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 INITIAL BRIEF

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INTRODUCTION

This case is about the most fundamental tenant of administrative law: due process. In the proceedings below, respondent Public Service Commission of Wisconsin (the "Commission") violated every core principle of due process that underlies administrative procedure. Principles of adequate notice, opportunity to a full hearing, transparency, and fair play. It bypassed the law, the parties, the public, and ultimately the record itself to make decisions that had no notice, no hearing, and no evidence. It did exactly the opposite of what the Legislature mandated through the provisions of the Wisconsin Administrative Procedure Act (the "APA").[1]

By bypassing the parties and the public, the Commission did more than harm the process: it harmed the public. The Legislature has deemed wind farms to pose significant and enduring risks to public safety. It has tasked the Commission to protect the public from those harms. After all, "[t]he primary purpose of public utility laws in this state is the protection of the consuming public." *GTE North Inc. v. Public Serv. Comm'n*., 176 Wis. 2d 559, 568, 500 N.W.2d 284, 288 (1993). But in the proceedings below, the Commission abandoned the public in both the process and the outcome.

Intervenor-respondent Highland Wind Farm, LLC ("Highland") has proposed a project with the very characteristics from which the Legislature sought to protect the public. The proposed wind farm (the "Project") would comprise over forty industrial turbines. Those turbines would be so large that they would be close to the tallest structures in Wisconsin. Their noise output would be so loud that a significant reduction in their rotational speed would be necessary to bring them even close to the Commission's own regulatory noise limits. All the turbines would be close to homes in what is currently a quiet, rural community that has enjoyed significant residential and

[1] Found in Chapter 227, Wisconsin Statutes. *See generally* Wis. Stat. ch. 227.

commercial growth in recent years. Thanks to the process and the decision below, that community has no prospect of ensuring the Project will abide by the noise limits meant to protect public safety.

To protect that community, petitioner Town of Forest (the "Town") has resorted to the Court. The Town now asks the Court to uphold the law and correct the material errors the Commission made both in its final decision and in the process that led to it. The Town requests that the Court void the Commission's decision and remand this case for further proceedings – in which the Commission abides by the APA and the principles of due process that underlie it.

BACKGROUND

I. The Applicable Statutes

A. Substantive Statutory Standards

This case involves Highland's application for a Certificate for Public Convenience and Necessity ("CPCN") for a wholesale merchant plant. *See* Wis. Admin. Code ch. PSC 111; Wis. Stat. § 196.491. Section 196.491, Wisconsin Statutes, provides several limitations on the Commission's ability to issue this kind of CPCN. *See id.* This section provides, in part:

> (d) [T]he commission shall approve … a certificate of public convenience and necessity only if the commission determines all of the following:
>
> ***
>
> 3. The design and location or route is in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability and environmental factors, except that the commission may not consider alternative sources of supply or engineering or economic factors if the application is for a wholesale merchant plant….
>
> 4. The proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water and recreational use.

***

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

Id. at § 196.491(3)(d).

B. Procedural Statutory Requirements

This case involves a Class 1 contested case proceeding. *See id.*; *see also id.* at §§ 227.01(3)(a), 227.44. The Commission must provide notice as well as contested case and public hearings for any CPCN application. *Id.* at § 196.491(3)(b); Wis. Admin. Code ch. PSC 2. The APA provides comprehensive requirements for contested case proceedings and standards for judicial review of those proceedings. *See, e.g.*, Wis. Stat. §§ 227.44–50, 227.57.[2]

II. The Parties

A. Petitioner Town of Forest

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

B. Respondent Public Service Commission of Wisconsin

Respondent Public Service Commission of Wisconsin is an administrative agency of the State of Wisconsin organized pursuant to Chapter 196, Wisconsin Statutes. The legislature has tasked the Commission with authorizing and regulating the construction and operation of industrial wind farms whose energy output at nominal capacity is 100 megawatts or more.

C. Intervenor-Respondent Highland Wind Farm, LLC

Highland Wind Farm, LLC is a Wisconsin-based for-profit wind farm developer wholly owned and operated by Emerging Energies, LLC. (Doc. 215, p. 61.) Emerging Energies

[2] For clarity purposes, this brief will address details of the APA in individual argument sections. *Infra*, pp. 10–56.

developed the Shirley Wind Project ("Shirley"), a wind farm located in Brown County, Wisconsin. (*Id.* at p. 189.)

Shirley is the first and only wind farm in Wisconsin to use the type of industrial-scale wind turbines that are proposed for the Project. (*Id.* at p. 474.) Shirley has been the site of multiple complaints of excessive wind turbine noise and associated health problems including nausea, dizziness, vertigo and insomnia. (*See id.* at p. 336; Doc. 432, p. 9.) Many families who used to live near Shirley have abandoned their homes because of wind turbine noise and associated health problems. (Doc. 432, p. 2.)

STATEMENT OF FACTS

I. The Original Proceedings

A. Highland's Application for a CPCN

On December 16, 2011, Highland filed with the Commission an application for a CPCN for the Project. (*See* Doc. 3); *see also* Wis. Stat. § 196.491(3). The Project, as Highland originally proposed it, would consist of between 41 and 44 of the largest wind turbines installed in a residential area in the United States. (Doc. 2, p. 2.) It would span over 26,500 acres over a substantial portion of the Town's jurisdiction. (*Id.* at p. 1.)

In March of 2010, shortly before Highland filed its application for a CPCN, Chapter PSC 128 of the Wisconsin Administrative Code went into effect. *See* Wis. Admin. Code ch. PSC 128. That chapter established – for the first time in Wisconsin – maximum noise limits for wind farms. *See id.* Specifically, section PSC 128.14, Wisconsin Administrative Code, set nighttime noise limits at 45 A-scale weighed decibels ("dBA"). *Id.* at § PSC 128.14(3) ("PSC 128.14"). The Project is the first proposal to come before the Commission under this new rule.

The proceeding before the Commission ("the original proceedings") revealed that audible

and inaudible noise from wind turbines could pose significant health risks to nearby residents. (Doc. 224, p. 45.) Experts testified that, in addition to audible noise, wind turbines also produced inaudible noise – known as "infrasound" – which experts believe may cause significant negative health effects. (*See id.*) The Commission's own environmental assessment predicted problems:

> Some nearby residents may be disturbed or annoyed by wind turbine noise from the [Project]. Sleep disturbance is likely the most important potential consequence to these individuals. It is not possible to predict how many people are likely to be disturbed. For people who might be disturbed or annoyed by wind turbine noise, the presence of new wind turbines could represent a substantial reduction in their quality of life.

(Doc. 441, p. 21.)

Expressing concern about this testimony, in December of 2012, the Commission funded an infrasound study to be conducted at Shirley. (*See* Doc. 432.) The study recommended that, to protect public health and safety from the effects of audible and inaudible noise, the Commission adopt a 40 dBA noise limit for all residences. (*Id.*)

Amid the testimony regarding the dangers of audible and inaudible noise, the Town and Forest Voice introduced evidence that at least seventeen Town residences were occupied by individuals with health conditions that would worsen with noise. (*See* Docs. 331, 332, 335, 337, 349, 341, 343, 345, 347.) The Town and Forest Voice, as well as the residents themselves, requested that Highland and the Commission extend to these residences more protection than PSC 128.14 offered. (*See, e.g.*, Doc. 53, pp. 7–8, 19–20.) Following off-the-record discussions with Commission staff, Highland proposed to re-site turbines to mitigate noise in merely six of those residences (the "six sensitive residences"). (Doc. 215, pp. 581:10–582:2.)

B. The Final Decision in the Original Proceeding

On March 15, 2013, the Commission issued a decision finding that the Project would not

meet the noise limits in PSC 128.14 and denying Highland a CPCN (the "original decision"). (Doc. 136, pp. 3–4.) The Commission wrote:

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

(*Id.*)

II. The Reopened Proceedings

A. Highland's Petition to Reopen

On April 4, 2013, Highland requested that the Commission reopen the proceedings. (Doc. 114, p. 1.) Highland claimed to have evidence that it could "curtail" the Project's turbines to meet the 45 dBA nighttime noise limits. (*Id.* at 7–11.) Highland's plan (the "curtailment plan") included a proposal to "[l]imit to 40 dBA nighttime sound attributable to the turbines at the six identified residences occupied by potentially sensitive individuals." (*Id.* at p. 19.)

Over the objections of the Town and Forest Voice, the Commission granted Highland's request to reopen the proceedings and consider the curtailment plan (the "reopened proceedings"). (Doc. 137, p. 1.) When it did, it adopted Highland's proposal by way of limiting the issues on rehearing regarding sensitive residences. Per Highland's proposal, additional protections would apply only to the six sensitive residences – at the exclusion of the other residences the Town and Forest Voice had identified as sensitive. (*See* Docs. 138–39.)

B. The Commission's Final Decision on Reopening

On October 25, 2013, the Commission issued its final decision on reopening granting Highland a CPCN for the Project (the "final decision"). (Doc. 144, p. 1.) In the final decision, the

Commission held that the Project would only have to comply with noise limits "95% of the time," and relied on Highland's proposed curtailment and monitoring plans to approve the project. (*See id.* at 35.)

On November 14, 2013, the Town petitioned the Commission for reconsideration or rehearing on the grounds that the Commission had made material errors of law and fact. (Doc. 115.) On December 20, 2013, six days after the Town's petition was deemed denied under section PSC 2.28, Wisconsin Administrative Code, the Commission issued a written decision denying the Town's petition. (Doc. 145, p. 1); *see also* Wis. Admin. Code § PSC 2.28. On January 10, 2014, the Town filed a timely petition for judicial review with the Court. *See* Wis. Stat. § 227.53(1)(a)(2).

SUMMARY OF ARGUMENT

The issues before the Court arise from material errors the Commission made both in its decision and in the process leading to that decision. These issues are about more than the Commission abusing its discretion: they are about the Commission ignoring basic due process requirements for a fair hearing, the APA requirements on substantial evidence and case law on deference to local governments. By failing to comply with mandatory requirements for its proceedings and decisions, the Commission acted arbitrarily and exceeded its authority.

The Commission made four major material errors. First, it adopted the new, "95% of the time" compliance standard for the noise limits in PSC 128.14(3) without notice, evidence or explanation. There was absolutely no notice, hearing or substantial evidence in the record to support the Commission's adoption of the new standard. To make matters worse, the Commission effectively extended the new standard to all existing and future wind farms in Wisconsin – without proper rulemaking process. Ultimately, by failing to define the "5% of the time" window, and by failing to limit how loud wind farms can get during that window, the Commission made it

effectively impossible for the public to ever enforce the noise limits of PSC 128.14. Without warning or reason, the Commission adopted a standard akin to a speed limit that motorists can exceed by however much they want to – only to claim a "5% of the time" window when caught.

Second, the Commission arbitrarily selected the six sensitive residences for additional noise protection – at the expense of several other similarly-situated residences. Other residents were equally if not more vulnerable to noise due to existing health conditions – ranging from Parkinson's disease to autism. With neither notice nor a proper hearing on this issue, the Commission simply selected the six sensitive residences based on private, off-the-record discussion between Commission staff and Highland. There was absolutely no evidence in the record that disclosed what happened in those discussions, or that explained why or how Commission staff and Highland had distinguished the six residences from the others. By extending protection to the six without any evidence to differentiate them from the others, the Commission violated fundamental principles of due process.

Third, the Commission failed to give appropriate deference to the Town's own interpretation of its land use plan. Throughout the proceeding, the Town made clear that it viewed the Project as contrary to its land use plan. Relying solely on the language of the plan, and without addressing the Town's opinion to the contrary, the Commission still decided that the Project would not "unreasonably interfere" with the plan. This arbitrary determination, made without substantial evidence in the record, will lead to the very effects the Town's land use plan is meant to prevent: erosion of quality of life and a loss in business and population.

Fourth, the Commission approved the Project without substantial evidence that the curtailment plan would ensure compliance with noise limits. The original proceedings showed that the Project cannot meet noise limits without the curtailment plan. The curtailment plan, on

which Highland relied to resolve this deficiency, had never been tested. It is based on nothing more than conjecture and hope. It depends on a monitoring plan that can monitor a handful of homes at any one time. It amounts to an experiment – not something that can ensure compliance with standards.

Each of these errors alone is material enough to warrant voiding the Commission's decision and remanding the case. While the Commission created a voluminous record, it still failed to comply with Wisconsin law. Courts have reversed the Commission again and again for committing these same kinds of errors in these same kinds of complex cases. As the Wisconsin Supreme Court noted seventy-five years ago, creating a voluminous record is no excuse for breaking the law:

> While … cases tend to drag out to interminable length and the rights of the utilities and the public often suffer on account of the length of hearings, the situation must be remedied in some way other than by a violation of the fundamental rights of parties.

Wis. Tel. Co. v. Pub. Serv. Comm'n., 232 Wis. 274, 287 N.W. 122, 138 (1939).

STANDARD OF REVIEW

Judicial review ensures that agencies fulfill their statutory responsibilities and articulate rational explanations for their determinations. Under section 227.57, Wisconsin Statutes, courts must set aside, reverse, modify, or remand the decision if the agency failed to follow prescribed procedure; erroneously interpreted the law; made factual findings not supported by substantial evidence in the record; or exercised discretion outside its delegated range of discretion, inconsistent with the agency's rule, policy or prior practice without satisfactory explanation, or otherwise in violation of a constitutional or statutory provision. Wis. Stat. § 227.57.

Courts review any allegation that an agency has violated constitutional due process *de novo*. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 6, 234 Wis. 2d 335, 341, 610 N.W.2d

129, 133. Questions of due process are questions of law for which agencies receive absolutely no deference. *Id.* Courts also review any challenge to an agency's conclusion of law on a novel issue *de novo*. *DeBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶35, 335 Wis. 2d 599, 619, 804 N.W.2d 658, 668; *Clean Wis., Inc. v. Pub. Serv. Comm'n.*, 2005 WI 93, ¶ 43, 282 Wis. 2d 250, 309, 700 N.W.2d 768, 796. Agencies only receive "great weight deference" or "due weight deference" where the agency has previous experience interpreting or applying a statute or rule. *See DeBoer*, 2011 WI at ¶¶ 33–34, 335 Wis. 2d at 617–18, 804 N.W.2d at 667.

Even where an agency has experience in interpreting a statute or rule, courts will only give the agency deference if the agency has enough experience to be in a better position to interpret the statute or rule than the reviewing court. *Clean Wis.*, 2005 WI 93 at ¶ 42, 282 Wis. 2d at 309, 700 N.W.2d at 796. Courts give no deference to an agency's conclusion of law based on a new statute or rule, or based on a new interpretation of any statute or rule. *Id.* Regardless of the level of deference, courts cannot sustain any agency decision that goes against the ordinary meaning of the plain language of a statute. *Id.*

Courts review any challenge to an agency's findings of fact pursuant to the substantial evidence standard. *See* Wis. Stat. § 227.57(6). Under this standard, courts must reverse an agency's decision predicated on findings of fact that, upon an independent review of the entire record, lack enough evidence to allow a reasonable mind to reach the same finding. *Wal-Mart Stores, Inc. v. Labor & Indus. Review Comm'n*, 2000 WI App 272, ¶ 10, 240 Wis.2d 209, 217, 621 N.W.2d 633, 636–37.

ARGUMENT

I. The Commission violated Wisconsin law by creating a new compliance standard without adequate notice, proper hearing, or substantial evidence in the record.

In its final decision, the Commission adopted a new compliance standard for the noise

limits of PSC 128.14, to be applied to both to the Project and other wind farms. (Doc. 144, p. 35.) The Commission wrote:

> The Commission finds that a showing of compliance by Highland at or above 95 percent of the time is adequate for the Commission to consider the proposed project in compliance with applicable noise limits. Highland shall work with Commission staff to finalize the post-construction testing methodology to be used consistent with a percentage-based standard. The Commission also concludes that it is reasonable to modify the Commission's Noise Protocol so that this protocol is consistent with the Commission's findings in this proceeding.

(*Id.*)

In adopting the new compliance standard, the Commission violated Wisconsin law in four ways: it failed to provide clear notice and a proper hearing on the standard; it lacked substantial evidence in the record to adopt the standard; it created a new rule without proper rulemaking process; and it created a standard that is too vague and ambiguous for the public, the Commission or the courts to enforce or review.

Wisconsin law requires industrial wind farms to operate within prescribed noise limits for the protection of public health. Through 2009 Wisconsin Act 40, the Legislature created the Wind Siting Council, a body that recommended noise limits for the Commission to adopt as administrative rules. The result was the adoption of the noise limits in PSC 128.14. *See* Wis. Admin. Code § PSC 128.14(3). PSC 128.14 provides in part that:

> [A]n owner shall operate the wind [farm] so that the noise attributable to the wind [farm] does not exceed 50 dBA during daytime hours and 45 dBA during nighttime hours.

Id.

The Wind Siting Council considered these limits to be absolute. In its recommendations, the Wind Siting Council stated:

> For all system size categories, the noise attributable to the [wind farm] should never

be allowed to exceed 45 dBA at night.[3]

The issues included in the notice for the original proceeding gave no indication that the Commission would consider a standard for determining compliance with PSC 128.14. (*See generally* Doc. 118.) The original prehearing conference memorandum, the document the Commission used to provide notice on the issues for hearing, stated in relevant part:

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

(*Id.* at p. 1.) In the entire prehearing conference that preceded this memorandum, neither the Commission nor any other party mentioned a compliance standard. (*See generally* Doc. 212.) Consequently, the parties spent the entire original proceeding presenting evidence and arguments on whether the Project would comply with required noise limits at all times. (*See, e.g.*, Doc. 53, pp. 11–13.)

Consistent with the fact that there was no issue about a compliance standard in the original proceeding, the Commission determined that PSC 128.14 prescribed "absolute limits." (Doc. 136, p. 6); *see also* Wis. Admin. Code § 128.14(3)(a). The Commission's decision reflected not only the Wind Siting Council's interpretation, but also the ordinary meaning of the plain language of PSC 128.14 – which uses the words "shall" and "does not exceed" to indicate absolute limits. *See id.* In that same decision, the Commission denied Highland a CPCN for the Project precisely because Highland failed to show the Project would comply with noise limits 100% of the time. (Doc. 136, p. 10.)

[3] The legislative history behind PSC 128.14 is not part of the record. The Town asks the Court to take judicial notice of it.

In a section of the final decision captioned "Future Applications," the Commission made a general reference about the potential for this issue to be considered in future cases:

> 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.* at pp. 18–19.)

However, nowhere in the reopened proceeding was there any mention of a new compliance standard. (*See generally* Docs. 103, 139.) When the parties debated whether the Commission should reopen the proceeding, neither Highland nor any other party raised the question of a new compliance standard. (*See generally* Docs. 74, 75, 114.) When the Commission provided its notice of the issues for the reopened proceeding, it made no reference to a new compliance standard. (*See generally* Doc. 139.) It merely indicated that it was reopening for "the limited purpose of taking evidence on whether and how Highland's proposed project can meet the noise standards in PSC 128.14. (*Id.*) The Commission identified the following hearing issues for the reopened proceeding:

> II. Issues:
>
> A. The record shall present detailed evidence that addresses the following:
>
> 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?

B. Without limitation to any other relevant legal issue, briefs shall address the following:

1. Will the project, as modified to meet the noise standards described in Issues A.1 and A.2, remain within the scope of Commission jurisdiction under Wis. Stat. § 196.491(3)?

2. Does PSC 128 allow curtailment: (1) as a design factor; (ii) only if the project is found to be out of compliance after it is built but not during the project planning phase; or (iii) at any time?

(*Id.* at p. 1.)[4]

All these issues concerned whether the Project, now revised to operate under the curtailment plan, could meet the same absolute noise limits at issue in the original proceeding. None of these issues concern how the Commission should interpret and apply those same absolute noise limits under a new compliance standard. Rather, the issues concern Highland's ability to comply with existing noise requirements, not whether the Commission should modify those requirements. In this highly contested case where noise exceedance were always at issue, no party ever offered any testimony or argument about a compliance standard – because no one knew it was at issue. (*See generally* Docs. 74, 75, 103, 139, 213.) Not even Commission staff identified

[4] This language reflects the language the Commission used in the Order to Modify the Second Prehearing Conference Memorandum. (*See* Doc. 139.) This language superseded the original language the Commission had used in the original Second Prehearing Conference Memorandum (*See* Doc. 138.)

it as an issue. (*See generally* Doc. 92.)

Yet, without warning, the Commission adopted a new, "95% of the time" compliance standard in its final decision. (Doc. 144, p. 35.) The Commission adopted this standard based on a single finding:

> Mr. Hessler also testified that if measured sound level is in compliance with the limit 95 percent of the time or more, he would consider the development to be in compliance. The Commission finds that a showing of compliance by Highland at or above 95 percent of the time is adequate for the Commission to consider the proposed project in compliance with applicable noise limits.

(*Id.*)

Ironically, the Commission misquoted Mr. Hessler. Mr. Hessler never testified that he would find Highland to be in compliance if it met noise limits 95% of the time, and never gave an opinion as to the adoption of a compliance standard with respect to PSC 128 noise limits. (*See* Doc. 219, pp. 524–25.) The totality of the testimony from David Hessler, an expert from Clean Wisconsin, is found in the following excerpt:

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

(*Id.*) There is no further testimony in the record from Mr. Hessler or any other witness regarding a compliance standard.

Nonetheless, the Commission adopted the new compliance standard as an order point of

its final decision – making it formally a part of the approval of Highland's CPCN. (Doc. 144, p. 49.) The Commission went on to extend the new compliance standard to other current and future wind farms, finding:

> The Commission finds that a showing of compliance by Highland at or above 95 percent of the time is adequate for the Commission to consider the proposed project in compliance with applicable noise limits. *The Commission also concludes that it is reasonable to modify the Commission's Noise Protocol so that this protocol is consistent with the Commission's findings in this proceeding.*

(*Id.* (emphasis added).) By incorporating the standard into the Noise Protocol,[5] the Commission adopted the new compliance standard for all current and future wind farms in Wisconsin. *See* Appendix F, p. 1. Yet, neither Mr. Hessler nor the Commission ever defined what they meant by "95% of the time." (*See id.* at pp. 35, 49; Doc. 136, pp. 18–19; Doc. 219, pp. 524–25.)

A. The Commission failed to provide adequate notice and a proper hearing on the new compliance standard.

1. Wisconsin case and statutory law makes clear that the Commission cannot decide an issue without giving clear notice that it will decide that issue.

The Wisconsin Statutes require an agency to give notice and opportunity for hearing on any issue it decides. *See* Wis. Stat. §§ 227.44(1)–(2). Section 227.44, Wisconsin Statutes, provides in relevant part:

> (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice….
>
> (2) The notice shall include:
>
> ***

[5] The Noise Protocol, officially titled "Measurement Protocol for Sound and Vibration Assessment of Proposed and Existing Wind Electric Generation Plants," can be found on the Commission's website at https://psc.wi.gov/utilityinfo/electric/construction/documents/noiseprotocol.pdf. For the Court's convenience, the Town is including a copy of the Noise Protocol as Appendix F. The Town asks the Court to take judicial notice of the existence and content of the Noise Protocol.

> (c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.

Id.

Consistent with this statute, Wisconsin and federal courts have consistently voided any decision in which an agency decides an issue without providing clear notice that it would decide that specific issue. *See, e.g.*, *Gen. Elec. Co. v. Wis. Emp't Relations Bd.*, 3 Wis. 2d 227, 88 N.W.2d 691 (1958); *Bituminous Cas. Co. v. Dep't of Indus., Labor & Human Relations*, 97 Wis. 2d 730, 295 N.W.2d 183 (Ct. App. 1980); *Bracegirdle v. Bd. of Nursing*, 159 Wis. 2d 402, 464 N.W.2d 111 (Ct. App. 1990); *GTE North*, 169 Wis. 2d at 649, 486 N.W.2d at 554 (*rev'd on other grounds*); *Wis. Bell v. Bie*, 216 F. Supp. 2d 873 (W.D. Wis. 2002). As the Wisconsin Supreme Court once wrote:

> Parties in a legal proceeding have a right to be apprised of the issues involved and to be heard on such issues. A finding or order made in a proceeding in which there has not been a full hearing is a denial of due process.

Bituminous Cas., 97 Wis. 2d at 735, 295 N.W.2d. at 186 (citations omitted).

In *General Electric*, the Wisconsin Supreme Court voided a decision from the Employment Relations Board after the board decided an issue on which it never provided notice and proper hearing. 3 Wis. 2d at 243, 88 N.W.2d at 701. In this case, the hearing concerned a particular provision of a union contract. 3 Wis. 2d at 230, 88 N.W.2d at 693. While another, separate provision was referenced at the hearing, it had not been the subject of a specific notice identifying it as an issue for decision. *Id.* The Board, however, made findings based on the provision that was not included in the notice. 3 Wis. 2d at 234–35, 88 N.W.2d at 696–97. The Court specifically rejected the board's argument that General Electric "should have known" an issue was at play simply because it was mentioned before the hearing and as part of evidence:

> [T]he evidence presented by the parties at the hearing related primarily to the [first provision of the union contract]. There was incidental evidence presented by the union [regarding the second provision of the union contract]…. It is manifest that the company was not cognizant … that the board would treat that matter [the second provision] as an issue for its determination.

3 Wis. 2d at 245, 88 N.W.2d at 702–03.

The Wisconsin Court of Appeals followed suit in *GTE North Inc. v. Public Serv. Comm'n of Wisconsin*. 169 Wis. 2d 649, 486 N.W.2d 554. In that case, the Commission held a contested case hearing to determine whether GTE improperly refused to give yellow pages directories to a customer without charge. 169 Wis. 2d at 656, 486 N.W.2d at 556. The Commission held that GTE did not act improperly in this regard. 169 Wis. 2d at 656–57, 486 N.W.2d at 556. However, based on the evidence received in the case, the Commission also held that the tariff GTE charged for the directories was unjustly discriminatory. *Id.* Based on the lack of specific notice about the tariff, the Court of Appeals voided the Commission's decision. 169 Wis. 2d at 671, 486 N.W.2d at 562.

Relying on this precedent, the United States District Court for the Western District of Wisconsin held that the Commission could not decide an unnoticed issue as a "logical outgrowth" of a noticed issue. *Wis. Bell*, 216 F. Supp 2d at 873. In *Wis. Bell*, the Commission held a proceeding to set rates for a particular type of internet service provider but, without notice, decided to set rates for all local calls. *Id.* at 879. Rejecting the Commission's argument that the latter issue was a "logical outgrowth" of the former, the Court voided the Commission's decision for lack of proper notice and due process:

> [T]he [C]ommission's notice exceeded the scope, rather than the specifics, of the topic to be determined. Simply put, it is not reasonable to conclude that a rate structure determination as to all local calls grows logically from notice announcing that only a rate plan for ISPs calls would be investigated and determined.

Id. at 881–82.

Similarly, the Court of Appeals has held that an agency cannot decide an issue without clear and specific notice by simply invoking its power to interpret its own rules. *Bracegirdle*, 159 Wis. 2d at 418, 464 N.W.2d at 116. In *Bracegirdle*, the Board of Nursing held a contested case hearing to determine whether a nurse violated a rule that prohibited the use of harmful "force or mental pressure" by using "excessive physical force" on a patient. 159 Wis. 2d at 410, 464 N.W.2d at 113. The board found that the nurse had not used "excessive physical force," just "verbal and physical encouragement." 159 Wis. 2d at 410–411, 464 N.W.2d at 113. Yet, the Board still concluded the nurse had violated the rule because the "verbal and physical encouragement … constitute[d] an act of force or mental pressure" that could harm the patient. 159 Wis. 2d at 411, 464 N.W.2d at 113.

The Court of Appeals voided the board's decision for lack of notice and a proper hearing. 159 Wis. 2d at 420, 464 N.W.2d at 117. The Court held that the board could not decide an issue that received neither notice nor argument simply by articulating a previously-unannounced interpretation of the rule:

> What the parties tried was not what the board decided. Fundamental fairness … required that the board decide Bracegirdle's "guilt" or "innocence" of the charges against her, not charges based on the board's interpretation of [the rule] announced for the first time in its decision. Had Bracegirdle been charged with violating the code provision by verbal and physical encouragement of the patient, she may have been able to show by expert testimony that appropriate verbal and physical encouragement of an uncooperative patient does not fall below the minimum standards….

159 Wis. 2d at 418, 464 N.W.2d at 116.

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

None of the issues included in the Commission's notice for the reopened proceeding contemplated the adoption of a new compliance standard. (Doc. 139, p. 1.) Much to the contrary, the plain language of the notice indicated the Commission would stick with its original interpretation of the noise limits of PSC 128.14: absolute maximums that required compliance "100% of the time." (*Id*.) The language "ensure compliance with the noise standards in [section PSC 128.14(3)] and a 40 dBA noise standard [for the six sensitive residences]" concerns Highland's ability to ensure compliance 100% of the time, not whether the Commission should modify the compliance requirements. (*Id.*) Because there was no notice, the Town was effectively denied an opportunity for hearing on this issue. The lack of any record on a compliance standard for PSC 128 noise limits reflects the fact that no party could present evidence or argument on an issue it knew nothing about.

The case law makes clear that the Commission cannot claim the parties had any notice of the new compliance standard based on the original decision's mention of a standard for future cases. *See General Electric*, 3 Wis. 2d at 230, 88 N.W.2d at 693. Nor can it claim notice based on Mr. Hessler's comments about Minnesota guidelines. *See id. General Electric* makes clear that mentioning an issue during proceedings, or even introducing evidence to support a finding on that issue, is not enough to constitute proper notice. *See id.* The standard is not whether the parties "should have known" the agency would decide the issue – but whether the agency made it clear in advance that it would decide the issue. *See id.*

The Commission explicitly limited the issues on reopening. (*See* Doc. 139, p. 1.) There was no reason for the Town to infer, nor was it required to assume, that the Commission would take up a new issue in the reopener. If the Commission intended to create a new compliance standard, it had to provide clear and specific notice to that effect. *See* Wis. Stat. § 227.44. Neither

the Wisconsin Statutes nor Wisconsin courts have ever made it the obligation of parties to determine by inference what the Commission will decide. *See id.*; *see also Friends of Earth v. Public Serv. Comm'n.*, 78 Wis. 2d 388, 254 N.W.2d 299 (1977).

The case law makes equally clear that the Commission cannot justify the new compliance standard based on the Commission's power to interpret a rule. *Bracegirdle*, 159 Wis. 2d at 418, 464 N.W.2d at 116. *Bracegirdle* makes clear that, when the Commission holds a contested case hearing to make a decision based on one interpretation of a rule, it cannot decide that contested case based on different, unannounced interpretation of that rule. *Id.* To do so is to deprive the parties of their due process right to make their case under the new interpretation as well as the old interpretation. *See id.* As the courts have noted, what the Commission decides cannot be different from what the parties try. *See id.*

The Commission's deprivation of the parties' due process right to notice and comment is far from harmless. The compliance standard is a critical issue for the Town. The whole reason the Town intervened in the administrative proceeding was its concern for the Project's noise exceedances and the harm they could cause to the Town's constituents. Had the Commission provided notice that a standard was at issue, the Town would have offered testimony and argument informing the Commission of the problems with such a standard. But the Town could not offer evidence or arguments on an issue it knew nothing about. The Commission violated the APA; therefore the Court should void the Commission's decision. *See* Wis. Stat. § 227.44(1)–(2).

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

1. The Commission cannot make findings without a basis in substantial evidence in the record.

The Wisconsin Supreme Court has held that incidental testimony on an issue is not alone

enough to qualify as "substantial evidence in the record" to support an agency's decision on that issue. *See* Wis. Stat. 227.40; *see also Gilbert v. State Med. Examining Bd.,* 119 Wis. 2d 168, 199, 349 N.W.2d 68, 82 (1984).

In *Gilbert*, the Court voided an agency's decision because the agency based its conclusion on testimony of an expert that did not address the ultimate question the agency decided. *See id.* The agency held a hearing to determine whether a physician had committed misconduct. 119 Wis. 2d at 178, 349 N.W.2d at 72. To find misconduct, the agency had to find that a "minimally competent physician" would not have acted in the way the accused physician had acted. 119 Wis. 2d at 190, 349 N.W.2d at 78. The agency found misconduct, but based that finding on a single expert's testimony that he, as a physician, would have acted differently. 119 Wis. 2d at 197, 349 N.W.2d at 81. The expert had never directly testified to the "minimally competent physician" standard. *Id.*

The Court held that an agency could not base a finding on incidental or equivocal testimony that did not directly address the question the agency answered. 119 Wis. 2d at 199, 349 N.W.2d at 82. The Court rejected the argument that the agency's expertise was enough to fill whatever gaps were left between the expert's testimony and the question at hand. *Id.* The Court wrote:

> We find this testimony to be inconclusive…. [I]n order for the Board to find that [the accused's] action constituted unprofessional conduct, there must be testimony to the effect that a minimally competent physician would have avoided or minimized the unacceptable risks which Gilbert's treatment posed…. The Board may have utilized its expertise in the field of medicine to bridge the gaps left by [the expert's] testimony. However, as the court of appeals correctly noted, the Board cannot rely on the expert knowledge of its members to make such inferences from inconclusive testimony. Its actions must be based only upon the record before it. The Board may not substitute its knowledge for evidence which is lacking.

Id.

For similar reasons, the Court has held that uncorroborated hearsay testimony does not amount to "substantial evidence on the record." *See* Wis. Stat. § 227.57(6); *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶ 54, 278 Wis. 2d 111, 135, 692 N.W.2d 572, 584. In *Gehin*, the Court upheld sixty-five years of precedent in reversing an agency decision that included a finding based exclusively on uncorroborated hearsay. *See id*. The Court concluded that "substantial evidence" cannot involve the "conjecture and speculation" inherent to hearsay. 2005 WI 16 at ¶ 48, 278 Wis. 2d at 133, 692 N.W.2d at 583. The Court wrote:

> [T]he purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force.
>
> ***
>
> The rule that uncorroborated testimony alone does not constitute substantial evidence allows an agency to utilize hearsay evidence while not nullifying the relaxed rules of evidence in administrative hearings…. This rule has been followed in Wisconsin since … 1939. There has been no suggestion that this rule has hindered the operation of state administrative agencies.

2005 WI 16 at ¶¶ 54–56, 278 Wis. 2d at 135, 692 N.W.2d at 584.

2. Mr. Hessler's testimony about noise exceedances was incidental and uncorroborated hearsay that does not amount to substantial evidence.

The Commission based its adoption of the new compliance standard on exactly the kind of testimony that the Wisconsin Supreme Court has deemed insufficient: a single remark that is both incidental to the issue and uncorroborated hearsay.

Mr. Hessler merely commented on ways to address temporary noise exceedances, whether by project design or standards for allowances. He referenced work he had previously done at some unknown time for Minnesota guidelines.

Mr. Hessler's lone comment had neither the purpose nor the effect of validating a "95% of the time" compliance standard for this case or for Wisconsin. He gave no opinion on whether a 95% standard was appropriate for PSC 128 noise limits. Like the testimony in *Gilbert*, Mr. Hessler's testimony never directly or conclusively addressed the ultimate question the Commission decided: that a "95% of the time" compliance standard was proper for the Project and for other wind farms in Wisconsin. *See* 119 Wis. 2d at 199, 349 N.W.2d at 82.

The statement that preceded Mr. Hessler's comment on a percentage-based compliance standard provides a good analogy of why agencies cannot do what the Commission did. Immediately before testifying about a percentage-based compliance standard, Mr. Hessler testified that wind farms must aim to operate at 10 dBA below legal limits in order to ensure they never exceed those limits. (Doc. 212, p. 524:20–22.) If the Commission can adopt the percentage-based compliance standard from an off-hand comment, it could also, or instead, have adopted a 10 dBA "buffer" standard from this same off-hand comment. The Commission could simply have found that (1) the Project would need to aim for 10 dBA below limits and (2) future applicants should design wind farms accordingly. Had the Commission done that, there would be no question that its decision would have no support in substantial evidence. The Commission's adoption of the percentage-based standard remark is no different.

Mr. Hessler's comment was also uncorroborated hearsay. In referencing a percentage-based compliance standard, Mr. Hessler was merely talking about previous work he had done in Minnesota. (*Id.* at pp. 524:24–525:3.) Neither his work nor the Minnesota guidelines are in the record. No other party ever corroborated Mr. Hessler's statement regarding those particular guidelines, or a percentage-based standard. No one ever introduced, through testimony or exhibits, any scientific analysis to explain a percentage-based standard – or support its adoption. In

referencing off-the-record guidelines, Mr. Hessler was offering the same kind of hearsay that *Gehin* held insufficient to amount to "substantial evidence in the record." 2005 WI 16 at ¶ 48, 278 Wis. 2d at 133, 692 N.W.2d at 583.

In short, a reasonable mind cannot accept Mr. Hessler's single comment on a percentage-based standard as substantial evidence in the record. He never testified that a "95% of the time" compliance standard was appropriate in this case or in Wisconsin. He never introduced the guidelines that made reference to a "95% of the time" compliance standard. He never proposed a "95% of the time" compliance standard.

The Commission violated the parties' due process rights by seizing this single, incidental remark and turning it into a standard – one that annuls both the parties' effort in the proceeding and PSC 128.14. *See* Wis. Admin. Code § PSC 128.14(3). The adoption of the new standard is a major decision that will affect the daily lives of the citizens of Forest and other Wisconsin residents who live near a wind farm. Wisconsin law requires that such a standard be based on substantial evidence and Wisconsin citizens deserve this protection. *See* Wis. Stat. §§ 227.44(1)–(2).

C. The Commission's creation of the new compliance standard amounted to unauthorized rulemaking that exceeded its authority.

1. The Commission cannot adopt a generally applicable and mandatory standard that interprets PSC 128.14 without rulemaking procedure.

The Wisconsin Statutes require agencies to go through formal rulemaking procedures to enact any "rule." *See* Wis. Stat. §§ 227.10–227.30. Section 227.01(13), Wisconsin Statutes, defines a "rule" as a standard of "general application" having the "effect of law" that an agency issues to "implement, interpret or enforce specific legislation the agency enforces or administers." *See id.* at § 227.01(13). While the Wisconsin Statutes do not further define these elements, Wisconsin courts have provided significant guidance on them.

The Wisconsin Supreme Court has held that an agency creates a standard of "general application" whenever it bases a decision to grant or deny a permit on a newly-announced criterion for all similar permit applications. *Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257, 89 N.W.2d 825, 827 (1958).[6] The Court of Appeals has followed suit, holding that an agency's decision or order is a standard of "general application" whenever it "announce[s] general policies and specific criteria under which all decisions … are to be made, now and in the future." *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769, 772–73 (Ct. App. 1986).

In line with these holdings, the Court of Appeals has also held that a standard has the "effect of law" when it has the power of denying future licensure. *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. In *Cholvin*, the Court rejected an agency's argument that a vague standard articulated in a decision lacked the effect of law because it required future case-by-case analyses. 2008 WI App at ¶ 29, 313 Wis. 2d at 763–764, 758 N.W.2d at 125. Instead, the Court focused on the fact that, regardless of how agency staffers interpreted the standard in the future, they would have no choice but to apply it. *Id.* That mandatory nature, the Court held, was what gave the standard articulated in one decision the "effect of law" for future decisions. *Id.*

Finally, the Wisconsin Supreme Court has consistently held that an agency "interpret[s] … specific legislation the agency enforces or administers" whenever it issues a decision that changes its previous approach to the legislation. *Schoolway Transp. Co. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976). In *Schoolway*, the agency denied an applicant a permit after years of granting identical permits under identical conditions. *See id.* The reason for the denial was the agency's change in interpretation of legislation. 72 Wis. 2d at 225–26, 240

[6] This decision supersedes a previous decision originally published in the same page span of the reporters.

N.W.2d at 405. On appeal by the applicant, the Supreme Court held that the agency's denial of the permit due to a change in how it viewed legislation amounted to a rule subject to rulemaking procedure. 72 Wis. 2d at 237, 240 N.W.2d at 410. The Court wrote:

> [W]hen the department changed its interpretation of [the legislation], it was engaging in administrative rule making. Those who are or will be affected generally by this interpretation should have the opportunity to be informed as to the manner in which the terms of the statute regulating their operations will be applied…. This is accomplished by the issuance and filing procedures of [Chapter 227, Wisconsin Statutes.]

Id.

When an agency's decision creates a rule without proper rule making process, parties to the proceeding that led to the decision may challenge the improper rule on judicial appeal. *See* Wis. Stat. § 227.40(2)(e). The Wisconsin Statutes require courts to void any agency decision that amounts to a rule promulgated without proper rule making process. *See id.* 227.40(4)(a).

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

In creating the new compliance standard, the Commission engaged in rulemaking without proper process; therefore, it exceeded its statutory authority. In extending the new compliance standard to its Noise Protocol, the Commission created a new standard of general applicability that has the force of law and represents a change in the Commission's interpretation of PSC 128.14 – in short, exactly what the case law makes clear qualifies as a "rule" under section 227.01(13), Wisconsin Statutes.

The Commission's Noise Protocol is a Commission guideline for measuring and predicting sound levels in the area of wind farms. As its title indicates, its guidelines are for general application to "proposed and existing wind generation plants." The Noise Protocol is not a published administrative rule, but a guide wind farm operators must use follow in the measurement

of noise. It is a technical guide providing procedures for the measurement of sound, e.g. two sound level measurements are to be taken at three locations at before construction of the wind farm.

The Town is not arguing that the current version of the Noise Protocol, without the new compliance standard, amounts to a rule, or should have been promulgated as a rule. Rather, the 95% compliance standard as added to the Noise Protocol will fundamentally change the purpose and effect of this guideline. The Noise Protocol as modified will now state a standard for enforcement of the PSC 128 absolute noise limits. *See* Wis. Admin. Code § PSC 128.14(3). This compliance standard, no matter how vague and defective, once incorporated into the Noise Protocol will be enforceable through the imposition of forfeitures under the Wisconsin Administrative Code and the Wisconsin Statutes. *See id.*; *see also* Wis. Stat. § 196.491. It will apply to all existing wind farms as well as those proposed in the future.

As defined by *Cholvin*, the 95% compliance standard adopted for state-wide application amounts to a new rule: the Commission describes it as a "standard" which is synonymous with a rule; this standard will be adopted into the Commission's Noise Protocol, which applies to "proposed and existing wind electric generation plants" and is therefore of general application; the new compliance standard determines whether a project complies with the noise limits of PSC 128.

Failure to show compliance with the new compliance standard will mean violating PSC 128.14. Such violations are enforceable by the Commission under the Wisconsin Statutes and the Wisconsin Administrative Code, and enforcement may include forfeitures; (4) the new standard was created and adopted by the Commission in its proceeding on Highland's application, and adopted for general application through its directive for staff to modify the Noise Protocol accordingly; and (5) the new standard interprets and implements the noise limits of PSC 128.14. *Cholvin*, 2008 WI App at ¶22, 313 Wis. 2d at 760, 758 N.W.2d at 124 (defining a rule as "(1) a

regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency").

The new compliance standard is also a clear reflection of the Commission's interpretation of PSC 128.14 – and one that changed between the original decision and the final decision. In the original decision, the Commission expressly and formally announced that it interpreted PSC 128.14 to impose absolute maximum noise limits. (Doc. 136, p. 6.) The new compliance standard is clearly a departure from that interpretation: it interprets PSC 128.14 to impose noise limits at an average of "95% of the time" compliance – meaning noise limits that are clearly not absolute maximums. (Doc. 144, p. 35.) This unannounced change in an interpretation of a rule is exactly the kind of change in interpretation that *Schoolway* called characteristic of a rule. 72 Wis. 2d at 237, 240 N.W.2d at 410.

As *Schoolway* noted, parties to an administrative proceeding and the public in general have a due process right to have notice and provide comment on an agency's approach to a rule that will dictate all future decisions. *Id.* This case is a perfect example of why that right is so important. The very reason parties such as the Town and Forest Voice intervened in this proceeding was their concern for excessive wind turbine noise and the harm it caused. There are countless other municipalities and citizens groups in Wisconsin that would have done the same were a wind farm proposed for their jurisdiction. If the Commission intended to interpret what all these parties assumed were maximum limits to mean something less than that, all these parties would want to have a say in what that something else would be.

This reality is not limited to those who oppose wind farms: wind farm developers, including Highland, have an interest and a constitutional right in being able to comment on what an all-

applicable, mandatory percentage-based standard should be. If given the opportunity, other wind farm developers would certainly be interested in providing evidence and arguments on what percentage should represent compliance – be it higher or lower than "95% of the time." By extending the new compliance standard to all future cases without notice, the Commission deprived those wind farm developers of their constitutional rights every bit as much as it did the Town and Forest Voice.

By creating what the Wisconsin Statutes define as a rule without proper rulemaking process, the Commission engaged in unauthorized rulemaking and exceeded its statutory authority. In doing so, it deprived the parties within and without this proceeding of their constitutional right to comment on the new standard, whether it be for or against it. Given these violations, the Court should do what courts in this situation have done before: void the Commission's decision. *See* Wis. Stat. § 227.40(4)(a).

D. The Commission's new compliance standard is void for being vague, ambiguous and impossible to enforce.

1. The Commission cannot issue orders or decisions that are so vague and ambiguous as to be impossible to interpret, enforce or review.

It is well established that administrative rules that are too vague or ambiguous are void. An administrative order is void if it is "so obscure that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability." *State v. LaPlant*, 204 Wis. 2d 412, 422–23, 555 N.W.2d 389, 393 (Ct. App. 1996) (citing *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 16, 291 N.W.2d 452, 456 (1980)). A rule must be capable of objective interpretation by the public that obeys it, the agency that enforces it, and the court that review it. *See State ex rel. Kalt v. Bd. of Fire & Police Comm'rs*, 145 Wis. 2d 504, 510, 427 N.W.2d 408, 411 (Ct. App. 1988).

The Wisconsin Supreme Court has a long history of voiding administrative rules for vagueness and ambiguity. For example, in *Commonwealth Tel. Co. v. Pub. Serv. Comm'n.*, the Court voided a Commission decision for being impossible to administer or enforce. 252 Wis. 481, 32 N.W.2d 247 (1948). In that case, the Commission issued a decision setting a utility's rate, but allowing it to change in the future to give the utility "reasonable profit which it [sic] is proper for the utility to enjoy under all relevant facts and circumstances." 252 Wis. at 483, 32 N.W.2d at 248. However, the Commission failed to provide any guideline as to what it meant by "all relevant facts and circumstances" in the future. 252 Wis. at 484, 32 N.W.2d at 248.

The Court voided the Commission's decision for vagueness and ambiguity. *Id.* The Court held that, without specific guidance as to what the Commission meant by "relevant facts and circumstances," the order was impossible to administer: the public and the courts would have no way of determining whether the rate would be adequate in the future. *Id.* The Court wrote:

> How can the Commission or the reviewing court or the utility or the public determine whether the profit is proper unless the Commission makes specific findings of the 'relevant facts and circumstances'? The Commission must determine what those are and set them forth as required by law. Those essential facts which control each case will then determine the rate base.
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> ***
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> If the rule were otherwise, the courts would have no rule to apply upon review, and the Commission could on rehearing in this same case a year hence determine that the present rate is unreasonable and that $25,000 of profits would be reasonable for the company to enjoy; and the consumers would then be bound by the Commission's abstract conclusion of 'reasonableness.'

252 Wis. at 484–85, 32 N.W.2d at 248–49.

2. 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.

The new compliance standard is impossible to interpret, enforce or review. The

Commission provided no definition as to what it meant by "the time." (*See generally* Doc. 144.) In effect, the Commission left the "5% of the time" in which the Project and any other wind farm may exceed PSC 128.14 noise limits up to impossible interpretation.

A quick survey of how many different ways one could interpret "5% of the time" highlights the absurdity of the window the Commission has left open. The new compliance standard allows wind farm operators to exceed PSC 128.14 noise limits for 5% of any time period. (*See id.* at p. 35.) In effect, that allows the Project and future wind farms to operate in excess of PSC 128.14 in any of the following scenarios:

- For 3 minutes per hour (5% of an hour);
- For 48 minutes during the daytime (5% of the 16-hour daytime period)[7];
- For 24 minutes during the nighttime (5% of the 8-hour nighttime period)[8];
- For 1 hour and 12 minutes during an entire day (5% of a 24-hour day);
- For 8 hours and 24 minutes during a week (5% of a 7-day week);
- For 1.5 days during a month (5% of a 30-day month);
- For 18 days and 6 hours during a year (5% of a 365-day year); or
- For three-quarters of a year during the life of the Project (5% of a 15-year lifetime).

The lack of definition of "the time" also allows for non-continuous exceedances. For example, within the 24 minutes of exceedances permissible during the nighttime period, the standard allows for 6-minute exceedances every other hour as opposed to an ongoing exceedance of 24 consecutive minutes.

To add insult to injury, the Commission also failed to limit the severity of exceedances

[7] PSC 128.14 defines "daytime" as the 16-hour period between 6:00 a.m. and 10:00 p.m. Wis. Admin. Code § PSC 128.14(1).

[8] PSC 128.14 defines "nighttime" as the 8-hour period between 10:00 p.m. and 6:00 a.m. *Id.*

within the "5% of the time" window. (*See generally id.*) The Commission imposed no dBA limit on exceedances, and no limit on the number of homes – or their proximity to the wind farm – that can be subject to exceedances. In effect, within their "5% of the time" window, the Project and future wind farms can subject any number of homes to any level of noise. (*See generally id.*) It may be one turbine subjecting one home to 51 dBA – or it may be every turbine subjecting every home to 71 dBA for some undefined period.

The new compliance standard makes it impossible for noise limits to protect the public, and for anyone – be it the public, the Commission or a court – to ever find or enforce a violation. A wind farm operator will always be able to retrospectively justify exceedances as within a timeframe of their choosing.

Consequently, the new compliance standard does exactly what PSC 128.14 meant to prevent: exposes the public to the harms of unlimited and unchecked wind turbine noise – and gives them no resort. With no resources to monitor every turbine and every home, the public, the Commission and the courts will be powerless to keep wind farm operators from maximizing profit by maximizing noise – at the expense of the public.

The new compliance standard, devoid of meaning or definition, is too ambiguous and vague to follow, enforce or review. Therefore, the Court should do what the Wisconsin Supreme Court mandated be done in these situations: void the Commission's decision.

II. The Commission violated Wisconsin law by applying different standards to similarly-situated individuals without a proper hearing or substantial evidence.

Throughout the original proceeding, the Town and Forest Voice presented evidence that some Town residents had health conditions that made them sensitive to noise, such as Parkinson's disease and autistic syndrome. (Docs. 331, 332, 335, 337, 339, 341, 343, 345, 347.) The Town and Forest Voice identified at least seventeen homes whose residents had health conditions

sensitive to noise and shadow flicker. (*See id.*) From then on, the Town and Forest Voice introduced evidence and arguments in favor of more conservative noise projections and lower noise limits for those homes. (*See, e.g.*, Doc. 53, pp. 7–8, 19–20.) Until November of 2012, neither the Commission nor Highland suggested any extra protection to those homes.

On November of 2012, Highland witness Jay Mundinger testified that Highland was re-siting certain turbines to reduce noise at six residences – but made no mention of any other residences that the Town and Forest Voice had previously identified. (Doc. 215, pp. 581:10–582:2.) Mr. Mundinger's only explanation was that, pursuant to off-the-record discussions with Highland, the Commission staff had "identified" those particular six over others:

> 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.

(*Id.*) To the Town's knowledge, no other party ever received notice of this discussion. The record reflects none.

Town Chairman Jaime Junker rejected Highland's proposal because it appeared to make matters worse for some residents. Responding to Mr. Mundinger, Mr. Junker noted that Highland's proposed re-siting would actually put turbines closer to some of the sensitive residences.[9] He also offered evidence of other similarly situated residents with noise sensitive conditions. (Docs. 331–32.)

Throughout the rest of the original proceedings, there would be no evidence on how or why Commission staff made these selections or determinations. During cross-examination, Mr.

[9] Mr. Junker's rebuttal testimony of November 29, 2012 (PSC Ref. # 117172) appears to be missing from the transcripts of pre-filed testimony, which the Court received as a compilation of all pre-filed testimony.

Mundinger did not provide the name(s) of the Commission staff person(s) who had "identified" the six selected residences – though he did admit the re-siting excluded other residences the Town had identified as sensitive. (Doc. 222, pp. 1117–19.) During post-hearing briefing, Highland never explained the selection; Commissions staff was equally silent in its briefing memorandum. (*See generally* Doc. 80; *see also* Doc. 92, pp. 29–32.) Despite the lack of response from Highland and Commission staff, the Town and Forest Voice argued strenuously for the extension of protective standards to more sensitive residences. (Doc. 57, pp. 5–8; Doc. 58, p. 3.)

Despite the highly contested nature of the issue, in its original decision, the Commission made no findings or determinations regarding any sensitive residences or additional protections for them. (*See generally* Doc. 136.) The original decision only briefly mentioned the re-siting in its description of the Project:

> In responses to concerns expressed by residents of the project area at the public hearing, Highland provided revised project layouts, which use some alternate turbine sites rather than Highland's original preferred sites.

(*Id.* at pp. 5–6.) The Commission made no further mention of the proposal, excluded sensitive residences, or of a lower noise standard for the selected residences. (*See generally id.*) When the Commission denied Highland a CPCN for failing to ensure the Project would comply with the 45 dBA nighttime noise limit of PSC 128.14, the issue became moot.

When Highland petitioned the Commission to reopen the proceeding, it extended a new and different proposal for the six selected residences: it proposed to apply a 40 dBA nighttime noise limit as a condition of the Project's approval. (Doc. 114, p. 19.) When the Commission reopened the proceeding, it ignored the fact that the size of the population of sensitive residents was an undecided and contested issue from the original proceeding. It simply adopted Highland's proposal as a decided issue. (*See* Doc. 139, pp. 1–2.) The Commission ordered that the reopened

proceeding would address the following issues:

> II. Issues:
>
> A. The record shall present detailed evidence that addresses the following:
>
> 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.* (emphasis added).) Somehow, the Commission had officially decided that only the six residences deserved additional protection. All without any explanation as to why or how Commission staff had selected these residences, or related findings of fact and conclusions of law.

The rest of the proceeding made clear the exclusion of the remaining sensitive residences was a decided matter – and that there would be no consideration of the other sensitive residences. During the reopened proceedings, the Town sought to introduce evidence that the Commission should extend the same protection that it had extended to the six sensitive residences to other, similarly-situated residences. (Doc. 214, pp. 45–49.) Excluding that evidence, the administrative law judge made it perfectly clear that the Commission had already made up its mind. (*Id.*) The following is the exchange that took place during the status conference before the hearings on

reopening:

(Exchange between counsel for the Town and the administrative law judge):

> Town's Counsel: That 40 dBA standard is a blanket of security to these folks with problems similar to the six. [Town Chairperson] Jaime Junker wants to testify about who the other folks are….
>
> ALJ: We won't be doing that because my understanding is the order [to modify the second prehearing conference memorandum] specifically points out the six residences having the problem. We're not adding to the extent that the – we won't be changing that issue in particular in terms of adding more residences …. The issue is the issue.
>
> ***
>
> Town's Counsel: Well, the [Commission] staff … looked at another individual. What if – look, the public interest requires us to dig deep. [Town Chairperson Jaime] Junker just wants the [Commission] to address this question, what about the other seven individuals –
>
> ***
>
> ALJ: They evaluated the situation and they picked out those six. If they have new information about the extra one the [Commission] identified so that's new information, that's one thing, but to bring up what the Commission has already seen and is not interested in this according to the issues list, not saying where should the 40 dBA limit apply which residences [sic], these six so I can only go with these six.

(*Id.*)

During the hearings, the Commission did not make available the Commission staff witness apparently responsible for picking the six sensitive residences over others. (Doc. 237, pp. 2202–2214.) The witness, Mr. Michael Jaeger, had been scheduled to testify that day – but never showed. (*Id.*; Doc. 142, p. 4.) The Commission availed an alternative witness – but that witness denied any knowledge on the selection of the six sensitive residences. (Doc. 237, p. 2209.) When the Town's counsel insisted on cross-examining Mr. Jaeger, Commission counsel declined to make him available at a later time. (*Id.* at p. 2214.)

Despite the lack of evidence and a full hearing on the issue, in its final decision, the Commission formally adopted the selection of the six residences to the exclusion of the other similarly-situated residences. (Doc. 144, p. 48.) The Commission made it expressly clear that it was "unwilling to extend this accommodation to others…." (*Id.* at p. 17.) The Commission then made the selection of the six an order point – therefore making it an official requirement of Highland's CPCN. (*Id.* at p. 48.)

Even within the six identified residences, the Commission refused to extend protection to any individuals but those currently living there. (*Id.*) The Commission's order points were:

> 8. The 40 dBA limit shall only apply during the nighttime hours of 10:00 p.m. to 6:00 a.m. at the six identified residences with sensitive individuals, provided however that the 40 dBA limit shall not apply to one of the six identified residences if Highland confirms that the occupant with the sensitive condition no longer resides or spends significant time at the residence.
>
> 9. Highland may eliminate the 40 dBA limit at any of the six identified residences when the resident with special needs no longer resides at the residence.

(*Id.*) Despite arguments from the parties, the Commission made no exception for residents that may develop health conditions in the future, or for residents with current health conditions that may move into unprotected homes.

For the protection of the public interest, the Town appeals the Commission's determination to adopt Highland's proposal of 40 dBA nighttime noise levels for six households whose residents have health conditions considered sensitive to wind turbine noise. Highland's proposal, while appearing helpful, falls far short of protecting the Town's most vulnerable residents. It represents a feeble mitigation effort for a handful of people which ignores all of the families and individuals in the Town who may suffer significant impacts to their health from Highland's wind turbines. It represents a gimmick to obtain project approval. The Commission erroneously adopted Highland's proposal through procedural error and without a basis in substantial evidence.

A. The Commission failed to provide a full hearing on the selection of sensitive residences for additional protective standards.

1. The Commission cannot decide a contested issue without providing a full hearing on that issue.

The APA gives every party to a contested case hearing the right to a hearing. *See* Wis. Stat. § 227.44(1). The Wisconsin Supreme Court established what amounts to a proper hearing in contested cases over seventy-five years ago. *See Wis. Tel.*, 232 Wis. at 274, 287 N.W. at 122. The Court articulated three elements of a proper hearing:

> (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto.

232 Wis. at 294, 287 N.W. at 133. In that case, despite the fact that the record spanned over eight thousand pages of testimony and over four hundred exhibits, the Court still voided a Commission decision for failure to allow the parties to present evidence, cross-examine witnesses, and argue the merits. 232 Wis. at 295–96, 287 N.W. at 134.

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

The Commission decided to adopt Highland's proposal and Commission's staff selection of the six sensitive residences without a full hearing on the issue. The Commission gave no indication that the selection of any residences as "sensitive" was an issue in the original proceeding: it provided no notice on the issue, and it reached no finding or conclusion on the issue. Yet, without warning or official decision, it simply settled on the six when it reopened the proceeding. The parties never had what the Wisconsin Supreme Court has called the fundamental elements of a proper hearing: proper notice, opportunity to present evidence and arguments, and opportunity for cross-examination. Much to the contrary, when the parties tried to have a hearing

about the selection of the residences, the Commission went out of its way to foreclose it by excluding evidence and precluding cross-examination.

The Commission had the obligation of giving the parties a full hearing on the selection of sensitive residences for additional protection as part of the reopened proceedings. Highland's proposal to extend a 40 dBA noise limit to the six sensitive residences was the equivalent of an administrative pleading. It was a condition Highland proposed in a petition for reopening. It was no different from the other conditions Highland proposed in that same petition, such as the condition of implementing the curtailment plan. The latter condition received a full hearing on its sufficiency – and the six sensitive residences proposal should have been no different.

A full hearing would have allowed the Town and Forest Voice to provide the input to which they are entitled under section 227.44, Wisconsin Statutes. It would have allowed them to properly represent the interest of their constituents by advocating for more protection for more residents – the very purpose of their intervention in the proceeding.

The Commission's justification for these actions, that the sensitive households issue had been decided in the original proceeding, was baseless. The original order did not even identify the sensitive residences issue much less explain how households were chosen. It made no determination whatsoever regarding the sensitive residences.

Moreover, even if the Commission adopted Highland's standard out of an "abundance of caution," it is not exempted from the due process requirements for a contested case proceeding. A disputed issue so legally important that it becomes a condition of approval and an order point requirement necessitates a hearing. Wisconsin law requires it.

The Commission circumvented the fundamental due process safeguards in Wisconsin law by accepting an applicant's voluntary proposal without evidence to support that proposal. Giving

free rein to an agency to accept such proposals in approving a construction application runs counter to the purpose of the APA to ensure uniformity, predictability and consistency in administrative decision making. Allowing this kind of agency decision would allow an agency to adopt any finding without notice or evidence simply because the underlying proposal is voluntary.

While such private staff-applicant discussions may take place, *see* Wis. Stat. 227.50, absent the opportunity for cross-examination of the staff person involved, the substance of the discussions on this important issue remains secret, and the basis for the selection of certain residents over others remains unjustified. The reason for the exclusion of households remains unknown because the Commission failed to produce Mr. Jaeger and prohibited the Town from litigating this issue in the reopened proceeding. The Town was precluded from presenting evidence about other similarly situated households and could not effectively argue for the inclusion of other Town folk because it had no way of knowing staff's criteria for selection. Even though Commission staff's private discussions were not ex parte communications, the Commission's failure to allow for cross-examination of the key staff witness creates an appearance of impropriety that emphasizes the need for a full hearing.

The principle of fair play is an important factor in a consideration of due process of law. Parties in a legal proceeding have a right to be apprised of the issued involved and to be heard on such issues. A finding or order made in a proceeding in which there has not been a "full hearing" is a denial of due process and is void. *General Electric*, 3 Wis. 2d at 227, 88 N.W.2d at 691.

As a result of the Commission not affording the Town a hearing, the Town residents who testified to noise sensitive health conditions and are similarly situated to the six households will never have an explanation for why they were excluded from the protective noise limits. And because they are not covered by the 40 dBA standard, these residents will have no recourse if the

louder levels of wind turbine noise to which they will be exposed harm their health. Other residents of the Town who already have or may develop noise sensitive conditions will be similarly excluded from a protective standard, for no reason.

The Town had a right to contest Highland's proposal related to sensitive households, and to present its evidence on other similarly situated households. The Town had a right to argue this matter on the "whole evidence" to the Commission. As a result of the Commission's errors, the Town was not afforded a full hearing on a contested issue causing prejudice to the Town in presenting its case. Accordingly, the Commission's order should be set aside and voided as violating the Town's due process rights, as provided in Wis. Stat. § 227.57(6).

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

1. The Commission cannot use unexplained, off-the-record exchanges between the applicant and staff as "substantial evidence on the record" upon which to base a decision.

The Wisconsin Supreme Court has made clear that unexplained testimony from Commission staff cannot amount to the "substantial evidence on the record" that the Wisconsin Statutes require be the basis for agency decision. *See* Wis. Stat. § 227.57(6). For example, in *Madison Gas & Elec. Co. v. Pub. Serv. Comm'n.* ("MG&E"), the Court reversed a Commission decision because it contained a finding of fact based on a figure whose calculation Commission staff failed to explain. 109 Wis. 2d 127, 325 N.W.2d 339 (1982).

MG&E involved a Commission decision to limit the extent by which a utility could raise its retail rates. 109 Wis. 2d at 129–30, 325 N.W.2d at 341. The analysis involved a projection of the utility's wholesale rates: the more the utility could sell in wholesale, the less the Commission would allow it to charge for retail. *Id.* During the proceedings, a Commission staffer testified that staff had arrived at a wholesale projection figure higher than the utility's proposed figure – but

offered no testimony as to how staff had arrived at the higher figure. 109 Wis. 2d at 130, 325 N.W.2d at 341. The utility offered no rebuttal to that testimony. *Id.* In its decision, the Commission adopted staff's projection, as opposed to the utility's projection. *Id.* The utility appealed, arguing the Commission's decision lacked a basis in substantial evidence. 109 Wis. 2d at 128, 325 N.W.2d at 340.

The Wisconsin Supreme Court reversed the Commission's decision for lack of substantial evidence. 109 Wis. 2d at 134–35, 325 N.W.2d at 343. The Court noted that the utility had conceded its own wholesale projections were inaccurate when it failed to challenge the staff's projections. *Id.* Nonetheless, the Court held the Commission's adoption of staff's projections lacked a basis in substantial evidence because staff had never testified as to how it arrived at its proposed figure. *Id.* The Court wrote: "Even if we accept that the engineer's testimony indicated that some [wholesale] capacity could be sold, there's no testimony as to how much could be sold." *Id.*

Similarly, in *Wis. Power & Light v. Pub. Serv. Comm'n* ("WP&L"), the Court reversed a Commission decision because it adopted a recommendation staff had reached pursuant to off-the-record discussions with the applicant – which staff never explained on the record. 171 Wis. 2d 553, 570–72, 492 N.W.2d 159, 166 (Ct. App. 1992). In *WP&L*, the Commission set the utility's rates based in part on a staff estimate of uncollected costs. 171 Wis.2d at 559–60, 492 N.W.2d at 161. Staff, in turn, had derived this estimate from its selection of six projects involving uncollected costs, projects it had selected in off-the-record discussions with WP&L. 171 Wis.2d at 571, 492 N.W.2d at 166. Staff offered no explanation for how it came to select these particular six projects, other than in these discussions. *Id.* The Court reversed the Commission:

> The problem here is an absence of *on*-the record evidence indicating how the commission arrived at the [final] figure. We are unable to ascertain any support in

> the exhibit for the commission's claim that its staff selected the six "most blatant [ ]" overages-or if the staff selected them as the basis for the rate based reduction, why it did so."

Id. (emphasis in the original). Noting that the record was "both complex and voluminous," the court declined to sift through the record to find supporting facts. *Id.*

2. The Commission cannot give different treatment to similarly-situated parties without substantial evidence in the record to distinguish them.

The courts have also held that an agency cannot give different treatment to similarly-situated parties unless it provides a proper distinction between those parties. *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *Westring v. James*, 71 Wis. 2d 462, 477, 238 N.W.2d 695, 703 (1976). State and federal courts have long held when an agency extends a particular treatment to one party or constituent, it cannot deny that same treatment to other parties or constituents unless it provides a distinction between those parties to justify the unequal treatment. *Westar*, 473 F.3d at 1241.

Absent an explained distinction, all parties before an agency are considered to be equal under the law. *See id.* To give unequal treatment or unequal protection to parties that are equal under the law is a violation of the Wisconsin and United States Constitutions. *Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756, 760 (1987); *GTE Sprint Commc'ns Corp. v. Wis. Bell, Inc.*, 155 Wis. 2d 184, 193, 454 N.W.2d 797, 800 (1990).

3. The Commission selected the six sensitive residences based solely on unexplained, off-the-record exchanges between the applicant and staff.

Commission staff's unexplained selection of six out of the population of "sensitive" residences is exactly the kind of unsupported conclusion and arbitrary recommendation that *MG&E* and *WP&L* held as insufficient to support a finding by the Commission. As in *MG&E*, the Commission simply adopted a figure that staff had proposed – even though the staff never

explained how it arrived at that figure. As in *WP&L*, the Commission simply relied on the staff's off-the-record deliberation to support a distinction between the six selected residences and other similarly-situated ones – even though the staff never explained the distinction *on*-the-record. As those two cases make clear, the standard is not whether the record shows a recommendation or conclusion that supports a decision: it is whether the record shows an *explanation* to support a recommendation or conclusion. *See MG&E*, 109 Wis. 2d at 134–35, 325 N.W.2d at 343; *WPL*, 171 Wis. 2d at 570–72, 492 N.W.2d at 166.

MG&E makes clear that the Commission cannot argue it was the responsibility of the Town, or of any other party, to challenge the selection of the six residences – or to somehow prove other residences were similarly situated. In *MG&E*, the Wisconsin Supreme Court concluded that the appellant's failure to challenge the staff's conclusion did not change the staff's obligation to explain how it had arrived at that conclusion. 109 Wis. 2d at 134–35, 325 N.W.2d at 343. A party's choices do not relieve the Commission from its obligation to make only those findings that have support in "substantial evidence in the record."

For similar reasons, *WP&L* makes clear that the Commission cannot argue the voluntary nature of the six sensitive residences proposal excuses the lack of evidence to support the exclusion of the other sensitive residences. The fact that the staff could have picked all or none of several available choices does not relieve the Commission from its obligation to support the adoption of the selected choices with "substantial evidence in the record."

Agencies must be required to supply a sufficient evidentiary basis and findings of fact. The only way courts will be able to effectively evaluate agency decisions is if the agency provides a sufficient record for review. Courts will be unable to determine the actual basis for an agency decision if the record lacks any evidence supporting the agency's decision. Such a situation would

encourage agencies to produce scanty records in order to escape judicial scrutiny. We want to ensure that agencies are making decisions based on actual evidence in the record rather than making their own inferences regarding the case. Parties to a case have a due process right to know why an agency made a certain decision.

Allowing an agency decision to stand that was based on no evidence whatsoever sets an alarming precedent for future proceedings. This would allow agencies to make uninformed decisions based on incorrect information, or based on their own will. It is particularly critical in matters concerning public health and safety that an agency be fully informed of the facts and allow parties to present evidence regarding a protective standard under consideration. Requiring decisions based on substantial evidence, and definite and specific findings, prevents arbitrary decision-making. If an agency knows that it may be subject to close scrutiny in subsequent proceedings, it will make sure to follow the proper procedures and take more care in making decisions. When an agency fails to inform itself about facts relating to health concerns, it leaves communities like Forest unprotected.

Ultimately, the Commission's unexplained decision to select six residences out of many eligible for protection amounts to a violation of constitutional equal protection rights. Federal and state case law makes clear that the Commission cannot extend protection to some, but not others, without offering a distinction to support the difference. *Westar*, 473 F.3d at 1241; *Westring*, 71 Wis. 2d at 477, 238 N.W.2d at 703. In this case, the Commission offered no such thing: it drew a distinction without a difference.

The Commission adopted Highland's proposal and the staff's recommendation with no explanation or reason to support it. The Town now asks the Court to do what courts have held must be done in this situation: void the Commission's decision, and remand the case for a full

hearing on how many residences should receive protective standards. *See* Wis. Stat. § 227.44.

III. The Commission failed to give the Town appropriate deference in its interpretation of its own land use plan.

For the past several decades, the Town's character as a quiet residential community has generated considerable population growth. (Doc. 365, p. 35.) The Town has conducted land use and land use planning to accommodate and encourage this residential growth. (*Id.*; Doc. 266, p. 60.) Over the last twenty years, residential land use has grown at a staggering rate of 3.5% per year. (Doc. 265, p. 35.) During that period, the number of parcels used for residential development has grown by 82.1% and the number of acreage used for that same purpose has grown by 135.9%. (*Id.*) In stark contrast, not a single parcel or acre was used for industrial development during that same period. (*Id.*)

In order to continue accommodating and encouraging residential growth, the Town adopted a comprehensive land use and development plan (the "Comprehensive Plan") in December 2009. (Doc. 264, p. 13.) The Town's Comprehensive Plan guides and regulates land use and development through 2030. (*Id.* at p. 3.) The Comprehensive Plan's primary purpose is to preserve the Town's nature as a quiet, rural area for residential development. (*Id.*) Not coincidentally, the Comprehensive Plan makes clear that industrial development stands in direct conflict with the Town's goal for land use. (Doc. 265, p. 36.)

The Comprehensive Plan imposed significant limitations on industrial development within the Town. (*Id.* at p. 30; Doc. 266, p. 60.) It expressly limited all commercial and industrial development to three locations: an area known as Hamlet of Forest, an area between Hamlet of Forest and US Highway 63, and the intersection of state highway 64 and US Highway 63. (*Id.*) Even within these areas, the Comprehensive Plan made clear that the Town would only allow

industrial development that is consistent with the purpose of the Comprehensive Plan. (*Id.* at 60.) Specifically, it provided:

> Proposed economic development projects and sites should be evaluated on a case-by-case basis. Foremost, the proposed project should be consistent with the community's vision and Comprehensive Plan. The question 'is it compatible with the rural nature of the community and does it pose a threat to farmland, woodlands, and most importantly surface water and groundwater of the community' should be asked. Also, impacts of the proposed project on local roads and services and the scale and scope of the proposal in character with the nature of the Town should be looked at. These examples are the types of inquiries the community will make when reviewing a proposed economic development project.

(*Id.*)

The Comprehensive Plan contemplated considerable growth in residential land use – and absolutely no growth in industrial land use. By the year 2030, it estimated a population growth of 22% and a residential land use growth of 57%. (*Id.* at 39.) In contrast, it estimated an industrial land use growth of zero percent. (*Id.*) The Comprehensive Plan made the Town's land use plan clear: to accommodate and encourage residential growth – and to contain and discourage industrial growth. (*See id.* at 36.)

A. Municipalities are entitled to deference in their interpretation of their own land use laws.

Wisconsin law prohibits the Commission from approving projects that significantly conflict with municipalities' land use laws. Section 196.491, Wisconsin Statutes, prohibits the Commission from issuing a CPCN for any facility that will "unreasonably interfere with the orderly land use and development plans for the area involved." Wis. Stat. § 196.491(3)(d)(6). Nothing in the statute defines the term "unreasonably interfere"; therefore, the term's definition depends on the ordinary meaning of its plain language.

According to the Webster dictionary, the term "unreasonably" means "not fair, sensible or appropriate"; and the term "interfere" means "to become involved in the activities and concerns of other people when [one's] involvement is not wanted." Merriam-Webster.com, http://www.merriam-webster.com/dictionary (last visited July 22, 2014). In effect, whether a facility "unreasonably interferes" with a local government's land use and development plan depends on whether the facility "becomes involved" in land use and development "when its involvement is not wanted" by the local land use and development plan in a way that is "not fair, sensible or appropriate." *See id.*; Wis. Stat. § 196.491(3)(d)(6). The question then turns on whether a local land use and development plan "wants" a facility.

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

B. The Commission failed to give the Town appropriate deference in the Town's interpretation of its own land use and development plan.

The Commission failed to give appropriate deference to the Town's interpretation of its own land use and development plan. *See* Wis. Stat. §§ 196.491(3)(d)6, 227.49(3).

In the original proceeding, the Commission noted that the project could unreasonably interfere with the Town's land use and development plan. (Doc. 136, p. 16–17.) But the Commission gave no deference to the Town's interpretation of its own plan in its final decision on reopening. The Commission wrote:

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

(Doc. 144, p. 14.)

But if the Town were of the opinion that the project would not "unreasonably" interfere with its land use plan, it would not have opposed the project so vehemently. Both the original and the reopened proceedings made it perfectly clear to the Commission that the Town saw the project as a completely unreasonable interference with the Town's intended use of the land.

The Town expressly told the Commission that the Comprehensive Plan envisions maintaining the rural character of the Town and siting large-scale developments in a limited area. While the Comprehensive Plan does support renewable energy development, it clearly does not support large-scale industrial development in this area.

The Town's Comprehensive Plan openly discouraged industrial development. (Doc. 265, p. 36.) The Town expected rapid residential growth within the next 30 years. (*Id.* at p. 30.) Thus, it imposed significant limitations on large-scale development in the Town. (*Id.*; Doc. 266, p. 60.) While the Comprehensive Plan did allow renewable energy development, it was reasonable that the Comprehensive Plan did not envision industrial-scale energy development in a rural Town bursting with residential land growth. (Doc. 265, p. 39.)

But the Commission ignored the Town's interpretation of its land use laws. (*See* Doc. 144, p. 14.) The Commission failed to give any deference to the Town's interpretation. (*See id.*) The

Commission failed to consider that the Town was in the best position to interpret its own land use plan because the Town officials were "especially attuned to local concerns."

The Commission incorrectly relied upon its experience with previous wind projects in interpreting the Town's land use plan and the project's interference with it. (*See id.*) Specifically, the Commission noted:

> In prior cases, the Commission has found that development of wind generation facilities in rural, agricultural project areas did not unreasonably interfere with the land use and development plans at issue in those proceedings.

(*Id.*)

But this case was starkly different. The Town, with its principal duty to protect its citizens and the land its citizens depend on, is firmly against the project. In this case, approving a project in the same "rural, agricultural project areas" the Commission has dealt with before will have a detrimental, and ultimately unreasonable, effect on the Town's land use. By approving a CPCN for the project, the Commission would be imposing an industrial-scale wind farm project on an unwilling municipality – which in and of itself should be considered an unreasonable interference with the Town's land use and development plan.

Wisconsin law requires that an agency defer to a municipal government's interpretation of its own land use plan. Town's adopt land use plans to further the rational and orderly development of land to promote values that the Town and its citizens share. Allowing an agency to make a decision about a town's land use plan without affording proper deference will lead to patchwork development. When a company like Highland is allowed to build a large-scale industrial development that does not conform to the Town's land use plan it changes the nature of the area. What was once a rural, agricultural area with residences becomes an area of industrial development. The Town has already considered the competing interests at hand, and determined

that the area should exclude industrial development. The Town is especially attuned to local concerns. The Commission failed to provide the Town's interpretation proper deference. Therefore, the Court should void the decision.

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

In the reopened proceeding, the Commission required Highland to prove that its "curtailment plan" would ensure the Project's compliance with the noise limits of PSC 128.14 and the new, 40 dBA limit applied to the six sensitive residences. (*See* Doc. 139, pp. 1–2.) In a nutshell, the curtailment plan involved programming the Project's turbines to reduce rotor speed when wind speed and direction would otherwise lead a given turbine to exceed applicable noise limits at any given residence. (*See* Doc. 114, pp. 18–19.)

To show it could ensure the Project's compliance with applicable noise limits, the curtailment plan depended on three components. The first was prediction: Highland had to present noise models that showed the Project, with the turbines curtailed, would not exceed applicable noise limits on any home at any time. (*See id.*) The second was implementation: Highland had to show that it could program the wind turbines to reduce rotor speed depending on wind speed and direction. (*See id.*) The third was verification: Highland had to propose a noise monitoring plan robust enough to ensure noise limit violations would not go unnoticed. (*See id.*)

For prediction, Highland used a scientific noise prediction standard the wind industry commonly uses.[10] (Doc. 79, p. 3.) Using the model's variables and assumptions, it ran several computer simulations to come up with its prediction of the maximum noise that each home[11] would

[10] The name of the standard is ISO 9613-2. The record sometimes refers to the standard as "ISO" or "9613."

[11] The homes for which Highland had to demonstrate compliance with noise limits were "non-participating residences." Prior to applying for a CPCN, Highland had offered nominal "good neighbor" payments to Town residents in exchange for their consent to have their homes subjected to higher noise limits than those imposed by law.

receive when the Projected operated under the curtailment plan. (*Id.* at pp. 3–4.) Highland's results predicted compliance with limits on every home – although they also predicted every one of the six sensitive residences would be within 0.5 dBA of their 40 dBA limit, and another ten residences would be within 1 dBA of their 45 dBA nighttime limit. (*See* Docs. 240–41.) Still, Highland argued that its predictions ensured the Project would not exceed those noise limits because Highland "cannot operate [the standard] in any more a conservative fashion." (Doc. 237, p. 2222.)

For implementation, Highland depends on the manufacturers of whatever turbine it ultimately selects for the Project.[12] (Doc. 233, p. 1682.) If the manufacturer or the software cannot accommodate the specifics of Highland's curtailment plan, the curtailment plan will fail. (*See id.*)

For verification, Highland proposed a noise monitoring system based on two "fixed" noise monitors and one "roving" noise monitor. (*See* Doc. 114, pp. 15–16.) The two "fixed" monitors would provide ongoing noise measurements in two permanent locations near a few homes. (*See id.*) The "roving" monitor would provide noise measurement samples from one home at a time as scheduled, or from whatever home required noise measurement due to a complaint of excessive noise. (*See* Doc. 233, pp. 1671, 1691, 1848, 1864.) The Commission would ultimately order Highland to use four, as opposed to two, "fixed" noise monitors. (Doc. 144, p. 48.)

During the reopened proceedings, Highland would admit that all three of the elements had significant holes. Highland admitted or did not contest all of the following:

The residences that accepted "good neighbor" payments were "participating residences," for which Highland did not need to ensure the Project's compliance with noise limits.

[12] Highland's proposals always contemplated more than one turbine model. In its final decision, the Commission allowed Highland to use either a Siemens SWT-2.3 model "or another turbine model with equivalent noise specifications."

- The scientific model Highland used to make predictions required a 3 dB margin of error, and Highland had not implemented that margin of error (Doc. 237, pp. 1964, 2165, 2233);

- The software Highland used to make predictions calculated the final prediction by using averages, not absolute maximums (Doc. 233, pp. 1687, 1767–68);

- That same software did not account for meteorological variables that could made wind turbine noise louder (*id.* at pp. 1749–51);

- That same software did not account for the spikes in noise that result from a wind turbine turning its rotor blades in order to reduce rotor speed (*id.* at p. 1786);

- That same software did not account for the increase in noise that results from the gradual erosion of the tip of wind turbine blades (Doc. 237, pp. 2170);

- The wind turbines would not react to a change in wind speed or direction that would cause higher noise production unless that change was greater than 30 degrees in angle and persisted for longer than 10 minutes (*id.* at p. 1983; *see also* Doc. 274);

- Highland had not sent any part of the curtailment plan to the manufacturers of the proposed wind turbines, on whom Highland depended for the development of software that could accommodate the curtailment plan (Doc. 233, pp. 1666–67, 1879–80);

- No other wind farm in the world had ever used or tested a fully-automated curtailment plan that relies exclusive on software without human supervision, which Highland's curtailment plan does (*id.* at pp. 1717, 1797);

- Residents that complained of excessive noise at their homes would have to get "on the waiting list" for noise measurements from the "roving" monitor (Doc. 233, pp. 1691, 1761); and

- Once a "roving" monitor had measured noise at a home and found no violation, Highland would use that finding as a presumption that no violation would occur in other homes under similar conditions (*id.* at p. 1864).

Yet, in its final decision, the Commission found that Highland had met its burden to show the curtailment plan *ensured* the Project would comply with noise limits. (Doc. 144, p. 1.)

The record does not have substantial evidence to support the Commission's finding regarding the curtailment plan. The record may be vast and detailed, and Highland may have presented copious amounts of evidence to support the curtailment plan. But the gaps are too wide for the Commission to patch with inferences.

The record leaves no doubt that Highland's noise prediction underestimated actual noise levels that would occur at homes: it used averages and failed to include a margin of error. (*See* Doc. 237, pp. 1964, 2165, 2233; Doc. 233, pp. 1687, 1767–68.) It also leaves no doubt that, even if Highland's predictions were accurate, there is no evidence that any turbine manufacturer is willing or able to develop or run the necessary software. (Doc. 233, pp. 1666–67, 1879–80.) Regardless, the record leaves no doubt that, if the Project becomes operational, the Town's residents will never be able to enforce compliance with noise limits: all but four homes would receive the constant monitoring necessary to identify exceedances. (*See* Doc. 114, pp. 15–16.)

The scheme the Commission concluded "ensures" compliance with noise limit is nothing but an experiment. Its predictions ignored mandatory variables, bypassed scientific principles, and relied on fictional software. It is an unprecedented and untested system that would use Town residents as guinea pigs. Its failure would drive people sick – and ultimately away from their homes. The Commission's very purpose as an agency is to make sure that does not happen.

The APA requires the Commission to base every finding on substantial evidence in the record. Wis. Stat. § 227.57. In this case, the finding that needed support from substantial evidence was not whether the Project "may work," but whether the Project "will work." The record offered no such support. All it offered was patchwork, conjecture, and speculation. The courts have made clear the Commission cannot patch up gaps in the record with its own judgment – regardless of its experience in the area. *Gilbert*, 119 Wis. 2d at 199, 349 N.W.2d at 82. Accordingly, the Court

should void the Commission's decision and remand the case for a new hearing on whether Highland can patch the many holes left in its evidence.

CONCLUSION

For the foregoing reasons, the Town respectfully request that the Court void the Commission's decision to grant Highland a CPCN for the Project, and remand this case for a new hearing with instructions that the Commission correct its violations of administrative law.

Respectfully submitted this 1st day of August, 2014.

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