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April 15, 2016

VIA FIRST CLASS MAIL AND EMAIL

Honorable Sean Mullany (Sean.Mullany@dps.ny.gov)
Administrative Law Judge
State of New York
Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

VIA FIRST CLASS MAIL AND EMAIL

Honorable Richard A. Sherman (Richard.Sherman@dec.ny.gov)
Office of Hearings and Mediation Services
NYS DEC
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Albany, New York 12233-1550

VIA FIRST CLASS MAIL AND EMAIL

Honorable David R. Van Ort (David.VanOrt@dps.ny.gov)
Administrative Law Judge
State of New York
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VIA FIRST CLASS MAIL

Hon. Kathleen H. Burgess
Secretary to the Commission
NYS Department of Public Service
3 Empire State Plaza
Albany, NY 12223

Re: Lighthouse Wind LLC
CASE 14-F-0485

**Reply to Lighthouse Wind's Response to Motion to Require Full
Stakeholder Participation in the Stipulation Process**

Your Honors:

As you are aware, this office represents the Town of Somerset (the Town) with regard to Apex Clean Energy's (Apex) proposed Lighthouse Wind Project (the Project). Please accept the following as the Town's Reply to



Point III of Apex's response to the Town's motion for a ruling requiring full stakeholder participation in the stipulation process. Apex proposes a procedure for the stipulation process that is contrary to and in violation of Article 10 and related Regulations. In this Reply, the Town sets forth the deficiencies in Apex's proposal and offers a proposed stipulation process that comports with Article 10's express requirement for stakeholder participation in the stipulation process.

Not surprisingly, Apex's proposed stipulation procedure improperly limits stakeholder participation. The Article 10 Regulations expressly state, "[a]pplicants are **required** to **consult** with the public, affected agencies, and other stakeholders" during the pre-application stage of Article 10 proceedings. 16 NYCRR § 1000.5(b) (emphasis added). The words "required" and "consult" clearly mandate a free exchange of ideas between the developer and stakeholders. Contrary to this mandate, Apex suggests that only Apex be allowed to submit proposed written stipulations.¹ Apex's proposal would improperly limit the consultation process to the issues Apex wants to address. The Town is unaware of any applicable statute or regulation which vests the ability to submit draft stipulations solely in the developer.

In addition, Apex seeks to prevent any conversation or consultation regarding "issue[s] about which [parties] are reasonably certain they will be unable to join in agreement." See pg. 11 of Apex Response, 3rd Bullet Point. This statement, along with Apex's proposed monopoly on providing proposed written stipulations, would allow Apex to avoid any pre-application consultation on issues about which the parties are likely to have disagreement. The consultation required by 16 NYCRR § 1000.5(b) cannot be limited to the issues Apex feels inclined to discuss.

Apex also seeks to improperly narrow the stipulation process by limiting involvement to a group of parties defined by Apex as "Participating Parties." Apex is attempting to require parties to affirmatively opt in to the stipulation process from the beginning or thereafter be completely excluded. Under Apex's proposal, if a party does not show express interest by affirmatively responding to an Apex letter, it will be barred from participating in any work sessions and viewing any draft stipulations. Given the potential for dramatic changes in the parties' positions during the stipulation process, it makes little sense for Apex to insist on an "opt in" requirement from the outset. Put another way, parties should not be forced to "opt in" to the stipulation consultation process at a point when nothing is known about what is going to be discussed.

¹ On page 11 of its response, Apex provides a date for the "Applicant to Circulate Draft Stipulations to Participating Parties." Apex does not provide any opportunity for stakeholders to provide their own proposed written stipulations.



Apex also disregards the clear language of Article 10 and the Regulations by insisting on an unwarranted veil of confidentiality. It is unclear how keeping the draft stipulations and related work sessions confidential is in line with Article 10's required public involvement and consultation. The issues that will be discussed during stipulation consultations and negotiations have already been publicly raised in the PSS and stakeholder comments. Apex's insistence on confidentiality indicates a troubling disregard for the openness, transparency, and public participation required by Article 10.

Finally, Article 10 provides a clear statutory mandate that the developer consult with the public during the stipulation process:

To facilitate the pre-application and application processes and enable citizens to participate in **decisions that affect their health and safety and the environment**, the department and such person **shall** provide opportunities for citizen involvement. Such opportunities **shall** encourage **consultation** with the public early in the pre-application and application processes, **especially before any parties enter a stipulation pursuant to subdivision five of this section**. The primary goals of the citizen participation process shall be to **facilitate communication** between the applicant and interested or affected persons. The process **shall foster the active involvement** of the interested or affected persons.

NY Pub Serv Law §163(3) (emphasis supplied). Despite this statutory mandate, Apex wants to arbitrarily limit the stipulation phase to a few weeks --a time period wholly inadequate given the number and magnitude of issues raised in response to Apex's woefully inadequate PSS.

Given Apex's continued refusal to comply with the letter and/or spirit of Article 10, the Town proposes the following procedure and timeline for the stipulation process:

1. As soon as practicable after a decision on the instant motion has been rendered, Apex should send a letter to all Parties providing notification of the upcoming stipulation process.
2. All Parties, not just the developer, may submit preliminary draft stipulations by uploading documents to the DPS website within sixty days of the notice provided in point one.
3. Apex will then arrange Stipulation Work Sessions for each exhibit topic addressed in the preliminary draft stipulations.



4. Notice of Work Sessions must be provided to all Parties at least 2 weeks in advance of the meetings.
5. Draft stipulations and Work Sessions will be open to the public in order to maximize public participation as required by Article 10. No aspect of the stipulation consultation process will be confidential.
6. Work Sessions and revisions to preliminary draft stipulations will continue for any given exhibit until the assigned ALJ for this matter is notified that a final draft stipulation has been obtained, or until an ALJ is notified that further negotiation is futile by the developer and at least 2 other Parties present at any of the Work Sessions held for the exhibit at issue.
7. Final draft stipulations will be filed, and public comments shall be allowed, before execution of any stipulation, in accordance with 16 NYCRR § 1000.5(j).
8. The ALJs may hold further proceedings regarding issues where further negotiation is reported as futile. Such intervention may be ordered by the ALJs, or requested by the developer or any other Party.

The process outlined above maximizes stakeholder and public participation while creating an open and transparent stipulation process. Further, the Town believes this process is more in line with the public consultation required under Article 10. The Town respectfully requests that Your Honors accept the Town's proposal and reject the stipulation process proposed by Apex.

Respectfully yours,

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MCD/jms

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***All cc via DMM website and individual email.**