STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | ST. CROIX COUNTY

TOWN OF FOREST,

Petitioner,

v.

Case No. 2014-CV-0018

PUBLIC SERVICE COMMISSION OF WISCONSIN,

and

HIGHLAND WIND FARM, LLC,

Respondents.

RESPONSE BRIEF OF PUBLIC SERVICE COMMISSION OF WISCONSIN

Cynthia E. Smith
Chief Legal Counsel

Justin W. Chasco
Assistant General Counsel
State Bar No. 1062709

John Lorence
Assistant General Counsel
State Bar No. 1006707

PUBLIC SERVICE COMMISSION
OF WISCONSIN
610 North Whitney Way (53705-2729)
P.O. Box 7854
Madison, WI 53707-7854

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INTRODUCTION

This is an action for judicial review of the Public Service Commission of Wisconsin's (Commission) Final Decision and Order in docket 2535-CE-100 (Final Decision) (Pet. App. A) (R.144[1]) granting a Certificate of Public Convenience and Necessity (CPCN) to Highland Wind Farm, LLC (Highland) to construct the Highland Wind Farm (Project).

The Town of Forest (Town) petitioned for judicial review of the Commission's Final Decision on January 10, 2014. Judicial review of agency decisions is governed by Wis. Stat. § 227.57. That statute spells out the limited bases for overturning or remanding a Commission decision, none of which apply in this case.

The Town characterizes this appeal as a unified rural community fighting an unwanted industrial development. It contends that the Project will not only change the way of life in the Town, but will also create a public health hazard. The Town wants the Court to infer, presumably, that the Commission is indifferent to whether large energy infrastructure harms the people of Wisconsin.

Of course, this view of the case is entirely inaccurate and unfair. To begin, it is simply not true that the entire community is opposed to the Project. Highland is not a public utility. Wis. Stat. § 196.01(5). It does not possess the power of eminent domain, meaning it cannot condemn property needed to build the Project. Wis. Stat. § 32.02. Even if it wanted to, the Commission cannot force unwilling residents to host this Project on their property. The only reason Highland can construct the Project is because it has the support of those who will actually host the turbines. Many members of the Town want to use their property to harvest the wind. In

[1] "R" denotes a Record Item, followed by a number indicating the item number on the Record List filed by the Commission.

addition to the numerous people who filed written comments in support of the Project, 18 members of the public showed up to the public hearing and gave testimony in support. (R.220 at 760, 771-772, 776-813, 834-844); (R.221 at 886-872, 882-886, 890-895, 901-902, 918-921.) A better view of this case, then, is that the Town seeks to control what private economic activities can take place on private land owned by community members who want to use wind energy to support their families. But what this case is really about is whether the Commission followed the Certificate of Public Convenience and Authority law (CPCN law)[2] when it granted Highland a CPCN to build the Project.

In the Commission's application of the CPCN law, this does not mean that the Commission was indifferent to public health issues and did not fairly consider the opinions of those opposed to the Project. Even though the Commission had previously rejected similar arguments in multiple proceedings and has spent years considering these issues, it allowed the opponents of the Project to re-litigate the debate about wind energy system's alleged effect on public health. It authorized further study of the issue as requested by the opponents of the Project. (R.129.) The Commission considered every piece of testimony and every public comment the opponents of the Project entered into the Record. In the end, the Commission did not ignore these concerns or prevent them from being heard. The Commission simply determined that the Town had not proven that there is in fact a causal link between the self-reported symptoms and wind energy systems.

The Town's view of the case consistently fails to recognize the important role the Legislature entrusts to the Commission to site large energy infrastructure. It is true that the purpose of public utility regulation is to protect the public, but the Town ignores that the

[2] Appellate courts have also referred to the CPCN law as the "Plant Siting Law."

Commission is the state agency charged with that protection.[3] Wis. Stat. ch. 196; Wis. Stat. § 196.491(3); (Town Init. Br. at 1). This distinction is not academic. Properly recognizing the role, expertise, and impartiality of the Commission is important when a court reviews petitions for judicial review.

Both Wis. Stat. § 196.491(3) and the Wisconsin Supreme Court plainly recognize that the Commission has tremendous expertise and responsibility in the review and ultimate approval of CPCN applications. *See* Standard of Review. The Commission takes that responsibility seriously. This case has been one of the most litigated administrative proceedings before the Commission in the past 20 years, spanning a period of time between December 2011 and October 2013. The Commission considered nearly 1,000 pages of pre-filed written testimony and over 200 exhibits. In addition, parties provided additional testimony at 8 days of technical hearings and submitted 21 party briefs on the merits of the application.[4] Over 600 members of the public provided public comments on the Commission's web site and more than 50 others provided oral testimony at one of the three public hearings held on the Project.

Ample opportunity was given to the opponents of the Project to submit evidence into the record on a wide range of subjects. Highland was afforded that same opportunity. As a result, the Commission considered and the Court now has before it a voluminous record supporting the Final Decision. If the correct standard of review is applied, the evidence before the Commission fairly described, and the process objectively explained, the Final Decision must be upheld.

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[3]The Town's citation to a case on public utility regulation is somewhat off point considering that Highland is not a public utility and not subject to comprehensive financial regulation by the Commission. But the offered quote can easily be applied to the Commission's role in siting large energy infrastructure. The Commission must balance all of the public interests noted in the CPCN law when it adjudicates CPCN applications.

[4] Additional briefs were also considered on procedural/evidentiary motions.

STATEMENT OF THE CASE

I. THE WIND SITING RULES.

The Town regularly references the existence of Wisconsin Admin. Code ch. PSC 128 (Wind Siting Rules) to support a variety of sometimes inconsistent positions. The Wind Siting Rules play a unique role in proceedings like the instant one.

The CPCN law requires persons seeking to construct electric generation facilities, including wind energy systems of 100 megawatts or more, to receive a CPCN from the Commission prior to commencing construction. Wis. Stat. § 196.491(1)(g) and (3). If a project is greater than 100 megawatts and the developer receives a CPCN, no local ordinance may prohibit the project's construction. Wis. Stat. § 196.491(3)(i).

Prior to 2009, however, local units of governments were allowed to prohibit or limit the installation of wind energy systems *smaller* than 100 megawatts. In 2009, the Legislature directed the Commission to create a uniform framework for local governments to regulate the siting of wind energy systems, if the local government so chooses. 2009 Wisconsin Act 40. Wisconsin Stat. § 196.378(4g)(b) was created to provide:

> The commission shall, with the advice of the wind siting council, promulgate rules that specify the restrictions a political subdivision may impose on the installation or use of a wind energy system . . . .

The Wind Siting Rules were promulgated to satisfy this legislative mandate.[5] Thus, the Wind Siting Rules were specifically created to establish the highest degree of regulation a local unit of government may impose upon a small wind energy system. Local municipalities may impose

[5] The Town's brief curiously states, without citation, that the Legislature has found wind energy systems to harm public health. (Town Init. Br. at 1.) But no Wisconsin law prohibits wind energy systems from being built. In fact, the Energy Priorities Law, the Renewable Portfolio Standard, the law establishing a statewide energy efficiency and renewable energy program (Focus on Energy), the CPCN law, and the statute requiring the promulgation of the Wind Siting Rules all allow and encourage the construction of wind energy systems. Wis. Stat. §§ 1.12(3) and (4), 196.374, 196.378, and 196.491(3).

lesser restrictions or no restrictions whatsoever, but may not go beyond the restrictions in the Wind Siting Rules.

The CPCN law does not require that applicants for a CPCN comply with the Wind Siting Rules, unless the Commission so directs. Wis. Stat. §§ 196.491(3)(dg) and 196.395(1). The law simply requires the Commission "consider whether installation or use of the facility is consistent" with the Wind Siting Rules. Wis. Stat. § 196.491(3)(dg). The Commission relies upon the Wind Siting Rules to aid its analysis of proposed wind energy systems, but it ultimately retains discretion to impose lesser or greater requirements upon a project that requires a CPCN.

The CPCN law gives the Commission the authority to impose conditions on approval. Wis. Stat. § 196.491(3)(e). Wisconsin Stat. § 196.395(1) also specifically authorizes the Commission to issue conditional orders. Because the CPCN law does not mandate any noise standard, those conditions are the only legal source of noise standards. In every case, then, the Commission must decide what, if any, noise limitations a proposed project must comply with and how compliance will be judged. Every decision to grant or deny a CPCN is decided on its own record. While a decision in one case can provide insight into how the Commission views recurrent issues, ultimately the facts of each case and the conditions that might be imposed are determined uniquely for each proposed project.

II. THE CPCN LAW.

The CPCN law governs the siting of large energy infrastructure such as high voltage transmission lines, fossil fuel power plants, and large wind energy systems. The Commission has been applying the CPCN law for over 30 years. The law unambiguously gives the Commission the discretion to make the myriad public policy choices involved in siting such infrastructure. As a result, the remedy the Town seeks in the case is an extraordinary one and is

rarely granted by courts, who must respect the Commission's unique role adjudicating CPCN applications.

The Town claims without any support that the Commission has been reversed "again and again" in "complex cases like this." (Town Init. Br. at 9.) Contrary to the Town's claim, and despite sophisticated challenges from groups well versed in energy policy and law, a Commission determination to grant a CPCN has *never* been overturned.[6] *See, e.g., Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin,* 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768; *Responsible Use of Rural & Agr. Land (RURAL) v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, 239 Wis. 2d 660, 619 N.W.2d 888. *Clean Wisconsin* was a landmark case resulting from a combined *five* separate lawsuits challenging the Commission's granting of a CPCN. The Wisconsin Supreme Court rejected all *fifteen* challenges to the granting of the CPCN project. *Clean Wisconsin*, 282 Wis. 2d 250.

CPCN applications require the Commission to make a determination on whether the public convenience and necessity require a project, a discretionary determination that relies both on the Commission's special expertise and the application of its quasi-legislative functions. For example, the Commission must find that the location of the project is *in the public interest* after *considering* project alternatives, location alternatives, individual hardships, engineering, economic, safety, reliability and environmental factors, and that the project meets the *reasonable* needs of the public for an *adequate* supply of energy. Wis. Stat. § 196.491(3)(d)2. and 3. The Commission must also find that the facility will not have *an undue* adverse impact on

[6]Indeed, cases overturning any decision of the Commission are rare. Courts routinely respect the legislative function of the Commission and regularly defer to the Commission's special expertise and experience in cases involving public utilities or large energy infrastructure. The Town's citation to 2 cases in the past 40 years hardly establishes a pattern of courts "again and again" overturning Commission decisions.

environmental values such as ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. Wis. Stat. § 196.491(3)(d)4. In addition, the proposed facility cannot *unreasonably* interfere with the orderly land use and development plans for the area involved. Wis. Stat. § 196.491(3)(d)6. Nor can the facility have a *material adverse* impact on competition in the *relevant* wholesale electric service market. Wis. Stat. § 196.491(3)(d)7. Each of these determinations requires the Commission to exercise its quasi-legislative functions, i.e., discretion.

In *Clean Wisconsin,* the Wisconsin Supreme Court repeatedly recognized the special expertise of the Commission and its unique role in adjudicating CPCN applications:

> We conclude that great weight deference is appropriate here. First, there is no dispute that the legislature has specifically charged the PSC with the interpretation of chapter 196. The legislature has given the PSC jurisdiction to "supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction." Wis. Stat. § 196.02(1).
>
> Next, the PSC is the only agency charged with administering § 196.491(3)(d), which has been in existence for 30 years. Further, there can be no doubt the decision to issue a CPCN for a specific plant at a specific location calls for the PSC to utilize its expertise and make a variety of factual findings.
>
> Finally, and most importantly, the PSC's interpretation and application of § 196.491(3)(d) inherently calls for a variety of policy determinations. Even a cursory review of the Plant Siting Law reveals that the PSC is charged with making a number of legislative-type policy determinations when determining if a CPCN should be issued . . . .
>
> All of these determinations are legislative-type determinations that require the PSC to make factual findings and apply its technical knowledge and expertise. The final decisions as to where and when a proposed power plant should be constructed, how large the plant should be, how it should be constructed, and what fuel it should use are quintessentially legislative policy choices that have been delegated to the PSC.

Clean Wisconsin, 282 Wis. 2d 250, ¶¶ 136-139.

III. THE INITIAL PROCEEDING BEFORE THE COMMISSION.

On December 19, 2011, Highland filed with the Commission an application for a CPCN to construct the Project. (R.1-43.) The Commission found the application to be complete on March 29, 2012. (R.196.) A Notice of Proceeding was issued on April 20, 2012. (R.146.)

A prehearing conference was held on May 30, 2012. (R.147.) Requests to intervene were granted to Clean Wisconsin (Clean WI), Forest Voice, Inc. (Forest Voice), RENEW Wisconsin (RENEW), and the Town of Forest (Town). (R.117.)

The Commission held technical hearing sessions in Madison on October 9, 10, and December 3, 2012, and January 17,18, 2013. (R.136 at 2.) Public hearings were held in the Project area on October 11, 2012, in Forest, Wisconsin. *Id.*

At the technical sessions, expert witnesses offered testimony and exhibits on behalf of Clean WI, Forest Voice, the Town, and Highland. The Commission conducted its hearings as Class 1 contested case proceedings, pursuant to Wis. Stat. §§ 196.491(3)(b), 227.01(3)(a), and 227.44. At the public hearings in Forest, the Commission accepted both oral and written testimony from members of the public. The Commission also requested and received comments from members of the public through its Internet web site. (R.136 at 2-3.)

The issue for hearing, as determined at the May 30, 2012, prehearing conference, was:

> Does the project comply with the applicable standards under Wis. Stat. §§ 1.11, 1.12, 196.025, 196.49, and 196.491, and Wis. Admin. Code chs. PSC 4 and 112?

(R.147 at 1.)

Initial and reply briefs were filed on December 17, 2012, and January 3, 2013, respectively. (R.136 at 3.) Initial briefs opposing the Project, or aspects of it, were filed by Forest Voice and the Town. *Id.* Clean WI and Highland filed initial briefs in support of the Project. *Id.* Reply briefs were filed by Clean WI, Forest Voice, the Town, and Highland. *Id.*

Additional initial and reply briefs regarding the ILFN portion of the proceeding were filed by Clean WI, Forest Voice, the Town, and Highland on January 29 and 31, 2013, respectively. *Id.*

The Commission discussed the record in this matter at its open meeting of February 14, 2013. (R.168.) The Commission further discussed this matter at its open meeting of March 1, 2013. (R.169.)

By Final Decision dated March 15, 2013, the Commission initially denied the application. (R.136.) The Commission concluded, based upon the record evidence from the initial proceeding that the design of the proposed Project was not in the public interest, because the available modeling in the record indicated that Highland had failed to demonstrate compliance with the Wis. Admin. Code § PSC 128.14(3) nighttime audible noise limit of 45 dBA which the Commission determined was an appropriate limit for the Project. The Commission determined that Highland had not provided modeling using the most conservative modeling assumptions that demonstrated that under planned operating conditions the Project could comply with a nighttime audible noise limit of 45 dBA. (R.144 at 2.)

The Commission indicated in its Final Decision that "Highland may either request reopening of the case under Wis. Stat. § 196.39, petition for rehearing under Wis. Stat. § 227.49, or file a new application under Wis. Stat. § 196.491 if and when it can demonstrate through sound modeling using a ground absorption coefficient of 0.0 that the Project as designed and operated will not, based upon model results, have any non-participating residences that exceed the Wis. Admin. Code § PSC 128.14(3) nighttime audible noise limit of 45 dBA." (R.136 at 7.)

IV. THE REOPENED PROCEEDING.

On April 4, 2013, Highland filed a Petition to Reopen, or in the Alternative, for Rehearing. (R.114.) By Order dated May 14, 2013, the Commission granted Highland's

Petition and reopened the proceeding under Wis. Stat. § 196.39(1) *for the limited purpose of determining if the Project can comply with the noise standards in Wis. Admin. Code ch. PSC 128.* (R.137.) Subsequent to the Commission's Order reopening the docket, a prehearing conference was held on May 13, 2013. Each of the intervenors in the initial proceeding continued to intervene in the reopened proceeding. (R.138.)

The Commission held technical and public hearing sessions in Madison on August 14 and 15, 2013. (R.150.) During the technical sessions, expert witnesses offered testimony and exhibits on behalf of Highland, Forest Voice, and the Town. The Commission conducted its reopened hearings as a Class 1 contested case proceeding and again accepted both oral and written testimony from members of the public.

Initial and reply briefs in the reopened proceeding were filed on September 3 and September 10, 2013, respectively. (R.80, 82, 85, 87.) Initial briefs in opposition to the Project were filed by Forest Voice and the Town. Highland filed an initial brief in support of the Project. (R.144 at 4.) Reply briefs were filed by Forest Voice, the Town, and Highland. *Id.* The Commission discussed the record in this matter at its open meeting of September 26, 2013. (R.174.)

On October 25, 2013, the Commission issued its Final Decision granting a CPCN to Highland. (R.144.) When the Commission made its Final Decision, it had considered nearly 3,000 pages of oral and written testimony from 144 witnesses and 4 rounds of briefs.

V. THE EVIDENCE AND ARGUMENT FROM THE INITIAL PROCEEDING REMAINED A PART OF THE RECORD AS THE COMMISSION CONSIDERED THE REOPENED PROCEEDING.

The Town's brief sometimes implies that evidence presented in the Initial Proceeding does not exist or was somehow ignored in the Reopened Proceeding. (Town Init. Br. 39-41.)

But the parties, including the Town, clearly understood that the Reopened Proceeding was a supplement to the Initial Proceeding. The Town's brief in this case relies upon testimony from the both proceedings. *See e.g.* (Town Init. Br. at 34; citing Mr. Mudinger's testimony from the Initial Proceeding.) That testimony would not be included in the Record for this Court's review, and would thus be inappropriate to cite, if it was not relied upon by the Commission when it issued its Final Decision.

The Commission reopened the proceeding under Wis. Stat. § 196.39(1). (R.137.) That statute clearly contemplates that a reopened case is not a new and independent case. It gives the Commission the power to rescind, alter, or amend its prior order. As it considered whether to amend or alter its prior order, the Commission only needed additional evidence on "whether and how Highland's proposed project can meet the noise standards in Wis. Admin. Code ch. PSC 128." (R.137.) Thus, every piece of testimony provided in the Initial Proceeding, such as the interpretation of the land use plan, remained a part of the Record. Further, each issue before the Commission in the Initial Proceeding could be revisited by the Commission and altered, amended, or rescinded in the Reopened Proceeding.

STANDARD OF REVIEW

The Town superficially characterizes this case as a "due process" challenge and argues for *de novo* review. Judicial review of agency decisions is governed by Wis. Stat. § 227.57. That statute and the Wisconsin Supreme Court's interpretation of its application to Commission determinations to grant or deny CPCNs clearly shows that *de novo* review is not appropriate. Rather, the Court must apply great weight deference to the Commission's interpretation and application of the CPCN law. Further, a reviewing court does not review the evidence *de novo*, but must uphold findings of fact if they are supported by substantial evidence.

The simple basis for the deference given to agency decisions is one in which agencies are viewed as the fact finding trial court. Thus, review of agency decisions fits a familiar model for a trial court. The agency is the trial court and the circuit court acts as the appellate court. The substantial evidence standard, explained below, largely comports with well-known judicial principles: evidence is best judged by the entity that hears the evidence directly. Even in this simple view of deference, the Town's request for *de novo* review is grossly inappropriate. But deference to agency decisions goes far beyond the deference traditionally afforded to juries.

State agencies are also policy makers, making discretionary policy decisions on behalf of the Legislature. Further, state agencies possess special expertise and experience. That expertise, experience, and authority to make policy and discretionary decisions is the cornerstone of judicial deference to agency decisions.

These principles come together in a variety of ways depending on the nature of a petitioner's claim. If a petitioner challenges the sufficiency of evidence supporting a finding of fact, the substantial evidence standard applies. Wis. Stat. § 227.57(6). If the challenge is to the Commission's interpretation or application of the CPCN law, the Commission is entitled to great weight deference. *Clean Wisconsin*, 282 Wis. 2d 250, ¶¶ 136-139. If an agency is interpreting its own rules, a great weight standard also applies, but is sometimes called "controlling weight." *Id.* ¶ 45; *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 54, 311 Wis. 2d 579, 754 N.W.2d 95.

I. SUBSTANTIAL EVIDENCE AND FINDINGS OF FACT.

Pursuant to Wis. Stat. § 227.57(6), a court will not disturb an agency's factual findings unless they are not supported by "substantial evidence."

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to

> the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Wis. Stat. § 227.57(6) (emphasis supplied).

"Substantial evidence" is that quality and quantity of evidence which a reasonable person could accept to support a conclusion. "Substantial evidence" does not equate with a "preponderance of the evidence," nor does the term "substantial evidence" allow the court to weigh the evidence anew. *DeGayner and Co. v. DNR*, 70 Wis. 2d 936, 939-40, 236 N.W.2d 217 (1975). A record may contain "substantial evidence" to support a number of reasonable findings of fact. In such a case, the question is not whether there is substantial evidence to support a finding that was not made, but whether substantial evidence supports the finding that the agency did make. *Robertson Transport Co. v. Pub. Serv. Comm'n*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). A court may set aside an agency's decision "only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Sterlingworth Condominium Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (1996).

In reviewing the Commission's findings of fact, the court need not look to see whether substantial evidence supports alternative findings that the court would make or that the Commission may have failed to make. *City of Oak Creek v. Pub. Serv. Comm'n*, 2006 WI App 83, ¶ 12, 292 Wis. 2d 119, 716 N.W.2d 152. The court need only look to see what substantial evidence supports the decision actually made. *Id.* The court is not to substitute its judgment de novo for that of the Commission or to evaluate the proffered interpretation by the Town to see if it is equally reasonable—or even more reasonable—than the Commission's. If the Commission's decisions are reasonable, all other interpretations are irrelevant.

II. THE COMMISSION'S INTERPRETATION AND APPLICATION OF THE CPCN LAW IS ENTITLED TO GREAT WEIGHT DEFERENCE.

Judicial review of agency discretionary decisions are governed by Wis. Stat. § 227.57(8):

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(Emphasis supplied.)

Thus, the Legislature gave agencies the right to make discretionary decisions. The right to make discretionary decisions includes "a limited right to be wrong." *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n of Wisconsin*, 150 Wis. 2d 186, 199-120, 441 N.W.2d 311 (1989). While the Legislature also gave courts the power to review an agency's discretionary decision, that power is highly restricted and a "court may not substitute its judgment for that of the agency in a matter of discretion." *Wisconsin Ass'n of Mfrs. & Commerce, Inc. v. Pub. Serv. Comm'n,* 94 Wis. 2d 314, 319, 287 N.W.2d 844 (1979). Furthermore, "[w]hether a given decision is in the public interest 'is a matter of public policy and statecraft and not in any sense a judicial question." *Clean Wisconsin,* 282 Wis. 2d 250, ¶ 35.

When adjudicating CPCN applications, the Commission must simultaneously interpret the CPCN law and make discretionary decisions. In *Clean Wisconsin*, the Wisconsin Supreme Court determined that the Commission's interpretation and application of Wis. Stat. § 196.491 is entitled to great weight deference because: (1) The Legislature has charged the Commission with the interpretation of Wis. Stat. ch. 196; (2) The Commission is the sole agency charged with administering the CPCN law, which it has done for more than 30 years, and (3) Administering

and interpreting the law calls for a number of policy determinations. *Clean Wisconsin,* 282 Wis. 2d 250, ¶136-139.

Under the great weight deference standard, the Commission's interpretation and application of the statute will be upheld if it has a "rational basis." *Id.*¶ 140.

The Town cites *Clean Wisconsin* to support *de novo* review of this case. (Town Init. Br. at 10.) No reasonable interpretation of *Clean Wisconsin* can lead to the conclusion that *de novo* review is appropriate in this case. Most importantly, the Town fails to note what conclusion the Wisconsin Supreme Court ultimately drew in that case: "We conclude that great weight deference is appropriate here." *Clean Wisconsin,* 282 Wis. 2d 250, ¶ 136.

The Wisconsin Supreme Court reviewed the same law that is at issue here, 15 similar legal challenges, and found on every issue that the Commission is entitled to great weight deference when it applies the CPCN law. *Clean Wisconsin,* 282 Wis. 2d 250, ¶ 136-139. Any attempt by the Town to distinguish *Clean Wisconsin* from this case should be summarily dismissed. Again, on each issue in that case, the Wisconsin Supreme Court found great weight deference was appropriate and that the Commission decision must be upheld because it was reasonable. The breadth of that decision itself should easily dispel the Town's argument.

The Town not only omits the conclusion drawn in *Clean Wisconsin,* but its discussion of the details of the case is also inexact. The Town argues that "Courts give no deference to an agency's conclusions of law based on a new statute or rule, or based on a new interpretation of any statute or rule." (Town Init. Br. at 10.) The implication of the citation is that the Commission must have made the exact same determination on the exact same issue in order to receive great weight deference. The Town may argue on reply, for example, that the Commission must have specifically discussed the application of the Wind Siting Rules or these

exact same compliance standards in a prior case in order to be granted deference. First, as previously explained, this is not a case about the Wind Siting Rules. This is a CPCN case for a wind energy system. The Commission has previously decided CPCN cases for wind energy systems.[7] Second, that is not at all what the Wisconsin Supreme Court requires. On this point, *Clean Wisconsin* stated:

> However, the appropriate test for great weight deference is not whether the agency has "decided a case presenting the precise facts raised by [the present] appeal. . . ." Rather, the correct test is whether the agency "'has experience in interpreting [the] particular statutory scheme' " at issue.

Clean Wisconsin, 282 Wis. 2d 250, ¶ 40 (internal citations omitted). The court then clearly finds that the Commission has that experience and that it is entitled to great weight deference when it interprets and applies the CPCN law. *Clean Wisconsin,* 282 Wis. 2d 250, ¶ 136-139. The Commission's determinations at issue in this case is entitled to great weight deference and must be upheld so long as they are rational.

III. AGENCY INTERPRETATIONS OF ITS OWN RULES.

Even if this case were about the Wind Siting Rules, which it is not, an agency is entitled to great/controlling weight deference when interpreting its rules:

> This court has frequently held that great weight should be given to the administrative agency's interpretation and application of its own rules, unless plainly erroneous or inconsistent with the regulation so interpreted. This is especially so in an area calling for special expertise.

Clean Wisconsin, 282 Wis. 2d 250, ¶ 45 (internal citations omitted).

The Wisconsin Supreme Court further explained controlling weight deference in 2008:

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[7] *Application of Forward Energy LLC*, No. 9300-CE-100 (Wis. PSC July 14, 2005) (PSC REF#. 37618); *Application of Wisconsin Electric Power Company*, No. 6630-CE-294 (Wis. PSC Feb. 1, 2007) (PSC REF# 68958); *Application of Wisconsin Electric Power Company*, No. 6630-CE-302 (Wis. PSC Jan. 22, 2010) (PSC REF# 126124).

> When applying controlling weight deference, we ask "whether the agency's interpretation is reasonable and consistent with the meaning or purpose of the regulation." Despite the different terminology, "controlling weight deference is similar to great weight deference," the latter associated with deference given to an agency when interpreting a statute as opposed to a rule interpretation. Thus, we may consider that standard's language; as such, under controlling weight deference, a court should "refrain from substituting its view of the law for that of an agency charged with administration of the law, and will sustain the agency's conclusions of the law if they are reasonable." "We will sustain an agency's conclusions of law even if an alternative view of the law is just as reasonable or even more reasonable." Accordingly, if the Commission's interpretation is reasonable and consistent with the meaning or purpose of the rule, then we uphold the Commission's decision rather than substitute our judgment for that of the Commission's.

Wisconsin Dep't of Revenue v. Menasha Corp., 2008 WI 88, ¶ 54, 311 Wis. 2d 579, 754 N.W.2d 95. (internal citations omitted).

ARGUMENT

The Commission is charged by the Wisconsin Legislature with making state energy policy. As part of that duty, the Commission must adjudicate applications for CPCNs. It must evaluate the Record, understand and interpret the CPCN law, utilize its substantial expertise and experience, and reasonably exercise the legislative authority that is delegated to it. The decision to permit or prohibit the development of large energy infrastructure is a complex and often controversial endeavor that often involves significant public import. Inevitably, one or more parties to a proceeding will be unsatisfied with the Commission's decision. But disagreement with a policy choice does not make that policy arbitrary and capricious. Dissatisfaction with the end result, does not mean the process used to arrive at that result was defective. Putting forth competing testimony or interpretations of testimony does not mean the other evidence in the proceeding is not substantial, and just because the Commission does not find certain evidence persuasive does not mean the process was unfair. The Town may not agree with the

Commission's decision, but it was arrived at after affording all parties ample opportunity to be heard, was reasonable and is supported by substantial evidence.

I. THE COMMISSION'S PROCEEDINGS COMPLIED WITH ALL RELEVANT DUE PROCESS REQUIREMENTS.

In an attempt to avoid great weight deference, the Town characterizes this entire case a due process challenge. At most, two of its complaints can labeled as due process related. The Town argues that the Commission providing guidance about how compliance will be measured was a violation of the Town's due process rights. (Town Init. Br. at 10.) The Town also argues that the Commission selected six residents for special accommodation without giving fair notice and hearing to the parties. (Town Init. Br. at 39.) Neither of the Town's purported due process challenges withstand scrutiny.

Generally, the fundamental or essential requirement of procedural due process of law is notice and hearing—that is opportunity to be heard either before a court or the administrative agencies. *Mid-Plains Tel., Inc. v. Pub. Serv. Comm'n*, 56 Wis. 2d 780, 785-86, 202 N.W.2d 907 (1973). "The cardinal test of the presence of absence of due process of law in an administrative proceeding is the presence or absence of the rudiments of fair play long known to law." *Id.* at 787 (internal citations omitted). Procedural due process requires an opportunity to be heard at a reasonable time and in a meaningful manner. *Bunker v. Labor & Indus. Review Comm'n*, 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864.

The basic question, then, is: did the parties have reasonable notice that a subject matter was an issue in a proceeding? Did the Town have fair warning and a reasonable opportunity to present evidence, that, if it desired a specific Commission decision on an issue, it had to present evidence and argument to convince the Commission?

A simple way to evaluate a party's claim that it did not have fair notice and opportunity to be heard is to examine what evidence and arguments that party presented. Again, it is important to note that the evidence in the Initial Proceeding remained a part of the Record. Where, as here, the party presented evidence on a given subject matter, that confirms sufficient notice and an opportunity to be heard has been provided. In this case, the opponents of the Project provided volumes of testimony and eight briefs on these issues on these subjects which they now claim ignorance of and an absence of the opportunity to be heard. A party who submits volumes of testimony on a subject and has four[8] opportunities to brief an issue cannot credibly claim that it was unfairly denied an opportunity to present its case.

A. All parties were well aware that whether and how the Project would meet any applicable noise standards was an issue in this case.

The Town argues the Commission failed to provide "clear notice" and a proper hearing on the noise standard. The Town misstates and misapplies the relevant law. There is no legal requirement that the notice must be "clear" and explicitly identify with specificity each and every issue that will be decided. Wisconsin Stat. § 227.44(1) requires that parties receive "reasonable notice." Wisconsin Stat. § 227.44(2)(c) recognizes that specificity is not required and that a "statement of the issues involved" suffices.

The Town's reliance upon *GTE North, Inc. v. PSC*, 169 Wis. 2d 649, 486 N.W.2d 554 (Ct. App. 1992), *rev'd on other grounds*, *GTE North, Inc. v. PSC*, 176 Wis. 2d 559, 500 N.W.2d 284 (1993), *Wis. Bell v. Bie*, 216 F.Supp. 2d 873 (W.D. Wis. 2002), *Gen. Elec. Co. v. Wis. Emp't Relations Bd.*, 3 Wis. 2d 227, 88 N.W.2d 691 (1958), and *Bracegirdle v. Bd. Of Nursing,* 159 Wis. 2d 402, 464 N.W.2d 111 (Ct. App. 1990) is misplaced. While *GTE North* and

[8] There were two opponents to the Project, who each filed four briefs on these subjects. They both filed Initial and Reply briefs in both the Initial Proceeding and the Reopened Proceeding.

Wis. Bell demonstrate the possible perils of too narrowly defining the issues for hearing, neither case preclude the use of broader issue statements to cover a multitude of issues or issues that logically flow therefrom. *Gen. Elec.* and *Bracegirdle* also are not instructive because in those cases, unlike here, the parties did not present evidence on the issues that were ultimately decided.

The Commission's notices that identified the issues for hearing complied with the law and gave the Town adequate notice so that it could, and in fact did, present evidence relevant to those issues to be decided by the Commission. The Administrative Law Judge issued Prehearing Conference Memoranda that broadly identified the issues. The Prehearing Conference Memorandum from the Initial Proceeding put all parties on notice that every issue relative to a CPCN would be considered by the Commission in the proceeding:

> The following is the issue upon which the Commission may make findings of fact and conclusions of law:
>
> A. Does the project comply with the applicable standards under Wis. Stat. §§ 1.11, 1.12, 196.025, 196.49 and 196.491, and Wis. Admin. Code chs. PSC 4, and PSC 111?

(R.118 at 1.)

The broad wording of the issue to be determined, including whether the Project complies with the applicable standards of Wis. Stat. § 196.491, puts all parties on notice that the noise levels associated with the wind energy system was an issue in the proceeding. Indeed, many witnesses, including witnesses for the Town, addressed noise and compliance with any applicable noise standard in great detail during the numerous hearings. (R.215 at Supplemental-HWF-Hankard 1r-2r, Direct-CW-Hessler-10-12, Rebuttal-CW-Hessler-9, Surrebttal-HWF-Hankard-2-3, Surrerebuttal-Forest-Schomer-7); (R.216 at Surrebuttal-CW-Hessler-4c; R.219 at 468, 511, 524-525, 540-548; R.222 at 1070-1098; R.230 at Rehearing-Direct-Forest Voice-Lamancusa-4c, 17-18, Rehearing-Rebuttal-HWF-Hankard-1-2.)

Because so many aspects of a project are reviewed to determine if a CPCN should be issued, it is impossible to specifically identify all these aspects in the notice and it is not necessary. That does not mean that the parties were denied due process.

The parties were fully aware the location, the turbines, the noise levels, shadow flicker, ground absorption coefficient, construction techniques, decommissioning, good neighbor payments, and a myriad of other factors were all subject to examination at the hearing. The CPCN law requires the Commission to consider whether the Project would comply with the standards set forth in the Wind Siting Rules, but does not require the Wind Siting Rules be imposed on an applicant. Wis. Stat. § 196.491(3)(dm). Thus, every CPCN determination for a wind energy system requires the Commission to decide what the noise standards will be and how they will be judged. Any noise standards established are imposed entirely under the Commission's authority to condition its orders. Wis. Stat. §§ 196.395(1) and 195.491(3)(e). In other words, parties had *carte blanche* to argue for whatever noise standard they desired to be implemented. Every participant in the case was on notice that the noise limitations and how they are judged were an issue in the proceeding.

The Town did not object or seem to have any confusion as whether the Commission would be considering noise standards and compliance with those standards in the case. Indeed, as described above, the Town presented volumes of evidence on its view of what the noise standards should be and how compliance should be judged. The Town notes that the limited reopening was to take additional evidence on specific issues and did not explicitly identify a "new compliance standard" as one of those topics. The question, though, is not whether the Town knew in advance how the Commission would balance the evidence presented on this issue,

the question is whether the Town had fair notice that the Commission would be making a decision on this subject.

Both the Commission's Order on Reopening and the Second Prehearing Conference Memorandum are crystal clear. In the Order on Reopening, the Commission stated that it was reopening the Record to take additional evidence as to "whether and how Highland's proposed project can meet the noise standards in Wis. Admin. Code ch. PSC 128." The fourth issue in the Second Prehearing Conference Memorandum for the reopener also made clear that compliance with the established noise limit was an issue:

> What post-construction sound testing protocols and compliance procedures are necessary to ensure ongoing compliance with the noise standards in Wis. Admin. Code ch. PSC 128 and a 40 dBA noise standard for (i) between the hours of 10 pm and 6 am, and (ii) for 24 hours (daytime and nighttime hours) at the six residences identified in the existing record as occupied by persons with special needs?

(R.139 at 1.)

As during the original hearings, compliance with the noise standards was clearly an issue for the reopener. And, as will be noted later, additional testimony on the compliance issues was introduced in the Reopened Proceeding. In short, the Town cannot now argue that the noise standard, and how the standard is measured, was not properly noticed as an issue in this proceeding. Their position is particularly disingenuous in light of the fact that the Commission specifically flagged this as an issue in its initial order. (R. 136, at 18-19.)

B. The Commission's acceptance of Highland's offer to accommodate six local residence was not a violation of any party's due process.

As to whether the Town was given a "full hearing" on the potential health effects of wind energy systems, a cursory review of the Record shows that the Town had ample opportunity to present evidence on the subject. The opponents to the Project submitted eight briefs that

discussed this subject at length. (R.52 at 19-21; R.53 at 7-15, 15-20; R.57 at 5-12; R.58 at 1-9; R.84 at 3, 26-27; R.82 at 15-16; R.89 at 4-12; R.87 at 1, 6.) It strains credulity for the Town to now suggest that there was no meaningful opportunity for it to present evidence on this subject. In the Town's Initial Brief before this Court, in the section in which it claims it was unjustly denied a "full hearing" on the issue, the Town describes the testimony and arguments it presented on this subject at length. (Town Init. Br. at 34.) Its section on this issue begins:

> Throughout the original proceeding, the Town and Forest Voice presented evidence that some town residents had health conditions that made them sensitive to noise, such as Parkinson's disease and autistic syndrome. (Docs. 331, 332, 335, 337, 339, 341, 343, 345, 347.) The Town and Forest Voice identified at least seventeen homes whose residents had health conditions sensitive to noise and shadow flicker. (See id.) From then on, the Town and Forest Voice introduced evidence and arguments in favor of more conservative noise projections and lower noise limits for those homes. (See, e.g., Doc. 53, pp. 7–8, 19–20.) Until November of 2012, neither the Commission nor Highland suggested any extra protection to those homes.

(Town Init. Br. at 33-34) (emphasis supplied).

The Town's seems to believe that it was entitled to know exactly what the Commission was going to do before the Commission made the determination. It is a curious view of due process. The Town admits it was allowed to present evidence and argument for greater protection for whomever it wanted. Even in this case, the Town points to *nine* pieces of testimony on this subject. That is more than due process required. It certainly does not require a court or policy maker to inform the parties what result it will choose before the case is even heard.

It may be that the Town mistakenly believes that the testimony prior to the reopening of the case was not part of the Record. But again, when the Commission reopens a case, as opposed to commencing a new proceeding, everything in the Record remains in the Record for the entire case.

After describing in detail the "evidence and arguments" it presented on this subject, the Town finds fault in not having advance notice that it would ultimately, through Highland's consent, be partially successful. Of course, due process does not require advance notice of all possible outcomes that a policy maker might choose. The Town cannot credibly claim that they were denied a meaningful opportunity to be heard on the issue of what additional protections, if any, should be required. The Town correctly notes that the Commission's Administrative Law Judge eventually required the Town and Forest Voice to stop placing redundant testimony in the Record. (Town Init. Br. at 36-37.) This is not a violation of due process. The Town has no right to litigate every issue in the manner and volume they choose. Due process requires that it be given fair, not unlimited, opportunity to be heard.

Numerous people testified on behalf of the opponents of the Project making a multitude of unsubstantiated assertions about wind energy systems. (Town Init. Br. at 33-34.) Countless others filed public comments about the purported health effects, which were also considered by the Commission. (R.235 at 1815-1818, 1822-1830; R.236 at 1937-1942, 1945-1963, 1965-1968, 1970-1974, 2028-2036, 2045-2056, 2121-2128, 2137-2138.) The Town was given multiple opportunities to brief the subject. The Commission's limitation of the re-opener to compliance issues was not a violation of anyone's due process. It simply recognized that the parties had fully presented their positions in the initial proceeding.

And, even though the Reopened Proceeding was limited to the issue of compliance, the Commission still allowed the public and the opponents of the Project substantial leeway to further litigate the purported health impacts of wind energy systems. The last four briefs cited above that discussed health impacts and "sensitive" residents were submitted in the Reopened Proceeding. In addition, the Commission once again permitted members of the public to opine

about the health impacts of wind energy systems during the Public Hearing. *Id.* In fact, the Commission's Final Decision considered that new evidence and concluded that it was not necessary to extend the protections Highland voluntarily agreed to others. (R.144 at pp. 15-17.)

II. THE IMPOSITION OF CONDITIONS RELATED TO COMPLIANCE WAS LAWFUL.

The Town asserts that the Commission improperly adopted a compliance standard relating the wind energy system's noise level. In addition to the due process issue discussed above, the Town raises three arguments. (Town Init. Br. at 21-31.) None of these arguments have merit; the Commission's Final Decision properly established conditions applicable to Highland.

A. The Commission's determination of how Highland must comply with the conditions of the Final Decision are supported by substantial evidence.

Despite the Town's assertions, the Commission did not create a "new standard" in this docket. (Town Init. Br. at 21-25.) First, the Commission was not applying a new standard to the Wind Siting Rules. The Wind Siting Rules do not apply to this CPCN application, unless and to the extent the Commission requires an applicant to comply with them. In other words, every CPCN is a new case in which the Commission must make a new determination as how compliance with whatever conditions are imposed in that docket will be judged. That is, the Commission applied a condition to a specific application before it. Wisconsin Stats. §§ 196.395(1) and 196.491(3)(e) allow the Commission to condition its orders. These statutes are the basis for all of the standards imposed in this case. There were no "old" standards and "new" standards. The Commission determined as a condition of the decision that if a turbine met the noise limits 95 percent of the time, it would be considered in compliance with the limits.

Whether considered new or not, the Record supports the use of the 95 percent of the time standard in this case. It is indisputable that wind speeds vary. At hearing, witness Hessler explained the impact of wind variability on noise limits:

> In this paper where we recommend that, we say what should be limited to 45 is the main long-term average level at each house. There's no practical way to maintain a level below a threshold like 45 or even 50 all of the time. That never happens. There's always spikes due to weather conditions and things. They're short-lived, but they're almost unavoidable.

(R.219 at 511.)

This testimony expanded on Mr. Hessler's prefiled testimony. In prefiled rebuttal testimony, Mr. Hessler recommends the project be designed "with the expectation that the *mean, long-term project sound level will be compliant with the effective State noise limit of 45 dBA* (Wisconsin Administrative Code PSC 128.14(3))." (R.215 at Rebuttal-CW-Hessler-9) (emphasis supplied). Hessler reiterates this in his prefiled surrebuttal: "The point I was making was that our modeling indicates that the vast majority of residents in the project area would likely experience *mean, long-term project sound levels of less than 45 dBA,* which, in our experience, is associated with a low rate of complaints; particularly when compared to a project level of 50 dBA. (R.215 at Surrebuttal-CW-Hessler-4p) (emphasis supplied).

Mr. Hessler's testimony on this point is consistent throughout the proceeding. His testimony on the subject reviewed and relied upon by the Commission is not simply some "lone comment." (Town Init. Br. at 24.) The Town also has a curious view of hearsay, contending that Mr. Hessler's statements about *his own* work and research on the topic is "uncorroborated hearsay." *Id.* The Town's reliance on *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111, 692 N.W. 2d 572 is also peculiar and simply does not support their position. In that case, the Group Insurance Board relied upon written medical reports submitted by others when deciding to terminate the claimant's long-term income continuation benefits. 2005 WI 16, at

¶ 25. None of the doctors who authored these reports testified and not a single live witness was offered to corroborate the contents, clearly making these reports uncorroborated hearsay. *Id.* at ¶¶ 30, 42. Other doctors did testify at the hearing and offered conflicting opinions from those set forth in the reports. *Id.*, at ¶ 32.

Here, Mr. Hessler did testify about his own work and opinions, was available for cross-examination, and contrary to the Town's assertion, others provided corroborating testimony as discussed below. Simply put, this is not a case about whether or not uncorroborated hearsay can constitute substantial evidence because Mr.Hessler's testimony is not hearsay and is supported by other Record evidence.[9]

Several intervenor witnesses for sound issues testified shortly after Mr. Hessler but did not contradict his prefiled or oral testimony. For example, Dr. Schomer was asked about average noise limits and maximum noise limits but did not dispute Hessler's testimony. (R.219 at 547-48.) He testified he had listened to Hessler's testimony on the stand but offered no response. (R.219 at 540.)

In fact, Mr. Hessler's proposal to condition noise compliance at 95 percent of the time was a direct response to a question solicited by an intervenor attorney representing Forest Voice.[10]

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[9] If Mr. Hessler's testimony is uncorroborated hearsay, surely too must be the testimony of Town residents who offered undocumented and uncorroborated testimony about the alleged impacts of a wind energy system on their health.

[10] Note that the Town incorrectly assumes that an "absolute limit" means a noise standard cannot ever be exceeded. However, that is not what "absolute limit" means in this context. Highland witness Mr. Hankard explained that the 45 dba "absolute standard" referred to by the Wind Siting Council actually referred to a fixed noise level as opposed to measuring noise as an amount over the ambient level. (R.215 at Surr.-HWF-Hankard-2 and 3.) Town witness Dr. Schomer agreed that the Commission uses absolute standards rather than relative ones. "I recognize that the PSC has chosen to use absolute limits rather than relative limits and I concur with that choice." (R.215 at Surrebuttal-Forest-Schomer-7.) So the absolute limit standard does not mean a turbine can never exceed the stated dba limit, it refers to a set, or absolute, noise level number that, when measured, includes ambient sound and wind turbine sound.

> Q: And one last question. To maintain absolute limit of 45 dBA that is never exceeded, what would – what should the project be designed at?
>
> A: Yeah, that's a good question. It has to be substantially lower than that to allow for temporary noise spikes, up to 10 dBA below. Now, that issue has been around for a while of these temporary exceedances. What I suggested, and I wrote some siting guidelines for Minnesota Public Utilities Commission, and what I say in there is that, well, if the measured level is in compliance 95 percent of the time or more, then I would consider it in compliance. So there has to be some allowance for these temporary excursions because they're essentially unavoidable.

(R.219 at 524-525.)

During the Reopened Proceedings, Intervenor Forest Voice expert witness John Lamancusa also recognized that compliance would not be achieved 100 percent of the time. In prefiled rehearing direct testimony, Dr. Lamancusa discussed safety margins to ensure turbines are in compliance with the noise standards approximately 90 percent of the time. (R.230 at Rehearing Direct-Forest Voice-Lamancusa-17-18.) Dr. Lamancusa again referred to compliance for approximately 90 percent of the time in his prefiled rebuttal testimony. (R.230 at Rehearing Rebuttal-Forest Voice-Lamancusa-4p.) In other words, even one of the opponents of the Project, Forest Voice, proposed a compliance plan that did not require "absolute limits" as the Town now attempts to use that term.

The Commission's determination is also supported by evidence that demonstrated a lower absolute noise level would not be possible to implement as a practical matter. Highland's witness, Mr. Hankard testified the project was not viable if a 40 dba standard was required on a 24 hour basis. (R.215 at Supplemental-HWF-Hankard-1r- 2r.)

Given the indisputable fact that wind speeds vary, there was substantial evidence to support the Commission's decision to require compliance with the noise standard 95 percent of the time.

B. The Commission did not engage in rulemaking in this docket.

Notwithstanding the Town's assertions, the Commission's Final Decision did not create a new compliance standard by unauthorized rulemaking. (Town Init. Br. at 25-30.) There was no unauthorized rulemaking. First, both Wis. Stat. § 227.01(13)(b) and Wis. Stat. § 227.10(1) clearly state that a decision or order in a contested case is not a rule. Wisconsin Stat. § 227.10(1) provides:

> **Statements of policy and interpretations of law; discrimination prohibited.** **(1)** Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule.

(Emphasis supplied). This matter was decided as a contested case proceeding, thus, the conditions imposed upon the Project are not administrative rules.

Second, Wis. Stat. § 227.01(13)(c) states an order directed at a specific person and that is served on that person is not a rule:

> "Rule" means a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" includes a modification of a rule under s. 227.265. "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:
> . . . .
> (b) Is a decision or order in a contested case.
> (c) Is an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class, and which is served on the person or persons to whom it is directed by the appropriate means applicable to the order. The fact that a named person serves a group of unnamed persons that will also be affected does not make an order a rule.

Here, the Final Decision in this contested case only applies to the applicant, Highland, and not to any public utility or to any other person that may build a wind energy system. The Commission did not create a compliance standard that will be applied to all future CPCN applications. Even if Highland attempts to build the exact same project in eastern Wisconsin in six months, that case will separately address how compliance with the conditions of that CPCN will be measured. For all these reasons, the Final Decision here does not constitute unauthorized rulemaking.

The reference to the noise protocols in the Final Decision does not constitute rulemaking either. First, the Town expressly notes it is not arguing the noise protocol should have been promulgated as a rule. (Town Init. Br. at 28.) If the protocols are not rules, a change to the protocol cannot be either. Second, the protocols are expressly permitted by rule and the rule contemplates and permits revision. Wis. Admin. Code § PSC 128.50(2). That provision of the Wind Siting Rules, like all other provisions, was approved by the Legislature when the Commission promulgated the rules. Third, Wis. Admin. Code § 128.02(4) permits individual consideration to allow lesser, greater, or different provisions than those in that chapter. Fourth, a change in the noise protocols does not have the force and effect of law, and there is absolutely no legal support for the Town's assertion that incorporation of the compliance standard into the noise protocol "will be enforceable through the imposition of forfeitures under the Wisconsin Administrative Code and the Wisconsin Statutes." (Town Init. Br. at 28.) If and only if the Commission chooses to include the compliance standard in other CPCN decisions will it have the force and effect of law and be subject to enforcement action should the applicant fail to abide by that condition. In short, a reference to the noise protocols in the Opinion section of the Final Decision does not harm the Town and does not constitute rulemaking. The Commission will

again consider any appropriate noise protocols the next time someone applies for a CPCN to build a wind energy system.

C. The Compliance standard is not vague unenforceable.

The Town asserts a 45 dBA standard is vague and unenforceable. (Town Init. Br. at 30-33.) Noise can be measured accurately and consistently in decibels. The applicant proposed a system for measuring noise, both on a fixed basis and at various locations. In the Final Decision, the Commission added additional conditions to strengthen the noise testing measures the applicant would be required to follow. The requirement to measure noise in decibels here is the same type of requirement used in the Wind Siting Rules for other smaller facilities, and is the same type of requirement used on earlier approved wind facilities. The standard could not be less vague.

The Town also argues that the requirement that the facilities operate at or below the established sound levels at least 95 percent of the time is also vague. (Town Init. Br. at 30-33.) It points out the "95 percent of the time" can be measured in differing total lengths of time. Of course this is correct and does not make the standard vague. If the wind energy system exceeds the noise standards more than 5 percent of the time, it is not in compliance and corrective action is required. This is true on an hourly, daily, or weekly basis. This is analogous to a vehicle speed limit. If the speed limit is 55 miles per hour, a vehicle is exceeding the speed limit if it travels above the posted limit for 100 hundred yards, several blocks, or several miles. That a standard may be measured in several ways, whether distances for a car or time periods for a wind facility, does not make the standard vague. In reality, the more time periods one can test for noise, the higher the likelihood compliance will be achieved.

The Town also suggests that under the noise standard the Project "can subject any number of homes to any level of noise." (Town Init. Br. at 33.) Nothing could be further from the truth. All turbines in the Project are required to be in compliance with the standard. If a single turbine is out of compliance near a single residence the applicant is required to correct the turbine. In summary, the noise compliance standards are measurable, clear, and understandable.

III. THE COMMISSION DETERMINATION TO ACCEPT HIGHLAND'S OFFER TO ACCOMMODATE THE REQUEST OF SIX LOCAL RESIDENTS WAS LAWFUL.

The Town complains that the Commission accepted Highland's offer to accommodate local community members without extending the same accommodation to every town member. To the Town, a regulatory agency accepting a compromise involving six members of the public and the developer, should be a basis for denying the CPCN altogether.

If this Court accepted the Town's arguments on this issue, it would have a chilling effect on the ability of people who believe they may be affected by the construction of large energy infrastructure to propose concessions. It would encourage a litigious environment where developers only give accommodations that they believe they are legally required to.

The Town asks the Court to use Highland's desire to build goodwill as an excuse to stop the entire development. If such were the law, no person seeking to build a coal plant, natural gas plant, high-voltage transmission line, or any large energy infrastructure would ever undertake this kind of community engagement. As the agency charged with siting large energy infrastructure, the Commission cannot understate the importance of this kind of public engagement. Not only does it foster goodwill, but it encourages public participation in the planning of the state's energy infrastructure. Even if local groups like the Town ultimately oppose a project, their participation in Commission proceedings is paramount to the creation of

good public policy. The Commission does all that it reasonably can to encourage constructive relationships between those who will own and build energy infrastructure and those who will live near it. Thus, the law does not require, nor should it, any evidence whatsoever for a developer to accommodate local residents.

A. The Town is not correct that the Commission is unconstitutionally discriminating against other members of the Town.

The Town asserts that the Commission's adoption of Highland's voluntary offer to accommodate six residents is a violation of equal protection. The Town's argument, properly viewed, is actually just a different way of arguing that there was not substantial evidence to support the Commission's decision. Even if the cases cited by the Town were analogous to this case, they add nothing to the analysis. None of the case establish that state agencies cannot permit a private entity to treat its neighbors differently.

The *Westar Energy Inc. v. Federal Energy Commission* case cited by the Town is both factually and legally distinguishable. *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1240 (D.C. Cir. 2007). It discussed how, *under federal law*, agencies must consistently treat the entities it regulates or give a reason for treating those entities differently. *Id.* But this is not a case in which the Commission has given preferential treatment to one public utility and denied it to another. On that basis alone, the case does not offer any reason to overturn the Final Decision. Under *Westar,* assuming *arguendo* that it applies at all, the Commission could not allow one public utility to construct a wind energy system without obtaining a CPCN while requiring all others to go through the regulatory process without offering an *explanation* of why it had done so. In other words, if exceptions are made to well established rules, the Commission would simply need to explain why it made such an exception. Of course, the Commission did so explain. It required Highland to lower the noise

levels at those residents because Highland offered to do so and those residents desired lower noise levels. That decision is rational and clearly explained.

In the only Wisconsin case cited by the Town to support this proposition, the Wisconsin Supreme Court, in vague dicta, quoted a treatise explaining that differential treatment can be a sign of arbitrary and capricious decision making. *Westring v. James*, 71 Wis. 2d 462, 477, 238 N.W.2d 695 (1976). The *Westring* case did not even involve an allegation of differential treatment and there was no discussion whatsoever about when that principle might or might not apply. The Town offers no Wisconsin case since *Westring,* which was issued in 1976, to support its view of this issue.

The only thing useful about this case is that it confirms the legal framework underlying the Town's argument is not constitutional, but is a statutory prohibition on arbitrary and capricious decision making. Neither *Westring* or *Westrar* invokes equal protection. The petitioner in *Westring* made an unrelated constitutional argument not involving differential treatment. *Westring*, 71 Wis. 2d at 465. Otherwise, neither case even mentions constitutional principles or equal protection. The Town's equal protection argument is so poorly developed, it should simply be disregarded.

Rather than the constitution, the legal prohibition on arbitrary and capricious decision making is founded in Wis. Stat. § 227.57(8).[11] In other words, it is one way courts have described the scope of judicial review of agency of discretionary decisions. Nothing in the *Westring* case changes that general scope of review. The Commission need only provide a reasonable explanation of why it accepted Highland's accommodation. Further, "(t)he Court

[11] The statute does not use the term arbitrary and capricious. But cases that describe the scope of review using that term are clearly evaluating and applying that statute. *See, e.g., Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n of Wisconsin, 109 Wis. 2d 256, 263, 325 N.W.2d 867(1982).*

shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8).

B. There is substantial evidence to support the Commission's decision to apply the existing noise standards to the rest of the public.

While the Town complains mostly about the extension of the accommodation to six residents, it is clear that they are really challenging the Commission decision to not extend that accommodation to everyone. The Town's view of the substantial evidence standard on this issue appears to be that, if any question can be raised about the potential health impacts of wind energy systems, they must prevail. But, it is the Commission who must weigh the evidence, not the Court, and certainly not the opponents of the Project. *City of Oak Creek v. Pub. Serv. Comm'n*, 2006 WI App 83, ¶ 12, 292 Wis. 2d 119, 716 N.W.2d 152. The Court need only look to see what substantial evidence supports the decision actually made. *Id.* In other words, a party cannot overturn substantial evidence simply by having someone disagree with it.

In evaluating findings of fact, it is important to first understand if the law requires any finding of facts to begin with. On this issue, the CPCN law requires two things. First, "the commission shall *consider* whether installation or use of the facility is consistent with the standards specified" in Wis. Admin. Code ch. PSC 128. Wis. Stat. § 196.491(3)(dg) (emphasis supplied). The CPCN law, then, does not even require the imposition of the Wind Siting Rules. The Commission must simply "consider" whether the Project will comply with it. The Commission required Highland to comply as a discretionary decision in the public interest, not because the CPCN law mandated it. Thus, the Town's argument that the Commission must have heard extraordinary evidence to disprove the existence of purported health impacts is not only contrary to the substantial evidence standard, but has no basis in the CPCN law.

The second and final place the CPCN law speaks to public health is in the standards for granting a CPCN. Prior to issuing a CPCN, the Commission must determine that:

> The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use. In its consideration of the impact on other environmental values, the commission may not determine that the proposed facility will have an undue adverse impact on these values because of the impact of air pollution if the proposed facility will meet the requirements of ch. 285.

Wis. Stat. § 196.491(3)(d)4 (emphasis supplied).

This section of the CPCN law shows many important things. Again, it shows that the way the Town has framed this issue is entirely unfounded. The Commission was not required to evaluate every novel medical theory or every self-diagnosed injury from wind energy systems. Even if there were health impacts of wind energy systems that comply with the Wind Siting Rules, a theory that has been repeatedly rejected by the Commission, the Commission could approve the Project anyway. Of course, that is not what the Commission did in this case. The substantial evidence and Commission decision showed that the application of the existing Wind Siting Rules was sufficient to protect everyone, and the accommodation to the six residents was extended solely because Highland offered to do so.

The Town's reliance on *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n of Wisconsin* is misplaced. To begin, in *MG&E*, the Wisconsin Supreme Court reaffirmed the basic principles of the substantial evidence test, which supports the Commission and not the Town:

> Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, reasonable minds could arrive at the same conclusion as the agency.

MG&E v. Pub. Serv. Comm'n of Wisconsin, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982). Further, the facts here are nothing like the facts of that case. In *MG&E*, Commission staff made

a recommendation *on the record* for Commission action that was then adopted by the Commission. The staff recommendation on the record was the only basis for the Commission action, it was not agreed to by the relevant parties, and it contained no explanation. *Id.*

Similarly, *Wisconsin Power and Light v. Pub. Serv. Comm'n of Wisconsin*, did not involve a party offering to undertake some voluntary action. Wisconsin Power and Light was working with Commission staff to address certain alleged bookkeeping errors, but that process was not yet complete and there was no agreement as to how to correct the accounting. In *WP&L*, the Commission specifically stated that the only reason it was lowering staff's proposed adjustment to rate base by more than $100,000 was because it understood staff and the utility were still working on the issue off-the-record. It gave no other explanation for the adjustment. *Wisconsin Power & Light Co. v. Pub. Serv. Comm'n of Wisconsin*, 171 Wis. 2d 553, 570, 492 N.W.2d 159 (Ct. App. 1992), *aff'd sub nom. Wisconsin Power & Light Co. v. Pub. Serv. Comm'n,* 181 Wis. 2d 385, 511 N.W.2d 291 (1994).

Nothing remotely similar happened in this case. Once again, the Town's argument that the Commission selected the six residences because Commission staff selected them is entirely untrue. The Final Decision clearly rejects that theory. In this case, the Commission did not "simply rely on the staff's off-the-record deliberation." (Town Init. Br. at 45.) The evidence showed that Highland offered to accommodate those residents. Nor did the Commission fail to explain why it accepted that offer. The Final Decision could not be plainer on this point. The Commission did not accommodate the residents because Commission staff so desired.

As to the remaining residents, the Commission specifically rejected the Town's repeated arguments that the Project will be injurious to public health. The Findings of Fact the Commission made on this subject were:

4. In the reopened proceeding, Highland submitted sound level modeling and a proposed curtailment plan that demonstrates, using the most conservative modeling assumptions, that the proposed project will meet applicable noise limits, including the Wis. Admin. Code § PSC 128.14(3) nighttime audible noise limit of 45 dBA.

6. The Highland project, as modified by this Final Decision on Reopening, will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water, and recreational use.

(R.144 at 5.)

Thus, the Commission specifically found that the parties failed to demonstrate that the existing standards were inadequate to protect public health. The Town's implication that it was proven beyond a doubt that these six residents would be harmed by the Project, and its further argument that the Commission was then arbitrary in not similarly protecting others has no basis in the Record. The Final Decision explains in depth the Commission's decision both on the purported health effects of wind energy systems in general and the reason why it accepted Highland's voluntary offer relative to the six residents. An excerpt of the Final Decision that includes the entire discussion of health impacts and the six sensitive residents is attached as Appendix A. The Final Decision explained, in part:

> There is debate in the scientific community as to whether noise at certain levels from wind turbines causes or contributes to any health issues. When the Commission established the noise limits in Wis. Admin. Code ch. PSC 128, it considered these alleged impacts and concluded that the established noise standards were protective of public health and welfare. As the Commission noted in its prior decision in this proceeding, the Commission is not convinced that a causal link between audible or inaudible noise at wind generating facilities and human health risks has been established to a reasonable degree of scientific certainty.
>
> While the Commission, based upon the available scientific literature, may have doubts as to whether noise from the turbines, whether it be at 40 dBA, 45 dBA or 50 dBA can cause or worsen any of the self-reported conditions individuals living at the six occupied residences may have, the Commission has erred on the side of caution by requiring Highland to demonstrate in modeling using the most conservative assumptions that the project will comply with the

> applicable noise limits. In addition, the Commission, out of an abundance of caution, accepts Highland's voluntary agreement to obligate itself to a lower limit of 40 dBA for the six identified residences, but the Commission is unwilling to require Highland to extend this accommodation to others—especially where, as here, the sound modeling submitted in this reopened proceeding demonstrates that the estimated levels are at or below 40 dBA for the commenters' residences identified in the reopened proceeding. As a result, the Commission finds that it is not necessary to extend the 40 dBA noise limit to the three additional affected residences identified in the reopened proceeding.

(R.144 at 16-18.)

The substantial evidence standard does not require the Commission to reject every iteration of the public health debate put forth by every participant in every proceeding. The Commission was not required, for example, to order physical examination of every person who claims they are particularly sensitive to noise. Nor was Highland required to obtain their medical records or depose their treating physicians. However, the Town's drastic view of the substantial evidence test would require a developer to litigate CPCN applications in exactly this manner. Clearly, this is not what the law requires. It was up to the Town to establish a causal link between self-reported symptoms and wind energy systems. They simply did not do so to the Commission's satisfaction. The Commission considered its opinions on the subject, but ultimately, the Commission found that the opponents had not established a causal link between wind energy systems and the self-reported symptoms to a reasonable degree of scientific certainty. (R.144 at 16-18.)

As to the accommodation made for the six residents, the Town goes to great lengths to argue that it had the right to know why and how Highland ultimately offered to accommodate these six residences. But why and how Highland ultimately agreed to accommodate these six residences is irrelevant. Highland will be a merchant plant owner. So long as it meets the basic

requirements of the CPCN law and any conditions the Commission imposes, it does not matter why it offered to accommodate these people.

Because Highland is not a rate regulated utility, the accommodation has no corresponding cost that will be passed on to ratepayers. Thus, the Commission did not need to consider the cost of the accommodation because it will be borne entirely by the party offering it. Similarly, Highland does not possess the power of eminent domain and therefore can only place turbines on the property of people who want to host them. As a result, there was absolutely no risk that such an accommodation could force a turbine onto an unwilling person's property. In other words, there was no reason for the Commission to investigate the accommodation and no finding of fact required to implement it.

Once Highland indicated its desire to accommodate those residents' concern, the issue was settled. It was not unreasonable for the Commission to implement Highland's decision to accommodate the six residences. There was testimony that people had concerns about the Project and an acknowledgment on the record that Highland would accommodate it. Nothing further is required.

The Town's attempt to link the six residents back to everyone else that lives near the Project is a red-herring. The Town implies that there was an informal Commission staff determination that these six residents would in fact be harmed absent special consideration. (Town Init. Br. at 44-46.) The Town then implies that the staff determination somehow became formal Commission policy. No such determination was made. The Final Decision clearly shows the Commission decided exactly the opposite.

The Town mischaracterizes several aspects of Commission decision making process that should be clarified. First, it is neither nefarious nor unusual for Commission staff to speak to the

parties. Commission staff communicates with all parties to its major investigations, and certainly afforded the Town and Highland the same courtesy. There is no legal requirement that all parties be involved in any one conversation because Commission staff is not the decision maker.

Nor does Commission staff set Commission policy. Commission staff is not even a formal party to the proceeding. "Members of commission staff appear neither in support of nor in opposition to any cause, but solely to discover and present, if necessary, information pertinent to the docket." Wis. Admin. Code § PSC 2.03(1). No Commission staff member testified at any point that these people or anyone else would suffer injury from the Project. Commission staff did not testify that these six residents needed special protection, nor does Commission staff possess the authority to force Highland to extend such protection.

In any event, the Town was entitled to conduct discovery if it truly desired more information on this subject. Wis. Admin. Code § PSC 2.24; (R.118 at 3.) It apparently did not do so.

The Town is certainly not correct that the accommodation that Highland offered is some sort of admission that, behind closed doors, the Commission and its staff secretly believe the Project will injure the public. Substantial evidence supported the Commission decision to apply the Wind Siting Rules to the general public, and nothing further was required to implement an offer to accommodate specific residences.

IV. THE COMMISSION'S DETERMINATION THAT THE PROJECT WILL NOT UNREASONABLY INTERFERE WITH LOCAL LAND USE PLANS MUST BE UPHELD BECAUSE IT WAS REASONABLE.

The Town's brief gives the impression that the Town's local land use plan unambiguously and consistently opposed renewable energy development like the Project. (Town Init. Br. at 47-52.) Even if that were true, the CPCN law allows the Commission to approve the Project anyway. Once again, however, the Town has inaccurately described the evidence before the Commission. Not only did the land use plan not prohibit development of this nature, it specifically encouraged renewable energy development.

The Final Decision explains the Commission's decision making process on this issue:

Land Use and Planning

> In the initial proceeding, Highland and Forest disagreed regarding the intent of the town's planning document, titled "Town of Forest Comprehensive Plan 2009-2030" (Comprehensive Plan). Highland stated that the proposed project would not interfere with orderly land use and development plans, and stated that its position is supported by several factors, including: the sparsely developed rural character of the project area; Forest's desire to maintain its rural, agricultural character; and the support for all types of renewable energy projects included in the town's Comprehensive Plan.
>
> Forest stated that its 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. Forest also stated 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.
>
> The testimony is conflicting and the Forest Comprehensive Plan does not expressly limit support for renewable energy to small-scale development. A wind project of this nature is typically placed in rural areas and is consistent with rural features and agricultural uses. In prior cases, the Commission has found that development of wind generation facilities in rural, agricultural project areas did not unreasonably interfere with the land use and development plans at issue in those proceedings.

> The Commission finds that the proposed project, as modified by this Final Decision on Reopening, will not unreasonably interfere with the orderly land use and development plans for the area involved. The Comprehensive Plan adopted by Forest expressly envisioned support for renewable energy projects. While Forest has asserted that the proposed project will have some interference with land use and development, Wis. Stat. § 196.491(3)(d)6. recognizes that a project may indeed have some interference, but requires only that such interference not be unreasonable. The Commission concludes any such interference with land use and development is not unreasonable. As a result, Highland's project is reasonable and in the public interest.

(R.144 at 13-14.)

The evidence supporting this decision was substantial. As noted in the Final Decision, the comprehensive plan itself was in the record. It stated, in part:

> The Town will be open to all forms renewable energy projects, including wind, solar and bio-energy.

(R.264 at 24.) This statement alone is sufficient evidence that the Commission's interpretation of the land use plan encouraged renewable energy development is correct. Highland' witness and one member of the public also provided testimony that supported Highland's position. The testimony summarized in the first paragraph of the above quote was provided by witness Jay Mundinger. (R.215, Direct-HWF-Mundinger-18, Rebuttal-HWF-Mundinger-3-4.) Mr. Mundinger provided substantial analysis of the Town's Comprehensive Plan and also provided the plan itself for Commission review. The presence of Mr. Junker's competing interpretation of the plan does not convert substantial evidence into reversible error.

Even if the Town's current interpretation of its Comprehensive Plan was reasonable, the Commission is not bound by that interpretation. The Town argues that the Commission must give deference to the Town's *post hoc* explanation of its land use plan. (Town Init. Br. at 49.) Taken to its logical conclusion, the Town's argument would mean that one member of a town

board could stop the development of the state's large energy infrastructure by testifying that the local government meant to prohibit that kind of development. The CPCN law clearly rejects this paradigm of state energy policy making.

The Wisconsin Supreme Court has indeed "deferred" to municipalities' interpretations of ordinances in circumstances where that interpretation is related to some function of local government. (Town Init. Br. at 48-49.) In other words, when municipalities are exercising their political authority, within that authority, they should receive some modicum of deference. No case cited by the Town remotely comes close to extending "deference" or the presumption of correctness beyond municipal actions within their traditional sphere of political authority. Indeed, in one of the two cases cited by the Town, the Wisconsin Supreme Court gave no deference to the local unit of government's interpretation. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 33, 498 N.W.2d 842 (1993).

Applying that limited set of case law to applications for CPCNs would be contrary to the CPCN law. The CPCN law not only requires the Commission to interpret land use plans, but expressly gives the Commission the authority to approve a project even if it interferes with that plan. It provides that a CPCN must be granted if "the Commission determines," *inter alia*:

> The proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved.

Wis. Stat. § 196.491(3)(d)6.

Thus, the plain text of the statute establishes, once again, that the Commission is the entity that must decide what is reasonable or unreasonable. Such a determination, as the Wisconsin Supreme Court noted in *Clean Wisconsin*, is rife with public policy determinations that effect statewide energy policy:

> Finally, and most importantly, the PSC's interpretation and application of § 196.491(3)(d) inherently calls for a variety of policy determinations. Even a cursory review of the Plant Siting Law reveals that the PSC is charged with making a number of legislative-type policy determinations when determining if a CPCN should be issued. For instance, the PSC must determine whether: "[t]he proposed facility satisfies the reasonable needs of the public for an adequate supply of electric energy"; "[t]he design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors"; "[t]he proposed facility will not have undue adverse impact on other environmental values"; "[t]he proposed facility will not unreasonably interfere with the orderly land use and development plans for the area involved"; and "[t]he proposed facility will not have a material adverse impact in competition in the relevant wholesale electric service market."

Clean Wisconsin, 282 Wis. 2d 250, ¶ 138 (internal citations omitted) (emphasis supplied).

Thus, the Wisconsin Supreme Court has specifically stated that the determination of whether a proposed facility will or will not unreasonably interfere with local land use and development plan is a Commission decision entitled to great weight deference. *Id.* As a result, the Commission's interpretation of the plan must be upheld even if a more reasonable interpretation exists. Similarly, the Commission cannot abrogate its legislative duty to make state energy policy by blindly accepting a municipality's unreasonable and *post hoc* interpretation of its plan.

Further review of the text of the CPCN law shows the clear intent of the law to limit municipalities' power to inhibit state energy policy. Certainly local governments may find the provisions objectionable, but, like the Commission, they are agents of the state and only possess those powers vested by the Legislature. The CPCN law requires local units of government to sell land at fair market value to any electric utility that receives a CPCN from the Commission. Wis. Stat. § 196.491(3e)(am). It further provides that the granting of a CPCN supersedes any local ordinance, including those that implement land use plans, that would interfere with the facility's construction. Wis. Stat. § 196.491(3)(i). Similarly, the statute that required the

promulgation of the Wind Siting Rules, 196.378(4g)(b), specifically removed the ability of local units of government to veto the construction of wind energy systems. Thus, read as a whole, the law clearly places the responsibility and authority for balancing local interests with state public policy with the Commission.

The Commission's determination that the Project will not unreasonably interfere with the local land use plans was supported by substantial evidence, is given great weight deference, and must be upheld.

V. THE COMMISSION'S DECISION THAT HIGHLAND HAD PROVIDED SUFFICIENT GUARANTEE OF COMPLIANCE WAS A REASONABLE DISCRETIONARY DECISION AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Town believes the substantial evidence standard requires Highland, and then the Commission, to disprove any possibility that the Project will not comply with the conditions in the Final Decision. (Town Init. Br. at 52-56.) In determining whether the substantial evidence standard has been met, it is critical to first identify what finding the CPCN law requires. On this subject, the CPCN law is entirely silent. The only thing the CPCN law requires is that the Commission *consider* whether the Project will comply with the Wind Siting Rules. Wis. Stat. § 196.491(3)(dg).

The Town points to no section of the CPCN law that requires a particular finding on compliance. Thus, what constitutes compliance and how compliance should be measured is entirely a discretionary determination of the Commission. Discretionary decisions may only be overturned if they are arbitrary and capricious and are entitled to great weight deference. Wis. Stat. § 227.57(8); *Clean Wisconsin*, 282 Wis. 2d 250, ¶¶ 136-139.

Even if the CPCN law required Highland to disprove every critique of compliance that an opponent put forth, the Commission would be entitled to deference in its determination that an

applicant had done so. This issue is a quintessential example of why agencies' specialized knowledge and expertise warrants deference. In a war of experts, trial judges reviewing agency decisions do not need to determine whether a wind turbine manufacturer's software design team can accommodate rotor speed variances or a meteorological variable's effects on measurable dBA levels. The trial judge does not need to become an expert on sound modeling and directivity analysis. (Town Init. Br. at 54.) To the extent a finding of fact is required at all on this subject, the Court need only find that the evidence the Record supports it and the Court may rely upon the Commission's expertise and experience siting large energy infrastructure when it does so.

Despite the Town's characterization of this issue, there were volumes of testimony on the subject. The Commission's explanation of its determination that curtailment would ensure compliance was exhaustive. (R.144 at 20-33.) The Final Decision discusses at length the testimony and arguments that were presented on this issue and thoroughly explains the Commission's decision. The Commission directly addressed each of the arguments resurrected in this case by the Town and reasonably rejected each of them. An excerpt of the Final Decision is attached as Appendix B.

The evidence supporting the Commission's Final Decision is not just summarized in the Final Decision, it is part of the Record that the Commission reviewed and that is now before the Court. Excerpts of the testimony are attached as Appendix C. The Town's disagreement with that testimony does not change its nature as substantial.

The Town curiously offers *Gilbert v. State Med. Examining Bd.* as somehow analogous and supportive of the concept that "the Commission cannot plug gaps in the record with its own judgment." *Gilbert v. State Med. Examining Bd.*, 119 Wis. 2d 168, 349 N.W.2d 68 (1984). The

Gibert case sheds no light whatsoever on how to view the substantial evidence standard in the modern era. It is not a landmark case and it barely describes the substantial evidence standard at all.

Furthermore, *Gilbert* involved the revocation of a doctor's professional license for malpractice in the 1970s. *Gilbert,* 119 Wis. 2d at 168. The proffered cite to *Gilbert* is to the Wisconsin Supreme Court conclusion that a doctor testifying that another doctor has not met the applicable standard of care must do more than say he would have done something differently. *Id.* at 199. Whether the doctor committed malpractice was the central factual issue in that case, it involved no exercise of discretion, no public policy was made by the Board's decision, and the testimony was nothing like the testimony in this Record.

The Court need not scour 40 years of case law to compare this case to the occasional example where an agency decision has been overturned. In the past 15 years, the Wisconsin Supreme Court has twice applied that standard to Commission decisions to grant CPCNs. In both cases and on every single issue, the Commission's decision applying this exact same law was upheld. *Clean Wisconsin,* 282 Wis. 2d 250; *RURAL v. Public Serv. Comm'n*, 2000 WI 129, 239 Wis. 2d 660, 619 N.W.2d 888.

CONCLUSION

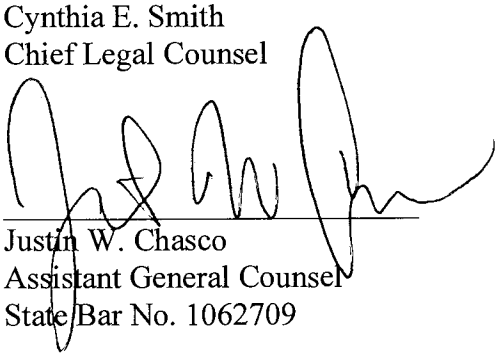
The Final Decision must be upheld. The Commission has substantial expertise and experience adjudicating applications for CPCNs. The Wisconsin Supreme Court has clearly stated that these determinations are entitled to great weight deference and can only be overturned if they are unreasonable. Substantial evidence supports each of the contested findings of fact. The Commission was reasonable in its exercise of discretion and the parties were given ample

opportunity to present evidence and argument on the relevant issues. The Petition for Judicial Review should be denied.

Dated this 29th day of August, 2014.

Respectfully submitted,

Cynthia E. Smith
Chief Legal Counsel



Justin W. Chasco
Assistant General Counsel
State Bar No. 1062709

John Lorence
Assistant General Counsel
State Bar No. 1006707

PUBLIC SERVICE COMMISSION
OF WISCONSIN
610 North Whitney Way (53705-2729)
P.O. Box 7854
Madison, WI 53707-7854
Tel. No. (608) 266-3708
Tel. No. (608) 266-8128
Fax. No. (608) 266-3957
E-mail: justin.chasco@wisconsin.gov
E-mail: john.lorence@wisconsin.gov