STATE OF WISCONSIN **CIRCUIT COURT** **ST. CROIX COUNTY**

TOWN OF FOREST,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

Case No.: 14CV18
Class Code: 30607
(Administrative Agency Review)

ST. CROIX CO. CASE NO.
FILED BY L. MEYER
ASSIGNED TO H.W. CAMERON

PETITION FOR JUDICIAL REVIEW

INTRODUCTION

Pursuant to section 227.52, Wisconsin Statutes, Petitioner Town of Forest petitions this Court for review of an October 25, 2013 decision by Respondent Public Service Commission of Wisconsin (the "Commission") to award Highland Wind Farm, LLC a Certificate of Public Convenience and Necessity for construction of an industrial wind farm in the Towns of Forest and Cylon, St. Croix County, Wisconsin.

Based on the grounds stated below, the Town requests that the Court reverse or set aside the Commission's decision and remand it for further consideration.

PARTIES

1. Petitioner Town of Forest is a political subdivision of the State of Wisconsin, organized pursuant to Chapter 60, Wisconsin Statutes, and located in St. Croix County, Wisconsin.

2. Respondent Public Service Commission of Wisconsin is an administrative agency of the State of Wisconsin, organized pursuant to Chapter 196, Wisconsin Statutes, and tasked with regulating industrial wind farms of output over 100 megawatts.

BACKGROUND

I. Municipal Permits and Conflicts of Interest

3. In early 2010, Wisconsin-based energy company Emerging Energies LLC filed an application with the Town for permits to build a 97 megawatt wind farm within the Town's jurisdiction, which it called the "Highland Wind Farm." *See* Direct-Forest-Junker, p. 22. Between late 2010 and early 2011, the then-current Town Board of Supervisors approved the application and issued the permits. *See id.*

4. Soon thereafter, Town residents uncovered evidence that the Board of Supervisors members who had approved those permits were expected to receive "good neighbor" payments from Emerging Energies. *See id.* After a successful recall election, the new Board of Supervisors revoked all the permits issued to Emerging Energies. *See id.*

II. Original Proceedings before the Commission

A. Application and criteria

5. On December 16, 2011, Emerging Energies, now doing business as Highland Wind Farm, LLC ("Highland") filed with the Commission an application for a Certificate of Public Convenience and Necessity ("CPCN") to build an industrial wind farm in the Town's jurisdiction (the "Project"). *See* Application of Highland Wind Farm, LLC for a Certificate of Public Convenience and Necessity; *see also* Wis. Stat. § 196.491(3). To meet the Commission's statutory jurisdictional threshold, Highland changed the proposed wind farm's output to 102.5 megawatts from the original 97 megawatts. *See* Tr. p. 1753. Highland's application showed that two out of three recalled Board of Supervisors members' families were listed as "participating" in the Project. *See* Appendix Y to CPCN Application.

6. The Project, as Highland proposed it to the Commission, would consist of between 41 and 44 of the largest wind turbines installed in a residential area in the United States. It would span over 26,500 acres over a substantial portion of the Town's jurisdiction.

7. In March of 2010, shortly after Highland filed its application for a CPCN, chapter PSC 128 of the Wisconsin Administrative Code ("PSC 128") went into effect. The chapter, which was drafted when Wisconsin's largest turbines were much smaller than the ones proposed for the Project, set nighttime noise limits at 45 A-scale weighed decibels (dBA). *See* Wis. Admin. Code § PSC 128.14(3).

8. Pursuant to section 196.491(3)(d), Wisconsin Statutes, the Commission could only issue Highland a CPCN for the Project if Highland met its burden to prove that the Project:

   a. Was in the public interest, considering individual hardships and safety, reliability and environmental factors;

   b. Would not have undue adverse impact on other environmental values such as ecological balance, public health and welfare, historic sites, geological formations, and the aesthetics of land and water used for recreation;

   c. Would not unreasonably interfere with the orderly land use and development plans for the area involved; and

   d. Would comply with the noise limits imposed by PSC 128.

   See Wis. Stat. § 196.491(3)(d).

B. Evidence and recommendations

9. The proceedings before the Commission (the "original proceedings") soon revealed that the Project could not meet the statutory criteria for a CPCN. Highland's own noise prediction modeling made clear that the Project would violate the 45 dBA noise limit in up to forty-five (45) homes. *See* Final Decision, p. 6.

10. The original proceedings also revealed that noise from wind turbines could pose significant health risks to nearby residents. *See, e.g.*, LFN Direct-Forest-Schomer, p. 6. Experts testified that, in addition to audible noise, wind turbines also produced inaudible noise –known as "infrasound" – which experts believe may cause significant negative health effects. *See id.* Several experts testified that the best way to avoid these effects was to set wind turbine noise limits at 40 dBA – as opposed 45 dBA. *See, e.g.*, SR-Forest-Punch, p. 17; SR-Forest-Schomer, p. 15. The Town produced evidence that multiple residences within its jurisdiction were occupied by residents with health conditions that could be exacerbated by the adverse health effects associated with wind turbine noise. *See* Exs.-Forest-Junker-20, 21.

11. In response to this testimony, in December of 2012, the Commission funded an infrasound study to be conducted in the Shirley Wind Farm in Brown County, Wisconsin (the "Shirley Study"). Ex.-FV-Rand-2. The Shirley Wind Farm, which was also developed by Emerging Energies and also used the same type of large wind turbines, had seen multiple complaints by residents of adverse health effects – with three entire families having abandoned their homes due to wind turbine noise. *See id.*

12. The Shirley Study recommended that, to protect public health and safety from the effects of audible and inaudible noise, the Commission adopt a 40 dBA noise limit for all residences. *Id.*

C. The Commission's decision

13. Ultimately, on March 15, 2013, the Commission issued a final decision denying Highland a CPCN for the Project (the "original decision"). *See* Final Decision, p. 6. The Commission wrote:

> The Highland project, based upon the design as presented and the accompanying modeling in this record, is not in the public interest and would create undue adverse impacts on public health and welfare, and individual hardships because there are multiple nonparticipating residences where Highland has failed to demonstrate compliance with the Wis. Admin. Code § PSC 128.14(3) nighttime audible noise limit of 45 dBA (A-weighted decibels).

Id. The Commission made no findings on a 40 dbA limit for any residents.

III. Reopened Proceedings before the Commission

A. Highland's proposal for reopening

14. On April 4, 2013, Highland requested that the Commission reopen the proceedings. Highland claimed to have evidence that the Project's turbines could be "curtailed" to meet the noise limits. Highland's proposal (the "curtailment plan") involved:

a. Changing rotor blade pitch in each turbine to reduce or "curtail" rotor speed and, according to Highland, reduce each turbine's noise output to meet noise limits;

b. Applying a "directivity analysis" to change the rotor blade pitch in each turbine to *increase* rotor speed and sound output back up toward noise limits based on each turbine's measurement of changes in wind direction;

c. Relying on turbine manufacturers to produce and program into each turbine a software to implement the curtailment plan – and therefore allow each turbine to do all of the above in real time without human input or supervision;

d. Implementing a post-construction sound monitoring system based on two fixed noise monitors and one "roving" noise monitor; and

e. Lowering the noise limit to 40 dBA in six residences identified as "noise sensitive" based on their occupants' health conditions.

See Petition to Reopen or, in the Alternative, for Rehearing, pp. 17-19.

15. On April 4, 2013, over the Town's objections, the Commission granted Highland's request to reopen the proceedings and provide a rehearing (the "reopened proceedings").

See Order to Reopen, p. 1.

16. In the reopened proceedings, the Commission ordered Highland to prove through sound modeling that its curtailment plan would *ensure compliance* with a 40 dBA nighttime noise limit for the six residences, and with a 45 dBA nighttime noise limit for all other residences with whom Highland had no agreement. *See* Second Prehearing Conference Memorandum, p. 1; Order to Modify Second Prehearing Conference Memorandum, p. 1.

B. Evidence and recommendations

17. In the reopened proceedings, the Town and Forest Voice, an independent group of Town residents intervening in the proceedings, provided substantial evidence that the Project, as modified by the curtailment plan, would not ensure compliance with noise limits. Some of that evidence included:

a. Testimony from multiple experts in the field, including Highland's own, that Highland's proposed fully-automated blade-pitch curtailment and directivity analysis had never before been used or tested in any other wind farm;

b. Uncontested testimony from Highland itself that the wind turbine manufacturers, who would be providing the very software upon which the curtailment plan depended, had never even received details on the curtailment plan – much less designed software tailored to accommodate the curtailment plan; and

c. Uncontested testimony that Highland failed to account for a 3 decibel margin of error that its own sound modeling required – which would amount to significant under-predictions of noise levels around the Project.

See generally Town of Forest's Initial Brief in Opposition to CPCN and Curtailment Plan; Forest Voice Initial Brief.

18. The Town also introduced evidence that the Town interpreted its land use plan (the "Comprehensive Plan") to be inconsistent with the Project. *See* Direct-Forest-Junker, p. 8. Although the Comprehensive Plan encouraged alternative energy development, it

restricted any industrial development to an area confined along Highway 64 – a confinement the Project would not respect. *See id.*

19. During briefing, the Town noted that the curtailment plan would lessen the generation capacity of the Project, thereby making it a smaller facility and outside of the Commission's jurisdiction. Town of Forest's Initial Brief in Opposition to CPCN and Curtailment Plan, pp. 6-7. Specifically, using Highland's own testimony regarding the power output loss associated with the curtailment plan, the Town noted that the total power out of the Project under curtailment would be less than 100 megawatts – the minimum threshold for Commission jurisdiction under section 196.491, Wisconsin Statutes. *Id.* at pp. 8-9; *see also* Wis. Stat. § 196.491(1)(g).

C. Town residents' health and safety concerns

20. In both the original and reopened proceedings, the Town presented evidence about individuals in the project area who suffer from noise-sensitive health conditions such as Parkinson's disease and autism. *See* Exs.-Forest-Junker-19, 20. Additionally, members of the public who resided in the project area testified in both proceedings regarding health issues that could be worsened by wind turbine noise. *See, e.g.*, Tr. pp. 1941, 2034-35.

21. When the reopened proceeding commenced, the Commission notified the parties through its prehearing orders that a 40 dBA limit had been adopted for six noise sensitive residences. *See* Second Prehearing Conference Memorandum, p. 1; Order to Modify Second Prehearing Conference Memorandum, p. 1. This came as a surprise: the Commission did not apply the 40 dBA limit to any residence – even the six Highland identified. *See generally* Final Decision.

22. As discussed thoroughly in this petition, throughout the reopened proceedings, the

Commission precluded the Town from introducing evidence and making arguments that there were additional Town residents who, because of their various health conditions, should be subject to the safer 40 dBA limit. Instead, the Commission applied the 40 dBA nightime standard to merely six residences – at the exclusion of others which had similar health conditions – based on at least one off-the-record private discussion between Commission staff and Highland, which was held without any notice or process to any other party. *See* Supplemental Direct-HWF-Mundinger, pp. 1-2.

D. The Commission's findings and conclusions

23. On October 25, 2013, the Commission issued a decision granting a CPCN for the Project (the "final decision"). *See* Final Decision on Reopening. On November 14, 2013, the Town petitioned the Commission for reconsideration of its decision and a rehearing on the grounds that the Commission had made material errors of law and fact. *See* Intervenor Town of Forest's Motion for Reconsideration. On December 20, 2013, six days after the Town's petition was deemed denied under section PSC 2.28, Wisconsin Administrative Code, the Commission issued a written decision denying the Town's petition. *See* Order Denying Motions for Reconsideration and Rehearing; *see also* Wis. Admin. Code § PSC 2.28.

IV. Prayer for Relief

24. Pursuant to section 227.52, Wisconsin Statutes, the Town now requests the Court to reverse or set aside and remand the final decision on the following grounds, as set forth fully in this petition:

a. The Commission made procedural errors which compromised the fairness and due process of the proceedings;

b. The Commission did not have jurisdiction to issue a CPCN for the Project;

c. The Commission made material errors of law;

d. The Commission based its decision on findings of fact not supported by substantial evidence in the record;

e. The Commission's determinations and the approval of Highland's CPCN application are not in the public interest; and

f. The Commission abused its discretion.

STANDING

25. Pursuant to section 196.491(3)(j), Wisconsin Statutes, any county, municipality or town having jurisdiction over land affected by a CPCN obtained under section 196.491(3)(a)(1), Wisconsin Statutes, may petition for judicial review of a decision to issue the CPCN under Chapter 227, Wisconsin Statutes.

26. The Town has jurisdiction over the land that will be directly affected by the Commission's approval of Highland's CPCN. The Project poses a significant risk to the health safety of Town residents, the value of properties within the Town, and the Town's ecological and geological environment. The Town therefore has standing under section 196.491(3)(j), Wisconsin Statutes, to petition for review of the Commission's decision.

GROUNDS FOR REVERSAL

I. The Commission Lacked Jurisdiction to Issue a CPCN for the Project.

27. The Commission lacked jurisdiction to grant Highland's CPCN because the Project under curtailment, as approved by the Commission, would produce less than 100 megawatts – which is the minimum overall energy output a project must have in order to fall under the Commission's jurisdiction. Wis. Stat. § 196.491(1)(g).

28. Highland's curtailment plan effectively placed the Project below the Commission's 100 megawatt jurisdictional threshold. *See* Town of Forest's Brief in Opposition to CPCN

and Curtailment Plan, pp. 6-9. Highland admitted that, by curtailing the Project's turbines to reduce noise output, it would also reduce each turbine's power output. Tr. p. 1737. Based on the curtailment levels Highland proposed for each turbine, as well as the projections of power output loss Highland provided, the Town submitted evidence that the Project's overall output would have been reduced to approximately 92 megawatts – or approximately 8 megawatts below the Commission's jurisdiction. Town of Forest's Brief in Opposition to CPCN and Curtailment Plan, pp. 8-9.

II. The Commission Deprived the Parties of their Right to Due Process and Made Material Errors of Law and Fact in Finding that the Project Only Needs to Comply with Noise Limits "95% of the Time."

29. In its final decision, the Commission determined that "a showing of compliance by Highland at or above 95% of the time is adequate for the Commission to consider the Project in compliance with applicable noise limits." Final Decision on Reopening, p. 35.

30. This finding is faulty in three ways: it was made without any due process to the parties; it is contrary and irreconcilable with the Commission's own conclusions of law; and it is unsupported by substantial evidence in the record.

A. The Commission deprived the parties of their due process rights by making this finding without giving the parties notice or an opportunity to present evidence or arguments on the issue.

31. Maximum noise limits attributable to wind projects are established by section PSC 128.14(3), Wisconsin Administrative Code. This section provides, in relevant part, that "an owner shall operate the wind energy system so that the noise attributable to the wind energy system does not exceed 50 dBA during the daytime hours and 45 dBA during the nightime hours." Wis. Stat. § 128.14(3).

32. How compliance with the PSC 128 limits is determined was not at issue in the original

proceeding. *See generally* Briefing Memorandum; Decision Matrix. There was nothing in the Commission's original briefing memorandum or decision matrix to suggest that the Commission would consider this issue in a decision. *See id.*

33. In its original decision, the Commission merely referred to the testimony of a single expert, who had opined that he would consider a wind farm to be in compliance with noise limits if it did not exceed those limits "95% of the time." Final Decision, p. 18. The Commission noted that it might be "helpful" in future cases to evaluate "some sort of percentage-based standard." *Id.* at 18-19. But the Commission made no finding that a 95% compliance level would be sufficient for a CPCN, or that it would become the standard in this or future cases. *See id.*

34. When the Commission reopened the proceeding, it never identified the issue of what should be the standard for compliance with the noise limits under PSC 128. *See generally* Order to Reopen. To the contrary, the Commission made clear that the scope of the reopened proceeding was to be limited to the issues identified in the second prehearing conference – none of which referenced a compliance level or percentage-based standard. *See* Second Prehearing Conference Memorandum, p. 1; Order to Modify Second Prehearing Conference Memorandum, p. 1.

35. In fact, throughout the reopened proceeding, the Commission consistently prohibited the parties from introducing any evidence that did not address the very narrow questions presented for reopening. *See, e.g.*, Order Denying Appeal of Evidentiary Ruling for Reopened Proceeding, pp. 1-2. Consistent with the scope of the proceeding set by the Commission, neither parties nor staff introduced evidence or made arguments on a compliance level or percentage-based standard. Again, consistent with the scope of the

proceeding, the staff's reopening Briefing Memorandum and Decision Matrix, which identify and inform the Commission of the issues in a proceeding, made no mention that a percentage-based standard or compliance showing was at issue. *See generally* Briefing Memo on Reopening; Decision Matrix on Reopening.

36. Yet, when the Commission made its final decision, it found that the Project could be built and operated should Highland show compliance with noise limits "95% of the time." Final Decision on Reopening, pp. 35, 49. Without notice or an opportunity to present evidence and legal argument on this issue, the parties never had any input on an issue that goes to the very core of protecting public health: whether the Project will be too loud at any given time.

37. The Commission's failure to provide adequate notice of the compliance issue amounts to a procedural error that deprived the parties of their due process rights and impaired the fairness of the proceeding.

B. The Commission's determination to impose a 95% compliance standard was contrary to its interpretations of law and its previous orders.

38. In its original decision, based on the recommendations of Wisconsin's Wind Siting Council, the Commission concluded that the applicable noise limits in PSC 128 were "absolute limits" – as opposed to average limits. Final Decision, p. 6; *see also* Wis. Stat. § 196.378(4g)(c). In other words, the Commission found that, in order to receive a CPCN, a project could not exceed the 45 dBA limit *at any time*. *See id.*

39. However, the Commission's decision that the Project only had to comply with noise limits "95% of the time" clearly allowed the Project to exceed the very noise limits the Commission had previously decided could not be exceeded. *See id.*

40. The Commission made no attempt to explain or reconcile its decision with its previous

interpretation of the applicable noise limits. *See generally* Final Decision on Reopening. Nothing in the Commission's final decision, and nothing in the record, suggests a reason for the Commission to reverse its previous interpretation that these limits could not be exceeded. Nor does anything in the Commission's decision or in the record provide a basis for an exception to the notion of absolute maximums. *Id.*

41. Therefore, the Commission's determination to set a compliance standard of 95%, and therefore allow the Project to violate noise limits, is an error of law.

C. The Commission's determination is not based upon substantial evidence in the record.

42. The Commission made the "95% of the time" finding without substantial evidence in the record to support it. As previously noted, the Commission's decision rests on a single statement made by one witness during cross-examination in the original proceeding. *See* Final Decision on Reopening, p. 6. Nothing else in the entire record addressed, directly or indirectly, the 95% compliance issue.

43. Without a record on this issue, the Commission did not and could not define what it meant by a standard of "95% of the time." *See, e.g.*, Final Decision on Reopening, pp. 35, 49. The Commission's undefined use of "time" leaves the Project free to be out of compliance in a wide range of circumstances. It could be read to mean the Project can operate any turbine at any noise level on any home for 5 out of every 100 minutes, hours, days, weeks, or months – consecutively or not. And there is no evidence in the record to suggest the effect of these permutations. With such an undefined standard, the public is left to experience loud noise levels that can be harmful to their health for substantial periods of time – and the wind farm operator is left free to violate the law 5% of whatever time period it finds most beneficial to its interests.

44. Therefore, having no evidence to even define it, the Commission's determination setting a compliance standard of 95% lacks a basis in substantial evidence and is an error of fact.

III. The Commission's Determination that the Proposed Project Would Not "Unreasonably Interfere" with The Comprehensive Plan Is Contrary to Law and Lacks a Substantial Basis in Evidence.

45. In its final decision, the Commission made an erroneous conclusion of law in not giving appropriate deference to the Town's interpretation of its own land use and development plan. *See* Wis. Stat. §§ 196.491(3)(d)(6), 227.49(3).

46. The Commission cannot grant a CPCN for a project unless the project "will not unreasonably interfere with the orderly land use and development plans for the area involved." Wis. Stat. § 196.491(3)(d)(6).

47. The Wisconsin Supreme Court has held that municipal governments are entitled to deference in their interpretation of their own land use laws. *See Ottman v. Town of Primrose*, 332 Wis. 2d 3, 14, 796 N.W.2d 411, 416 (2011); *see also Marris v. City of Cedarburg*, 176 Wis. 2d 14, 33, 498 N.W.2d 842, 842 (1993). The Court noted that deference is owed to municipalities because "locally elected officials are especially attuned to local concerns." 332 Wis. 2d at 29, 796 N.W.2d at 424.

48. But the Commission did not defer to the Town's interpretation of its own land use plan. *See* Final Decision on Reopening, p. 14. The Commission concluded that the Project would not "unreasonably interfere" with the Town's land use plan merely because the Town's land use plan "does not expressly limit support for renewable energy to small-scale development" and because wind projects are "typically placed in rural areas." *Id.*

49. This finding was wholly inconsistent with the evidence introduced by the Town. The Town's evidence made clear to the Commission that the Project would conflict with

provisions in the Comprehensive Plan that limit industrial development – so as to preserve the Town's scenic qualities and rural character. *See id.* at p. 13.

50. Specifically, the Town informed the Commission that the Comprehensive Plan envisions "maintaining the rural character of the town; siting and designing large-scale businesses and developments to avoid conflicts with preserving the town's rural character; and limiting development, such as the proposed project, to only the hamlet of Forest and along State Highway 64." The Town also informed the Commission that "although the Comprehensive Plan supports renewable energy development in the town, it should be read to mean small-scale renewable energy development, not development of the size and scope of the proposed project." *See id.*

51. The Commission's finding that the Town's Comprehensive Plan "does not expressly limit support for renewable energy to small-scale development" was not enough to support its conclusion that the Project would not "unreasonably interfere" with the plan. Much to the contrary, the fact that the Comprehensive Plan was silent on this specific issue was yet another reason for the Commission to defer to the Town's interpretation – rather than imposing its own inconsistent interpretation.

52. In sum, the Commission failed to give the Town the deference due under Wisconsin law, and reached a conclusion wholly inapposite to the evidence in the record. Even under the most deferential standard of review, the Commission's disregard of the Town's interpretation of its own land use plan was clearly inconsistent with section 196.491(3)(d)(6), Wisconsin Statutes. *See Ottman v. Town of Primrose*, 332 Wis. 2d 3, 14, 796 N.W.2d 411, 416 (2011); *see also Marris v. City of Cedarburg*, 176 Wis. 2d 14, 33, 498 N.W.2d 842, 842 (1993).

IV. The Commission's Finding that There Was No Basis to Apply a 40 dBA Limit to Additional Sensitive Residences Is Not Supported by Substantial Evidence and Is The Result of Material Errors Law, Fact and Procedure.

53. The Commission declined to extend the protection of the 40 dBA nighttime noise limit to residences other than the six Commission staff identified – even though those residences were similarly situated vis-à-vis the six identified. *See* Final Decision on Reopening, p. 15. This decision was the result of a faulty process that ignored substantial evidence in the record and deprived the parties, as well as the similarly-situated Town residents, of their rights to a fair proceeding.

54. In its final decision, the Commission wrote that it "accept[ed] Highland's voluntary agreement to obligate itself to a lower limit of 40 dBA for the six identified residences," but was "unwilling to require Highland to extend this accommodation to others." *Id.* at p. 17. However, the record shows that these six residences were selected, in private meetings between Highland and Commission staff, from a much larger group of similarly situated residences – without notice or explanation to any other party. *See* Supplemental Direct-HWF-Mundinger, p. 1-2.

55. In the original proceeding, the Town and Town residents presented substantial testimony about individuals with chronic health conditions, such as Parkinson's disease and autistic syndromes, that can be exacerbated by noise. *See* Rebuttal-Forest-Junker, pp. 2-4; Exs.-Forest-Junker 18, 19c. In all, the Town identified mulitple residences whose occupants were vulnerable due to health conditions. *See id.* No proposal to give those residences special consideration came from Highland or from the Commission.

56. Highland first reported six residences as "sensitive" due to health concerns in the testimony Jay D. Mundinger, one of Highland's witnesses. *See* Supplemental Direct-

HWF- Mundinger pp. 1-2. But the only explanation Mr. Mundinger gave to the selection of these six particular residences was that Highland had had "discussions with [Commission] staff," in which he claimed "[Commission] staff identified six individuals" for whom Highland decided to revise the site layouts to reduce noise. *See id.* No parties were ever notified of these discussions, or invited to comment on their outcome.

57. The Town's Chairperson, Jaime Junker, responded by testifying that noise protections should be extended to other Town residents with health problems, as presented in the Town's health surveys. Rebuttal-Forest-Junker pp. 2-4. Nonetheless, the Commission identified the six residences, at the exclusion of others, as the "sensitive" ones – without any explanation as for why similarly situated residences were excluded. Briefing Memorandum of January 10, 2013, pp. 29-32.

58. In its original decision, the Commission made no findings related to the six sensitive residences. *See generally* Final Decision. The Commission referenced these residences only indirectly in the description of the Project: "In responses to concerns expressed by residents of the project area at the public hearing, Highland provided revised project layouts, which use some alternate turbine sites rather than Highland's original preferred sites." Final Decision, pp. 5-6. No mention was made of a 40 dBA nighttime limit for these residences. Because the Commission ultimately denied Highland's CPCN application in its original decision, the Town never appealed it.

59. On reopening the case, however, the Commission's prehearing orders identified as issues whether the project could meet a 40 dBA standard for "the six sensitive residences." Second Prehearing Conference Memorandum, p. 1; Order to Modify Second Prehearing Conference Memorandum, p. 1. These orders appear to reflect Highland's offer in its

April 4, 2013 petition to reopen to apply a 40 dBA nighttime sound limit to the "six identified residences occupied by potentially sensitive individuals." Petition to Reopen or, in the Alternative, for Rehearing, p. 19.

60. The Town again sought to present evidence about other sensitive residences that should be included under the now-identified 40 dBA standard. Direct-Forest-Junker, p. 2-3. Exs.-Forest-Junker, 28c-33. At the status conference of August 13, 2013, the Town argued that the "40 dBA standard is a blanket of security to these folks with problems similar to the six [identified sensitive residences]. Jaime Junker wants to testify about who these other folks are." Status Conference Transcript, pp. 45-49.

61. However, the administrative law judge granted Highland's motion to exclude this evidence, stating that "the order [to Modify the Second Prehearing Conference Memorandum] specifically points out the six residences having the problem ... [the Commission] evaluated the situation and they picked out those six." *Id.* The testimony and exhibits of Mr. Junker relating to the other households was stricken from the record and required to be redacted. *See id.*

62. Similarly, at the August 15, 2013 hearing, the administrative law judge ruled that the Town was not allowed to question Commission staff about why the 40 dBA standard was not extended to other town residents who testified to health problems similar to the selected six residences. Tr. 2202-2214. Additionally, Commission staff advised that the staff person responsible for evaluating individuals for inclusion in the standard was not available to testify. Tr. 2202-2214. The parties had no notice of this availability issue prior to the hearing.

63. In sum, the Commission adopted a 40 dBA nighttime standard for sensitive residences in

its orders in these proceedings, and then selectively applied this standard to only six residences, despite evidence of other similarly situated households. The exclusion of the other sensitive residences was never explained in the record, lacks a basis in substantial evidence and is an error of fact.

64. Similarly, the Commission's repeated rulings excluding evidence relating to other sensitive households, in reliance on an agreement between Highland and staff made in private meetings, impaired the fairness of the proceeding and amounts to a material error in procedure warranting reversal and remand.

V. The Commission's Determination that Highland's Curtailment Plan Is Sufficient to Ensure Compliance with Noise Limits Is Not Supported by Substantial Evidence.

A. The Commission's determination that Highland's computer modeling was sufficiently accurate and reliable to ensure the Project's compliance with applicable noise limits is not supported by substantial evidence.

65. In the original proceeding, Highland's noise modeling predicted that noise levels from the wind turbines would exceed sound level limits of 45 dBA for as many as forty-five (45) nonparticipating residences. Final Decision, p. 8. In the reopened proceeding, Highland again provided noise modeling; this time, in an attempt to prove that curtailment of the wind turbines would allow the Project to comply with the applicable sound limits. According to Highland, its new modeling showed that curtailment would bring all turbines into compliance vis-à-vis every residence – although many residences met the limits by fractions of a decibel. Ex.-HWF- Hankard 10, Exs.-HWF-Blank 3, 4.

66. In its final decision, the Commission wrote:

> Highland's sound modeling results, which were prepared using the WindPro modeling software that implements ISO Standard 9613-2, represent the higher end of likely sound levels from project facilities,

> considering the limitations and uncertainties included in the software and model. As such, the Commission found the modeling is reasonable and these results predict that that [sic] proposed project will likely comply with applicable noise limits.

Final Decision on Reopening, p. 25.

67. However, in concluding that Highland's modeling accurately predicted sound levels, the Commission ignored uncontested evidence that the ISO 9613-02 Highland had used required a margin of error of plus or minus 3 dB – which Highland did not apply. Direct-FV-Lamancusa, p. 12, Surrebuttal-FV-Lamancusa, p. 4. Effectively, this meant that Highland's results could be under-predicting sound by as much as 3 dBA. *See id.*

68. The Commission's finding that Highland's modeling predictions showed likely compliance with noise limits lacks a basis in substantial evidence and is an error of fact.

69. Highland's curtailment proposal consists of the operation of the wind turbines in "reduced noise operation modes in order to meet applicable noise limits." *See* Final Decision on Reopening, p.26. Highland's plan requires the programming of individual turbines to mechanically change the turbine blade pitch in order to lower noise levels. While Highland has developed parameters based on its directivity analysis, its plan is for the wind turbine manufacturer to implement these parameters by programming each wind turbine. *See* Final Decision on Reopening, pp. 25-27.

70. The Commission found that "The turbines proposed by Highland are designed and constructed to be operated in reduced noise modes." *See* Final Decision on Reopening, p. 27. The Commission went on to find that "Highland's directivity analysis and turbine programming proposal is adequate to ensure compliance with applicable noise limits." *See id.*

71. The Commission's finding that Highland's proposal will ensure compliance with the noise limits lacks a basis in substantial evidence. During the technical hearings, Highland's witnesses admitted that Highland had not presented its curtailment plan, including the programming parameters, to any turbine manufacturers for review. Highland offered no evidence from the turbine manufacturers under consideration that its curtailment plan was feasible and that its parameters could be implemented into the programming or mechanically achieved by the wind turbines. *See* Town of Forest Initial Brief in Opposition to CPCN and Curtailment Plan; Forest Voice Initial Brief.

72. Further, uncontested in the record is the fact that no witness for Highland or any party could identify a wind farm anywhere that is operating under the type of noise reduction curtailment proposed by Highland. No evidence, such as industry reports, was offered by Highland to substantiate its claim that the wind farm wide programming that it proposes has ever been done anywhere. The Commission relied solely on the self-serving unsubstantiated claims of Highland to find that the turbine programming will be adequate for compliance.

73. The Commission's finding that Highland's turbine programming proposal is unsubstantiated by evidence and contrary to the public interest – as it exposes the residents to an unproven experiment with a high likelihood of noise levels exceeding noise limits and posing health hazards.

B. The Commission's determinations regarding Highland's directivity analysis lack a substantial basis in evidence, and assume violations of the Commission's own noise requirements.

74. Highland introduced a "directivity analysis" as part of its curtailment plan. Acknowledging that operation of the wind turbines in the curtailment, or noise reduction,

mode would result in energy production losses, Highland proposed to minimize the necessary curtailment through a "directivity analysis." *See* Final Decision on Reopening, pp. 25-26. The "directivity analysis," as alleged by Highland, will provide parameters for the software programming of individual wind turbines so that the turbines considers wind direction and adjust curtailment to the minimum amount necessary to achieve compliance with noise limits. *See id.* at p. 25.

75. The Town and Forest Voice provided expert testimony that Highland's directivity analysis was unsubstantiated in the record, lacked a scientific basis, underestimated noise levels and was unproven for never having been used in any wind farm previously. *See id.* at p. 26. But the Commission ultimately disregarded this evidence by concluding that Highland "provided evidence that its project will be in compliance even without considering directivity." *See id.* at pp. 26-27.

76. The Commission's conclusion is contrary to the uncontested fact that Highland proposed to operate the Project using the directivity analysis to reduce curtailment and maximize production. Highland did not propose to run the Project without this analysis. In short, the Commission's finding that the Project can operate without directivity has no basis in evidence and is an error of fact. *See id.* at pp. 20, 26-27.

77. The Commission further determined that "if the use of directivity results in sound levels exceeding the limits, Highland will be required to increase the amount of curtailment so that the proposed project complies with applicable noise limits." *See id.* at pp. 26-27.

78. In essence, the Commission contemplated and effectively allowed for violations to occur as a result of Highland's faulty directivity analysis, with the assumption that the resulting violations could be caught and corrected at some later time. This finding is an error of

law and contrary to the public interest as it assumes that violations will occur, and implicitly burdens the residents with the nuisance and harmful health effects of the high noise levels.

C. The Commission's finding that Highland's post-construction sound monitoring plan would ensure compliance with applicable sound level limits was not supported by substantial evidence.

79. In its final decision, the Commission determined that a post-construction sound monitoring system including four permanent locations with continuous sound-level measurements, and one roving monitor, would be sufficient to ensure compliance with the noise limits. *See id.* at p. 33.

80. The Project would consist of approximately 44 turbines will span 26,500 acres, including several homes which the Commission identified as at risk for having a nighttime sound level over 45 dBA. Final Decision, p. 8. Additionally, the Commission has required a 40 dBA nighttime sound limit for six noise sensitive residences. For such a large project, requiring only 4 fixed-point and one roving monitor is wholly inadequate.

81. The Town presented evidence that, without better quality and coverage of the residences by the monitoring system, the burden of proof to ensure compliance with the noise limits will fall to the Town's residents. Violations by Highland will go undetected because there are too few monitors for the number of homes and readings of the monitors will occur significant periods of time after the sound records are made. Unless a resident is close to the five monitors, there will be no data on the noise levels and whether a violation occurred. It will be left to the resident to somehow show that noise levels exceeded the noise limits.

82. Notably, if the roving monitor is already in use at another location, Highland will have to

deny a complaining resident testing. Indeed, the Highland expert who designed the monitoring system admitted that "if complaints come in more often than the rover can move around, then there's going to be a waiting list." Tr. p. 1671.

83. In its decision, the Commission failed to consider that the monitoring plan was inadequate for the large wind farm proposed and that it lacked the coverage and real time technical capabilities to detect noise violations. By approving such a system, the Commission shifted the burden to ensure compliance on the Town and its residents. Because the Commission failed to consider this evidence in its decision, the Commission's determination that Highland could ensure compliance with noise limits was not based on substantial evidence in the record.

VI. The Commission's determinations and the approval of Highland's CPCN application are not in the public interest.

84. Given the limitations of the proposed curtailment plan, the inherent design flaws of siting the proposed large turbines in setbacks made for much smaller turbines, the Commission's failure to impose a 24-hour 40 dBA noise limit for all residences, as recommended by experts in this proceeding, is without substantial evidence and contrary to the public interest.

85. The Commission's failure to adequately address information in the record on the health impacts of wind turbine noise is also against the public interest.

86. The Commission's failure to provide a process for application of the 40 dBA standard for noise-sensitive residents other than those who testified at the public hearing and/or are included in the Town's testimony, such as those who are born in the project area or move to the area post-Commission decision, is also against the public interest.

CONCLUSION

Based on the grounds detailed in this petition, the Town respectfully requests that the Court reverse or set aside the Commission's decision and remand the case with instructions regarding the correct interpretation of relevant legal provisions and the applicable evidentiary standard of substantial evidence. The Town also requests leave to present additional evidence before the Court and the Commission.

Respectfully submitted this 10th day of January, 2014.

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