. Additionally, the Applicant may lose another 3 acres due to orphan panel areas and potentially an additional 13.6 acres due to removal of tree clearing for a proposed access road. This would result in the loss of, at a minimum, an estimated 4 MW of energy generation capacity of the proposed Facility.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes because the roughly half acre prohibition for tree clearing is so restrictive that it is almost a prohibition of tree removal altogether. Considering the layout of the vegetation and topography of the Town, it would be almost impossible to build the Facility without cutting an area greater than 0.46 acres. Therefore, the Applicant cannot design the Facility in all circumstances to meet the Town's requirements. Figure 11-1 (Mapped Impacts to Plant Communities) highlights the areas of tree clearing needed to design the Facility. Locations where the Facility will require clearing of areas greater than 20,000

square feet are also noted on Figure 24-1. As noted herein, this clearing is needed to maintain capacity and ensure the Facility can be efficiently sited on the parcels hosting components.

(d) The request is the minimum necessary

The request is for the minimum necessary because the Applicant is only proposing to clear 36 acres in the Town of Canajoharie and the majority of contiguous areas are less than one acre in size. This amount was chosen based on the topography of the area and was limited to the amount necessary to build the Facility. The Applicant has limited tree clearing to only what is necessary for the construction and operation of the Facility and solar arrays in the Facility Site have been sited outside of forested areas to the extent practicable to decrease fragmentation of existing forest community types.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Applicant has minimized and mitigated potential adverse impacts to the maximum extent practicable by proposing Planting Plans to add new trees where necessary and by limiting the amount of tree clearing to only the amount necessary to build and operate the Facility.

The adverse impacts of granting the request are mitigated to the maximum extent practicable. While approximately 36 acres of land are proposed for tree clearing in the Town of Canajoharie, the Facility components are primarily located on agricultural land, thereby avoiding a significant amount of potential tree clearing. See Exhibit 11(c) for additional details on impacts to forestland and the Applicant's efforts to avoid and minimize impacts to forestland. Overall, the design of the Facility avoids and minimizes impacts to interior forests, forested wetlands, and early successional forests, resulting in only marginal impacts to these areas, and the Applicant has mitigated these impacts by leaving large areas of core forest blocks in and around the Facility Site undisturbed to the extent practicable. Additional information regarding tree clearing can be found on the Design Drawings (Appendix 5-1) and in the Visual Impacts Minimization and Mitigation Plan in Appendix 8-1 (Attachment 7).

(vi) Waiver of Overlay Standards: Section 8(B)(5)(o)(iv)

Section 8(B)(5)(o)(iv). Compliance with applicable overlay district standards, including the Critical Environmental and Scenic Resources Overlay Districts.

The Town's Solar Energy Law contains a provision referring to standards for overlay districts. However, to date the Applicant is not aware of the Town creating these districts. The Zoning Law of the Town of Canajoharie requires that the Town adopt a map entitled "Critical Environmental Overlay District" and "Scenic Resource Overlay District" before the overlay is created. The Applicant has been unable to locate any maps with these districts and the Town has not responded to requests for information. In addition, there are no standards associated with these districts within the Town's Zoning Law.

The Applicant is therefore seeking a waiver of this requirement as there are no overlay district standards which to comply.

(vii) Waiver of Agricultural Restrictions: Section 8(B)(5)(p)(i)

> *Section 8(B)(5)(p)(i). When proposed on Active Agricultural Land located within an Agricultural District designated under Section 303 of the NYS Agricultural and Markets Law, a Tier 3 Solar Collector System components, equipment, and associated impervious surfaces shall occupy no more than 20% of any Prime and other Important Farmlands, but in no case shall it exceed 15 acres of such Prime and other Important Farmlands. Tier 3 Solar Collector Systems shall, to the maximum extent practical, avoid impacts to Active Agricultural Land and Productive Agricultural land.*

The Town's Solar Energy Law contains a lot coverage restriction of no more than 20% and 15 acres of Prime or other Important Farmlands. The Facility cannot be designed to comply with this provision because it is extremely restrictive.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden imposed on the Facility by the application of Section 8(B)(5)(p)(i) is substantial and would result in a significant reduction in energy production capacity for the Facility. Eleven of the parcels within the Facility Site are located in the Town of Canajoharie, nine of which are within Montgomery County Agricultural District 1. Each of the parcels contain portions of active agricultural land (i.e., defined in Section 1100-2.16(b)(1) as lands involved in the production of crops, livestock, and livestock products for three (3) of the last five (5) years). Active farmland

was determined though on-site observations, the Agricultural Landowner Survey conducted by the Applicant, and historic aerial imagery via Google Earth.

Table 24-2. Town of Canajoharie Prime and Important Farmland in Parcels within Mapped Agricultural Districts

Tax Parcel ID	Total Parcel Acreage (Approximate)	Active Farmland on Parcel (Approximate)	Facility Components in Active Farmland within Prime and Important Farmland (Approximate)	Facility Component % of Active Farmland (Approximate)
110.-1-9	85.23	25.16	5.28	21
79.-2-12.1	80.64	49.76	10.22	21
79.-2-14	137.06	75.80	2.60	3
79.-2-15.11	199.77	78.64	28.00	36
80.-2-13.111	150.11	74.77	35.60	35
80.-2-14.2	75.91	39.44	14.86	38
80.-2-17.11	232.67	94.43	0.00	0
96.-1-1.11	130.30	57.78	0.00	0
96.-1-6	110.99	9.30	0.84	9
Total	**1,202.68**	**505.08**	**97.40**	**18%**

Of the nine parcels in the Town of Canajoharie that are within a mapped Agricultural District, one of the parcels contains no Facility components on active farmland (as defined above) and one contains less than 0.01 acre of Facility components (Parcel 96.-1-1.11). Therefore, the Applicant evaluated the percent cover of Facility components on the active agricultural portion of the parcel and not the entire parcel. In summary, the Facility components within the Town of Canajoharie that are within a mapped Agricultural District and on active agricultural land only cover 18% of the active agricultural land on Prime and Important Farmland.

One parcel along Cunningham Road would lose 28 acres of PV array if this provision were required to be implemented. This would be the area entirely east of the school and ballfields and would require the Applicant to remove these from the Facility Site, losing nearly 6.5 MW of capacity. This also hinders the Applicant's ability to put MV collection in that parcel, allowing overall connectivity to larger, upland, previously disturbed agricultural fields in the Town of Canajoharie to the north and west. One additional parcel would lose 35.6 acres of PV and components on the eastern portion of the Town of Canajoharie, West of Canyon Road and Lookout Road, if the Applicant were required to comply with this provision.

This would result in the largest portions of the panel arrays in the Town of Canajoharie to be unusable to the Applicant, which would require the Applicant to look for additional parcels to maintain a capacity of 300 MW for the Facility Site. This would lead to increased disturbance, fragmentation, more orphaned areas of farmland, and likely more grading and forested clearing required elsewhere in the vicinity of the Facility to make up for the loss.

Much of the suitable land for solar development in the Town is active agricultural land, located within the NYS Certified Agricultural District. In fact, much of the land within 5 miles of the Facility Site is in a NYS Certified Agricultural District. Figure 3-6 in Exhibit 3 depicts agricultural district land within the Facility Site and 5-mile Study Area.

ORES has waived lot restriction requirements in other proceedings as such severe restrictions are contrary to the State's renewable energy goals. For example, in *ConnectGen Chautauqua County LLC aka South Ripley Solar* (Matter No. 21-00750), ORES waived a restriction of 15 percent, which would have resulted in the loss of 674 buildable acres and a loss of 143 MW. Here, as demonstrated below, the loss would be approximately 106 acres and over 24 MW. In the *Horseshoe Sola*r proceeding (Matter No. 21-02480) ORES waived a local law that required that no more than 50 percent of Designated Farmland be developed on any individual parcel, or on contiguous participating parcels containing project components. This restriction eliminated 1,166 buildable acres in the Town of Caledonia. Similarly, here the restriction in the Town of Canajoharie would eliminate 106 acres from the Facility Site, *alone*, the acres across the Town would be much higher. ORES has also waived a 40 percent lot coverage restriction in *Greens Corners Solar* (Matter No 21-00982), which would have eliminated 109 acres and 15 MWs of capacity, which is less than would be lost here.

(b) Why the burden should not reasonably be borne by the Applicant

This request should not be borne by the Applicant as approximately 106 acres and approximately 24 MW DC, would be lost if the Facility were to comply with the local requirement, making it infeasible for the Facility to meet capacity and design goals. The application of the local requirement would prevent the development of this Facility.

This burden (i.e., loss of Facility buildable area and energy generation capacity) should not reasonably be borne by the Applicant. The Applicant has designed the Facility within the Facility Site to avoid sensitive environmental areas (wetlands, streams, and archaeologically sensitive areas) to the maximum extent practicable such that the buildable area has been reduced within the Facility Site to the minimum size economically feasible.

If forced to comply with this provision, and to maintain the proposed 300 MW generating capacity for the proposed Facility, the Applicant would need an additional 106 acres of land. It is important to know that acquiring this amount of land means that the Applicant would have to have access to that land for Facility components. The Applicant would need to acquire a significantly increased amount of land to evaluate for siting components and ultimately end up with 106 acres of buildable land while avoiding impacts to other resources. The additional acres would likely add environmental impacts that are the same or greater than the impacts this provision seeks to prevent. In other words, limiting the land available on each parcel. This eliminates any value that this provision seeks to provide and therefore, this burden should not reasonably be borne by the Applicant.

(c) The request cannot reasonably be obviated by design changes to the facility

As described above, requiring the Facility to comply with this lot coverage provision requires the Applicant to obtain more parcels to obtain the same operating capacity, leading to a greater Facility footprint of, at least, 106 acres.

(d) The request is the minimum necessary

The request is for the minimum necessary because the Applicant has already designed the Facility to avoid and minimize impacts to the most productive soils within the Facility Site. In the Town of Canajoharie the majority of the parcels that contain MSG 1-4 are active agricultural land, and the Applicant has reduced the footprint in these areas to the extent practicable as shown in Table 24-2 above. Within the Facility Site, soils classified as MSG 1-4 account for 485.9 acres

(12.8 percent), and soils classified as MSG 5-10 account for 3,296.7 acres (86.9 percent). Within the Facility LOD, 240.6 acres of MSG 1-4 exist. Of these 240.6 acres, 42.5 acres (17.6 percent) will be temporarily impacted, and 187.8 acres (78.1 percent) will be permanently impacted. These permanent impacts account for 38.7 percent of the soils within the Facility Site classified as MSG 1-4 which is in line with NYSDAM goals to limit the conversion of agricultural areas from solar development (NYSDAM, 2019). Temporarily disturbed soils will be restored in accordance with the NYSDAM Guidelines. Additionally, there are approximately 2,730 acres of agricultural land within the Facility Site. Approximately 1,092 acres located outside of the Facility's LOD can continue to be used as agricultural lands during the life of the Facility.

The disturbance to agricultural lands will be temporary as all components will be removed and the ground restored during decommissioning of the Facility. Therefore, impacts will be either temporary during construction or impacts for the life of the Facility; temporary disturbances will include laydown yards, collection trenches, HDD pits, collection HDD segments, grading, and the LOD, while impacts for the life of the Facility will include disturbances to lands impacted by access roads, fenced area, fence line, solar panel arrays, inverters, POI switchyard, collection substation, MV feeder, stormwater features, clearing, and landscaping.

The 1,447.8 acres of disturbance to agricultural land will include 230.3 acres of temporary impact (8.4 percent of all agricultural land within the Facility Site) and 1,217.5 acres of impact for the life of the Facility (44.6 percent of all agricultural land within the Facility Site). At the end of the operational life of the Facility, all components will be decommissioned, and the site will be restored to its pre-existing conditions.

Project interaction with known operating farms in the Study Area was minimized based on direct communication with landowners and farm operators during early community discussions and land acquisition efforts. In particular, landowners and farm operators were consulted to identify parcels for consideration of solar development, while also identifying parcels or portions of parcels in which known operating farms and agricultural practices should be avoided.

To the maximum extent practicable, the siting of the Facility avoids, minimizes, and mitigates agricultural impacts to active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within MSG 1 through 4). The Applicant will comply with the NYSDAM Guidelines requirements that are specific to restoration, monitoring, and decommissioning (NYSDAM, 2019).

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

As outlined in Exhibit 15, the Applicant has avoided and minimized impacts to active farmland to the maximum extent practicable. The adverse impacts of granting the waiver, if any, have been minimized to the maximum extent practicable because the Applicant has carefully designed the Facility in a way that minimizes impacts to the most practicable level. Furthermore, pursuant to the ORES Regulations, the Applicant has proposed an Agricultural Plan, that is consistent with NYSDAM Guidelines to the maximum extent practicable. The Applicant refers ORES to Exhibit 15: Agricultural Resources for this discussion.

Town of Root

(1) Solar Energy Law of the Town of Root

(i) Waiver of Sound Requirements: Section 7.1(F)(15)

> *Section 7.1(F)(15). The 1-hour average noise generated from the Solar Energy Equipment/System shall not exceed a noise level, as measured at the outside wall of any non-participating residence or occupied community building, based on current (45dBA) or future recommendations from the World Health Organization. Noise levels must not have adverse or unreasonable impacts on surrounding homes or properties.*

Similar to the Town of Canajoharie, The Town of Root's Solar Energy Law requires that the numerical noise limit of a Solar Energy System not exceed 45 dBA measured at 1-hour intervals. Although the noise limit of 45 dBA included in the local law is reasonable, the Applicant is seeking a waiver of the future World Health Organization (WHO) recommendations requirements, as the future WHO recommendations is an unknown, potentially unachievable, and shifting standard.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

Requiring the Facility to comply with "future WHO recommendations," is overly broad and unnecessarily vague, essentially creating a moving target requirement for the Facility. This could necessitate the consistent allocation of resources to monitor WHO updates and verify the Facility's compliance with evolving standards. Such a requirement introduces significant unpredictability and operational complexity, as the Applicant must track potential changes and assess the implications on an on-going basis. The undefined requirement to meet future recommendations also opens the door to the Applicant having to come back to the Facility and redesign or rebuild portions to comply with a potential change in noise level standards such as installing sound barriers, upgrading equipment or even altering the site layout. Each of these adjustments could involve considerable costs, engineering efforts, and potential operational disruptions. This creates and an unreasonable amount of burden and resources required for the Applicant to comply with. For example, what happens if WHO issues new recommendations

during construction of the Facility or immediately thereafter? Would an applicant be required to decommission the Facility to redesign a new Facility to comply?

Redesigning the Facility to comply with an undefined "future" requirement could cause significant design changes and create an unreasonable and significant burden for the Applicant.

(b) Why the burden should not reasonably be borne by the Applicant

The burden imposed on the Applicant by Section 7.1(F)(15) should not reasonably be borne by the Applicant. As noted above, the Applicant has already designed the Facility to comply with the standards established by ORES and has reduced sound impacts as outlined in Exhibit 7: *Noise and Vibration*. The noise standards are a set of standards that ORES has established after careful consideration and evaluation of projects state-wide. There is no basis to mandate that the Facility comply with different undefined future standards than those already set forth in the ORES regulations.

*(c) T*he request cannot reasonably be obviated by design changes to the Facility

As stated above, complying with an unclear standard, that has the potential to change in the future is not reasonable and design changes are not feasible to address this requirement. With respect to the 1-hour Leq, the Facility as currently designed meets both the (45) dBA Leq (8-hour) and (45) dBA Leq (1-hour).

(d) The request is the minimum necessary

The Applicant is requesting the minimum waiver needed. The Applicant is not requesting a waiver for the 45 dBA standard, but simply the potentially changing "future WHO recommendations" standard. The request is for the minimum necessary because the request is for the industry standard, one that ORES has adopted and deemed sufficient for solar energy systems such as the Facility statewide.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Facility is in compliance with all of the ORES requirements on sound. The Facility has been sited in a strategic manner to reduce noise, along with many other types of impacts, by centrally locating inverters, the collection substation and the POI switchyard. In fact, the Facility's sound

levels are generally predicted to be relatively low. There are no adverse impacts of granting the Applicant's request as the Facility's sound meets the ORES requirements.

(ii) Waiver of Screening Requirements: Section 7.1(F)(16)(b); Section 7.2(D); and Section 7.2(D)(4).

Section 7.1(F)(16)(b). Visual Mitigation and/or landscaping plan that demonstrates the visual mitigation strategy will provide year-round screening so that, to the maximum extent practicable, the Solar Energy Equipment/System is not visible from roadways and adjacent non-participating properties.

And

Section 7.2(D) The solar facility, including any proposed off-site infrastructure, shall be located and screened in such a way as to avoid visual impacts as viewed from public locations, public dedicated roads and highways, residences located on contiguous parcels, or other locations identified by the Planning Board.

And

Section 7.2(D)(4). The plans shall show maximum screening of utility-scale solar. The plan shall demonstrate that screening is provided year-round, to the fullest extent possible and will not have visual adverse impacts on roadways or adjacent properties

The Facility's Landscaping Plan (Appendix 5-2 of Exhibit 5; see Abbreviated Landscaping Plan in Attachment 7, Plan 7A) demonstrates that the proposed landscaped buffer will provide year-round screening so that, to the maximum extent practicable, the Solar Energy Equipment/System is not visible from roadways and adjacent nonparticipating properties.

Moreover, the Applicant notes that the local law allows the Planning Board to waive screening and landscaping requirements in select locations based on an applicant's demonstration of non-impact or impact mitigation on adjacent parcels. See Section 7.1(F)(16)(c).

However, to the extent that the Town or ORES assert that the Town's Solar Energy Law requires the Facility to be "not visible" from roadways and adjacent non-participating properties year-round regardless of the number of viewers, receptor sensitivity, temporal exposure, or use of the

adjacent parcel (e.g., agricultural land/residential, occupied/vacant, side lot/rear lot), such requirement would be unreasonably burdensome.

The Town's Solar Energy Law has two provisions that require the Facility to be "not visible" from roadways and adjacent non-participating properties year-round. The language in each is identical and the requirement is the same. Therefore, this waiver request is for both provisions.

The Applicant is seeking a waiver of this provision due to technological limitation and economic considerations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

As an initial matter the Applicant has provided year-round screening, with the inclusion of evergreen species, that effectively minimizes and mitigates the visual impacts associated with the Facility and complies with the requirements of the local laws, as outlined in Exhibit 8, Section 11.11. (Appendix 5-2 of Exhibit 5; see Abbreviated Landscaping Plan in Attachment 7, Plan 7A).

The proposed Landscaping Plan utilizes different planting modules based on the targeted setting and the proximity of sensitive receptors. Each planting module arrangement utilizes native species and a mixture of evergreen and deciduous species to reinforce and replicate the character of regional roadside vegetation and hedgerows. This conceptual planting plan was developed as a site-specific solution appropriate to the scale of the Facility and visual character of the existing landscape.

Nevertheless, to the extent ORES or the Town assert more is needed to comply with this local requirement, the burden imposed on the Applicant by Section 7.1(F)(16)(b) and Section 7.2(D)(4) is substantial and would be unreasonable. These provisions require the installation of a vegetative buffer capable of screening the Facility from view year-round at all roadways and non-participating properties without discretion or consideration of the number of views, receptor sensitivity, temporal exposure (i.e., fleeting views), topography, or the use of the adjacent parcel (e.g., participating or non-participating).

Currently, robust vegetation screening is tailored to the level of potential impact to sensitive receptors, including participating and non-participating residences and public and private businesses. Landscaping was added to screen sensitive receptors from unobstructed views of above-ground project components. Sensitive receptors include participating and non-participating

homes, schools (i.e. Canajoharie High School), regularly used recreational areas (i.e. the Canajoharie High School athletic fields), frequently used town buildings (i.e. the Root Town Justice building and the Root Town Garage), and other recreational resources (i.e. the Canajoharie Forest Fish & Game Club).

Vegetation screening was not placed at areas with existing vegetative screening, low visibility, a small number of viewers (e.g., seasonal roads, rear and side lots, vacant land) or views that are consistent with solar energy such as abutting farming operations.

The application of a robust landscaping buffer alongside every roadway and adjacent non-participating property would require the disturbance of additional land at a significant increase in cost while providing minimal benefit to a small number of viewers, in the case of adjacent non-participating open land or in the case of adjacent roadways with transient views. The Applicant is currently proposing 30,750 linear feet (approximately 5.82 miles comprising 419 deciduous trees, 2,001 evergreen trees, and 1,966 deciduous shrubs) to mitigate views of the Facility from the most sensitive receptors. The majority of this, approximately 24,190 feet, is to be placed in the Town of Root. Focused screening of these receptors provides the inherent benefit of screening the Facility from roadways as well.

Fully complying with both town's requirements to screen along all roadways and non-participating properties, regardless of visual impacts, would result in the need for approximately 45,000 linear feet (approximately 8.5 miles) of additional vegetative screening. An estimate of probable cost for the 300-foot planting template unit has been calculated to be approximately $12,000 to install. As such, the currently proposed plan, which provides screening for sensitive resources, would cost approximately $1,230,000. If screen was provided for all roads and all properties, the cost would increase by approximately $1,800,000 to screen the foreground of the Facility from all passing vehicles, adjacent vacant properties and agricultural fields.

(b) Why the burden should not reasonably be borne by the Applicant

The burden imposed on the Applicant by the Town's requirement should not be reasonably be borne by the Applicant because it has little to no effect on adjacent parcels that are vacant, roadways, or parcels used for agriculture. This requirement increases the disturbance of the Facility without creating a significant benefit. An additional 45,000 linear feet of landscaping at a 20-foot width would be 900,000 SQ FT or 20.66 acres of disturbance. The Applicant's Landscaping Plan effectively minimizes and mitigates visual impacts to the surrounding

environment, and additional landscaping would provide little to no benefit as areas without proposed landscaping are those areas where viewers are absent and/or the landscape is rarely viewed. See Exhibit 8, Section 11 for further discussion on the Landscaping Plan.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes because the Facility has already been sited with proposed screening to create a visual buffer to the greatest extent possible, providing careful attention to the sensitivity of the surrounding nonparticipating properties, and in accordance with visual screening requirements under the ORES regulations. Design changes cannot obviate this request because by providing additional screening and visual buffer, the Applicant would potentially create additional and unplanned environmental impacts without adding a substantial benefit. By requiring year-round screening of the Facility from all roadways and adjacent non-participating properties, regardless of receptor sensitivity, the vegetative buffer would result in an additional disturbance of 20.66 acres.

(d) The request is the minimum necessary

This request is the minimum necessary because the Applicant has already proposed and developed a screening plan that addresses visual buffers for sensitive receptors and complies with the requirements of the ORES regulations. The Applicant, as required by Article VIII, submitted a Visual Impacts Minimization and Mitigation Plan that outlines how the Applicant has minimized and mitigated potential adverse impacts to the maximum extent practicable.

The request is limited to the extent that this provision requires the installation of a landscaped perimeter buffer in areas where vegetative screening already exists, and to the extent that it would require the installation of a landscaped perimeter buffer to screen locations without existing sensitive receptors located proximate the Facility.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Applicant prepared a visual impacts assessment in compliance with the requirements of the Article VIII regulations, and based on the assessment, visual impacts anticipated within the Visual Study Area (VSA) are very limited. The topography, existing vegetation, and proposed vegetation offer effective screening for the vast majority of areas within the VSA, and specifically with respect

to non-participating properties and roadways, the Applicant proposed a reasonable landscaping plan. Therefore, there are not adverse impacts associated with granting this request.

(iii) Waiver of Planting Requirement: Section 7.2(D)(1) and Section 7.2(P)

> *Section 7.2(D)(1). When the site is surrounded by existing mature trees, trees within the buffer shall not be cut and shall be maintained as a wild zone for the life of the facility.*
>
> *And*
>
> *Section 7.2(P). Previously cleared or disturbed areas are preferred locations for solar projects. Forested sites shall not be deforested to construct solar energy facilities. Any clearcutting shall follow the Adirondack State Park law N.Y. Comp Codes R. & Regs. 573.7*

The Town's Solar Energy Law prohibits deforestation and mature tree cutting, but does not define "deforested", nor does it define "wild zone" resulting in a lack of clarity of what this provision requires. Due to this ambiguity in the local provision, the requirement appears to read as an outright prohibition of tree removal. Additionally, the Facility should not be subject to the Adirondack State Park standards because the Facility is not located in the Adirondack State Park. Although the Adirondack Park Agency regulations provide a standard of clearcutting, located at 9 NYCRR 573.7(a)(1), when combined with the language of the local law, the conflicting Adirondack standard contributes to the overall lack of clarity of this provision. The local provision states that trees within the wild zone should not be cut, but the Adirondack standard states that the Applicant should not cut "trees over six inches in diameter at breast height over any 10-year cutting cycle where the average residual basal area of such trees after such cutting is less than 30 square feet per acre, measured within the area harvested." The lack of a clear definition makes it impossible for the Applicant to comply with the local provisions because the provisions could be read to prohibit the cutting or removal of one tree or one hundred trees.

On March 27, 2024, the Applicant requested the Town to clarify and define to what extent removing trees was considered "deforested". The Town did not respond to the request for clarification and did not provide any additional detail when the Town passed a final version and adopted their solar law on April 24, 2024, resulting in a provision that can be interpreted as an

outright prohibition of cutting trees in an undefined area, ultimately creating a provision impossible to comply with.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden that this provision causes is significant due to the lack of clarity within the provision. "deforested" and "wild zone" could mean either removing one tree, or one hundred trees and if the provision means fewer trees, then it may be physically impossible to build the Facility. Without a clear standard, it is impossible for the Facility to comply with the Town's provision.

(b) Why the burden should not reasonably be borne by the applicant

The burden this provision places on the Applicant is significant and should not be borne by the Applicant because there is no clear standard to meet. "Deforested" could mean that the Applicant not remove any trees, or not remove a large number of trees. For the "wild zone," there is no clear standard as to where the zone begins or ends.

Approximately 135 acres of trees will be cleared for construction of the Facility, largely for access, collection, and to minimize shading. Most solar arrays in the Facility Site have been sited outside of forested areas to decrease fragmentation of existing forest community types. To the extent practicable, connectivity of forested corridors with surrounding forest patches has been maintained, including areas where forested wetland communities are found. Facility components were sited away from forested land to the maximum extent practicable. See Exhibit 11, Terrestrial Ecology for more information on the proposed clearing for the Facility.

The environmental impacts of a project should be considered as a whole, and the outright prohibition of tree removal is not a reasonable burden that should be borne by the Applicant. The Facility has already been sited to avoid as much tree clearing as possible, however some clearing is needed to site Facility components and ensure the safety of equipment and personnel. By prohibiting tree clearing, this provision would eliminate approximately 135 acres to be cleared and would reduce the energy generation capacity of the proposed Facility.

Therefore, the burden should not reasonably be borne by the Applicant and the Applicant is requesting a waiver of this provision.

(c) The request cannot reasonably be obviated by design changes to the Facility

The request cannot reasonably be obviated by design changes to the Facility because the provision itself is not clear. This uncertainty, combined with the topography and landscape of the Town, creates a situation that makes compliance with this provision impossible regardless of how the Applicant designs the Facility.

Additionally, without a clear definition of “deforested”, this suggests that any clearcutting or removal of trees constitutes deforestation which would violate this local provision. Also, there is no clear standard as to what a “mature” tree is and where the “wild zone” begins and ends and similar to “deforested” the Facility cannot be redesigned to comply with unclear standards.

(d) The request is the minimum necessary

This waiver request is for the minimum necessary because the Applicant, as discussed above, has already carefully designed the Facility to avoid tree removal and environmental impacts to the maximum extent practicable. The Applicant has also limited tree clearing to only what is necessary for the construction and operation of the Facility and solar arrays in the Facility Site have been largely sited outside of potentially “forested” areas to decrease fragmentation of existing forest community types. To require compliance with this provision, with an unclear standard, would force the project to create new and additional environmental impacts that the Applicant originally avoided in an effort to minimize environmental impacts resulting from construction of a 300 MW solar facility.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Facility has already been designed to minimize tree clearing and comply with § 1100-6.4(m)(7)-(8).

The adverse impacts of granting the request are mitigated to the maximum extent practicable. While approximately 135 acres of trees will be cleared for construction of the Facility, the Facility components are primarily located on agricultural land, thereby avoiding tree clearing. See Exhibit 11(c) for additional details on impacts to forestland and the Applicant’s efforts to avoid and minimize impacts to "forested” areas.

(iv) Waiver of Planting Height Requirements: Section 7.2(D)(2)

> *Section 7.2(D)(2). Trees to be included in screening shall be native and non-invasive species of evergreen, e.g. White Spruce, White Pine, Larch, red cedar, juniper, a minimum of 8' tall and 3" in diameter at breast height. It shall be determined and documented by the developer if at the time of planting if any species are threatened due to regional blight, disease, etc. Final decisions on appropriate plantings will be made by the Planning Board.*

The Town's Solar Energy law requires a very specific height for trees planted for screening and limits tree selection to only evergreen species. The specific height requirement poses a significant challenge due to the limited availability of trees that meet this height requirement.

The Applicant is seeking a waiver of this provision due to technological and ecological limitations and economic considerations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The Applicant has already provided year-round screening that effectively minimizes and mitigates the visual impacts from the Facility. Trees that are 8' tall and 3" in diameter, and available to be relocated for purposes of screening, are difficult to procure, especially for the quantity that the Facility would require. Trees this size also have larger root balls and are much heavier and more difficult to ship. Currently, the Facility is proposing to procure and install 5 to 6 feet tall trees for screening plantings with no caliper size (caliper size is the typical unit of measure for nursery stock and is measured at 12 inches from the ground, while diameter at breast height is typically used for established trees and is measured at 4.5 feet from the ground) requirement, a size that will provide a 10 to 12-foot-tall screening height within 5 years. Requiring 8' tall trees with a specific caliper size that may require an even larger tree (and possibly larger yet if diameter at breast height is used) at the time of planting creates significant availability and financial burdens for the Applicant.

Generally, nurseries grow and sell smaller caliper sized trees as it allows them to rotate through nursery stock quicker. Overall, smaller more common caliper sized trees tend to be more successful and oftentimes will obtain taller heights faster than larger caliper trees, which can suffer significant growth setbacks from the process of relocation. The size of the root system of larger

trees makes them more difficult to transplant without damaging the roots. Also, larger trees require more water and nutrients once transplanted. The quantity of trees proposed in the plan can more likely be obtained with greater success as the sizes are more readily available. The trees required by the law would require ball and burlap root ball stock that is much larger and would require significantly more equipment for delivery and installation efforts.

The Applicant is proposing to utilize tree species at a height that can vary based on environmental and other factors but if obtained as balled and burlap stock are typically around 500 pounds each. In comparison, a ball and burlap evergreen species of a height of 8 ft can be more than 300 pounds heavier, at around 800 pounds each. This weight difference offers limited if any benefit to overall success of the tree once planted, but which significantly increases the burden on the Applicant at planting. Logistically, this would require the Applicant to acquire larger equipment to both unload and move the stock to and within the Facility Site for planting. This would likely lead to increased ground disturbance in the vicinity of the planting areas as well as an estimated doubling of the amount of delivery trips required to get the plantings to the Facility Site. These trips would also be performed by heavier equipment to support the increased size of the plantings. Each of these considerations would also lead to an unnecessary increased financial burden on the Applicant.

While unclear in the law, if the intent of the requirement is to only plant evergreen species this limits the diversity and habitat value of the screening plantings. Monocultures of evergreen species, while providing year-round screening, may result in areas that stand out visually from the surrounding landscape which is dominated by deciduous species. Using a mix of evergreen and deciduous species, as well as intermixing shrub species, provides a more landscape appropriate screen similar to hedgerows located throughout the area.

Ultimately, the degree of burden caused by this detailed requirement is significant, without providing a substantial benefit to the overall Facility and environment.

(b) Why the burden should not reasonably be borne by the Applicant

The burden imposed on the Applicant by the Town's requirement should not reasonably be borne by the Applicant because the Facility already includes adequate screening as discussed in this Appendix and Exhibit 8: Visual Resources, Section 11. The Applicant is proposing to use more readily available 5-6 feet tall trees that will provide a 10-foot-tall screening height within 5 years as well as a variety of evergreen, deciduous, and shrub species. Overall, the proposed plantings,

which include more than just evergreen trees, will sustain various growth rates (depending on the specific tree or shrub species) and are expected to realize heights between 7 to 15 feet in approximately 5 years after installation. See Table 11 of Exhibit 8: Visual Resources, Section 11, for information on the plant species heights and growth rates of the proposed Landscaping Plan.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes because the availability of larger trees is not design dependent.

(d) The request is the minimum necessary

This request is the minimum necessary because the Applicant has already proposed and developed a screening plan with trees that are 5-6 feet, a size that is more readily available, that adequately addresses visual impacts for sensitive receptors. The Applicant, as required by Article VIII, submitted a Visual Impacts Minimization and Mitigation Plan that outlines how the Applicant has minimized and mitigated potential adverse impacts to the maximum extent practicable.

This request is limited to the extent that this provision requires the installation of a specific sized tree and limits selection to only the species of evergreens noted in the law. Although the tree size required by this law is only a few feet larger and may not seem significant, it results in the need for much larger balled and burlap root stock, which is more difficult to procure, ship, and install. Especially when it pertains to the proposed evergreen tree quantities in total.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The Applicant prepared a visual impacts assessment in compliance with the requirements of the Article VIII regulations, and based on the assessment, visual impacts anticipated within the Visual Study Area (VSA) are already very limited. The topography, existing vegetation, and proposed 5-6 foot trees offer effective screening for the vast majority of areas within the VSA, and specifically with respect to non-participating properties and roadways, the Applicant proposed a reasonable Landscaping Plan. The Applicant's Landscaping Plan effectively minimizes and mitigates visual impacts to the surrounding environment, See Exhibit 8, Section 11 for a further discussion on the Landscaping Plan. Therefore, there are no adverse impacts associated with granting this request.

(v) Waiver of Planting Rows: Section 7.2(D)(3)

> *Section 7.2(D)(3). The solar facility shall provide for the creation of a mixed-species buffer that has an offset, double row of densely growing evergreens with the addition of some smaller trees and shrubs in front to create more of a naturalized hedgerow habitat. The purpose of the double row is to provide additional screening early while the trees are still small. While the evergreens should be the dominant tree for screening, addition of some smaller trees and shrubs are to be provided to benefit wildlife and aesthetics. Appropriate shrubs and small trees to include to create a hedgerow could be Elderberry, American Plum, Hazelnut, Witch Hazel, Blueberry, Dogwoods (Pagoda, Flowering, Silky, Gray), Sumac, Buttonbush, Pear, Apple, Lilac, Shadbush, Pussywillow, Raspberry Maple leaved viburnum, nannyberry, chokecherry.*

The Town's Solar Energy law requires a double row of evergreens for screening. The stated reason for the double row is "to provide additional screening early while the trees are still small."

The Applicant is seeking a waiver of this provision due to technological and ecological limitations and economic considerations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The Applicant's proposed Landscaping Plan minimizes and mitigates visual impacts to the surrounding environment. Landscape templates A and B are proposed for an approximate total of 30,750 linear feet (approximately 5.82 miles comprising 419 deciduous trees, 2,001 evergreen trees, and 1,966 deciduous shrubs). The Applicant incorporated evergreens in the landscape plan, however the plan does not include two rows of evergreens.

The Landscaping Plan prepared by the Applicant adequately screens the Facility and two rows of evergreens are unnecessary to screen the Facility, especially since the proposed plantings, which include a variety of evergreen and deciduous trees as well as intermixed shrubs, will sustain various growth rates (depending on the specific tree or shrub species) and are expected to realize heights between 7 to 15 feet in approximately 5 years after installation. See Table 11 of Exhibit 8: Visual Resources, Section 11, for information on the plant species heights and growth rates of the proposed Landscaping Plan. In addition, the planting modules proposed for the Facility do

include a staggered spacing of plantings, which effectively achieves the double row planning effect. The planting modules can be seen on Sheets L-201-62 and L-201-67 and are represented in the VIMMP which is included as Attachment 7 of the VIA (Appendix 8-1). The proposed planting modules to achieve the stated goal of this section of the law, which is "...to create more of a naturalized hedgerow habitat."

(b) Why the burden should not reasonably be borne by the Applicant

The Applicant's Landscaping Plan appropriately screens the Facility and adding a second row of evergreens will not significantly enhance these benefits. The requirement for two rows of evergreen trees would double the costs of the planting plan (twice as many trees), in addition the landscaping buffer would need to increase to accommodate a second row of trees, thereby increasing the overall impacts of the Facility. Moreover, not all areas of screening have space to accommodate two rows of evergreen trees, which could result in the loss of panels and clean renewable energy to add additional rows of trees.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes because the Facility has already been sited with proposed screening to create a visual buffer to the greatest extent possible, providing careful attention to the sensitivity of the surrounding nonparticipating properties, and in accordance with visual screening requirements under the ORES regulations. Design changes cannot obviate this request because by providing additional screening and visual buffer, the Applicant would potentially create additional and unplanned environmental impacts without adding a substantial benefit.

(d) The request is the minimum necessary

This request is the minimum necessary because the Applicant has already proposed and developed a robust screening plan that includes evergreen trees and was designed to achieve the desired hedgerow habitat while providing the necessary screening. The Applicant, as required by Article VIII, submitted a Visual Impacts Minimization and Mitigation Plan (Attachment 7 of Appendix 8-1) that outlines how the Applicant has minimized and mitigated potential adverse impacts to the maximum extent practicable.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

Mandating two rows of evergreen trees is an excessive requirement that significantly increases costs without providing a proportional benefit in screen. The Applicant prepared a visual impacts assessment in compliance with the requirements of the Article VIII regulations, and based on the assessment, visual impacts anticipated within the Visual Study Area (VSA) are already very limited. The topography, existing vegetation, and proposed Landscape Plan offer effective screening for the vast majority of areas within the VSA, and specifically with respect to non-participating properties and roadways, the Applicant proposed a reasonable Landscaping Plan. The Applicant's Landscaping Plan effectively minimizes and mitigates visual impacts to the surrounding environment, See Exhibit 8, Section 11 for a further discussion on the Landscaping Plan. Therefore, there are no adverse impacts associated with granting this request.

(vi) Waiver of Fencing Requirements: Section 7.2(D)(7)

> *Section 7.2(D)(7). Fencing installed for security or public safety shall be seven-foot (7') tall, composed of natural wood poles that mimic the rural aesthetics of the community. Barbed wire or any similar alternatives is prohibited.*

The Applicant is proposing to use galvanized steel posts around the solar arrays for safety and durability and is therefore seeking a waiver of the Town's requirement to use natural wood posts. The fencing around the arrays will be seven-feet tall and does not include barbed wire.

In addition, the Applicant is seeking a waiver of this provision as it also relates to the barbed wire fencing at the collection substation and POI switchyard to ensure the collection substation and POI switchyard are sufficiently protective of the public health and safety.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

As stated above the Applicant is proposing to use fencing that will consist of woven wire fencing with evenly spaced galvanized (gray) metal posts around the solar arrays. Characteristics of this woven wire fencing are similar to that of an agricultural style fencing; however, using galvanized steel offers several advantages over wood poles, as galvanized steel does not rot, decay, or get

infested by insects. Galvanized steel is also weather and corrosion resistant making it ideal for climates such as the northeast. Galvanized steel is also sturdier than wood, and is non-combustible, providing better fire safety for the Facility and is also stronger than wood providing better site security. Overall, using galvanized steel over wood posts provides the Facility with better protection and lower overall maintenance concerns.

With respect to the collection substation and POI switchyard, standards for safety are outlined in the National Electric Code (NEC) and must be adhered to. The burden this requirement places on the Applicant is significant as wood posts would violate safety protocols related to the substation and interconnection site, in addition barbed wire is a typical safety measure added to these types of facilities to protect the Facility and public.

The Facility will be connecting to the grid at the existing 345 kilovolt (kV), New York Power Authority (NYPA) Transmission Line #352 and deliver 300 MW of electric energy to the grid. Any connection to the grid that provides electricity requires advanced safety measures to ensure that any interference, intentional or unintentional is prevented. As required per the standards in the NFPA 70 (2023 edition) – National Electrical Code (NEC), Chapter 1 – General, Article 110 – General Requirements for Electrical Installations, Section 110.31, a fence shall enclose all outdoor electrical installations to deter access by persons who are not qualified to access the equipment. Such fence shall not be less than seven feet in height or a combination of six feet with one foot of barbed wire or equivalent. It is typical for fencing around substations to include barbed wire for public safety reasons. The barbed wire is to protect the interconnection equipment, which if disrupted could result in the loss of power for thousands of households.

(b) Why the burden should not reasonably be borne by the Applicant

As stated above, galvanized steel poles are superior to wood poles from both a safety and durability standpoint. Requiring the Applicant to use wood poles would expose the Facility to greater safety risk and maintenance costs. In addition, fencing around the substation and POI must comply with NEC design standards to ensure the safety and protection of both people and components, barbed wire is a typical fence design that ensures safety and protection of the collection substation and POI switchyard equipment.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes because the industry and public safety standard is to utilize galvanized steel poles around the solar arrays and barbed wire for collection substation and equipment at the POI switchyard.

(d) The request is the minimum necessary

This request is the minimum necessary because the Applicant has designed the Facility fence to ensure safety and protection of the public and equipment throughout the Facility. Additionally, the woven wire fencing, as opposed to chain link, is very similar to an agricultural style fencing.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

There are no adverse impacts associated with granting this request because the Applicant is merely requesting that ORES allow the Facility to be designed to ensure Facility and public safety. In fact, not granting a waiver of this provision would potentially create adverse impacts due to the Facility being more accessible and therefore more vulnerable. Moreover, any adverse impacts associated with the request have been mitigated to the maximum extent practicable as demonstrated throughout the Application including Exhibits 5 and 6, visual impacts, in Exhibit 8, and cultural impacts in Exhibit 9. Therefore, there are no increased environmental impacts associated with the waiver request and the Applicant has demonstrated in the Application that the impacts have been minimized and mitigated to the maximum extent practicable.

(vii) Waiver of Slope Restrictions: Section 7.2(J)

> *Section 7.2(J). No solar panels shall be placed on slopes of 15 percent or greater as averaged over 50 horizontal feet. No cutting or filling may be done to alter natural slopes for placement of panel arrays. Site disturbance, including but not limited to, grading, soil removal, excavation and soil compaction in connection with installation of utility-scale solar energy facilities shall be minimized to the extent practicable.*

The Town's Solar Energy Law prohibits the placement of panels on slopes fifteen (15) percent or greater as averaged over 50 horizontal feet. Based on the topography of the land, compliance with this provision places a burden on panel placement and the overall siting of the Facility.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden imposed on the Facility by the application of Section 7.2(J) is substantial and compliance with this provision would require the Applicant to re-site panels outside of areas with 15% slopes or grater. The Applicant has already carefully sited the Facility to avoid slopes greater than 15%, but there is one instance where the Applicant has sited panels on a slope greater than 15%. These areas are unavoidable given the other constraints present on the Facility Site. See also Exhibit 10, Figure 10-1 Existing Slopes.

The Applicant only has 0.04 acres (approximately 1,300 square feet) of panels sited on a slope greater than 15%, located centrally in a PV array area. Slopes in this area are between 15 – 25%. If this area were required to be avoided, technological limitations could potentially make this entire area of approximately 58 acres of panels unfeasible. Grading this small area (0.03 acres) of greater than 15% slopes, within a larger area on slopes less than 15%, within previously disturbed land maximizes the PV array placement in this buildable area and reduces the need for the Applicant to disturb more land in other areas to site these 58 acres of panels, which could ultimately increase other impacts and fragmentation of the Facility's PV arrays. As can be seen on Figure 24-1, the majority of slopes greater than 15% are between areas of panels and have been avoided. This careful siting has avoided impacts and the need for grading on a large portion of area with slopes greater than 15%, while only requiring grading in one, small (0.04 acre) location in the central portion of a PV array.

(b) Why the burden should not reasonably be borne by the Applicant

This burden (i.e., the loss of energy generation capacity) should not reasonably be borne by the Applicant because there is no technological or environmental benefit to siting panels in areas with less than 15% slopes. Modern solar panels and racking technology, such as the ones proposed for the Facility are designed to accommodate various slopes and can be adjusted to ensure the panels remain at an optimal angle for solar exposure. In addition, modern panels can be sited on slopes at 15% or greater without the need for excessive grading, thereby avoiding stormwater concerns. See also the Facility's Stormwater Pollution Prevention Plan (SWPPP), submitted as Appendix 13-3.

The Applicant has designed the Facility within the parameters of the Facility Site to comply with this provision to the maximum extent practicable while still maintaining generating capacity of 300 MW. In siting the Facility, the Applicant avoided and minimized the placement of panels on areas with slopes greater than 15% over 50 horizontal feet to the extent practicable.

(c) The request cannot reasonably be obviated by design changes to the facility

The request cannot reasonably be obviated by design changes to the Facility because in order to comply with this provision, the panels would have to be sited elsewhere resulting in additional environmental impacts that were originally avoided by placing the panels on the sloped portions of land. Therefore, the Applicant is requesting a waiver for this provision because the request cannot reasonably be obviated by design changes to the Facility. Figure 24-1 highlights the instances where panels are sited on slopes greater than 15%. These instances are required to maintain generation capacity and ensure the Facility can be efficiently throughout the Facility Site.

(d) The request is the minimum necessary

The request is the minimum necessary because only one location (0.04 acre) with slopes greater than 15% requires grading. As shown on Figure 24-1 and on Figure 10-1 (Existing Slopes), the majority of areas with slopes greater than 15% are located outside of panel array areas and have been avoided by siting of the Facility. Also, it is possible for solar facilities to be safely built on slopes greater than 15% without causing negative environmental impacts; however, the Applicant has still avoided all but one small, unavoidable area of 0.04 acre which would allow contiguous placement of a larger PV array.

As required by ORES, the Applicant has drafted a Stormwater Pollution Prevention Plan (SWPPP), submitted as Appendix 13-3, to maintain construction discharges. ORES also did not set a slope standard when developing the USCs after carefully considering the standards that allow for the development of renewable energy projects such as the Facility while also minimizing environmental impacts. Therefore, the requested waiver is the minimum necessary for this provision because the request is the minimum necessary for siting a 300 MW solar energy Facility.

(e) The adverse impacts of granting this request would be minimized or mitigated to the maximum extent practicable

The adverse impacts of granting the request are mitigated to the maximum extent practicable as the Applicant has sited panel arrays outside of slopes greater than 15 percent to the maximum

extent practicable. In addition, the Facility will be designed in accordance with the New York State Stormwater Management Design Manual to manage stormwater runoff from the developed Facility. The preliminary SWPPP (Exhibit 13, Appendix 13-3) provides information on stormwater management practices, including erosion and sediment control (temporary and permanent vegetative and structural measures), construction phasing and disturbance limits, waste management and spill prevention, and site inspection and maintenance.

(viii) Waiver of Waterbody Setbacks: Section 7.2(O)

> *Section 7.2(O). Utility-scale solar energy systems shall not be installed on Town-owned bodies of water, nor shall they be installed within 1,000 ft of drinking water sources of any type regardless of intended for human or livestock consumption.*

The Town's Solar Energy Law prohibits placing solar energy systems on town-owned bodies of water and creates a 1,000 ft setback for drinking water sources. The Facility is not located within 1,000 feet of any Town-owned bodies of water; however, as shown in Exhibit 13 (*Water Resources*), there are instances in which the Facility is sited within 1,000 feet of existing water wells and livestock drinking water sources. The 1,000-foot setback is significantly larger than the setback standard established by ORES and creates a setback for a water resource not recognized by ORES (livestock drinking water sources), both of which makes compliance almost nearly impossible based on other aspects of the Facility Site.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden imposed on the Facility by the application of Section 7.2(O) is substantial because it is significantly greater than the standards established by ORES and does not create any additional environmental benefit. In § 1100-6.4(n), ORES outlines the standards related to water supply protection. For solar facilities such as the Facility proposed by the Applicant, ORES prohibits pier and post driving activities, except for fence and utility poles, within one hundred (100) feet of any existing, active drinking water supply well. The Town's provision is ten (10) times

the standard set by ORES, and notably is substantially greater than any distance recommended by the Department of Health to protect "wells used for drinking culinary and/or food processing"[2]

To comply with this provision, the Applicant would be required to obtain, at a minimum, an estimated 326 acres of additional PV array area to maintain a 300 MW capacity. Even if the Applicant were able to acquire the minimum acres necessary, this would expand the footprint of the Facility and create additional impacts to resources such as wetlands, Threatened and Endangered species, visual resources, and there is no guarantee the additional acres won't have additional drinking water sources, causing the Facility to require even more than 326 acres to meet capacity goals.

In addition, the ORES regulations do not include a setback restriction for livestock drinking water sources. This is because livestock drinking water resources are potentially abandoned or relocated throughout the resources lifetime, resulting in a potentially moving target and potential violations throughout the life of the Facility. In addition, these sources could be wells, portable tubs, farm ponds, or stream channels. To determine whether or not livestock drinking water resources are active would place a substantial burden on the Applicant, let alone the task associated with locating and identifying them. This burden would continue throughout the life of the Facility as the Applicant would have to dedicate physical and fiscal resources to monitor the status and location of the livestock water sources.

(b) Why the burden should not reasonably be borne by the Applicant

The burden should not reasonably be borne by the Applicant because it is ten (10) times greater than the standards established by ORES and the Department of Health and creates an additional setback to a resource that is difficult to verify without providing any additional environmental benefits. If the Facility were to comply with this setback to human drinking water resources without even considering livestock water resources this would result in a loss of 326 acres of panels, or the increase of 326 acres environmental impacts due to relocating the number of panels necessary to comply with this provision. This number would significantly increase if applied to livestock water resources, which could include wells, portable tubs, ponds, and stream channels. This decrease in energy generation would limit the Facility's ability to provide the maximum

[2] https://www.health.ny.gov/environmental/water/drinking/regulations/

amount of energy possible within the proposed Facility Sit to contribute to the state's energy goals identified in the CLCPA and New York State Energy Plan of having 70 percent of energy generation produced from renewable energy sources by 2030 and 100% zero emission energy generation by 2040. Therefore, the Applicant is requesting a waiver for this provision because it is unreasonable for the burden to be borne by the Applicant.

(c) The request cannot reasonably be obviated by design changes to the facility

Design changes could not bring the Facility into compliance with these setbacks, since they are based on drinking water supply locations, some of which frequently change status and locations. Additionally, the provision imposes such a significant and large setback compared to the requirements of Article VIII. The design changes necessary to make the Facility comply with this provision would result in the loss of a large portion of panel array areas, access roads and other Facility components. Given the other environmental and topographic factors present in the Facility Site design changes are not possible to obviate the waiver request of § 7.2(O), particularly if all other setbacks and required areas of avoidance required by ORES are applied to the Facility site as well. Therefore, the Applicant is requesting a waiver for this provision because the request cannot reasonably be obviated by design changes to the Facility.

(d) The request is the minimum necessary

The Facility has been designed to follow the setbacks outlined in § 1100-2.6(d) of the ORES regulations. The Facility will also comply with all of the water well and drinking source requirements established by ORES. The Applicant is committed to engaging a qualified third party to perform pre- and post-construction testing of the potability of water wells and drinking supplies for collection lines located within one hundred (100) feet of an existing active water well on a non-participating property, pier or post installations within two hundred (200) feet of an existing active water supply well on a non-participating property, and HDD operations within five hundred (500) feet of an existing, active water supply well on a non-participating property. After complying with all of the referenced ORES standards, the Applicant is requesting a waiver of this provision and only where the Facility violates the Town's water supply setback provision.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

There would be no adverse Facility impacts from granting the waiver request for Section 7.2(O). Adherence to the setbacks in the USCs and all other applicable requirements set forth in Part 1100 (i.e., noise, visual, threatened and endangered species, wetlands) will be maintained, as outlined in each applicable exhibit, to the maximum extent practicable. The 100-foot setback in the USCs is sufficiently protective of public health and safety along with property owners' rights and were established by ORES with all of these concerns taken into considerations. As discussed above, the standards were also based on careful consideration of best practices for siting of renewable energy projects generally, engineering guidelines, past Article 10 precedent and typical local law requirements across New York. The Applicant respectfully directs ORES to Exhibit 13: Water Resources and Aquatic Ecology for a more detailed discussion regarding the Facility's avoidance and mitigation efforts, along with the Facility's overall impact to drinking water resources. As such, no adverse impacts to the drinking water supply, community, and environment would result from granting this waiver.

(ix) Waiver of Setbacks: Section 7.2(Q)

> *Section 7.2(Q). There shall be a minimum 500-foot setback between any utility scale ground mounted solar panel structures and associated electrical equipment to the parcel boundary line with any non-participating property, public road, or public area. Fencing, collection lines, access roads and landscaping may occur within the setbacks.*

The Town's Solar Energy Law requires that components of solar facilities be set back 500 feet from a neighboring property boundary line. This setback requirement does not differentiate between participating (parcels with executed lease, easement or other agreements with the Applicant) and non-participating property lines or residences. In addition, the Town's setback requirements significantly differ from the setback requirements under § 1100-2.6 of the Article VIII Regulations and are substantially more burdensome. For non-participating property lines (non-residential), the setback requirement under ORES Regulations is 50 feet, and for non-participating residential property lines, the setback requirement is 100 feet. The Town's setback provision, as applied to non-residential non-participating properties, is ten (10) times, and as applied to

residential non-participating property lines, five (5) times the minimum setbacks established under the ORES Regulations.

The Facility cannot be designed to comply with this requirement, and the Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

It is impossible to apply the Town's setback requirements to the Facility and maintain the proposed generating capacity of 300 MW for the Facility. As noted above, the 500-foot setback is 10 and 5 times the ORES setbacks to non-residential non-participating and residential non-participating property lines, respectively. The burden Section 8(B)(5)(h) imposes on the Facility is substantial and would result in a significant reduction in buildable area and as a result, associated Facility capacity. Table 24-1, provided above in response to a similar provision in the Town of Canajoharie (Section 8(B)(5)(h)), outlines the remaining buildable area of the Facility if the setbacks provided by the Town were applied.

Table 24-3. Town of Root PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
272289 110.-1-9	Canajoharie	27.8	9.0	18.8	32.3%
272289 79.-2-12.1	Canajoharie	16.6	1.3	15.2	8.0%
272289 79.-2-14	Canajoharie	13.3	5.5	7.8	41.4%
272289 79.-2-15.11	Canajoharie	63.9	21.3	42.6	33.4%
272289 80.-2-13.111	Canajoharie	54.9	29.0	25.9	52.9%
272289 80.-2-14.2	Canajoharie	21.5	13.0	8.5	60.4%
272289 96.-1-10.12	Canajoharie	49.5	31.8	17.6	64.4%
272289 96.-1-6	Canajoharie	10.7	9.2	1.6	85.2%
	Total	**258.2**	**120.1**	**138.1**	**46.5%**
273600 111.-1-1	Root	1.0	1.0	0.0	100.0%
273600 111.-1-11.11	Root	28.4	17.2	11.3	60.4%
273600 111.-1-21.211	Root	116.3	41.1	75.2	35.3%
273600 111.-1-24.11	Root	64.5	23.3	41.1	36.2%
273600 111.-1-24.12	Root	5.4	5.4	0.0	100.0%
273600 111.-1-26.1	Root	11.8	7.8	4.0	66.0%
273600 111.-1-38.12	Root	91.7	54.8	36.9	59.7%
273600 111.-1-48	Root	3.2	3.2	0.0	100.0%
273600 111.-1-5.211	Root	20.3	13.2	7.1	65.0%
273600 112.-1-15.2	Root	34.0	13.3	20.7	39.0%

Table 24-3. Town of Root PV Array Loss by Parcel and Town with 500 Foot Setback Applied

Tax Parcel ID	Town	PV Array on Parcel with ORES Setbacks (acres)	PV Array Lost if 500' Setback Applied	PV Remaining if 500' Setback Applied	Percent Decrease in PV Array Per Parcel
273600 112.-1-16.111	Root	14.0	2.9	11.1	20.7%
273600 112.-1-16.112	Root	14.9	13.5	1.3	91.0%
273600 112.-1-21.3	Root	52.8	12.2	40.7	23.0%
273600 112.-1-22.2	Root	9.3	6.3	3.0	67.6%
273600 112.-1-24.11	Root	63.5	23.4	40.1	36.8%
273600 112.-2-10.1	Root	49.3	19.0	30.3	38.6%
273600 112.-2-10.2	Root	13.3	10.5	2.8	79.1%
273600 96.-3-10	Root	1.3	1.0	0.3	75.8%
273600 96.-3-12	Root	12.6	11.8	0.8	93.9%
273600 96.-3-13	Root	2.3	2.3	0.0	100.0%
273600 96.-3-14	Root	5.5	5.5	0.0	100.0%
273600 96.-3-8	Root	3.6	3.5	0.0	99.6%
273600 96.-3-9	Root	16.5	10.7	5.8	65.0%
273600 97.-1-37.11	Root	61.6	52.5	9.1	85.3%
273600 97.-1-38.2	Root	6.9	6.9	0.0	100.0%
273600 97.-1-6	Root	66.6	57.5	9.1	86.3%
	Total	**770.6**	**419.8**	**350.7**	**45.5%**
	Total (Both Towns)	**1028.8**	**539.9**	**488.8**	**52.3%**

As shown in Table 24-1 (presented above regarding Section 8(B)(5)(h) of the Town of Canajoharie Solar Law and also shown below), in the Town of Root alone the Facility would lose 45.5% of the total PV array area, including five parcels that would lose all PV array (100%).

Thirteen (13) additional parcels in the Town of Root (of the 26 parcels) would lose greater than 50% of their PV array area. Eleven (11) of those 13 parcels would lose greater than 60% of their total PV array, and five (5) of those would lose greater than 80% of their PV array. In total, this equates to the loss of approximately 419.8 acres of PV array in the Town of Root. The buildable area remaining for installation of PV array after applying the 500-foot setback is very minimal and prohibits the siting of a 300 MW solar energy facility.

Similar with the remainder of the Facility, specifically in the Town of Root, the Applicant has carefully sited components by using previously disturbed portions of agricultural land, maximizing PV array on each panel while limiting impacts to environmental resources (e.g., wetlands, streams, adjacent areas, steep slopes, and forested habitat). By requiring the Applicant to adhere to a 500-foot setback in the Town of Root, as shown on Figure 24-1, remaining portions of the Facility Site which contain panels in the Town of Root become too small and therefore no longer technologically feasible to support the installation of PV array. This would, essentially, remove the ability of the Applicant to place panels on previously disturbed land in these suitable locations when environmental and other constraints have been avoided to the extent practicable.

Requiring compliance with the local setbacks would force the Applicant to obtain, at a minimum, approximately 419.8 acres of additional land in the Town of Root and 1201. acres of additional land in the Town of Canajoharie to maintain the proposed 300 MW capacity. This equates to nearly 97 MW DC in the Town of Root. This is a removal of nearly 32% of the Facility's capacity in the Town of Root alone related directly to PV array loss. This does not take into account portions of panels that would no longer be economically feasible to construct as they would be small, orphaned areas of PV array and may not be feasible at all given technological limitations to string length and panel placement.

As can be seen on Figure 24-1, the buildable area remaining after applying the Section 8(B)(5)(h) setbacks is very minimal and prohibits the siting of a 300 MW solar energy facility.

Even if the Applicant was able to acquire an additional 419.8 acres of buildable land, this would greatly expand the footprint of the Facility. Additionally, if the Applicant applied the setbacks, in order to maintain a 300 MW facility, components of the Facility would need to move and would likely encroach upon local sensitive environmental resources that are currently avoided by adhering to the ORES setbacks and could create additional impacts to resources such as threatened and endangered species, wetlands, visual resources, and others. The Facility has

been designed to avoid sensitive local environmental resources to the maximum extent practicable, but if the setbacks required by the Town were enforced, local environmental resources could be subject to permanent negative impacts.

It's important to keep in mind the context for setback restrictions and limitation and the purpose of a setback, particularly in balancing potential impacts. A 500 ft setback to property boundaries does not adequately balance the limitations to Facility design with the potential reduction of impacts to residents, particularly noting that it is 5 times (or more to non-residential property lines) the setback required under the ORES regulations to property lines. A larger setback does not provide any specific additional benefit or impact reduction (especially 5 times the difference). Larger setbacks alone do not equate to "more protective" and there is a point where a setback becomes prohibitive to the project development. This is that point, as demonstrated throughout this exhibit. The ORES regulations serve as a comparison point where that balancing results in a setback of 100 ft. to property boundaries. Thus, the ORES regulations should be adhered to for this Facility and the local requirement waived.

The degree of burden caused by the requirement is substantial, as this loss in generating capacity could result in the need to abandon the project. The Applicant has invested a substantial amount of time and resources to develop a project that minimizes potential impacts to environmentally sensitive resources within the Facility Site. Therefore, the Applicant is requesting a waiver for this provision because it is unreasonably burdensome.

(b) Why the burden should not reasonably be borne by the applicant

The burden (i.e., the loss of Facility buildable area, energy generation capacity, potentially leading to abandonment of the Facility) should not be borne by the Applicant. The Applicant has carefully designed the Facility within the Facility Site to avoid sensitive environmental areas (e.g., wetlands, threatened and endangered species, streams, and archaeologically sensitive areas), such that the buildable area has been reduced within the Facility Site to the minimum size economically feasible.

The Applicant has proposed a 300 MW project at this location because of the existing and available 345 kV transmission line, which allows larger utility scale projects to more readily and economically interconnect to the transmission grid. The 345 kV line allows applicants such as Flat Creek Solar to take advantage of existing transmission infrastructure that can support larger scale projects, without significant and costly upgrades, thereby helping the State achieve its CLCPA

goals more efficiently. Reducing the size of the Facility to comply with the Town setbacks would negate the benefits of the existing transmission infrastructure, penalize the State's consumers, who demand clean renewable energy, and would ultimately require more projects across the State to meet the State's clean energy goals. Ensuring the Facility can meet its proposed 300 MW capacity without unreasonable burdens such as excessive setbacks align with the State's clean energy mandates and allows the Applicant to take advantage of the existing 345 kV transmission line, allowing a more efficient and effective path towards fulfilling the CLCPA mandates.

Abandonment of the Facility at this stage would eliminate the contribution of 300 MW of renewable energy to the State's energy goals identified in the CLCPA and New York State Energy Plan of having 70 percent of energy generation produced from renewable energy sources by 2030 and 100% zero emission energy generation by 2040.

Therefore, the Applicant is requesting a waiver for this provision because it is unreasonable for the burden to be borne by the Applicant.

(c) The request cannot reasonably be obviated by design changes to the facility

No design change could bring the Facility into compliance with these setbacks, since they are tied to property lines and because the local provision imposes setbacks that are significantly large when compared to the Article VIII Regulations. If the Facility was redesigned to comply with the 500-foot setback, the Facility would lose a significant amount of buildable area. This would result in a loss of a large portion of the panel array areas, substation, access roads, and other Facility components. Figure 24-1 illustrates the Facility's buildable area (area inside of the Facility's Limit of Disturbance) that would be eliminated if the Facility were forced to comply with the Town's setback requirement. Moreover, the Applicant has carefully designed the Facility to avoid and minimize other environmental impacts including but not limited to wetlands, streams and water bodies, New York State (NYS) threatened and endangered species, visual resources, agricultural resources, and cultural and historic resources. The location of the proposed Facility is constrained by these other environmental resources and other provisions of local laws. Given the area within the Facility Site, design changes are simply not possible to obviate the waiver request for this provision, especially if all other required areas of avoidance and setbacks required by Article VIII are adhered to as well. Therefore, the Applicant is requesting a waiver for this provision because the request cannot reasonably be obviated by design changes to the Facility.

(d) The request is the minimum necessary

The request is the minimum necessary as the Facility has been designed to adhere to the setbacks outlined in § 1100-2.6(d) of Article VIII and the local law to the maximum extent practicable and implementing a setback of 500-feet would essentially create smaller patches of isolated buildable area which would not be technologically feasible for a 300 MW project.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

Granting the waiver request for the 500-foot setback would not create any adverse impacts. In fact, granting the waiver would prevent adverse impacts that would result from the relocation of panels and expansion of the Facility Site. Adherence to the setbacks in the ORES regulations are sufficiently protective of public health and safety and property owners' rights and were also based on careful consideration of typical best practices for siting of renewable energy projects, engineering guidelines, past Article 10 precedent and typical local law requirements across New York[3]. In addition, a setback of 100 feet from non-participating residential property lines and the proposed visual screening plan will minimize and mitigate potential visual concerns (see Exhibit 8, Visual Impacts) and the Facility will meet noise limits (See Exhibit 7, Noise and Vibration). Therefore, no adverse impacts to the community, adjoining landowners, participating and non-participating would result from granting this waiver.

For all of the reasons above, the Applicant requests that ORES grant the requested waiver for Section 7.2(Q) with respect to the 500-foot setback.

(x) Waiver of Underground Requirements: Section 7.2(T)

> *Section 7.2(T). All transmission lines, especially those traversing nonparticipating properties, and wiring associated with a utility-scale solar energy system shall be buried and include necessary encasements in accordance with the National Electric Code.*

[3] Assessment of Public Comments, Office of Renewable Energy Siting pg. 36.

The Town's Solar Energy Law contains a provision that requires all transmission lines to be buried underground. Note, no transmission lines will traverse non-participating properties.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden that Section 7.2(T) causes is substantial because of the location of the interconnection equipment. The Facility will connect to the adjacent NYPA 345 kV Transmission Line #352, with the POI switchyard located immediately to the south of the existing ROW. The Applicant has worked diligently to site the collection substation and POI switchyard as close to the existing, overhead NYPA Transmission Line #352 as feasible while avoiding impacts to participating properties. As can be seen on Figure 24-1, the interconnection facilities are in an area easily accessible from public roadways to the east and west, while centrally located in previously disturbed agricultural areas to avoid impacts to adjacent properties (e.g., visual and noise impacts) to the extent practicable and in adherence with ORES requirements.

The proposed overhead tap lines which will connect the Facility to the existing transmission grid from the POI switchyard to the existing NYPA Transmission Line #352 will be a total distance of 230 feet; however, approximately 50 feet of this overhead line will be within the proposed POI switchyard footprint (which will contain overhead structures) and another 20 feet will be within the existing NYPA ROW, which currently contains overhead structures and lines. Therefore, the overhead portion of the line required outside of the footprint of the POI switchyard and existing ROW is limited to 140 feet. Similarly, only a portion of the overhead line (approximately 20 feet) of the gen-tie line between the collection substation and POI switchyard will be located outside of the footprints of those facilities. Undergrounding of these lines would not be suitable for the loop in loop out interconnection proposed at the existing NYPA Transmission Line #352.

(b) The burden should not reasonably be borne by the applicant

The substantial burden this provision creates should not reasonably be borne by the Applicant because the Applicant has already designed the Facility with the majority of the lines being buried underground. The Applicant only requires 140 feet outside of the POI switchyard and existing NYPA ROW to remain aboveground and to properly connect via loop in loop out to the existing

NYPA Transmission Line #352. Additionally, the Applicant only needs approximately 20 feet outside of the collection substation and POI switchyard for the gen-tie line.

(c) The request cannot reasonably be obviated by design changes

As stated above, the Applicant cannot change the design of the Facility to comply with this provision, because the POI switchyard is aboveground, and the collection substation is adjacent and aboveground, therefore the connection between these two facilities (gen-tie line) must be aboveground and the transmission tap lines to the existing NYPA Transmission Line #352 must be aboveground. This eliminates the feasibility of underground construction.

(d) The request is for the minimum necessary

The Applicant's request is for the minimum necessary because the Applicant is only requesting that ORES waive this local requirement for the gen-tie line and transmission tap lines that must be placed aboveground due to technological and reliability constraints.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

There would be no adverse Facility impacts from granting the waiver request for Section 7.2(T). Interconnection is required for the Facility to provide 300 MW of electric generation to the grid. The portion of the transmission lines that are required to be placed aboveground are minimal, and result in negligible, if that, environmental impacts.

(xi) Waiver of Construction Hours: Section 7.2(V)

> *Section 7.2(V). Pre, post and during construction working hours shall be limited to Monday through Friday between the hours of 7 a.m. and 6 p.m. The Town Board shall have discretion on whether to allow work on Sundays.*

This provision significantly restricts when the Applicant is able to work on the Facility and is also much more restrictive than the permitted construction hours allowed by ORES. This would extend the timeline of construction without providing any real benefits to the Town.

The Facility cannot be designed to comply with this requirement, and the Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden imposed on the Facility by the application of Section 7.2(V) is substantial because it is significantly more restrictive than the ORES regulations outlined in § 1100-6.4(a) and would negatively impact the Facility's construction timeline. ORES has permitted construction to occur from 7:00 AM to 8:00 PM Monday through Saturday and 8:00 AM to 8:00 PM on Sundays and national holidays. The Applicant has proposed working hours of approximately 7:00 AM to 8:00 PM Monday through Saturday. This proposed restriction in the Town of Root's provision creates a significant burden on the construction timeline of the Facility because it removes 2 hours per day from the Monday through Friday construction period and the entirety of Saturday. Altogether this removes 34 hours of potential construction time per week and over the course of a year this adds an additional 1,700 hours of required construction to the construction timeline (or approximately 2 additional months of construction).

(b) The burden should not reasonably be borne by the applicant

The burden of the restrictive construction period provision should not be borne by the Applicant because ORES, after taking all potential factors into consideration, has already determined construction hours that minimize or avoid impacts. By limiting working hours, construction cost of the project potentially increase and the overall period of time that the Facility will be in construction extends, at no benefit to the Town. Typically, developers and host municipalities seek to minimize construction to as short of a time frame as possible to reduce the length of time residents are impacted by construction activities such as traffic and noise.

(c) The request cannot reasonably be obviated by design changes

The request cannot be obviated by design changes as the project design is not dependent on construction hours. This provision merely focuses on when the Applicant is allowed to build the Facility and there is nothing the Applicant modify with the Facility design to achieve compliance with this provision.

(d) The request is the minimum necessary

The request is the minimum necessary as the Applicant is requesting to follow the limits set forth in the Article VIII Regulations and is not seeking to extend construction hours beyond those limits.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The adverse impacts of granting the request are mitigated to the maximum extent practicable as the Applicant will abide by the construction hour limits in 16 NYCRR § 1100-6.4(a). The construction hour limits in Article VIII are sufficient and reasonable to facilitate construction and set forth reasonable procedures for work beyond the established work hours due to safety or continuous work that requires work outside the established hours. The construction limits are typical for solar energy system development throughout New York State. Set by ORES, the hours adequately mitigate impacts to the Towns and waiving the construction hour limitations reduces impacts on the community associated with a lengthier construction schedule and ensures the project can timely provide the benefits of renewable energy generation to New York State energy consumers.

For all the reasons stated above, the Applicant is requesting a waiver of this provision and ask that ORES allow the Applicant to follow the construction hours listed in the regulations.

(xii) Waiver of Buffer Zone: Section 7.2(W)

> *Section 7.2(W). Wherever a point of ecological interest exists there shall be a buffer zone of 50 feet surrounding that shall remain as native vegetative habitat. For example, if there is a natural pond, wetland, stream, or other protected habitat, no construction or deformation of the land shall occur within 50 feet of the shore, river bank, or marsh boundary.*

The Town's buffer zone provision is unclear and creates a setback that is impossible to tell where it begins and ends. Although the provision provides examples of what may be considered "of ecological interest," the Solar Law does not explicitly define what is "of ecological interest."

On March 27, 2024, the Applicant requested the Town to clarify and define what was considered a "buffer zone". The Town did not respond to the request for clarification and did not provide any additional details when the Town passed a final version and adopted their solar law on April 24, 2024.

The Applicant is seeking a waiver of this provision due to technological limitations. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The burden that Section 7.2(W) causes is substantial because it is unclear and requires a setback that is stricter than the standards ORES developed. For example, the outright prohibition of any "construction or deformation of the land" within 50 feet of the points of ecological interest is significantly more restrictive than the ORES standards for New York State-protected waterbodies. For wetlands, ORES provides an option for applicants who cannot avoid impacts to all wetlands and adjacent areas. If applicants cannot avoid the impacts, they must submit an explanation of all efforts made to minimize the impacts and provide mitigation for unavoidable impacts in accordance with § 1100-2.15(f). ORES established this standard because the Office understands that building projects such as the Facility are about minimization and mitigation, and not based on outright prohibitions.

Similar to the setback provisions discussed above, if the Applicant applied this additional setback, components of the Facility would need to be relocated and could encroach upon other local sensitive environmental and cultural resources, that are currently avoided in the Facility's design. Especially since "ecological interest" is not properly defined, it is impossible to comply with this design because it is unclear where a setback begins and ends due to the lack of clarity. The Applicant has invested a substantial amount of time and resources to develop a project that minimizes potential impacts to environmentally sensitive resources within the Facility Site. Therefore, the Applicant is requesting a waiver for this provision because it is unreasonably burdensome.

(b) The burden should not reasonably be borne by the Applicant

The substantial burden this provision creates should not reasonably be borne by the Applicant because New York State law already includes extensive provisions for addressing protection for wetlands, streams, and other potential resources of "ecological interest." All of which was taken into consideration when the Applicant designed the Facility. As collectively noted throughout the Application, careful consideration and compliance with the State standards and laws have been incorporated into the Facility's design. Section 7.2(W) of the Town of Root's law does not allow encroachment on the setback for any reason and does not offer the potential for mitigation. The Applicant does not even fully understand how, if even possible, to redesign the Facility to comply because the provision itself is not clear on what is required. Therefore, due to the confusion created by the undefined terms and the strict prohibition of development, without any opportunity

for mitigation creates an unreasonable and significant burden that should not reasonably be borne on the Applicant because the Applicant has already followed the Office's guidelines when designing the Facility.

Reducing the size of the Facility to comply with the Town's ambiguous setbacks would negate the benefits of the existing transmission infrastructure, penalize the State's consumers, who demand clean renewable energy, and would ultimately require more projects across the State to meet the State's clean energy goals. Ensuring the Facility can meet its proposed 300 MW capacity without unreasonable burdens such as excessive setbacks align with the State's clean energy mandates and allows the Applicant to take advantage of the existing 345 kV transmission line, allowing a more efficient and effective path towards fulfilling the CLCPA mandates

(c) The request cannot reasonably be obviated by design changes

As stated above, the Applicant cannot change the design of the Facility to comply with this provision, because the provision is not clear and does not allow for mitigation.

(d) The request is for the minimum necessary

Here, the Applicant's request is for the minimum necessary because the local law's requirement is not clear on what the Facility must be setback from. Without a clear and measurable standard, the Applicant cannot comply with the provision. Additionally, the Applicant is requesting that the Facility be held to the standards set in the ORES regulations. Therefore, the Applicant's request is for the minimum necessary.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

There would be no adverse Facility impacts from granting the waiver request for Section 7.2(W). Adherence to the setbacks and guidelines in the Article VIII regulations and all other applicable requirements set forth in Part 1100 (i.e., noise, visual, threatened and endangered species, wetlands, etc.) will be maintained as outlined in each applicable exhibit to the maximum extent practicable. The setbacks and allowance for mitigation in the regulations are sufficiently protective of public health and safety and environmental concerns and were established by the Office with these concerns taken into consideration. The Applicant has already designed the Facility in a way that minimizes impacts to wetlands and what may be considered points of "ecological interest." The Applicant respectfully directs ORES to Exhibits 13: Water Resources and Aquatic Ecology

and Exhibit 14: Wetlands for additional information. As such, no adverse impacts to the environmentally sensitive areas would result from granting this waiver.

(xiii) Waiver of Decommissioning Security: Sections 9.1(B) and 9.2(A)

> *Section 9.1(B) The cost of removing the entire solar energy system based upon prevailing wages and any other requirements applicable to municipalities under state of federal law and no salvage value shall be attributed to any of the components of the solar energy systems and/or the solar energy equipment.*
>
> *Section 9.2(A). Security shall be in an amount sufficient to ensure the good faith performance of the terms and conditions of the permit issued pursuant hereto and to provide for the removal of the solar energy system and restoration of the site subsequent to removal. The amount of the bond or security shall be 125 percent of the estimated cost of removal of the solar energy system and restoration of the property, with an escalator of 2 percent annually (or Consumer Price Index change if more than the annual escalator of 2 percent) for the life of the solar energy system and shall not take into account the net salvage value of any such project components.*

The Town's decommissioning requirement that a decommissioning security be 125% of the cost of removal, with an escalator of two (2) percent, and prohibit the inclusion of salvage value are all significantly more burdensome than the Uniform Standards and Conditions (USCs) established by ORES.

The Applicant is seeking a waiver of this provision, specifically for the 125% security amount, and 2 percent annual escalator, each based on factors of costs and economics. The justification for the Applicant to seek a waiver of this provision is outlined below.

(a) The degree of burden caused by the requirement

The Article VIII regulations provide that the Applicant execute a Decommissioning and Site Restoration Plan that provides a letter of credit with a 15% contingency, to be updated every fifth year due to inflation or other cost increases, and to include the projected salvage value. § 1100-10.2(b)(2); § 1100-2.224(a)-(c). The Town's requirements include a contingency that is 10% greater than the one established by ORES, increases by 2% every year, and completely prohibits salvage, which ORES has explicitly chosen to include. ORES chose the specific amounts based

on careful consideration of similar projects across the State and the Town's requirements create a significant and unnecessary additional financial burden on the project.

The degree of burden caused by this requirement is substantial in that it would require the Applicant to take on a significant and unnecessary financial burden and therefore, should not reasonably be borne by the Applicant.

(b) Why the burden should not reasonably be borne by the Applicant

The burden should not reasonably be borne by the Applicant because the Applicant has already provided for a 15% contingency in the Decommissioning and Site Restoration Plan. Contingencies for decommissioning account for a level uncertainty that accompanies the calculation of costs to be incurred at some point in the future. Actual costs may be more or less than the estimate prepared depending on the conditions present at the time of decommissioning. A 15% contingency is more than sufficient to cover unexpected costs associated with the decommissioning of a solar facility. By requiring the Applicant to provide a larger contingency, to update the amount every three years instead of five, and to not include salvage value, the Town's provision imposes a significant burden on the Applicant without providing a benefit to the Facility, Town, or local community. The Town's decommissioning requirements would result in a decommissioning bond amount of $29,429,177 compared with the ORES required amount of $11,696,235 which is sufficient to cover costs associated with decommissioning (see Appendix 23-1). It is unreasonably burdensome to require millions of dollars in additional costs to update the numbers more frequently, especially since ORES has already determined that a 15% contingency amount, updated every five years, and to include salvage value is appropriate for solar facilities statewide. Therefore, this burden should not reasonably be borne by the Applicant.

(c) The request cannot reasonably be obviated by design changes to the facility

The provision cannot reasonably be obviated by design changes because no matter how the Facility is designed, the Town's requirements would significantly increase the amount of financial security required for decommissioning. This is not the type of requirement which could be accommodated by a design change to the Facility.

(d) The request is the minimum necessary

Given that ORES has already determined what is appropriate (i.e. 15% contingency, updates every fifth year instead of annually, and the inclusion of salvage value), the benefits of applying

this provision are negligible. This is not the type of requirement that could be accommodated by a design change to the Facility, nor is there a particular adverse effect of waiving this requirement on the Town and community. The Applicant will already be required to provide decommissioning financial security to protect the Towns in the unlikely event that the Facility owner does not conduct decommissioning and site restoration on its own. A cost estimate for decommissioning has been provided in Appendix 23-1, Decommissioning and Restoration Plan. There is no basis to impose additional financial burdens on the Facility by requiring more financial security than ORES has deemed necessary. Also, applying local laws that conflict with the standards under Article VIII creates unnecessary uncertainty for developers of renewable energy facilities and works to undermine the standards and conditions promulgated under the regulations, which is contrary to the goals of the CLCPA and the needs of consumers.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

As part of the ORES process, the Applicant has prepared a Decommissioning and Site Restoration Plan. The Plan includes a detailed protocol for removal of panel arrays in the event of abandonment and a net decommissioning and site restoration estimate to be allocated between the two Towns based on the estimated costs associated with removal and restoration of facilities within each Town. The Applicant followed the requirements of the ORES regulations when preparing the estimates. Therefore, the Applicant requests ORES elect to not strictly apply this regulation considering the benefits of the Facility and the directives of the CLCPA.

For all of the reasons above, the Applicant requests that ORES grant the requested waiver for Section 9.2(A) with respect to the 125% contingency requirement, the two (2) percent annual increase, and the prohibition of the inclusion of salvage value.

(xiv) Waiver of Decommissioning Removal Requirements: Section 9.1(A)

Section 9.1(A) The removal of all energy facilities, structures and equipment including any subsurface wires and footings from the parcel. Any access roads created for building or maintaining the system shall also be removed and re-planted with vegetation in coordination of the landowners wishes.

The Town requires the removal of all above and below-ground structures, equipment, and footings. However, this requirement is unnecessarily conservative as abandoning certain

components in place, such as buried collection, can be done safely and prevent unnecessary environmental impacts associated with removal.

The justification for this assertion is grounded in both financial considerations and the technical practical implications associated with this removal requirement.

(a) The degree of burden caused by the requirement

This request should not be borne by the Applicant or consumers who demand renewable energy. The Applicant will remove all aboveground equipment and buried components down to a depth of 48 inches below grade in agricultural lands and 36 inches in non-agricultural lands. However, removing Facility components buried below these depths would result in significant impacts to the resources above and below which those components are located. Extending removal efforts to such depths great than 4 feet would also increase the scope and duration of decommissioning activities, causing disruption to the surrounding community through additional and prolonged earth disturbance, noise, traffic, and road impacts from hauling cable, with no notable benefit to them from doing so. This concept is recognized by the NYSDAM Guidelines which states “If the operation of the generation facility is permanently discontinued, remove all above ground structures (including panels, racking, signage, equipment pad, security fencing) and underground utilities if less than 48- inches deep. All concrete piers, footers, or other supports must be removed to a minimum depth of 48-inches below the soil surface.” It is common practice statewide and nationally to leave deeper underground components in place for this reason.

(b) Why the burden should not reasonably be borne by the Applicant

As demonstrated above, the practical implications of removing the components are more impactful than leaving them in place. Disrupting the existing underground infrastructure may lead to unintended environmental consequences, such as soil disturbance, potential groundwater impacts (see Exhibit 5), and disruption of ecosystems that will have regrown following construction. Leaving components below grade as proposed minimizes environmental impacts overall.

(c) The request cannot reasonably be obviated by design changes to the facility

The provision cannot reasonably be obviated by design changes as the depth of removal of buries facility components does not related to design. This is not the type of requirement which could be accommodated by a design change to the Facility.

(d) The request is the minimum necessary

The request is the minimum necessary as the Applicant will remove all Project specific above ground equipment and buried components to a depth of 4 feet below grade in agricultural land which is in compliance with the requirements set in the ORES regulations and NYSDAM Guidelines. In addition, few Facility components will be buried at a depth of greater than 48 inches; the components that would exceed that depth are primarily horizontal directional drilled (HDD) or bored collection lines crossing beneath roadways, wetlands, or other sensitive features. Leaving components in place below these depths avoids additional and unjustifiable environmental impacts to land resources that would result from the complete removal of buried components, especially since some of these components have been buried to avoid impacts to sensitive resources.

(e) The adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable

The adverse impacts of granting the request are less than not granting the request since more adverse impacts will occur by removing the components and the Applicant will abide by the decommissioning requirements in Section 900-2.24(c) and 900-10.2(b)(1).

For all of the reasons above, the Applicant requests that ORES grant the requested waiver for Section 9.1(A) removal requirements.