

**OFFICIAL FILING
BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Highland Wind Farm, LLC for a
Certificate of Public Convenience and Necessity
To Construct a 102.5 MW Electric Generation
Facility and Associated Electric Facilities, to be
Located in the Towns of Forest and Cylon,
St. Croix County, Wisconsin

Docket No. 2535-CE-100

**HIGHLAND WIND FARM, LLC'S EMERGENCY REQUEST TO HAVE THE
COMMISSION RECONSIDER ITS PRELIMINARY DETERMINATION IN THIS
DOCKET AND LEAVE TO PRESENT ADDITIONAL EVIDENCE**

EMERGENCY REQUEST

Highland Wind Farm LLC (“Applicants” or “Highland”) respectfully and urgently requests that the Commission not issue a final order in this proceeding at its March 1, 2013 open meeting. Applicants request that instead, the Commission – based on the contents of this submission – resume their discussion of the record, clarify any remaining issues, impose appropriate conditions to assure compliance with sound limits and to address any other matters of concern, and render a decision approving the Application. It is imperative that the Commission resume its discussion before cementing a denial of the Application in a final order. The Applicants have labored six years and spent nearly \$2.0 million on development of the Highland Project. *See* Osterberg Aff., ¶ 4¹. Of course, the Applicants fully expected the Commission to impose conditions in the order requiring full compliance with the law, including any applicable noise standard, and are ready, willing and able at their risk to comply with such conditions.

¹ In order to consider this new evidence as well as the other evidence provided with this submission Applicants seek leave to present additional evidence pursuant to Paragraph IV.A.5.f of the Prehearing Conference Memorandum (PSC Ref. #166193).

Rather than impose such conditions, however, the Commission to this point has determined it will deny the Application. If the Commission denies the Application rather than conditioning its approval, the value of Highland's \$2.0 million investment and six years of labor will evaporate. The investment will be lost because there is no time left for refiling a new application, seeking rehearing, or seeking reopening of a final order. If an order conditionally approving the Application is not issued before March 25, 2013, Applicants will miss the opportunity to participate in the recently announced Xcel Energy Wind RFP process and the chance to use production tax credits to help finance the Project, opportunities which are critical to the ultimate success of the Project. Osterberg Aff., ¶ 6. None of the procedural remedies typically available in the post-final decision phase, such as formal rehearing or reopening, can be completed in time for the investment to be rescued.

The devastating loss of this investment, and the jobs and other economic development benefits that go along with it, can be avoided if the Commission simply reexamines the existing record to assure itself that the Project will comply with PSC 128.14, and accepts Highland's offer to be subject to enforceable conditions requiring it to so comply and to demonstrate ongoing compliance. There is abundant evidence in the existing record to support it. If that evidence appears insufficient after further discussion, the Commission should accept the incontrovertible evidence provided with this submission that compliance with the noise standard is achievable, and approve the Application with the proposed conditions. The existing evidence is more than enough to support a conditional approval, however, because combined with the Commission's conditioning authority the debt and equity markets will assure compliance, and will therefore protect the public interest. In short, they will not provide a penny to the Project

unless and until those markets are satisfied that the Project can be built and operated in compliance with any conditions imposed by the Commission.

INTRODUCTION

At its open meeting on February 14, 2013 (“Open Meeting”) the Commission voted to deny approval of the Highland CPCN Application. The Application was rejected, in essence, because of a concern that the record contains no sound models showing that the Project, as designed, will operate in compliance with the PSC 128 45 dBA nighttime limit when using a 0.0 ground factor in the modeling. Ex.-HWF-Osterberg-1, pp. 9, 14 (Open Meeting Transcript (“OM Transcript”)).

Applicants implore the Commission to resume its discussion of the noise compliance issue before it issues a final order denying the Application, and do so on the basis of the record as it stands. The technological capabilities of the turbines being considered are such that the Project, as designed, can and will operate in compliance with the PSC 128 noise standards. Further, for the six sensitive residences, the turbines can be operated to meet a 40 dBA night time standard as suggested by Chairman Montgomery. To demonstrate this, Applicants have submitted with this request a sound modeling run using a 0.0 ground factor establishing that the Project can be operated to handle the worst case scenario in full compliance with the noise limits established in PSC 128. *See* Blank Aff., Exs.-HWF-Blank-3 and 4. Unless there is a reason to conclude that Applicants will refuse to comply with or will otherwise flout the noise standard, the Commission – as it has done in so many cases – should approve the Application subject to the condition that the noise limits established in PSC 128.14 are met, and if necessary, that the Applicants provide periodic evidence of such compliance.

Aside from the noise standard compliance issue, the discussion at the Open Meeting did not reveal any issues which would cause any of the Commissioners to deny the Application. To the extent there were concerns about other issues, the Commission discussed a number of conditions that would meet them. Applicants welcome the imposition of those conditions. To ensure a complete discussion, Applicants also request that when the Commission resumes its discussion of this matter and resolves the noise standard compliance issue, that it confirm the Project meets all of the other requirements for a CPCN. If there are concerns with respect to any of those requirements, the Applicants ask the Commission to address those issues, to the extent possible, through appropriate conditions in a final order.

I. THE PROJECT WILL MEET THE APPLICABLE NOISE STANDARD.

A. The Rules Contemplate Curtailment Of Operations To Comply With Sound Limits, And Highland Will Curtail Its Operations To Comply

Commissioner Nowak indicated in her comments at the Open Meeting that the model using a 0.0 ground factor supports denial of the CPCN, because it shows an inability for the Project to comply with PSC 128 standards “without curtailing production.” OM Tr., p. 11. That discussion did not take into account, however, that Wis. Admin. Code § PSC 128.14 *specifically allows curtailment for compliance with the sound standards*: “Methods available for the owner to comply with sub. (3) **shall** include operational curtailment of one or more wind turbines.” Emphasis added. In short, the Project must be given a chance to comply with the noise standard by curtailing production, especially where, as here, the Project is otherwise compliant with the other CPCN standards. That is precisely what the Commission recognized when it issued its Final Decision in the *Glacier Hills* proceeding. There, the Commission specifically allowed “operational curtailment of the turbine or turbines contributing to the exceedance of the noise limits” as one of the “methods available for WEPCO to comply with both the daytime and

nighttime noise limits.” Docket No. 6630-CE-302, Final Decision, pp. 24, 50 (Jan. 22, 2010) (PSC REF#: 126124).

The record as it stands shows that the turbines being considered for the Project are some of the quietest and technologically advanced turbines on the market today, and that they can be programmed to comply with noise limitations. Tr. Vol. 3, pp. 64-65; Ex.-HWF-Mundinger-1, App. E, Siemens 2.3 Brochure, p. 5, Nordex N117 Powerpoint, p. 10. Each of these turbines is individually programmable to automatically curtail its operation when certain wind speed and direction conditions exist. The Nordex technical specifications describe this capability in some detail:

Depending on the wind farm’s specific requirements, individual technical or regulatory specifications to the operation control can be made. These can be partial reductions or shutdowns. For example, the wind turbine can be operated noise optimized or its output can be limited if the feed-in power of the grid is reduced. Limited modes of operation based on a defined time schedule or depending on the wind direction are also possible.

Id. at App. E, Technical Description, p. 34. This technology is quite similar to other more conventional generation types that are programmed to follow load. Such units ramp up and down automatically as necessary to maintain the reliability of the system. Both the Nordex N117 and Siemens 2.3 have the capability to be run at power output levels significantly lower than full capacity and it is clear from the power curves already in the record that sound levels decrease with decreases in power levels. Ex.-HWF-Hankard-3.² In fact, the power curves already in the record depict exactly how much noise reduction occurs at different reductions of power output levels. Using those power curves, the operator calculates at what wind speed and direction an

² For example the Nordex N117 Power Curve data provides sound data for two different levels—0 and 1 with zero at full output and 1 in a reduced mode of 1750 kW. The level 1 data shows much lower sound emissions. The highest sound level in the reduced mode is 101dBA whereas at full output it is 105 dBA. Ex.-HWF-Hankard-3, Nordex Power Curve, pp. 2-3. Similar data is included in the Siemens 2.3 power curve data. The Siemens power curve calculates noise levels for six different levels of output and shows a 1 dB drop for each reduced level of power output. *Id.*

exceedance of the PSC 128 sound level will occur for a given receptor, and programs the power curtailment into the turbine in order to assure no exceedances are experienced. By programming the individual turbines to automatically ramp down to a predetermined level at such time as existing wind speed and direction would cause an exceedance of the 45 dBA limit, the Project, without operator intervention, will automatically reduce output to comply with the sound limit. To obtain a better understanding of each turbine's capabilities Applicants have provided additional documentation from the manufacturers describing how the turbines can operate in this manner. *See Osterberg Aff.*, ¶¶ 8-9, Exs.-HWF-Osterberg-2, 3, and 4.

As Chairman Montgomery noted, the Commission does not expect parties to weigh down the record by asking witnesses questions about information that can easily be gleaned from filed exhibits. OM Tr., p. 4. The Applicants endeavored to honor this expectation throughout this proceeding, and avoided introducing what appeared to be unnecessary technological details of the turbine curtailment procedure in live testimony, since the capability to operate the turbines in a reduced capacity based on wind conditions can be gleaned from the exhibits.³ In fact, none of the intervenors challenged or countermanded the Applicants' capability to use power curtailment to meet the 45 dBA regulatory limit. Instead, they focused their attacks on the Commission's adoption of 45 dBA as the regulatory standard and the potential for sporadic, momentary

³ Furthermore, Ms. Blank and Mr. Hankard both testified that the turbines' noise reduction mode could be used to bring noise levels below 45 dBA, if necessary due to worst-case scenarios. Direct-HWF-Blank-22; Direct-HWF-Hankard-12; Tr. Vol. 7, p. 1095.

exceedances, not whether Highland would be able to operate the Project in a manner that will ensure compliance.⁴

In sum, the Commission should resume its discussion of the noise issue to examine the existing record and this submission, which demonstrate that operational curtailment can and will achieve compliance with the applicable noise standard. Thus satisfied, the Commission should impose a condition requiring power curtailment as necessary to maintain compliance. In addition, the Applicants hereby commit to demonstrating compliance through post-construction testing in conformance with the Commission's own sound testing protocol, and welcome the imposition of that requirement as a condition of the CPCN.

B. Additional Modeling, Though Not Technically Necessary, Shows That Power Curtailment Will Achieve Full Compliance With Sound Limits.

In the Open Meeting discussion it was noted with interest that Applicants first submitted a model showing exceedances of the PSC Noise limits at a number of homes. It was further noted that "if the most favorable parameters in the applicant's first submission didn't show that sound levels for all nonparticipating residences were below the limits in PSC 128 it seems very likely that the turbine production would have to be curtailed at some point." OM Tr., pp. 11-12.⁵ Once again, the Commission's discussion in this regard inaccurately seems to assume that power curtailment is a bad thing, that it is not an appropriate strategy for sound limit compliance. As

⁴ Mr. Hessler did raise a general concern about the ability of operators to use turbine noise reduction mode to realize regulatory compliance, but it is clear he was not referring to the specific capabilities of the Nordex N117 or Siemens 2.3 turbines. Moreover, he noted that, even generally speaking, low noise operating modes can reduce the sound level by several decibels. Rebuttal-CW-Hessler-8. Mr. Slaymaker also made a general, and unsupported, claim that operational curtailment often achieves only a one or two decibel reduction; however, this statement is directly refuted by the power curve data set forth in Ex.-HWF-Hankard-3. Direct-Forest-Slaymaker-4. All other witness statements that were critical of relying on curtailment as a strategy were focused on the operator's ability to alleviate annoyance-based complaints, not on compliance with a regulatory noise limit.

⁵ Commissioner Nowak also indicated that Applicants changed to the more favorable 0.5 model after Mr. Hessler used the 0.5 ground factor. OM Tr., pp. 9-10. While Mr. Hessler put his model run into the record prior to Ms. Blank, Applicants were well aware of the 0.5 model run results before Mr. Hessler modeled the Project. The sound modeling using the 0.5 ground factor presented in Ex.-HWF-Blank-1 was run on May 7, 2012, just three days after Clean Wisconsin was granted intervener status.

shown above, however, it is not only appropriate, it is expressly contemplated as a compliance method by the only rules in existence in Wisconsin on wind farm sound regulation and has been expressly authorized by the Commission for the *Glacier Hills* project. Finally, if curtailment was not an appropriate mitigation strategy, the turbine manufacturers would not have wasted time developing the technology.

In any event, at the time Applicants submitted their Application, they included the 0.0 ground factor modeling runs because that was what Applicants used to microsite the Project.⁶ Given the results of those runs, which represent the worst-case scenarios, Applicants anticipated they would potentially have to mitigate and, in fact, the Application itself anticipated this:

HWF plans to perform a post construction noise assessment per PSC protocol. In the event mitigation is necessary measures to be taken may include installing insulation or sound deadening material in the offending wind turbine(s), installing landscaping, insulation and sound deadening material(s) at the residence; **or changing the operation of the wind turbine(s) to reduced noise output.”**

Ex.-HWF-Mundinger-1, p. 38. Until the Commission decision at the Open Meeting there was no basis in law or PSCW precedent to suspect that to obtain a CPCN an applicant must submit for the record a modeling run using a 0.0 ground factor with no exceedances of the PSC 128.14 noise limits. The original 0.0 ground factor runs, already in the record, establish that the Project meets, in all respects, the 50 dBA daytime standard. Ex.-HWF-Mundinger-1, App. V. The 0.0 runs also establish those residences that may not meet the 45 dBA nighttime standard during a worst-case scenario, thus identifying those homes where mitigation may have to occur at certain times. The mitigation could include any or all of the mitigation methods mentioned in the Application including operational curtailment as allowed under PSC 128.14(4)(c) and contemplated by the Applicants’ consulting experts. Direct-HWF-Blank-22; Direct-HWF-

⁶ Applicants initially ran the model with a 0.0 ground factor to be as conservative as possible in the micrositing process. Subsequently as Ms. Blank testified a 0.5 run was performed ‘for the purpose of assessing a realistic impact of the turbines on the land owners. . . .’ Rebuttal-HWF-Blank-2.

Hankard-12; Tr. Vol. 7, p. 1095. Thus, there should be no requirement for further modeling to demonstrate what the evidence already shows, that curtailment can bring the power levels, and therefore the sound levels down, to a level that complies with the sound limits imposed by the Commission.

However, to the extent that the Commission requires such further modeling to avoid any doubt, Applicants are providing with this submission sound modeling for both turbine models being considered using a 0.0 ground factor with operational parameters demonstrating the Project can be operated in compliance with the PSC 128.14 noise requirements. *See* Exs.-HWF-Blank-3 and 4. These sound modeling runs eliminate any need to infer compliance capability, and demonstrate conclusively that the proposed turbines are capable of complying with PSC 128.14 under the very worst case conditions for the very properties that were of concern during the Commission's discussion. Other than the reduced-power operating parameters, these runs employ the most conservative assumptions available, including a 0.0 ground factor, and noise propagation at maximum power in all directions. *See* *infra* p. 12, fn. 8. The probability of these conditions occurring at the same time, especially since the last assumption cannot really occur, is quite limited. When combined with the evidence in the record that a 0.5 ground factor assumption is a better predictor of actual field measurements, (Direct-CW-Hessler-7 to 8; Surrebuttal-HWF-Hankard-2), we know the time that conditions may exceed 45 dBA will be extremely limited. Yet to assure that such exceedances do not happen, the turbines being contemplated will be programmed to automatically deal with these very limited occurrences. Under these circumstances, on the basis of the existing record, and if necessary on the basis of

the additional information provided with this submission, a condition in the order requiring compliance, rather than outright denial, is warranted.⁷

C. Revising The Turbine Layout Through Additional Micrositing Will Not Improve The Modeled Results, and Is Rendered Unnecessary By Sound Limit Compliance Requirements.

It is important that the Commission understand that revising the turbine layout, as suggested by Commissioner Nowak, or conducting additional micrositing exercises, as suggested by Commissioner Callisto, will not produce the modeled result the Commission seeks.

Osterberg Aff., ¶ 2. The micrositing process the Applicants went through prior to filing the present Application involved an iterative process designed to identify the optimal turbine locations for minimizing the effects of noise and shadow flicker on nearby residences. Direct-HWF-Blank-17. Based on the parcels of land available to Highland, the identified turbine locations are the optimal *locations* for minimizing those impacts. (As noted above, operational controls are available to further reduce impacts.) That the micrositing process truly identified the optimal locations is demonstrated by the fact that the revised layout Applicants provided to address the six potentially sensitive residences produced both winners and losers in terms of noise and shadow flicker impacts. *See* Rebuttal-Forest-Slaymaker-2r: 20 to 3r: 2.

II. CONDITIONS ON THIS PROJECT WILL ADEQUATELY PROTECT THE PUBLIC INTEREST, JUST AS CONDITIONS HAVE PROTECTED THE PUBLIC INTEREST FOR COUNTLESS OTHER PROJECTS.

Issuing Highland a CPCN with a categorical sound limit condition and a post-construction sound testing condition is the appropriate way for the Commission to protect the public interest. Indeed, the Commission routinely issues conditional approvals and the

⁷ Applicants note that it would be unnecessarily restrictive for the Commission to impose a condition requiring the turbines to continuously operate at the reduced-power levels reflected in the model runs submitted with this request. The models demonstrate that compliance is entirely feasible; the actual turbine programming will utilize the automatic wind-based controls described herein to determine when reduced-power operations are necessary to meet the regulatory noise limits.

imposition of conditions in conjunction with an agency approval is a tried-and-true method of ensuring compliance with enumerated standards. See, e.g., *City of New Richmond v. DNR*, 145 Wis. 2d 535, 546, 428 N.W.2d 279 (Ct. App. 1988) (noting that DNR properly conditioned an air pollution control permit on the use of a dry scrubber-fabric filter baghouse control system to “reduce the negative impact of [air pollutant] emissions”); *Maple Leaf Farms v. DNR*, 2001 WI App 170, ¶ 29, 247 Wis. 2d 96, 633 N.W.2d 720 (noting that WPDES permit conditions operate “as a means to enforce compliance with surface and groundwater standards”); *Andersen v. DNR*, 2011 WI 19, ¶ 40, 332 Wis. 2d 41, 796 N.W.2d 1 (noting that the federal Clean Water Act gives EPA the authority to review every state-issued discharge permit to determine that it will “ensure compliance with” the Clean Water Act and that permit provisions relating to “reporting, monitoring, or sampling by the permittee are [adequate] to assure compliance with . . . effluent standards and limitations, required by the Clean Water Act”); *Public Intervenor v. DNR*, 156 Wis. 2d 376, 389, 456 N.W.2d 878 (Ct. App. 1990) (recognizing that in the context of approving a conditional grant of exemption from solid waste regulatory requirements DNR properly “based its grant of exemption on future compliance with stated conditions” and, in fact, “would have been seriously remiss had it not imposed conditions to ensure” a measure of protection to the public health and environment).

In many respects, a condition requiring Highland to construct the Project to comply with sound limits and to demonstrate post-construction operational compliance with a 45 dBA standard is no different than the thousands of monitoring and reporting conditions DNR has imposed to demonstrate compliance with numerical air emission and water pollutant discharge limits. Moreover, it is precisely the method the Commission used to address noise for the *Glacier Hills* project. For *Glacier Hills*, the Commission imposed a 50 dBA noise limit (and the

selective imposition of a 45 dBA summer nighttime limit upon receipt of neighbor complaints), required post-construction testing to demonstrate compliance, and specifically authorized operational curtailment as means to achieve compliance. *See* Final Decision, pp. 24, 50 (Jan. 22, 2010) (PSC REF#: 126124).

Denying Highland's CPCN Application out-of-hand simply because the modeling demonstrates that operational controls *may be required* to meet the numeric (i.e. dBA) limit⁸ is akin to DNR denying an air permit application simply because air modeling demonstrates that without proper operation of a baghouse control certain air quality limits will be exceeded, or denying a wastewater discharge permit application simply because mechanical treatment processes are required to meet certain water quality effluent limits. Just as the Commission recognized that the mechanical use of operational curtailment, together with post-construction testing, is a valid method for the *Glacier Hills* operator to achieve and demonstrate compliance with established noise limits, the Commission should issue Highland's CPCN with a categorical compliance condition with an identified noise standard, and appropriate post-construction noise compliance demonstration conditions, as it has in the past. Assuring compliance with conditions is a compellingly appropriate method to protect the public interest in this case given that noise limit compliance is the lone issue on which the Commission based its initial decision to deny the CPCN outright, and that there is no evidence in the vast record developed in this proceeding that reasonably controverts Highland's demonstrated ability to meet that requirement.

⁸ Indeed, it is not certain that any operational controls will actually be required for the Project to meet the 45 dBA standard. The noise modeling procedure employs highly conservative assumptions. Most notably, the typical modeling without operational controls assumes that all turbines are simultaneously operating at full acoustic power and that the noise propagates at maximum power in all directions – these are the worst case conditions. Direct-HWF-Hankard-8. Actual field tests have confirmed that modeling with a 0.5 ground coefficient yields a reliable approximation of actual noise conditions. Direct-CW-Hessler-7:15 to 8:2; Sur-Surrebuttal-HWF-Hankard-2. Indeed, modeling with the 0.5 ground coefficient still produces conservative results. *Id.* Dr. Schomer advocated for the use of the 0.0 ground coefficient, yet he admitted that his supposition that the relevant ISO standard requires use of the 0.0 coefficient is both newly discovered and untested. HWF Reply Br., pp. 1-2. Everyone agrees that the models run with a 0.5 ground coefficient predict that the Project will comply with a 45 dBA regulatory limit.

Moreover, in light of the “stringent procedural requirements of Wis. Stat. § 196.491” that a CPCN applicant must “navigate,” the Wisconsin Supreme Court has specifically noted that the Commission’s practice of conditionally issuing CPCNs is an approach that “practically speaking . . . works” because it does not “make an applicant start from scratch and begin the [CPCN application] cycle again.”⁹ *Clean Wisconsin, Inc. v. PSCW*, 2005 WI 93, ¶¶ 228, 261, 282 Wis. 2d 250, 700 N.W.2d 768. The legislature obviously agrees with the Supreme Court’s view, as it has unequivocally authorized the Commission to craft appropriate conditions when issuing a CPCN. First, the legislature gave the Commission explicit authority to issue orders with conditions, including compliance testing conditions. Wis. Stat. § 196.395(1). Second, the legislature has directed that when the Commission determines that a CPCN application does not meet the statutory approval criteria, the Commission is explicitly authorized to “approve the application with such modifications as are necessary for an affirmative finding under [the approval criteria].” Wis. Stat. § 196.491(3)(e). In light of the Commissioners’ own admitted uncertainty regarding the proper inputs and parameters for conducting noise modeling, it would be wholly appropriate to either approve with conditions or “approve with modifications” Highland’s Application.

With respect to concerns about the Applicants’ initial noise model, a model that was based on a 0.0 ground coefficient and assumed no curtailment, Highland offers for the Commission’s consideration the following two conditions on a CPCN:

- ***Highland will utilize only those turbines that have the capability, on an automated basis, to curtail operations, and in doing so to automatically and without further human intervention to achieve the sound limits imposed in this order.***

⁹ The stringency of the CPCN application process is highlighted by Chairman Montgomery’s observation that Highland submitted its application in this proceeding on December 19, 2011, a full 14 months ago. OM Tr., p. 2.

- *Highland will program the individual turbines to curtail power output based on real-time wind speed and directional data to ensure compliance with the PSC 128.14 noise standards.*

Furthermore, the Applicants would agree to perform post-construction noise compliance demonstration testing that accomplishes the following goals:

- *In addition to any testing performed in response to individual noise complaints, Highland will perform post-construction sound compliance measurements annually for three years. Once Highland has demonstrated compliance for three years it need only test for individual noise complaints;*
- *The annual tests will include data during the winter season;*
- *The annual tests will include data obtained during periods of high wind conditions;*
- *In the event the Commission imposes a 40 dBA nighttime limit at the six individual residences of concern, the annual tests will include testing at each of those six residences (to the extent the respective residents consent to such testing); and*
- *Highland will provide the Commission with a report based on the post-construction testing that describes the correlation between actual and modeled sound measurements to assist the Commission in evaluating which ground absorption coefficient – 0.0 or 0.5 – more accurately predicts actual sound levels.*

Finally, the Applicants agree to comply with the following conditions that were discussed during the Open Meeting:

- *Limit to 40 dBA nighttime sound attributable to the turbines at the six identified residences occupied by potentially sensitive individuals;*
- *Eliminate the Nordex N100 turbine model from consideration;*
- *Perform post-construction sound testing pursuant to the Commission's sound testing protocol;*
- *Fully cooperate with the Commission and staff in order to facilitate third-party sound testing;*

- *Given Commissioner Callisto's comments, in lieu of Applicants' previous offer on good neighbor payments, Applicants will agree to provide good-neighbor payments consistent with the requirements of PSC 128.33(3);*
- *Coordinate necessary road repairs with the respective towns;*
- *Provide financial assurance in an appropriate amount (see following section for additional comments);*
- *Install collector circuits underground;*
- *Conduct an additional year of bat mortality study, if deemed necessary by WDNR and Commission staff; and*
- *Report to staff any modifications undertaken to accommodate eagles.*

III. APPLICANTS REQUEST THE 180 DAY TIME PERIOD FOR THE TOWN AND APPLICANTS TO AGREE ON DECOMMISSIONING ESTIMATORS BE SIGNIFICANTLY REDUCED

Applicants agree with Commissioner Callisto's suggestion that PSCW Staff act in lieu of the Town in determining the decommissioning cost estimators and to process any complaints that may arise in the future regarding decommissioning requirements. OM Tr., p. 30. This manner of staff supervision is consistent with Commission practice generally, by which Staff oversees compliance with Commission order points and conditions. Moreover, it is consistent with the overall applicability to this Project of the other matters addressed by PSC 128, Subchapter II. As to those Subchapter II issues such as siting criteria (PSC 128.13), noise criteria (PSC 128.14), shadow flicker criteria (PSC 128.15), and signal interference (PSC 128.16), staff monitors compliance with CPCN approval conditions. It follows that staff would similarly supervise compliance with any decommissioning conditions pursuant to PSC 128.19.

Nevertheless, if the Commission insists that Applicants and the Town work together to identify decommissioning cost estimators, as suggested by Chairman Montgomery and Commissioner Nowak, Applicants respectfully request that the parties be given only 30 days to

mutually agree on the experts. If they are unable to reach agreement in that timeframe, and if Highland can demonstrate to Staff's satisfaction that it participated in good faith in an effort to reach agreement, then staff should superintend the process. This approach will avoid the possibility of additional unreasonable delay on top of that which the Applicants have already endured. Additional delay of up to six months on this issue alone could very likely stifle timely development of the Project and jeopardize the availability of production tax credits.

IV. NOTHING IN THE LAW PRECLUDES THE COMMISSION FROM PROVIDING INTERVENERS A REASONABLE OPPORTUNITY TO RESPOND TO THIS SUBMISSION, TO FURTHER DISCUSS THE RECORD, TO APPROVE CONDITIONS, AND ISSUE ITS ORDER PRIOR TO THE MARCH 25, 2013 STATUTORY DEADLINE.

Applicants realize they are making an extraordinary request. At bottom, Highland is asking the Commission to reconsider its initial conclusions in what was perhaps too short of a discussion of the record. Highland is cognizant of the Commission's need to issue a final order in this proceeding no later than March 25, 2013. To that end Highland has submitted this request in a timeframe that will allow the interveners to respond prior to the open meeting scheduled for March 1, 2013.¹⁰ Given the date of this filing interveners will need to respond by noon Wednesday February 27, 2013, two days in advance of the Commission's March 1, 2013 open meeting.

Applicants request that the Commission, at its March 1, 2013 open meeting, consider this submission and any filed responses and continue its discussion of the record. Applicants' counsel will be present at the March 1 open meeting and can be prepared to provide witness testimony supporting any additional evidence provided with this submission, oral argument and/or address any questions the Commissioners may have at that time. Intervenors should have

¹⁰ Under Paragraph IV.A.5.f. of the Prehearing Conference Memorandum in this proceeding interveners have three business days to reply to a request for leave to present additional evidence.

the same opportunity. To accommodate such proceedings, Applicants respectfully suggest that the Commission hold its open meeting in the Commission hearing room. So long as all the Commissioners are present at such a hearing there is no need for official transcripts or briefs, and the Commissioners could deliberate at the conclusion of the testimony and argument and render a decision. Such a schedule will leave Commission staff over three weeks to draft a final order before the March 25 deadline. Alternatively, the Commission could resume its discussion of the record on March 1st as requested, and, if it determines that the additional evidence provided with this submission is materially necessary for them to approve the CPCN, but time is too limited for any testimony on March 1st, hold a short hearing during the week of March 4th with the Commission in attendance. Again, the matter could be decided by the Commissioners upon close of the hearing and any associated questions and answers, and a decision issued by the March 25th statutory deadline.

CONCLUSION

While Highland's request is extraordinary in that it asks the Commission to resume an open discussion prior to issuing a formal decision, it is not fantastic, unreasonable or contrary to law. Indeed, while there is not a significant amount of precedent for such an action, it makes sense for the Commission to exhaust an issue before issuing a written decision where a complex significant infrastructure Project hinges on a single, technical issue, and where resuming discussion stands to assure greater accuracy to the Commission's decision and to obviate time-consuming, expensive and ultimately ineffective post-decision legal proceedings. Highland asks the Commission to proceed as requested, and in so doing to eliminate the chance of a wasted investment, and loss of associated economic development

Respectfully submitted this 22nd day of February, 2013.

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