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VIA FEDERAL EXPRESS

Ms. Kristi Severson
St. Croix County Clerk of Court
Government Center
1101 Carmichael Road
Hudson, WI 54016

Re: *Town of Forest v. Public Service Commission of Wisconsin et al.*
Case No. 14-CV-18

Dear Ms. Severson:

Enclosed please find the original version and a copy of Petitioner Town of Forest's Reply Brief in the above-referenced case, with the accompanying certificate of service. Please file the original version, authenticate the copy, and return the copy to me the enclosed pre-posted envelope.

Thank you for your time and attention in this matter.

Sincerely,

REYNOLDS OLIVEIRA LLC

By: Marcel S. Oliveira, Esq.
Attorney for the Town of Forest

MSO

Encl.: Petitioner Town of Forest's Reply Brief (original and copy w/ certificate of service)
Pre-posted envelope addressed to Reynolds Oliveira LLC

cc: Public Service Commission of Wisconsin, c/o Justin Chasco and John Lorence (via hand-delivery w/ encl.)
Highland Wind Farm, LLC, c/o Michael Screnock and John Wilson (via hand-delivery w/ encl.)

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

TOWN OF FOREST,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

and

HIGHLAND WIND FARM, LLC,

Respondents.

Case No. 14-CV-18
Case Code 30607
Administrative Agency Review

PETITIONER TOWN OF FOREST'S REPLY BRIEF

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INTRODUCTION

Respondents Public Service Commission of Wisconsin (the "Commission") and Highland Wind Farm, LLC ("Highland") would have the Court believe that the Commission, on account of its discretion, is entitled to a blank check. They argue that since the Commission can impose conditions on a project, it is entitled to impose conditions that contravene the plain language of a rule – or the entire purpose of a proceeding. Since it can deem a condition unnecessary, it is entitled to apply that condition to some citizens, but not others – without notice, hearing, or evidence to distinguish amongst them. Since it can decide what amounts to a "reasonable" interference with local land use, it is entitled to ignore the local government's perspective on land use. Since it has experience in making judgment calls, it can substitute its judgment for the evidence. And ultimately, since it has experience in applying the law of Certificates of Public Convenience and Necessity ("CPCN"), it is entitled to the highest level of deference on everything it does in a CPCN case – be it a matter of procedure, fact, or law.

Fortunately, the law says otherwise. The Commission may have significant discretion and receive significant deference, but the law draws a line. That line is found in Chapter 227 of the Wisconsin Statutes: the Wisconsin Administrative Procedure Act ("Chapter 227"). Chapter 227 makes clear that the Commission cannot rely on discretion to bypass procedure. And the case law that interprets Chapter 227 makes clear that the Commission cannot rely on deference to exceed its statutory authority. What the Commission did in this case exceeded that statutory authority.

Petitioner Town of Forest (the "Town") cannot overstate the importance of the Court's scrutiny in this case. The precedent it sets is significant. The Commission requests a blank check to use its general experience with CPCN cases to completely remove itself from the purview of Chapter 227. Indeed, with respect to the issue of the sensitive residents, the Commission openly

takes the position that it believes itself entitled to make decisions without applying the standards of Chapter 227. (Commission's Brief, p. 40.)

SUMMARY OF THE ARGUMENT

The Commission's adoption of the new compliance standard violated Chapter 227. The Commission's notices misled the parties to believe that the Commission would not adopt a new compliance standard – a reality the Commission cannot now escape by pointing to general off-topic evidence the parties introduced. The Commission admitted that it lacked sufficient evidence to adopt a new compliance standard, but now attempts to argue that the record is sufficient. The Commission created what amounts to a rule, and now attempts to use the technical status of a CPCN and the Noise Protocol to avoid the consequences. Finally, the new compliance standard is so ambiguous that neither respondent can explain what it means.

The Commission's arbitrary selection of six out of several similarly-situated residents for different treatment, and its subsequent adoption of Highland's proposal regarding those residents, violated Chapter 227. In the original proceeding, Commission staff selected and separated six residents (the "Six Selected Residents") out of several residents that had asked for additional protection on account of health conditions (the "Sensitive Residents") – without evidence or explanation in the record as to what led Commission staff to make the selection, or to separate between the two groups. In the reopened proceeding, the Commission adopted Highland's proposal to apply a lower noise limit to the Six Selected Residents, and the exclusion of the Excluded Residents, without a hearing, findings of fact, or conclusion of law to support the distinction between the two groups. As evident from their arguments, neither respondent can explain the selection or distinction between the two groups.

The Commission's treatment of the Town's interpretation of its land use plan was contrary to CPCN law. The Commission gave absolutely no deference to the Town's own interpretation of its own land use plan. The respondents' reliance on the plain language of the Town's land use plan does nothing to change that. The Commission did not explain, or even attempt to explain, how it reconciled its conclusion with the Town's position.

Finally, the Commission's conclusion that Highland has ensured the Highland Wind Farm (the "Project") will ensure compliance with applicable noise limits lacks substantial evidence in the record. The Commission lacked evidence that Highland had verified, or had any ability to verify, that its plan to curtail wind turbine noise production (the "curtailment plan"), which it admitted was necessary to ensure compliance, would be implemented correctly. The respondents' reliance on evidence about other aspects of the curtailment plan does nothing to change that.

STANDARD OF REVIEW

The respondents go through great lengths in their briefs to reframe the issues in this case. Both respondents meticulously and systematically rephrase the Town's arguments in ways that, if accurate, would transform the Town's procedural challenges into challenges to the Commission's judgment – which just happen to fall under a standard of review that is highly deferential.

Before addressing the merits of the respondents' arguments, it is important to clarify what the Town's arguments actually are – and what standard the Court should employ to review them.

I. Wisconsin law applies different standards of review for issues of procedure, issues of fact, and issues of law on judicial review of agency decisions.

The respondents conflate the issues of procedure and fact in this case with issues of interpretation of law in order to secure the most favorable standard of review for every single issue the Town raises. (Commission's Brief, pp. 11–16; Highland's Brief, pp. 6–14.) The Commission seeks overly-broad deference, claiming that it is "entitled to great weight deference when it

interprets and applies the CPCN law." (Commission's Brief, p. 16.) Similarly, Highland argues that "each relevant Commission interpretation and application of the CPCN statute at issue in this case is entitled to great weight deference." (Highland's Brief, p. 13.)

The respondents' argument on standard of review seems to be the following:

- The case of *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin* gives the Commission the "great weight deference" in its interpretation of CPCN law; and
- The Town challenges decisions the Commission made in issuing a CPCN; therefore
- The Commission receives "great weight deference" on every decision it made.

(*See id.* (citing *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin*, 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768).) In other words, the respondents suggest that everything the Commission ultimately decides pursuant to its power to issue CPCNs deserves great weight deference – no matter what process it used to reach that decision, and no matter what record it had on which to base that decision.

If that were the case, there would be nothing left of other standards of review, much less of due process and Chapter 227. If the Commission could justify deciding whatever issues it wanted without notice, hearing or evidence by turning to its power to make "legislative-type policy determinations" – upon which the respondents rely exclusively in support of their arguments – there would be no point left in contested case proceedings and administrative law. (*See* Commission's Brief, p. 7 (citing *Clean Wisconsin*, 2005 WI 93, ¶¶ 136–39, 282 Wis. 2d at 350–52, 700 N.W.2d at 817).) The Commission would cease to be an agency empowered to make "legislative-type policy determinations," and simply turn into a legislature.

The Commission, however, is a "creature of the legislature" and is bound by the limits of its statutory authority. *Wis. Power & Light Co. v. PSC*, 181 Wis.2d 385, 392, 511 N.W.2d 291 (1994). Accordingly, case law imposes limits on the deference owed the Commission, particularly

where there is a question about whether it has exceeded its statutory authority. Chapter 227 and the case law that interprets it draw a clear and significant distinction between the Commission's discretion to draw conclusions from a proper process and the Commission's ability to bypass a proper process. As the Commission notes, "disagreement with a policy choice does not make that policy arbitrary and capricious." (Commission's Brief, p. 17.) But a policy choice made without notice, hearing or evidence is the very definition of arbitrary and capricious. Which is exactly why the legislature armed courts with a far less deferential standard of review for issues of procedure. *See* Wis. Stat. § 227.57(4).

A. Chapter 227 requires courts to apply separate standards of review for issues of procedure, issues of fact, and issues of law.

Wisconsin Chapter 227 has governed all aspects of this case, from the first day of proceedings before the Commission, to the Court's review of the record and the parties' arguments. *See id.* at §§ 227.44 (applying Chapter 227 to contested case proceedings), 227.52 (applying Chapter 227 to judicial review of contested case proceedings).

Chapter 227 clearly distinguishes judicial review of issues of procedure from judicial review of issues of law or fact. *See id.* at § 257.57(3). Chapter 227 provides the framework that courts must use in judicial review as follows:

> The court *shall separately treat* disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

Id. (emphasis added). In other words, Chapter 227 makes clear that courts *shall* treat differently three "categories" of issues: (1) challenges to procedure, (2) challenges to interpretations of law, and (3) challenges to findings of fact. *See id.*

Chapter 227 then provides a *different standard of review* for each one of these three categories. *See id.* at §§ 227.57(4)–(6). They are as follows:

- For issues of *procedure*, "[t]he court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure";

- For issues of *conclusions of law*, "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law"; and

- For issues of *findings of fact*, "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."

Id.

B. Wisconsin case law interpreting Chapter 227 limits deference to findings of fact and certain conclusions of law.

Contrary to the plain language of Chapter 227, the respondents rely on *Clean Wisconsin* to argue that the Commission is owed "great weight" deference on everything it does in a CPCN proceeding. (*See, e.g.*, Commission's Brief, p. 16; Highland's Brief, p. 13.) In this broad brush approach, the respondents ignore the controlling legal distinctions made in *Clean Wisconsin* and the simple fact that it only applied the great weight deference analysis to conclusions of law – and not to findings of fact or issues of procedure. *See Clean Wisconsin*, 2005 WI 93, ¶ 37, 282 Wis. 2d at 307, 700 N.W.2d at 795.

A plain reading of *Clean Wisconsin* makes clear that its holding regarding deference is limited to conclusions of law. *See id.* The whole point of *Clean Wisconsin* was to espouse different levels of deference based on an agency's experience and expertise in *interpreting and applying a statute*. *Id. Clean Wisconsin* specifically separates issues of procedure and issues of fact from the

issues of law that its holding addresses. *Id.* at ¶¶ 46, 153, 282 Wis. 2d at 310, 358, 700 N.W.2d at 797, 820. Regarding procedure, the *Clean Wisconsin* court wrote: "our great weight deference review … is not concerned with the actual procedures utilized…." *Id.* at ¶ 153, 282 Wis. 2d at 358, 700 N.W.2d at 820. Regarding facts, *Clean Wisconsin* upheld and reaffirmed the separate, single level of deference that applies to judicial review: the substantial evidence standard. *Id.* at ¶ 46, 282 Wis. 2d at 310, 700 N.W.2d at 797. The *Clean Wisconsin* court wrote:

> Pursuant to [Chapter 227], a court will not disturb an agency's factual findings unless they are not supported by "substantial evidence." An agency's findings are supported by substantial evidence if a reasonable person could arrive at the same conclusion as the agency, taking into account all the evidence in the record.

Id. In sum, nothing in *Clean Wisconsin* changes long-standing Wisconsin case law on the standards of review that apply to either issues of procedure or issues of findings of fact.

1. Courts review issues of procedure or due process de novo.

The respondents fail to acknowledge the massive body of Wisconsin case law applying *de novo* review to challenges to agency procedure. *See, e.g., Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 6, 234 Wis. 2d 335, 341, 610 N.W.2d 129, 133; *DeBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶35, 335 Wis. 2d 599, 619, 804 N.W.2d 658, 668. Even the most cursory research reveals a large body of cases applying *de novo* review to challenges to procedure and questions of due process violations – both before and after the publication of *Clean Wisconsin*.

It is well established that Wisconsin courts apply *de novo* review to claims that an agency violated due process rights. Courts have continued to hold that *de novo* is the appropriate standard for review of due process issues well after the publication of *Clean Wisconsin*. *See, e.g., Daniels v. Wisconsin Chiropractic Examining Bd.*, 309 Wis. 2d 485, 490, 750 N.W.2d 951, 954 (Ct. App. 2008) ("whether the proceedings … satisfied due process … is a question of law we review *de novo*"). The reason for that is simple: an agency only receives deference in interpreting statutes

that it administers. *See id.* Agencies do not administer Chapter 227; to the contrary, Chapter 227 administers agencies. *Haase-Hardie v. Wisconsin Dept. of Natural Resources*, 2014 WL 4335622, ¶ 12, n.7 (Wis. App. 2014) (denying deference and applying *de novo* review to a question brought under Chapter 227 because the agency did not administer Chapter 227).

It is equally well established that Wisconsin courts apply *de novo* review to claims that an agency violated Chapter 227 by failing to provide adequate notice. Courts have always considered lack of notice to be a due process issue – and *Clean Wisconsin* has done nothing to change that. *See, e.g., Homeward Bound Services, Inc. v. Office of Ins. Com'r*, 2006 WI App 208, ¶ 39, 296 Wis. 2d 481, 509, 724 N.W.2d 380, 394 ("[w]hether a notice is sufficient to provide due process presents a question of law, and our review is therefore *de novo*").

The same applies to claims that an agency violated Chapter 227 by engaging in unauthorized rulemaking. Courts have always considered unauthorized rulemaking to be a question of an agency's power, and consequently subject to no deference. Once again, courts have continued to hold as much well after the publication of *Clean Wisconsin*. *See id.* at ¶ 27, 296 Wis. 2d at 504, 724 N.W.2d at 392 ("[w]hether an agency's action constitutes a 'rule' under [Chapter 227] presents a question of law, which we review *de novo*"); *Wisconsin Federated Humane Societies, Inc. v. Stepp*, 2014 WL 3359323 (Wis. App. 2014) (applying *de novo* review to the question of whether an agency had exceeded its statutory authority in rulemaking).

2. Courts review findings of fact under the substantial evidence standard.

As previously noted, *Clean Wisconsin* did not change the level of deference that courts apply to judicial review of questions of fact. *See* 2005 WI 93, ¶ 46, 282 Wis. 2d at 310, 700 N.W.2d at 797. The proper standard continues to be the substantial evidence standard. Under that

standard, courts determine whether a reasonable person could have reached the same decision as the agency given the facts in the record. *Id.*

3. Courts review interpretations of statutory law by weighing the agency's experience in interpreting and applying the statute.

Courts only give deference to an agency's interpretation and application of statutes when the agency has experience and expertise in applying that particular statute. *See Andersen v. DNR*, 2011 WI 19, ¶¶ 26–28, 332 Wis. 2d 41, 54–56, 796 N.W.2d 1, 8. There are three levels of deference that courts apply to an agency's interpretation of a statute: great weight deference, due deference, and no deference (*de novo* review). *Id.* at ¶ 26, 332 Wis. 2d at 54–55, 796 N.W.2d at 8. Under great weight deference, the court defers to the agency's interpretation of the statute so long as it is reasonable. *Id.* at ¶ 27, 332 Wis. 2d at 55, 796 N.W.2d at 8. Under due deference, the court defers to the agency's interpretation of the statute so long as it does not conflict with the plain language of the statute, and so long as it is the most reasonable interpretation that exists. *Id.* at ¶ 28, 332 Wis. 2d at 56, 796 N.W.2d at 8. Under *de novo* review, the court gives the agency's interpretation of the statute no deference – and instead applies its own. *RURAL v. PSC*, 2000 WI 129, ¶ 22, 239 Wis. 2d 660, 676, 619 N.W.2d 888, 899.

Great weight deference, the highest level of deference, only applies if the agency's specific interpretation under review is one that is long standing. *Andersen*, 2011 WI 19, ¶ 27, 332 Wis. 2d at 55, 796 N.W.2d at 8. To receive great weight deference on any given interpretation of a statute, the agency must show that it meets all of the following elements:

(1) The agency is charged by the legislature with administration of the statute being interpreted;

(2) The agency's interpretation is one of long standing;

(3) The agency employed its expertise or specialized knowledge in forming its interpretation; and

(4) The agency's interpretation will provide uniformity and consistency in the application of the statute.

Id. If *any* of these elements are not met, the agency cannot receive great weight deference, and the standard of review is either due deference or no deference.

Due deference, the mid level of deference, only applies over *de novo* review if the agency has "some experience in the area" in which it is applying the given statute. *Id.* at ¶ 28, 332 Wis. 2d at 56, 796 N.W.2d at 8. It is well established that if the (1) agency's interpretation of the statute is a case of first impression or (2) the agency's interpretation of the statute has been so inconsistent as to provide no real guidance, the standard of review is *de novo*. *Marsi v. State Labor and Industry Review Com'n*, 2014 WI 81, ¶ 24, 850 N.W.2d 298, 306; *J&E Investments LLC v. Division of Hearings and Appeals*, 2013 WI App 90, ¶ 12, 349 Wis.2d 497, 506, 835 N.W.2d 271, 275.

4. Courts review interpretations of regulatory law by determining whether the interpretation is inconsistent with the rule itself.

Courts only defer to an agency's interpretation of its regulations if that interpretation is consistent with both the meaning and the purpose of the regulations. *Wisconsin Dept. of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 54, 311 Wis. 2d 579, 615, 754 N.W.2d 95, 113; *Wisconsin Power and Light Co. v. Public Service Com'n of Wisconsin*, 2009 WI App 164, ¶ 18, 322 Wis. 2d 501, 511, 777 N.W.2d 106, 111. The Wisconsin Supreme Court has explained this "controlling weight deference" standard of review as follows:

> [A]pplying controlling weight deference, we ask whether the agency's interpretation is reasonable and consistent with the meaning and purpose of the regulation.

Id. If the agency's interpretation is inconsistent with *either* the plain language of the regulation *or* the purpose of the regulation, the agency receives no deference – and the court reviews the interpretation *de novo*. *See id.*

II. The Appropriate Standard of Review for the Issues in This Case is *De Novo*.

In this case, the Town raises eight separate issues. (Town's Brief, pp. i–iii.) They span across four subject matters and all three categories of issues under Section 227.57(3), Wisconsin Statutes. *See* Wis. Stat. § 227.57(3). They are:

On the subject matter of the new, "95% of the time" compliance standard:

1. The Commission's decision to adopt a new compliance standard without giving clear notice and specific *notice* violated the parties' due process rights;

2. The Commission adopted the new compliance standard without substantial *evidence* in the record to support it;

3. The Commission's extension of the new compliance standard to the Noise Protocol amounted to unauthorized rulemaking without proper *process*; and

4. The new compliance standard is void for being so vague and ambiguous as to be impossible for the public to *interpret* or for a court to review.

On the subject matter of the exclusion of certain Sensitive Residents:

5. The Commission failed to provide the parties with an opportunity for a full *hearing* on the selection of the six sensitive residences; and

6. The Commission adopted the staff's selection and Highland's proposal on the six sensitive residences without substantial *evidence* in the record.

On the subject matter of the Town's land use and land use planning:

7. The Commission failed to give appropriate deference in its *interpretation* of its own land use plan.

On the subject matter of Highland's curtailment plan:

8. The Commission's decision that the curtailment plan "ensured compliance" with applicable noise limits lacks sufficient basis in substantial *evidence*.

(Town's Brief, pp. i–iii.)

The plain language of the description of each issue makes clear which issues belong to which category under section 227.57(3), Wisconsin Statutes. *See id.*; *see also* Wis. Stat. § 227.57(3). Issues 1, 3 and 5 are issues of *procedure*, and therefore receive *de novo* review. *See id.* at § 227.57(4). Issues 2, 6 and 8 are issues of *fact*, and therefore receive substantial evidence review. *See id.* at § 227.57(6). Issues 4 and 7 are issues of *interpretation of law*, and are therefore the only ones subject to a deference analysis. *See id.* at § 227.57(5).

A. The issues of procedure the Town raises can only receive *de novo* review.

The Court should apply *de novo* review to the issues of procedure the Town raises. *See id.* at § 227.57(4); *DeBoer*, 2011 WI 64, ¶ 35, 335 Wis. 2d at 619, 804 N.W.2d at 668. Those issues, listed by the number with which they are identified in the list above, are:

1. The Commission's decision to adopt a new compliance standard without giving clear notice and specific notice violated the parties' due process rights;

3. The Commission's extension of the new compliance standard to the Noise Protocol amounted to unauthorized rulemaking without proper process; and

5. The Commission failed to provide the parties with an opportunity for a full hearing on the selection of the six sensitive residences.

(*See* Town's Brief, pp. i–iii.)

All three of these issues are issues of procedure under section 227.57(3), Wisconsin Statutes. *See* Wis. Stat. § 227.57(3). Long established Wisconsin case law makes clear that issues of notice, hearing, and rulemaking are issues of due process – and therefore mandatorily subject to *de novo* review. *Homeward Bound Services*, 2006 WI App 208, ¶¶ 27, 39, 296 Wis. 2d at 490,

504, 724 N.W.2d 380 at 394, 392 (*de novo* review on lack of notice and unauthorized rulemaking); *Daniels*, 309 Wis. 2d at 490, 750 N.W.2d at 954 (*de novo* review on lack of hearing).

With complete indifference to Chapter 227 and the case law that applies it, the respondents insist that even the Town's procedural challenges should not receive *de novo* review. (Commission's Brief, p. 11; Highland's Brief, p. 13.) Yet, neither respondent explains how exactly the Town's arguments regarding notice, proper hearing and rulemaking are anything but procedural, and subject to anything but *de novo* review. (*See generally id.*)

Instead, the respondents dismiss the procedural nature of these issues as semantics. *Id.* Indeed, the Commission's only reference to the procedural nature of the Town's arguments is an allegation that the Town "superficially characterizes this case as a 'due process' challenge." (Commission's Brief, p. 11.) However, the Wisconsin Court of Appeals and Supreme Court have clearly and specifically identified issues of notice, hearing and rulemaking as procedural and subject to *de novo* review. *Homeward Bound Services*, 2006 WI App 208, ¶¶ 27, 39, 296 Wis. 2d at 490, 504, 724 N.W.2d 380 at 394, 392; *Daniels*, 309 Wis. 2d at 490, 750 N.W.2d at 954. Ignoring the distinction between issues of law and issues of procedure or fact, as the Respondents do, is contrary to law and presents an overly simplistic view of judicial review.

B. The issues of fact the Town raises can only receive review under the substantial evidence standard.

The Court should apply the substantial evidence standard to review the issues of fact the Town raises. *See* Wis. Stat. § 227.57(6); *Clean Wisconsin*, 2005 WI 93, ¶ 46, 282 Wis. 2d at 310, 700 N.W.2d at 797. Those issues, listed by the number with which they are identified in the list above, are:

2. The Commission adopted the new compliance standard without substantial evidence in the record to support it;

6. The Commission adopted the staff's selection and Highland's proposal on the six sensitive residences without substantial evidence in the record; and

8. The Commission's decision that the curtailment plan "ensured compliance" with applicable noise limits lacks sufficient basis in substantial evidence.

Besides their attempt to conflate issues of fact with issues of law, and thus secure great weight deference for every single step the Commission took, the respondents do not directly challenge the application of the substantial evidence standard to the issues of fact the Town raises. (*See* Commission's Brief, p. 12; Highland's Brief, p. 10.)

C. The issues of law the Town raises deserve *de novo* review.

The Court should review the issues of law the Town raises *de novo*. *See Use of Rural and Agr. Land (RURAL) v. Public Service Com'n of Wis.*, 2000 WI 129, ¶ 22, 239 Wis. 2d 660, 676, 619 N.W.2d 888, 899. Those issues, listed by the number with which they are identified in the list above, are:

4. The new compliance standard is void for being so vague and ambiguous as to be impossible for the public to interpret or for a court to review; and

7. The Commission failed to give appropriate deference to the Town's *interpretation* of its own land use plan.

While these issues, as issues of law, are subject to *Clean Wisconsin*'s deference analysis, that analysis still provides support for *de novo* review or, at most, mid-level due deference review.

1. The Commission does not automatically receive great weight deference in cases involving CPCN law.

The respondents cite *Clean Wisconsin* in support of the proposition that the Commission, on account of experience, receives great weight deference whenever it interprets and applies CPCN law. (Commission's Brief, p. 11; Highland's Brief, p. 13.) The respondents then use that proposition to make the sweeping claim that, since this is a CPCN case, the Commission gets great

weight deference for every decision it made in this case – regardless of whether those decisions give rise to issues of procedure or issues of fact. (*See id.*)

The respondents' overeager analysis of the case law is inaccurate. While the *Clean Wisconsin* court may have ultimately decided to apply great weight deference *in that case*, great weight deference is by no means automatic in every CPCN case. *See RURAL*, 2000 WI 129, ¶ 46, 239 Wis. 2d 660, 693, 619 N.W.2d 888, 906. In fact, the very case upon which the *Clean Wisconsin* court relied for its deference analysis shows that, even in CPCN cases, deference depends on a case-by-case analysis – one that can end without deference where the Commission has no experience in applying CPCN law to the particular circumstances of the case. *See Clean Wisconsin*, 2005 WI 93, ¶ 262, 282 Wis. 2d at 413, 700 N.W.2d at 848–49 (citing *RURAL*, 2000 WI 129, ¶ 46, 239 Wis. 2d at 693, 619 N.W.2d at 906).

RURAL arose from a case similar to this one: a CPCN case in which the Commission applied new, never-before interpreted non-statutory provisions.[1] *RURAL*, 2000 WI 129, at ¶ 2, n.3, 239 Wis. 2d at 666, 619 N.W.2d at 894. Specifically, the Commission had interpreted and applied non-statutory requirements for expediting the CPCN process, as well as CPCN law itself. *See id.* On review, the Commission and the applicant argued that the Commission should receive great weight deference on account of its experience in applying CPCN law. *Id.* at ¶ 23, 239 Wis. 2d at 677, 619 N.W.2d at 899. The Wisconsin Supreme Court declined. *Id.* The Court wrote:

> We disagree. Even though the [Commission's] … interpretation of the provisions governing the substantive review of [CPCN] applications … is long-standing, their interpretation of [the non-statutory provisions] is not, and could not be, one of long-standing. There is no indication that the agencies had used [the non-statutory provisions] prior to [the CPCN application]. [The non-statutory provisions] … first allowed for wholesale merchant plants and eliminated the requirement that a certificate application had to substantially comply with an advance plan that the

[1] Non-statutory provisions are those the legislature enacted but, due to limited applicability or duration, did not codify into the Wisconsin Statutes. *RURAL*, 2000 WI 129, at ¶ 2 n.3, 239 Wis. 2d at 666 n.3, 619 N.W.2d at 894 n.3.

> [Commission] previously approved. [The non-statutory provisions] present *novel circumstances, making great weight deference inappropriate.*

Id. (emphasis added and citations omitted).

2. The Commission has no experience in applying PSC 128 or CPCN law to a wind farm such as the Project.

In this case, as in *RURAL*, great weight deference is not appropriate because the Commission has absolutely no experience in applying the brand new statutes and rules it had to apply to this case. Specifically, the Commission has no experience in applying sections 196.378(4g) and 196.491(3)(dg), Wisconsin Statutes, and Chapter PSC 128, Wisconsin Administrative Code ("PSC 128"). *See* Wis. Stat. §§ 196.378(4g), 196.491(3)(dg); Wis. Admin. Code ch. PSC 128. The former two provisions require the Commission to apply the wind turbine siting, shadow flicker and noise limit criteria in the latter administrative chapter – all of which are brand new.

The Commission cannot claim to have experience in application or a long standing interpretation of the new CPCN law requirement that the Commission consider PSC 128 in issuing CPCNs. The reason for that is simple: this case marks *the first time ever* in which the Commission has had to interpret or apply those new statutory provisions and PSC 128.

The Commission argues that it "has previously decided CPCN cases for wind energy systems," suggesting a history of applying and interpreting the relevant wind energy statutes. (Commission's Brief, p. 16.) However, a review of the cases the Commission references shows that it did not apply the new CPCN provisions to any of those cases. In fact, the Commission specifically declined to apply the new CPCN provisions to the most recently proposed project as

the application preceded the effective date of the wind siting rules. *Final Decision on Application of Wisconsin Electric Power Company,* Docket No. 6630-CE-302 (Wis. PSC Jan. 22, 2010).[2]

The new CPCN law provisions create an entirely new area of expertise with which the Commission has never had experience. The new provisions in CPCN law require the Commission to consider each wind farm's compliance with PSC 128 to provide "reasonable protection from any health effects, including health effects from noise and shadow flicker, associated with wind energy systems." *See* Wis. Stat. §§ 196.378(4g), 196.491(3)(dg). These provisions mark a major departure from previous CPCN law, which never required the Commission to apply any special rules to wind farms as compared to other power generation and transmission applications. In other words, this case marks the first time ever in which the Commission has had to review a CPCN wind farm application in light of new rules governing multiple aspects of the project.

The facts of this case also entail a kind of wind farm with which the Commission has never had experience. The record establishes, and no party contests, that the Project uses turbines with which the Commission has never had to deal. (Doc. 215, p. 474.) These would be amongst the tallest structures in Wisconsin. (*Id.*) They produce far more noise and far more shadow flicker than any other wind farm that the Commission has ever encountered. (*Id.*) These features make these turbines far more likely to affect the public, and far more likely to exceed PSC 128 noise limits. The Project is not the kind of wind farm with which the Commission has experience.

3. The Commission's inexperience with the new CPCN law and the unique facts of this case makes great weight deference inappropriate.

The Commission's inexperience with the brand new law and the unprecedented facts in this case makes it more analogous to *RURAL* than *Clean Wisconsin*, and therefore inappropriate

[2] PSC Ref. # 126124, available at http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=126124.

for great weight deference. *Clean Wisconsin*, 2005 WI 93, ¶ 262, 282 Wis. 2d at 413, 700 N.W.2d at 848–49 (citing *RURAL*, 2000 WI 129, ¶ 46, 239 Wis. 2d at 693, 619 N.W.2d at 906).

There are two key distinctions between *Clean Wisconsin* and this case. First, in *Clean Wisconsin*, the Commission had a long history of interpreting the specific CPCN provisions and energy priorities laws whose interpretation and application the appellants challenged. *Clean Wisconsin* at ¶¶ 117–125, 247, 282 Wis. 2d at 343–46, 700 N.W.2d at 813–14. In *Clean Wisconsin*, the Commission's experience with those particular provisions was exactly what the Wisconsin Supreme Court held separated *Clean Wisconsin* from *RURAL*. *Id.* at ¶ 247, 282 Wis. 2d at 407, 700 N.W.2d at 845. The Court wrote:

> [U]nlike the situation in RURAL, the [Commission] is not interpreting nonstautory provisions of a recently passed act. Instead, it is applying § 196.491(3)(e), which it has exclusively administered since that statute's enactment in 1975.

Id. Here, the situation is exactly as it was in *RURAL*: the Commission is interpreting provisions of a recently passed act – as opposed to provisions it has applied since 1975.

Second, in *Clean Wisconsin*, all of the appellant's challenges were to discretionary choices the Commission had made consistently with a long history of similar choices, such as determining the completeness of CPCN applications, and the application of the Energy Priorities Law. *Id.* at ¶ 48, 282 Wis. 2d at 310–11, 700 N.W.2d at 797. Here, the Town's challenges are predominantly to the Commission's lack of process and evidence in reaching decisions. (*See* Town's Brief, pp. i–iii.) Those challenges require the Court to interpret and apply Chapter 227 – not the CPCN law or the Energy Priorities law.

4. The Commission's actions in this case raise issues of first impression.

What the Commission did with respect to the new compliance standard and the Sensitive Residents in this case gives rise to issues of first impression. The Commission cites no precedent

for the its decision to allow the Project, as well as other wind farms, to exceed the limits imposed by the plain language of a regulation "5% of the time." (*See generally* Commission's Brief; *see also* Highland's Brief.) This is a brand new standard imposed on a brand new rule. More importantly, by extending this standard to its Noise Protocol, the Commission has set this standard as precedent to a plethora of other cases. (*See* Town's Brief, pp. 25–30.) As an issue of first impression with reach beyond this case, it deserves *de novo* review. *Marsi* at ¶ 24, 850 N.W.2d at 306; *J&E Investments* at ¶ 12, 349 Wis.2d at 506, 835 N.W.2d at 275.

Likewise, the Commission also cites no precedent for its decision to adopt an unexplained selection of six citizens for different treatment based on nothing but the "voluntary" nature of an applicant's offer. (*See generally* Commission's Brief; *see also* Highland's Brief.) The Commission makes clear that it knowingly adopted the Sensitive Residents decision without following the substantial evidence standard. (*See* Commission's Brief, p. 40.) It writes:

> [T]here 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.

Id.

In other words, the Commission's position is that, since it deemed the condition regarding the Sensitive Residents "voluntary," it was to bypass the requirements of Chapter 227. *See* Wis. Stat. §§ 227.44 (requiring a full hearing with opportunity for comment), 227.47(1) (requiring all decisions to be based on findings of fact and conclusions of law). This is an unprecedented Commission action based on an unprecedented interpretation of law. It sets a precedent for future cases – one that invites applicants to bypass scrutiny by making voluntary offers. As an issue of first impression with such wide consequences, it deserves *de novo* review. *Marsi* at ¶ 24, 850 N.W.2d at 306; *J&E Investments* at ¶ 12, 349 Wis.2d at 506, 835 N.W.2d at 275.

ARGUMENT

I. The Commission had to and did apply PSC 128 to this case – and had to respect Chapter 227 in doing so.

The respondents attempt to bypass the Town's challenge to the decisions on the new compliance standard and the Sensitive Residents by arguing that the Commission did not need to apply or abide by PSC 128 in this case – and was therefore free to do whatever it wanted with respect to noise limits. (Commission's Brief, p. 5; Highland's Brief, p. 9.) The Commission merely brushes PSC 128 aside by noting that CPCN law only requires the Commission to "consider" whether the proposed wind farm is "consistent" with PSC 128. (Commission's Brief, p. 5 (citing Wis. Stat. § 196.491(3)(dg).) Highland adds that PSC 128 does not preclude the Commission from "giving individual consideration to exceptional or unusual situations and applying requirements to an individual energy system that may be lesser, greater, or different from" those in PSC 128. (Highland's Brief, pp. 9–10 (citing Wis. Admin. Code § PSC 128.02(4).)

Their argument is based on an interpretation of technicality that, if applied, allows the Commission to bypass CPCN law, any constraint on its interpretation of rules, and ultimately Chapter 227 itself.

A. CPCN law requires the Commission to apply PSC 128.

The legislature recently amended the Wisconsin Statutes to require the Commission to apply new noise limits to wind farms. In 2009, the legislature enacted 2009 Wisconsin Act 40. Act 40 amended CPCN law in two ways. First, it mandated the Commission to create rules imposing noise limits on wind farms based on recommendations from the Wind Siting Council. *See* Wis. Stat. § 196.378(4g)(b). The legislature provided the purpose of the new rules would be to "provide reasonable protection from any health effects, including health effects from noise and shadow flicker, from wind energy systems." *See id.* Those new rules, which went into effect in

2012, were codified as PSC 128. Second, it provided that, in any CPCN case involving a wind farm, the Commission "*shall* consider whether installation or use of the [wind farm] is consistent with the standards specified in" the new rules prescribing those noise limits. *See id.* at § 196.491(3)(dg) (emphasis added).

Both the plain language and the purpose behind the new CPCN statutes make clear that the Commission must apply and abide by PSC 128 in CPCN cases such as this one. *See id.* While both the CPCN statute and PSC 128 give the Commission flexibility and discretion in doing so, they by no means give the Commission a blank check to ignore the rules – or interpret them in ways inconsistent with their plain language.

The plain language of the CPCN statute makes clear that the Commission must apply PSC 128 to wind farm cases. *See id.* at § 196.491(3)(dg). Section 196.491(3)(dg), Wisconsin Statutes, provides that the Commission "*shall* consider" PSC 128 in CPCN cases. *Id.* (emphasis added). Both respondents place great emphasis on the word "consider" to argue that the Commission is free not to apply PSC 128 altogether. (Commission's Brief, p. 9; Highland's Brief, p. 5.) But the word "shall" makes clear that the Commission cannot simply decide to ignore PSC 128, and approve a CPCN for a Project that completely bypasses or violates PSC 128. If the legislature intended to allow the Commission to consider the language of PSC 128, but ultimately decide to ignore it, it would have drafted the statute to read that the Commission "*may* consider" PSC 128 in CPCN cases.

The object and purpose behind the changes to the CPCN statute make equally clear that the Commission must apply PSC 128 to wind farm CPCN cases. As a matter of logic, it would be absurd to argue that the legislature mandated the Commission to work with the Wind Siting

Council to create rules that provide specific noise limits to wind farms – only to later be able to ignore them in large wind farm cases.

Finally, the respondents' own arguments about the language of PSC 128 contravenes their argument that the Commission does not have to apply it. The respondents draw attention to language in PSC 128 that allows the Commission to apply limits that are greater, lesser or different than those in PSC 128 based on any unique circumstances of an individual project. (Commission's Brief, p. 5; Highland's Brief, p. 9 (citing Wis. Admin. Code § PSC 128.02(4)).) If the Commission were allowed to ignore the noise limits in PSC 128, there would be absolutely no need for that provision. The reason PSC 128 mentions flexibility to accommodate "unusual" projects is precisely because, absent "unusual" circumstances, the Commission is otherwise bound to apply PSC 128 as written.

B. The Commission must abide by PSC 128 because it chose to apply it here.

Regardless of whether the law requires the Commission to apply PSC 128 to CPCN cases, the Commission chose to apply PSC 128 in this case. A cursory review of the record makes it abundantly clear that this was a PSC 128 case. (*See, e.g.*, Docs. 136, 138, 139, 144.) From day one, the vast majority of the testimony, exhibits, and briefs focused on a single thing: whether the Project would meet PSC 128. (*See id.*)

The same is true with the notices and decisions the Commission issued. In the Original Decision, the Commission denied Highland a CPCN for the Project precisely because Highland had not demonstrated to the Commission's satisfaction that the Project could meet PSC 128. (*See* Doc. 136, p. 4.) When Highland applied for a reopening, the drive of its argument was that it could now show compliance with PSC 128. (Doc. 114, pp. 2, 6, 9–12.) When the Commission granted that reopening, it made PSC 128 the focus of every single one of the issues to be developed on

reopening. (Doc. 139, p. 1.) In the Final Decision, the Commission granted Highland a CPCN because it was satisfied that Highland had demonstrated compliance with PSC 128. (Doc. 144, p. 5.) Yet, the respondents now attempt to argue that PSC 128 was some sort of advisory guideline to the Final Decision – one that the Commission was free to "consider" and then discard.

The history of the proceeding is illustrative of the absurdity of the respondents' argument. If the Commission could consider the noise limits in PSC 128, but then ultimately decide not to apply it, it could render moot an entire proceeding such as the one in this case. The principle the respondents espouse would allow the Commission to provide notice, take evidence, and entertain arguments that address one set of rules – and then ignore it completely as "merely advisory."

This is exactly the kind of arbitrary and capricious decision-making that Chapter 227 prohibits. Chapter 227 makes clear that an agency must provide adequate notice on the issues of a proceeding, allow for a full hearing on those issues, and make decisions pursuant to evidence in the record. *See* Wis. Stat. §§ 227.44(1)–(2), 227.57(6). If the parties had notice, hearing and evidence on one set of rules, but the Commission issued permits based on a completely different set of rules, the provisions of Chapter 227 would be meaningless.

In this case, the Commission chose to apply PSC 128. It provided notice that it would decide the case based on PSC 128. It issued the Original Decision based on PSC 128. It had the parties spend enormous amounts of resources debating over whether the Project complied with PSC 128. It cannot now argue that it was free not to apply PSC 128 to its Final Decision.

C. The Commission cannot escape being bound by rules of legal interpretation in applying PSC 128.

The respondents imply that, because the Commission was not obligated to apply PSC 128, it was free to impose upon the Project whatever noise limits it desired – and whatever compliance standard it desired – when it did apply it. (Commission's Brief, p. 35; Highland's Brief, p. 10.) If

that argument carried the day, the Commission would have a license to completely ignore the plain language of PSC 128 whenever it applied it.

As Highland notes, an agency is not free to interpret one of its own rules without regard to the plain language of the rule. (Highland's Brief, p. 14 (citing *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 19, 299 Wis. 2d 1, 18, 727 N.W.2d 311, 319).) Even under a controlling weight deference standard of review, an agency cannot interpret its own rule in a way that is "inconsistent with the language of the rule." *Hillshaven Corp. v. DHFS*, 2000 WI App 20, ¶ 12, 232 Wis. 2d 400, 409–10, 606 N.W.2d 572, 576–77.

If the Commission were free to deviate from the noise limits of PSC 128 as it desired by labeling them "advisory," the Commission would be free to interpret PSC 128 in way that is "inconsistent with the plain language of the rule." *See id.* This case is a perfect example of that. In this case, the Commission applied the following rule in PSC 128:

> [A]n owner shall operate the wind energy system so that the noise attributable to the wind energy system *does not exceed … 45 dBA during nighttime hours.*

Wis. Admin. Code § PSC 128.14(3)(a) (emphasis added). Now, the respondents argue that the Commission also applied the following rule in PSC 128:

> Nothing in this chapter shall preclude the commission from giving *individual consideration to exceptional or unusual situations* and applying requirements to an individual energy system that may be lesser, greater, or different from those provided in this chapter.

Id. at § PSC 128.02(4) (emphasis added). The plain language of the two provisions provide that the Commission (1) must not allow a wind farm to exceed a 45 dBA nighttime noise limit unless (2) it does so on account of exceptional or unusual situations of the individual wind farm. *See id.* at §§ PSC 128.02(4), 128.14(3)(a).

Yet, the respondents now argue that the Commission was free to impose a compliance standard that allows *any* wind farm to exceed noise limits in former provision because the latter provision allows an *individual* wind farm to exceed noise limits due to exceptional or unusual circumstances. That plainly contradicts the language of both provisions.

Needless to say, there is a question of whether extending "lesser, greater, or different" noise limits to *any* wind farm contravenes the plain language of section PSC 128.02(4), Wisconsin Administrative Code. *See id.* And when that question arises, the Commission cannot escape the principle that agencies cannot interpret rules in a way that is contrary to their plain language by simply claiming the rule is advisory only.

II. The Commission violated Chapter 227 by adopting a new compliance standard without notice, evidence, clarity or proper rulemaking procedure.

In line with their strategy to reframe the issues, the respondents systematically attempt to dilute the issue of the compliance standard by conflating it with other issues. Specifically, the respondents use the terms "compliance *standard*" and "compliance *testing*," "compliance *measurement*," or "compliance *demonstration*." (Commission's Brief, p. 22; Highland's Brief, pp. 15, 23, 27, 34, 42, 45.) Before addressing the merits of the respondents' arguments, it is important to clarify that distinction.

What the Town refers to as the "new compliance standard" is the Commission's decision that the Project, as well as other winds farms, only have to comply with PSC 128 noise limits "95% of the time." (Doc. 144, p. 49.) In other words, what the Town challenges as the "new compliance standard" is the Commission's decision to allow the Project, as well as other wind farms, to exceed PSC 128 noise limits "5% of the time." (*See id.*) The Commission itself referred to this as a "percentage-based compliance standard." (Doc. 144, p. 35.)

What the respondents refer to as "compliance testing" and "compliance measurement" is an entirely different matter. There was a separate, much larger body of evidence in the proceedings below about Highland's post-construction "noise testing" or "noise measurement" protocol. (*See* Doc. 138, p. 1; Doc. 139, p. 1.) That evidence addressed the question of how much noise data Highland would have to collect in order to assure the Commission that the Project, if built, would indeed be operating within the noise limits of PSC 128. (*See, e.g.*, Doc. 79, pp. 15–17.) This evidence addressed matters such as the number of noise monitors Highland would use, where Highland would place monitors, the frequency with which Highland would take measurements, and how Highland would report measurements to the Commission. (*See id.*)

The distinction is significant. The question of "compliance testing" and "compliance measurement" was about how Highland would prove the Project does *not exceed* PSC 128 noise limits post-construction. The question of "compliance standard," which the Town challenges, is about the Commission's actions allowing the Project to *exceed* PSC 128 limits "5% of the time" post-construction. The former is about making sure the Project does not cross a line; the latter is about the Commission's decision to lower that line. The pile of evidence the respondents recite that go to the former only reinforces the Town's point that the Commission's decision on the latter lacks notice and evidence.

Having made that clarification, the Town now turns to the respondents' arguments regarding (A) notice, (B) evidence, (C) vagueness and (D) rulemaking on the topic of the new compliance standard.

A. The Commission violated Chapter 227 by failing to provide adequate notice that it would adopt the new compliance standard in the Reopened Proceeding.

1. Wisconsin law does not allow an agency to escape its burden to provide adequate notice by pointing to the evidence in the proceeding.

The respondents grossly misstate the law on the issue of notice. They argue that the standard for the Court to determine whether an *agency* has given adequate notice that it would decide an issue is an inquiry into whether a *party* had the opportunity to present evidence and argument on that issue. (Commission's Brief, p. 18; Highland's Brief, p. 18.) Not only does this standard lack support in the case law, but it also completely contravenes the plain language of Chapter 227, and the large body of case law that interprets it. *See* Wis. Stat. § 227.44(1).

Chapter 227 makes clear that agencies have the burden to provide adequate notice on the issues they will decide. *Id.* at § 227.44(2). Chapter 227 makes clear that the notices the agencies provide must be clear and specific. *Id.* at § 227.44(2)(b). It makes absolutely no mention of the parties having "constructive" notice, or of the role of evidence and arguments in creating notice.

The case law reinforces that principle. Wisconsin courts have long held that the fact the parties present or hear evidence and arguments does not provide them with adequate notice the agency will actually decide that issue. *See, e.g.*, *Gen. Elec. Co. v. Wis. Emp't Relations Bd.* ("*General Electric*"), 3 Wis. 2d 227, 243, 88 N.W.2d 691, at 701 (1958).

General Electric is a perfect example of that. In *General Electric*, the appellant argued the agency had not provided adequate notice it would decide an issue. *Id.*, 3 Wis. 2d at 243, 88 N.W.2d at 701. In the proceedings below, that issue had been mentioned (1) in correspondence between the appellant and the other parties to the proceeding, (2) immediately prior to the hearing, (2) in testimony, and (4) in arguments. *Id.*, 3 Wis. 2d at 243–46, 88 N.W.2d at 701–03. There was absolutely no question that the appellant knew the issue was contested; in fact, the issue was the very reason that led other parties to file a complaint that began the contested case proceeding. *See id.* Yet, the court reversed because the agency had, through its notice, created the appearance that it would decide a separate issue. *Id.*

There is good reason for Chapter 227 and the case law to place the burden to provide proper notice on agencies, instead of placing the burden on the parties to figure out issues from the evidence. In administrative proceedings, parties often have enormous liberty to introduce evidence that is ancillary, tangential, or marginally relevant to the issue the Commission will decide. Parties often make larger policy arguments to an agency, or attempt to build the record for the legislature. If the agency could use that evidence to decide a related, but not noticed issue, the agency would have absolutely no reason to abide by any notice.

Notice is an essential element of Chapter 227 and due process. Without proper notice, parties cannot adequately protect their due process rights. If an agency were able to issue notice on one matter, and then decide another, it can deprive the parties of the right to comment on that former manner. As the case law notes, adequate notice is essential to ensure that a party that wants to make a case on any given issue *can* make the case on that issue.

2. The Commission's notices were insufficient.

Aside from their argument that the evidence in the proceeding can substitute for adequate notice from the Commission, the respondents argue that the Commission's actual notices gave the Town sufficient warning that the Commission would adopt the new compliance standard. A quick review of those notices alone shows otherwise; and a review of those notices in the larger context of the proceeding makes clear those notices were insufficient and misleading in this regard.

The Commission issued three separate notices of issues for the entire proceeding below. Those notices were each contained in the Prehearing Conference Memorandum (the "Original Notice"), the Second Prehearing Conference Memorandum (the "Reopener Notice"), and the Order to Modify the Second Prehearing Conference Memorandum (the "Modified Reopener Notice"). (Docs. 118, 138, 139.) Pursuant to the Commission's order, the Modified Reopener

Notice replaced the Reopener Notice as the notice of issues for the Reopened Proceeding. (Doc. 139, p. 1.) Individually, none of these notices gave any indication the Commission would adopt any compliance standard, much less a specific one, which would allow the Project to exceed PSC 128 noise limits "5% of the time."

The Modified Reopener Notice gave no indication that the Commission would adopt a new compliance standard. (*See* Doc. 139, p. 1.) The Reopener Notice listed the following issues:

1. Can the project comply with the noise standards in Wis. Admin. Code ch. PSC 128?

2. Can the project achieve a 40 dBA nighttime noise standard at the six residences identified in the existing record as occupied by persons with special needs?

3. Will the proposed curtailment plan ensure 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?

4. 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?

Id.

The Commission's repeated use of the phrase "ensure compliance" makes it completely unreasonable for any party to presume or deduce that the Commission would later adopt the new compliance standard. The dictionary definition of "ensure" is "to make sure, certain, or safe." Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/ensure. Its synonym is "guarantee." *Id.* No reasonable party would read a notice that indicates the Commission will decide whether Highland can make sure, certain, safe, or guaranteed that the

Project will *comply* with PSC 128, and draw the conclusion that one of the issues for the Commission's decision were whether the Project could *exceed* PSC 128.

3. In light of the Original Decision and the facts of the case, the Commission's Modified Reopener Notice was misleading.

The respondents suggest that the Original Notice was "broad" enough to provide adequate warning that the Commission could adopt a new compliance standard for PSC 128. (Commission's Brief, p. 20; Highland's Brief, p. 18.) For the simple fact that the notice does not even mention PSC 128, much less a standard, that is not true. (*See* Doc. 118, p. 1.) But even if it were, the Commission's subsequent actions still mislead the parties on this issue, and deprived them of proper notice that the Commission would allow the Project to exceed PSC 128 noise limits "5% of the time."

The Original Decision gave the parties no reason to believe that the Commission would allow the Project to exceed PSC 128 noise limits at any time. In the Original Decision, the Commission denied Highland a CPCN for the Project precisely because the evidence showed the Project would exceed PSC 128 noise limits. (Doc. 136, p. 4.) In the Original Decision, the Commission made a finding of fact that the Project would exceed PSC 128 noise limits, and a conclusion of law that PSC 128 noise limits were "absolute." (*Id.* at p. 6.) The latter conclusion came after the parties had debated whether those noise limits should be either absolute, meaning limits that cannot be exceeded, or averages, meaning limits that can be exceeded by a certain percentage. (*See id.*) The Commission then invited Highland to apply for a reopened proceeding with evidence that it could curtail the Project – precisely show that it could now show how it could eliminate exceedances of PSC 128 noise limits. (Doc. 136, p. 18.)

And that is exactly what Highland did: it sought and secured a reopened proceeding to demonstrate "no exceedances" of PSC 128. (Doc. 114, pp. 2, 6, 9–14.) When Highland filed its

petition to reopen, it reiterated to the Commission that its purpose was to demonstrate "no exceedances" of PSC 128 noise limits – seven times over. (*Id.*) Highland's petition to reopen made absolutely no mention of a "95% of the time" compliance standard or any percentage-based compliance standard. (*See generally id.*)

When the Commission reopened the proceeding, it limited the issues in a way that led the parties to believe that "no exceedances" would be the only standard it would adopt. First, the Commission issued the Reopener Notice, it significantly *narrowed* the issues from those noticed in the Original Notice. (*See* Doc. 138.) The Reopener Notice listed the following issues:

1. Can the project comply with the noise standards in Wis. Admin. Code ch. PSC 128?

2. Can the project achieve a 40 dBA night-time noise standard at the six residences identified in the existing record as occupied by persons with special needs?

3. How effective curtailment will be as a noise mitigation strategy for this project?

4. Will the Applicant's proposed post-construction sound testing protocols and compliance procedures be effective, reasonable, and in the public interest?

(*Id.* at p. 1.) Subsequently, when it issued the Modified Reopener Notice, the Commission *further narrowed* the issues from those in the Reopener Notice. (*See* Doc. 139.) It deliberately chose to replace broader language about effectiveness and reasonableness, with language that used the phrase "ensure compliance with … PSC 128." (*Id.* at p. 1.) In sum, the Commission deliberately chose to narrow its notices, again and again, until the parties were led to believe that the Commission would only decide this case on a compliance standard of "100% of the time."

The Commission's mention of the "95% of the time" compliance standard in the Original Decision does nothing to change this reality. (*See* Doc. 136, pp. 18–19.) The Commission's only indication of its position on this standard in the Original Decision was as follows:

> *In future cases*, it may be helpful for the parties to *develop the record on this issue further and submit for the Commission's consideration* some sort of percentage-based standard that takes into account the possibility of infrequent and unavoidable exceedances of stated limits.

(*Id.* (emphasis added).) In other words, the Commission led the parties to believe that (1) in future cases (2) the parties would need to (a) develop the record further on a new, percentage-based compliance standard and (b) submit that standard for the Commission's consideration.

Even if the reopened proceeding could be considered a "future case," no party took up the Commission's invitation. There was no further evidence on a percentage-based compliance standard. (*See, e.g.*, Docs. 233–37.) No party argued for or against any such standard – including Mr. Hessler's comment about his work on a "95% of the time" standard for Minnesota – during the reopened proceeding. (*Id.*) In fact, as previously mentioned, Highland was not only silent on a compliance standard in its Petition to Reopen, but also insisted on demonstrating "no exceedances" – seven times over. (Doc. 114, pp. 2, 6, 9–14.)

The lack of evidence and argument on any compliance standard during the reopened rroceeding is great evidence on the effect of the Commission's notices during the reopened proceeding. It is completely illogical for the respondents to argue that the parties had notice that the Commission would adopt "some sort of percentage-based compliance standard" in the Final Decision – be it from the Original Notice, the Reopener Notice, or the Modified Reopener Notice – but yet chose to sit silently on this matter throughout the Reopened Proceeding.

The simple truth is that the notices during the reopened proceedings, combined with the Original Decision, led the parties to believe that the Commission would base the Final Decision on whether Highland proved the Project would comply with PSC 128 noise limits 100% of the time. Had the parties known better, they would have argued the issue.

B. The Commission violated Chapter 227 by adopting the new compliance standard without substantial evidence in the record to substantiate it.

The respondents argue that there was sufficient evidence to support the Commission's decision to adopt the new compliance standard. (Commission's Brief, pp. 25–29; Highland's Brief, pp. 32–34.) In support of that argument, they point to a pile of evidence the parties introduced during the Original Proceeding to argue over whether the Project would exceed PSC 128 noise limits and, if so, by how much. (*See id.*)

There are two problems with the respondents' arguments: they ignore the case law on the substantial evidence standard, and they ignore the Commission's admission of insufficient evidence in the Original Decision.

1. Wisconsin case law makes clear that the substantial evidence standard requires expert testimony in support of the specific decision an agency adopts.

The respondents' arguments fail to adequately address the rule espoused in *Gilbert v. State Med. Examining Bd.* 119 Wis. 2d 168, 349 N.W.2d 68 (1984). As the Town noted in its initial brief, *Gilbert* stands for the proposition that an agency cannot base a decision on a single expert's testimony if that expert is not testifying conclusively in support of the agency's decision. (Town's Brief, pp. 22, 24 (citing *Gilbert*, 119 Wis. 2d at 199, 349 N.W.2d at 82).) And, as the Town noted in its initial brief, that is exactly what happened here. (*Id.*) The Commission based its decision to adopt the "95% of the time" compliance standard on a single comment made by a single expert about unrelated work in Minnesota who did not testify under any interpretation that he supported a "95% of the time" compliance standard for this specific case. (Doc. 144, pp. 35, 49.)

The respondents' recitation of evidence does nothing to change that. The respondents recite a plethora of expert opinions about matters such as whether the Project will exceed PSC 128 noise limits, how large that exceedance would be, how often it would take place, and what should

be done to mitigate it. (*See* Commission's Brief, pp. 25–29; Highland's Brief, pp. 32–34.) But not a single one of those experts ever testified that the Commission should adopt a percentage-based compliance standard *in this case* – much less a specific one. (*See id.*)

The Town is not arguing there was insufficient evidence to prove exceedances, their average frequency, or their intensity. Instead, the Town is arguing there was insufficient evidence to support the adoption of this specific compliance standard to this specific Project. *Gilbert* dictates that, if the Commission is going to adopt a specific standard based on a single expert's testimony, that testimony must directly support the adoption of that *specific standard in this specific case*. *Gilbert*, 119 Wis. 2d at 199, 349 N.W.2d at 82. Mr. Hessler's comment, which addressed an opinion he provided for a proceeding in Minnesota, fell far short of that.

2. The Commission admitted it lacked enough evidence to adopt a percentage-based compliance standard in the Original Decision.

The respondents' argument also fails to recognize that the Commission itself indicated it lacked enough evidence to adopt the "95% of the time" compliance standard. In the Original Decision, the Commission recited some of the evidence the parties introduced about "spikes" over PSC 128 noise limits. (Doc. 136, pp. 18–19.) Amongst the evidence recited, the Commission specifically mentioned Mr. Hessler's comment about the "95% of the time compliance standard." (*Id.*) Yet, the Commission wrote:

> *In future cases*, it may be helpful for the parties to *develop the record on this issue further and submit for the Commission's consideration* some sort of percentage-based standard that takes into account the possibility of infrequent and unavoidable exceedances of stated limits.

(*Id.* (emphasis added).) In other words, the Commission itself admitted that it needed additional evidence to draw a conclusion on a compliance standard.

If the Commission needed more evidence to adopt a new compliance standard at the end of the Original Proceeding, it needed more evidence to adopt a new compliance standard at the end of the Reopened Proceeding. As previously mentioned, in the Reopened Proceeding, there was no evidence or argument on any compliance standard – much less a specific, percentage-based one. The Commission cannot now argue that it had enough evidence from the Original Proceeding to support the new compliance standard when, in the Original Decision, it listed that evidence – and declared it needed more.

Highland attempts to shore up support for the compliance standard by citing technical terms, from the Noise Protocol to support the proposition that the current measurement criteria do not require the recording of maximum sound levels, as explained in the Glacier Hills wind energy case. (Highland's Brief, pp. 28–30.) However, citing an unrelated docket that preceded PSC 128 does not make the jump to showing record support for the compliance standard. The Noise Protocol and its references to mechanical and statistical measurements concern how wind turbine noise is measured and recorded, not legal compliance with established requirements.

C. The Commission violated Chapter 227 by adopting the new compliance standard without the required rulemaking procedure.

The respondents argue that the Commission's extension of the new compliance standard to the Noise Protocol does not amount to rulemaking. The respondents argue that (1) decisions and conditions imposed in contested case hearings, such as this one, cannot be rules; and that (2) since the legislature has given the Commission the power to modify the Noise Protocol as it sees fit without engaging in unauthorized rulemaking, adding the new compliance standard to the Noise Protocol cannot amount to rulemaking.

1. Wisconsin law applies the definition of a "rule" based on the outcome of the proceeding, not on the label of the proceeding.

The respondents argue that the new compliance standard cannot be a rule because it is a condition imposed in an order through a contested case proceeding. In support of that argument, the respondents cite the Chapter 227 provisions that make conditions and orders imposed in a contested case proceeding exceptions to the statutory definition of a "rule."

That argument ignores the clear precedent espoused by the case law that that the Town cited in its initial brief. (Town's Brief, pp. 26 – 27 (citing *Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257, 89 N.W.2d 825, 827 (1958); *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769, 772–73 (Ct. App. 1986); *Cholvin v. Wis. Dep't. of Health & Family Servs.*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 762, 758 N.W.2d 118, 124).) That precedent makes clear that the test to determine whether something amounts to a rule is not one of technicalities and semantics, but one of realities: if an agency creates something that meets the definition of a rule under Chapter 227, that something *is* a rule – regardless of how the agency created it. *See id.*

All those cases involved decisions and orders in licensing and permitting cases – which technically qualify for the exceptions the respondents suggest apply here. Yet, in all those cases, the courts found that the agency had engaged in rulemaking because what resulted from its actions met the definition of a rule. In short, all those cases stand for the proposition that an agency cannot escape rulemaking procedure by creating something that amounts to a rule in a proceeding or order that would otherwise meet the statutory exceptions to the definition of a rule.

2. The Commission's extension of the new compliance standard to the Noise Protocol exceeds the Commission's statutory authority.

The respondents argue that the Commission's modification of the Noise Protocol cannot amount to rulemaking because the legislature has allowed the Commission to modify the Noise

Protocol. Their argument is that if the Commission can modify the Noise Protocol without rulemaking procedure, modifying the Noise Protocol cannot amount to rulemaking.

That argument ignores the significant difference between what the Noise Protocol does, and what the new compliance standard does. As the respondents explain, the Noise Protocol's purpose and effect is to provide a state-wide "how to" guide for wind farm developers and operators to measure and record noise from wind turbines. It does not, and cannot, establish, regulate and modify what those limit actually are, which must be done by order and rule. There is a difference between the Commission changing a measurement protocol to ensure consistency in how wind farm noise is measured and recorded, and the Commission raising the legal limits of allowable noise levels. The legislature has authorized it to do the former at will – but it has not authorized it to permanently do the latter.

What the Commission did by extending the new compliance standard to the Noise Protocol was the latter: it effectively allowed every wind farm to exceed PSC 128 noise limits. By extending the new compliance standard to the Noise Protocol, the Commission officially incorporated into its noise measurement guidelines a window of "5% of the time" in which noise measured above legal limits will not be considered a violation. In other words, it used what is supposed to be a measurement guideline as a tool to modify a rule.

The respondents attempt to justify this modification by pointing to section PSC 128.02(4), Wisconsin Administrative Code. Wis. Admin. Code § PSC 128.02(4). That section allows the Commission to apply limits lower, higher or different than the limits in PSC 128 based on "individual consideration to exceptional or unusual situations." *See id.* But the plain language of that section only undermines the respondents' arguments: it allows for variation in noise limits for *individual* cases based on *individual* situations that are exceptional or unusual. That is the precise

opposite of taking a condition imposed based on the facts of one case, and extend it to every other case through the Noise Protocol.

D. The new compliance standard is void for being too vague and ambiguous to interpret, enforce or review.

All of the errors made by the Commission in imposing the 95% compliance standard, the lack of notice and corresponding lack of evidence, come home to roost in a standard that is so vague and ambiguous that it is impossible to apply and interpret. This outcome is underscored by the competing interpretations of the standard by the respondents in their respective briefs. Highland suggests that the most "logical interpretation" is that compliance would be based on "monthly intervals,' with "ambiguity" in the standard used against Highland to compel compliance. (Highland Brief, pp. 34–35.)

In contrast, the Commission seems to argue against the 5% allowance in the standard itself, saying the standard is like a highway 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." Commission Brief at 31-32. The Commission's argument suggests that any exceedence of the required noise limits is a violation, and does not attempt to explain in any way what the "5% of the time" means.

There is clearly a vast difference is saying the 5% will be measured by one night, compared to one week, or one month or one year. The Commission suggests that the time frame could be any of these, but also argues conversely, that any exceedence amounts to a violation.

E. The Commission's errors regarding the new compliance standard materially impaired the fairness and correctness of the proceedings below.

The Commission's errors in the lack of process for a 95% compliance standard and the lack of evidence supporting the standard are material errors that impaired the fairness of this

proceeding. Had proper notice and hearing been provided, the parties could have offered evidence on a meaningful standard and addressed the questions of whether a standard was needed in the first place. The parties could have offered evidence on the merits of a standard for compliance with PSC 128 and for the Highland Wind Farm. The parties could have offered evidence on the provisions of a standard so as to make it meaningful and enforceable. Instead, as a result of the Commission's material error in adopting this standard, the public is left with a standard and rule that achieve none of these objectives.

III. The Commission Violated Chapter 227 by Selecting the Six Selected Residents for Additional Protection at the Exclusion of Similarly-Situated Residents without Sufficient Evidence or a Proper Hearing to Support their Distinction.

A. The respondents mischaracterize the issues, legal grounds, and facts underlying the Town's challenge to the selection of the Six Selected Residents.

1. The respondents mischaracterize the nature of the Town's challenge to the arbitrary selection of the Six Selected Residents.

The respondents spend a considerable portion of their briefs reciting evidence and arguments about (1) the correlation between wind turbine noise and health concerns and (2) a 40 dBA standard as a solution to mitigate that correlation. They then argue that the Town cannot claim to a lack of hearing or evidence on the Commission's eventual decision to address health concerns by apply a 40 dBA standard to certain residents. But that is not what the Town claims.

The Town's position is clear and specific: that there was neither due process nor evidence to accept an offer *distinguishing the Six Selected Residences from the other similarly-situated Sensitive Residences so as to apply a 40 dBA standard to those six at the exclusion of the others now and in the future.* The Town challenges the Commission's decision to pick the Six Selected Residents without an explanation as to what made them different, and without a proper hearing on the issue of who should be covered by this offer.

A cursory review of the respondents' briefs makes clear that the respondents can recite no evidence to distinguish the Six Selected from the other Sensitive Residents. In the enormous pile of evidence the respondents cite in their attempt to reframe the Town's argument as one about health concerns or the 40 dBA standard generally, they offer not a single piece of evidence that explains the criteria for the selection of the six and exclusion of all others who are or may be similarly situated. And the reason that they cannot point to any evidence is that none exists in the record.

2. The respondents mischaracterize the legal basis for the Town's challenge.

The respondents mischaracterize the Town's argument as being that the Commission cannot apply, or cannot allow Highland to apply, different noise limits to similarly-situated residents. In other words, they claim that the Town's position is that the Commission has to ensure every resident receives the same level of noise and shadow flicker. But again, this is not the Town's position.

The Town argues not for equal treatment in *outcome*, but for equal treatment in *process.* The Commission has the right to decide that some residents will benefit from lower noise limits than those required by law. But it does not have the right to pick who those residents will be, or to allow Highland to pick who those residents will be, without explaining what distinguishes them from the others that want similar treatment – or without allowing the others to make their case for similar treatment. Without any explanation from the Commission or Highland on how the selection of the six was made, all of the other potentially sensitive residents were precluded from coming forward to testify in the reopener and effectively make their case for coverage under the offer.

3. The respondents attempt to obscure the fact that Commission staff – not Highland – selected the Six Selected Residents at the exclusion of others.

Both the Commission and Highland mischaracterize the facts to make it seem as if Highland picked the Six Selected Residents for additional protection. That is simply not true. The record makes the truth perfectly clear: *Commission staff picked the Six Selected Residents*. The single piece of evidence in the entire record that touches upon the actual selection of this six individuals is the testimony from Highland principal Jay Mundinger, which provides:

> After the public hearing we had some discussions with staff wherein *they* indicated there were potential concerns about some of the members of the public who testified to certain health concerns. *Staff identified six individuals* and loosely grouped them into two groups of three. The first group was considered more serious than the second group. Based on these discussions we decided to revise the layout for all three turbine models to mitigate to the greatest extent possible sound and shadow flicker on those individuals' residences.

In other words, *Commission staff identified the six residents; Highland just decided what to do with them.* There is absolutely no evidence that Highland had anything to do with separating the Six Selected Residents from the other Sensitive Residents. The question now is not why or how Highland decided to treat these six, but why or how Commission staff decided to identify these six at the exclusion of others. The Town did not sit on its hands during the initial proceeding or reopener on this issue. It sought to introduce evidence of similarly situated residents and sought to question the Commission staff at the reopener hearing. Because staff did not appear as scheduled, cross-examination could not occur however. It is disingenuous for the Commission to claim the reason for the selection does not matter when this evidence was entirely within its control. The Commission's position reflects its own failure to make the record that it needed.

4. The respondents mischaracterize the nature of Highland's proposal.

Finally, the Commission and Highland mischaracterize the nature and context of Highland's proposal. Both respondents attempt to characterize Highland as a "good neighbor" and conscientious developer, whose treatment of the Six Selected Residents is part of an effort to conduct community outreach and protect the public interest. The Commission makes repeated references to Highland's "voluntary offer" to be a "good neighbor"; Highland opens its argument with "Giving meaning to the cynical expression that no good deed goes unpunished…." These arguments characterize the Town as ungrateful to the respondents' apparent good deeds, and unresponsive to the needs of its own citizens. Nothing could be further from the truth.

Highland's motives and objectives are something the Town did not emphasize in its Initial Brief. After all, the Town's objective is to correct the errors the Commission made, not to attack Highland. But repeatedly calling this offer a "good neighbor" gesture belies the cynical way in which it was offered to only six households, the way it discriminates against other similarly situated residents despite all the record evidence of additional families that merit inclusion, and Highland's refusal to extend it to future residents. Moreover, Highland seeks to withdraw the offer for a child with autism on the ground that he does not visit his father often enough to warrant inclusion. This is by no means a "good neighbor" offer.

As previously noted, the evidence shows that Highland did not identify residents for additional protection. In fact, Highland vigorously objected to the Town's efforts to identify those residents. Highland's own testimony makes clear that it was Commission staff who expressed concern about the Sensitive Residents and their testimony about health conditions. There is no evidence that Highland reviewed, analyzed or took action on testimony about others with health concerns, or otherwise took any initiative to accommodate any residents.

Highland's initial proposal to re-site turbines near the Six Selected Residents was not an olive branch of friendship or concern. In fact, it made matters worse. As the Town explained in its Initial Brief, and as Highland recognizes, the re-siting actually subjected other, excluded Sensitive Residents to more noise.

Highland's proposal to apply a 40 dBA limit for these select residences only came when Highland found itself in a pickle: with a CPCN denied. Highland's Petition to Reopen was the first time in which Highland actually suggested applying a 40 dBA limit to any resident. And even that was not at Highland's own initiative: Highland was merely responding to a comment a commissioner had made during the vote to originally deny Highland a CPCN. When the Commission reopened the proceeding, it simply accepted the offer for the 40 dBA limit as applying only to the Six Residents. As the Commission admits, "[o]nce Highland indicated its desire to accommodate those residents' concern, the issue was settled."

Ever since the offer was made, Highland has been quick to limit, and even begin to withdraw, its proposal to "accommodate" Sensitive Residents. First, Highland made it clear that it would lift the 40 dBA limit from the homes of the Six Selected Residents as soon as those residents moved out of those homes.

Second, Highland made it equally clear that it would not extend the 40 dBA limit to any other existing or new Sensitive Resident. In other words, if a resident with similar or worse health conditions moves into or is born into the Town – or even replaces one of the Six Selected Residents in any given home – Highland will not extend the 40 dBA standard to them.

Third, Highland has asked the Commission to be able to lift the 40 dBA limit from the home of one of the Six Sensitive Residents because, according to Highland, that resident "does not

visit the home often enough." That resident happens to be a I think he is a 21? 22? year old young man with severe autism who causes great bodily harm to himself upon exposure to noise.

What the record shows is not a conscientious developer sacrificing its profitability to accommodate the public interest to a reasonable extent. Instead, what the record shows is a proposal made by a developer that was desperate to save its investment.

Highland is a business doing what businesses do: maximize profit. But that is exactly what separates the Commission from developers, and what gives the Commission purpose. The Legislature had charged the Commission to protect the public interest, not the developer's bottom line or, as the Commission puts it, the right of developers to privately contract with citizens. And that is exactly why the Commission cannot rely on the "voluntary nature" of a developer's offer to justify an official action and escape the requirements that it provide an adequate hearing on whether to accept it, and an adequate explanation as to why it accepted it.

B. The "voluntary nature" of Highland's offer does not release the Commission of its obligation to follow Chapter 227.

The respondents argue that the fact the Commission found no correlation between noise and health concerns means the Commission did not need to have a hearing or evidence to support its adoption of Highland's proposal regarding the Six Selected Residents. In effect, their argument is that, if a developer volunteers a condition that the Commission does not consider necessary, the Commission may adopt that condition without having a hearing on it, and without having evidence that explains it. In circular reasoning, the Commission repeatedly insists that the only evidence it needs to justify its decision in this matter is evidence that Highland made an offer.

But the alleged voluntary nature of the offer does nothing to release the Commission of its burden to provide a fair process on every issue it decides, and to base its findings only on

"substantial evidence in the record." The respondents' argument to the contrary has no support in the facts, in the law, or in logic.

1. Commission staff's selection of the six sensitive residences was grounded on health concerns.

The respondents' argument that the Commission decided to adopt Highland's proposal on the Sensitive Residents "despite" the lack of correlation between the proposal and health is inconsistent with the facts. The respondents insist that the Commission thoroughly rejected every piece of evidence and argument tying wind turbine noise and health. Yet, the record makes clear that the very basis for the selection of the Six Selected Residents was health concerns.

Highland's witness made clear that Commission staff had "potential concerns" about "certain health concerns," "identified six individuals," "loosely grouped them into two groups of three," and considered "[t]he first group … more serious than the second group." Even if the Commission's ultimate decision was that these health concerns have no correlation with wind turbine noise, no one can argue that the reason the Six Selected Residents ended up with a lower noise limit had nothing to do with health.

It is important to note that the health concerns with the sensitive population were separate and distinct from issues about the general health effects of wind turbines on the population of healthy residents. (*Cf.* Jaeger Ex. 1, pp. 20–23; *id.* at pp. 29–30 (environmental assessment separately discussing the effects of noise on a healthy population and the effects of noise on noise-sensitive conditions such autism and epilepsy.) The Respondents attempt to confuse the two groups and argue that the Town wants the protection extended to everyone. But the evidence presented by the Town containing health surveys and affidavits of people with noise sensitive conditions shows that this issue concerns this specific group and not the general population.

2. The Commission must follow Chapter 227 to make all decisions and impose all conditions – even those it considers "unnecessary" or "voluntary."

Second, the Commission's position that it needed no evidence to support its decision on Highland's offer has absolutely no support in the law. Nothing in Chapter 227, or in the massive body of case law that applies it, suggests that the Commission need only apply the sufficient hearing and sufficient evidence standards to conditions that it finds necessary, or that are not otherwise voluntary. Moreover, the fact that the Commission adopted the offer as an order point and condition of issuing the CPCN contradicts that argument that this decision was "unnecessary." Not surprisingly, neither the Commission nor Highland cite a single provision in Chapter 227, or a single case that interprets it in support of their argument. All the respondents do is reiterate the Commission's discretion to decide that there is no correlation between noise and health, and therefore no need for additional conditions. But again, the fact that the Commission has the power to decide a condition is merely voluntary does not change the process it must follow to adopt that condition.

Much to the contrary, the case law the Town cited in its Initial Brief makes clear that the voluntary nature of a Commission determination does nothing to change the Commission's obligation to support that decision with substantial evidence in the record, particularly when that determination represents a highly contested issue.

3. Allowing the Commission to bypass Chapter 227 whenever decides conditions are "voluntary" would deprive the parties and the public of their due process rights.

There is good reason why the law does not permit the Commission to adopt a condition without a proper hearing or enough evidence just because the Commission sees it as "unnecessary" or "voluntary." If the Commission could justify not having a proper hearing or sufficient evidence to support every decision, there would be little left of Chapter 227 and of due process.

The point of administrative procedure law is to ensure that in the *process* of reaching a decision or imposing a condition – be it a necessary or unnecessary decision, be it a voluntary or involuntary condition – the Commission give equal opportunity to all parties to present their case or, absent that, an explanation as to all parties as to the lack of equal opportunity.

This case is a perfect example of that reality. An agency such as the Commission is tasked by the legislature to ensure the public's protection and uphold the public interest when it decides an application. In the process of deciding that application, the public seeks protection from the Commission. The Commission has the right to determine that the protection the public seeks is not necessary given the law, facts, or policy choices the Commission makes. But if it does decide to extend that protection *even if* the protection is unnecessary, it cannot pick the citizens that will receive that protection arbitrarily. It must provide a process through which the public and the parties can make their case as to who should get the extra protection, and why.

A developer like Highland may be free to decide which neighbors it will offer to treat better than others, but the Commission is not free to flip that coin. It has the legal obligation to justify every decision it makes as being in the public interest. And that includes a decision to distinguish between a person that receives a protection it deems unnecessary, and a person that does not. The reason is simple: the Commission may think the protection has no value – but the person selected and the person excluded most certainly do not agree. It is those citizens that have the due process right to a hearing and an explanation.

C. The Commission's actions regarding the Sensitive Residents impaired the correctness and fairness of the proceedings below.

The Commission's failure to provide proper process on Highland's offer, and failure to base its finding and order of protective treatment for six residences on substantial evidence are material errors that affected the fairness of the entire proceeding and order. Sensitive residents

with conditions arguably indistinguishable from the six afforded protective treatment were denied coverage of the offer.

For example, the husband and wife who submitted testimony and evidence in Junker Exhs. 25 and 26, dated December 3, 2012 and introduced in the initial proceeding informed the Commission that the husband suffers from a severe hearing problem with tinnitus and vertigo and balance problems. The wife suffers from motion sickness and sleep problems among other issues. Their testimony included medical records supporting these conditions. They live in the project area and will be in the proximity to six wind turbines within one mile, three of which will be within one-half mile.

This family, who was not selected by staff for inclusion in the cohort of sensitive residences, should be compared to some of those who were selected. For example, public testimony from the Cress family indicated that the children suffer from motion sickness, the husband has migraines and the mother has sleep issues. Tr. Vol 6, 955. L 13-17.October 11, 2012 Similarly, another one of the six, Doris Schmidt, testified in the public hearing to an inner ear problem that causes her difficulty with balance. This is the entire record on these two of the six families.

There is nothing in the record, however, to show why these families were included for protective treatment but the one previously described was denied. As a result of the Commission's failure to provide a fair process and support its finding in evidence, people like the family who offered testimony in Exh. 25 and 26 have been denied protections extended to other similarly situated persons, without any reason. Had individuals like this family and the Town known of the selection criteria, they could have addressed it in their testimony to make their case. But they were left in the dark without knowing what the Commission staff was looking for in its selection of

sensitive residents. This is a material error in the process and requires reversal under Chapter 227. *See* Wis. Stat. § 227.57(4).

IV. The Commission failed to give any deference to the Town's interpretation of its own land use plan.

The respondents argue that the Court should uphold the Commission's finding that the Project would not "unreasonably" interfere with the Town's land use plan. The respondents' argument in this respect is two-fold. First, they argue that the Commission gave enough deference to the Town by evaluating the *language* of the land use plan. Second, they argue that the Commission has utmost discretion in interpreting the term "unreasonably" within CPCN law – and therefore owes the Town no deference. In line with the respondents' blank-check approach, both arguments take the facts and the law too far.

CPCN law requires the Commission to find that a wind farm will not "unreasonably interfere with the orderly land use and development plans for the area involved." Wis. Stat. § 196.491(3)(d)(6). There is no question that the Commission, not a municipality, has the power to interpret CPCN law – and therefore the power to interpret what "unreasonably" means. There is also no question that a municipality's opposition to a project cannot, by itself, mandate a finding that the project "unreasonably" interferes with a land use or land use plan in the municipality. But that is not what the Town argues.

The Town's argument is simple: that the Commission had to, at the very least, address the Town's interpretation of its own land use plan and, if necessary, provide what factors override the Town's position. After all, the object and purpose of the provision requiring the Commission to consider what local land use and development is to take into account the locality's position on whether a project would interfere with land use. If the Commission were free to ignore a municipality's position on its own land use and planning, this provision would be meaningless.

And that is exactly what the Commission did here. In its Final Decision, the Commission concluded that the Project did not "unreasonably" interfere with the Town's land use and planning based exclusively on the *language* of the Town's land use plan – not on the Town's interpretation of that plan. An agency cannot possibly determine whether something "unreasonably" interferes with a municipality's use of land without even accounting for what the municipality believes to be reasonable.

V. The Commission Lacked Substantial Evidence in the Record to Conclude Highland's Curtailment Plan Ensured Compliance with Noise Limits.

The respondents argue that the Commission had more than enough evidence to conclude that Highland's curtailment plan was sufficient to "ensure compliance" with applicable noise limits. In support of their argument, the respondents recite a pile of evidence about the curtailment plan and, once again, ask for deference to the Commission's conclusion.

The evidence the respondents cite does not patch the key hole in the record the Town pointed out in its initial brief: that there was no evidence the wind turbine manufacturers could or would implement Highland's curtailment plan. Without evidence that those manufacturers were even aware of the specifics of Highland's curtailment plan, the Commission could not possibly have drawn the conclusion that Highland had "ensured" the Project's compliance with noise limits. Highland may have introduced plenty of evidence on a plan, but it introduced no evidence on the tools it would use to implement that plan.

Combined with the fact Highland's curtailment plan is untested and unprecedented, that void in the evidence was too much for the Commission to fill with its own opinion. The Commission has plenty of discretion to weigh evidence and interpret the law – but it does not have the discretion to make assumptions. Absent evidence that Highland had even provided the

curtailment plan to the turbine manufacturers, the Commission's conclusion that Highland could successfully implement the curtailment plan was nothing but an assumption.

CONCLUSION

For the foregoing reasons, the Town respectfully reiterates its request that the Court void the Commission's decision and remand this case for a proper hearing on a compliance standard, on the selection of sensitive residences for additional protection, on the Town's interpretation of its land use land, and on Highland's ability to demonstrate it has the necessary software to make its curtailment plan work.

Respectfully submitted on September 17, 2014.

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

TOWN OF FOREST,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

and

HIGHLAND WIND FARM, LLC,

Respondents.

Case No. 14-CV-18
Case Code 30607
Administrative Agency Review

CERTIFICATE OF SERVICE

I, Marcel S. Oliveira, hereby certify that on this 17th day of September, 2014, I caused true and correct copies of the enclosed Petitioner Town of Forest's Reply Brief to be served via email and hand-delivery upon the following parties:

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