



**Board on Electric
Generation Siting
and the Environment**

Audrey Zibelman
Chair

Howard Zemsky
Basil Seggos
Richard L. Kauffman
Howard A. Zucker, M.D., J.D.
Members

Kimberly A. Harriman
General Counsel
Kathleen H. Burgess
Secretary

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov/SitingBoard

April 26, 2016

TO: Howard Zemsky, Commissioner, President & CEO NYS Empire State Development
Louis A. Alexander, Alternate for Basil Seggos, Acting Commissioner, NYS Department
of Environmental Conservation
John B. Rhodes, Alternate for Richard L. Kauffman, Chair, NYS Energy Research and
Development Authority
Howard A. Zucker, M.D., J.D., NYS Department of Health
Mary Catherine Orr, Ad Hoc Member
Russell Martino, Ad Hoc Member

RE: CASE 14-F-0485 – Application of Lighthouse Wind LLC for a Certificate of
Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a
201 MW Wind Energy Facility.

Dear Members of the Siting Board:

Lighthouse Wind, LLC ("Lighthouse") filed a Preliminary Scoping Statement on November 23, 2015, regarding its proposal to construct and operate a 201 megawatt facility in the Town of Somerset, Niagara County and the Town of Yates, Orleans County. This submission is a required step prior to filing an application for consideration by the New York State Board on Electric Generation Siting and the Environment ("Siting Board"), and is also the action that initiates the process of selecting the *ad hoc* members to the Siting Board. The Siting Board that will consider Lighthouse's application is now fully constituted and, on behalf of Chair Zibelman, I would like to thank Mr. Martino and Ms. Orr, the *ad hoc* members, for their willingness to serve.

In anticipation of the filing of the application, the following describes your duties and responsibilities as Siting Board members. In addition, all Board members must file a certification regarding stock ownership by May 13, 2016. The *ad hoc* members must file an oath of office and an additional certification regarding Public Service Law §161, which are described below.

First, all members of the Board are considered to be State officers and are required to sign an oath of office. Members who are presently State employees signed an oath of office at

commencement of their State employment. Mr. Martino's and Ms. Orr's Oaths of Office have been filed with the Department of State.

Second, as State officers, all Siting Board members are required to abide by Public Officers Law §74, the Code of Conduct, which is included for your information. State officers should not have any interest, financial or otherwise, direct or indirect, or engage in any business activity, transaction, or professional act that is in substantial conflict with the proper discharge of his or her duties in the public interest. Section 74(3) sets forth the standards that implement this responsibility.

In addition to the Code of Conduct in Public Officers Law §74, Siting Board members are required to comply with the Public Service Commission's Rules of Conduct. 16 NYCRR §1000.3 of the Siting Board's regulations states that the Public Service Commission's Rules of Procedure will be applicable to the Siting Board. The Rules of Conduct, set forth in 16 NYCRR §2.2, provides that "no presiding officer shall preside over, and no member of the Commission shall participate in making a decision in, a proceeding in which such officer or Commissioner has a personal bias or interest with respect to the matter involved." Siting Board members are to decide whether to grant the certificate to Lighthouse after considering, in an open-minded manner, the information that is on the record made before the presiding hearing officer.

Third, Public Service Law §161 states, in part, that Siting Board members shall not hold any securities of an electric utility operating in the State, or proposed for operation in the State, any affiliate, or any other company, partnership or business that may appear before the Siting Board. As mentioned above, attached is a certification indicating that you are in compliance with this section. Please sign the certification and return it in the enclosed envelope by May 13, 2016.

Public Service Law §161 further provides additional considerations for *ad hoc* members. *Ad hoc* members cannot currently be an officer or director of any such entity, described above, or have been an employee for the last ten years. In addition, *ad hoc* members cannot hold any other State or local office. Attached is a certification for Mr. Martino and Ms. Orr indicating compliance with this section. Please sign the certification and return it in the enclosed envelope by May 13, 2016.

Fourth, the Siting Board is considered a "policymaking board" and, as such, members are required to file a Statement of Financial Disclosure with the Joint Commission on Public Ethics pursuant to Public Officers Law §73-a. A member who is required to file because of his duties with his or her respective State agency is not required to submit another Financial Disclosure Statement. The names and addresses of the *ad hoc* members will be forwarded to the Joint Commission on Public Ethics. The Joint Commission on Public Ethics will contact the *ad hoc* members directly with information regarding the process to file the Statement of Financial Disclosure.

Finally, included is a memorandum to the Siting Board regarding *ex parte* communications. Siting Board members must be aware of the constraints on communications with persons who are interested in this proceeding, now and especially once the application is

filed. Please contact Kimberly Harriman, General Counsel to the Siting Board (518-474-2510), with any questions you may have regarding *ex parte* communications.

If you have any other questions, please contact Michele Hacker at 518-408-1750 or Michele.Hacker@dps.ny.gov.

Very truly yours,



Kathleen H. Burgess
Secretary

cc: Audrey Zibelman, Chair

Attachments: Certification Regarding Ownership of Securities
Certification for Ad Hoc Members (regarding Public Service Law §161)
Public Officers Law Section 74
Ex parte memo to Siting Board from Kathleen Burgess and Kimberly Harriman



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Certification Regarding Ownership of Securities

I, _____, am a member of the New York State Board on Electric Generation Siting and the Environment (“Board”) that will consider Case 14-F-0485 – Application of Lighthouse Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a 201 MW Wind Energy Facility.

Public Service Law Section 161 that requires that no Board members “may retain or hold any official relation to, or any securities of an electric utility corporation operating in the state or proposed for operation in the state, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before the board.”

I certify that I do not retain or hold any official relation to, or any securities of an electric utility corporation operating in New York State or proposed for operation in New York State, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before me in my capacity as a Board member considering the Lighthouse Wind, LLC project.

Signature

Date

Print Name



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Certification for *Ad Hoc* Members

I, _____, am an *ad hoc* member of the New York State Board on Electric Generation Siting and the Environment (“Board”) that will consider Case 14-F-0485 – Application of Lighthouse Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a 201 MW Wind Energy Facility.

Public Service Law Section 161(3) that requires that no *ad hoc* members “shall be eligible to be an appointee to the board who holds another state or local office.”

Public Service Law Section 161(3) also states that no *ad hoc* member shall “have been a director, officer or, within the previous ten years, an employee of” the following: “an electric utility corporation operating in the state or proposed for operation in the state, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before the board.”

I certify that I do not hold another State or local office.

I certify that I have not been a director or officer, or an employee within the past ten years at an electric utility corporation operating in New York State or proposed for operation in New York State, any affiliate thereof or any other company, firm, partnership, corporation, association or joint-stock association that may appear before me in my capacity as an *ad hoc* Board member considering the Lighthouse Wind LLC project.

Signature

Date

Print Name

Public Officers Law Section 74 - Code of Ethics

1. Definition. As used in this section: The term "*state agency*" shall mean any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor or corporations closely affiliated with specific state agencies as defined by paragraph (d) of subdivision five of section fifty-three-a of the state finance law or their successors.

The term "*legislative employee*" shall mean any officer or employee of the legislature but it shall not include members of the legislature.

2. Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

3. Standards.

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other employment which will impair his independence of judgment in the exercise of his official duties.

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

g. An officer or employee of a state agency should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services of any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.

4. Violations. In addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate any of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law. Any such individual who knowingly and intentionally violates the provisions of paragraph b, c, d or i of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation. Any such individual who knowingly and intentionally violates the provisions of paragraph a, e or g of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed the value of any gift, compensation or benefit received as a result of such violation.

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

October 29, 2014

TO: NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

FROM: KATHLEEN H. BURGESS, Secretary
KIMBERLY A. HARRIMAN, General Counsel

SUBJECT: *Ex Parte* Communications, Conflicts of Interest, Project Sunlight

Introduction

All members of the Siting Board, including the two *ad hoc* public members, serve as "state officers" as defined by Section 2 of the Public Officers Law. The purpose of this memorandum is to provide you with guidance concerning the parameters of permissible communications and recommended procedures when communications occur during the phases of an Article 10 proceeding, as dictated by rules applicable to state officers concerning *ex parte* communications, conflicts of interest, and Project Sunlight.

Ex Parte Communications

The term "*ex parte*" means "on one side only" and in the context of a tribunal like the Siting Board refers to a potential situation where the Siting Board or its members receive a substantive communication from one party without notice to or the opportunity to contest by any other party that has an interest in the matter. Such *ex parte* communications are prohibited by Section 307(2) of the State Administrative Procedure Act (SAPA) in proceedings where the Siting Board adjudicates the legal rights, duties or privileges of named parties thereto and is required by law to make its determination only on a record and after an opportunity for a hearing. A Siting Board proceeding to determine whether to grant a certificate of environmental compatibility and public need authorizing the construction of a major electric generating facility is such an adjudicatory proceeding.

The filing of an Article 10 application commences the adjudicatory phase of the Siting Board proceeding and the prohibitions on *ex parte* communications commence at that milestone. It should be noted that the pre-application public involvement and preliminary scoping phases of an Article 10 proceeding are not adjudicatory in nature and are not subject to the *ex parte* prohibition. Commencing upon the filing of an Article 10 application, information received outside of the public record is considered *ex parte* and prohibited. Therefore, after an application is filed, members of the Siting Board and their advisors must not communicate with any person, party or party representative about any issue of fact or question of law in the matter. Should a Siting Board member inadvertently receive an *ex parte* communication, the member should notify the Secretary to the Siting Board, who will take whatever steps that can be taken to remedy the situation.

The *ex parte* rules do not prohibit Siting Board members from consulting at any time with "advisory staff" who provide guidance and counsel to Siting Board members. The presiding and associate examiners (administrative law judges) assigned to the proceeding are considered advisory staff, as are most senior staff personnel at the state agencies that provide the permanent

members of the Siting Board. In contrast, “trial staff” is made up of those employees of an agency designated to participate as a party in the proceeding. Those trial staff employees are treated like any other party to the adjudication and the members of the Siting Board are prohibited from communication with them by the *ex parte* rules. Because of the different roles of advisory staff and trial staff and the limitations with respect to *ex parte* communications applicable to trial staff, it is essential that trial staff be separate from the advisory staff and, further, that caution be exercised concerning communications by Siting Board members intended for advisory staff so that such communications are not directed inadvertently to trial staff. The Secretary is available to assist Siting Board members in their communications.

Conflicts of Interest

Public Officers Law §74 is the Code of Ethics, which pertains to all State officers and employees. The rule with respect to conflicts of interest, contained in Public Officers Law Section 74(2), is as follows:

No officer or employee of a state agency ... should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct that address not only actual but apparent conflicts of interest. Of relevance are the following:

. . . .

(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

. . . .

(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

. . . .

(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

. . . .

Public Officers Law §74 applies to activities of State officers and employees that have even the appearance of a conflict of interest; an actual conflict is not necessary for a violation of the law.

Considering SAPA §307 and Public Officers Law §74 in tandem, if communications are not prohibited by SAPA during the pre-application stages of the proceeding, Public Officers

Law §74 still requires that consideration must be given to the propriety of having meetings or phone calls with representatives of entities or members of the public involved with the process. A Board member should ensure that his or her conduct does not give a reasonable basis for the impression that any person can improperly influence or unduly enjoy his or her favor in the performance of official duties. A Board member should also ensure that his or her conduct does not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of the public trust.

Siting Board members should exercise discretion and caution, in light of Public Officers Law §74, when considering communications with individuals and/or representatives of entities or members of the public concerning a potential Article 10 application. There is a risk that a member's conduct could give a basis for the impression that he or she was improperly influenced. Communications with an applicant or other interested parties prior to the filing of an application, while not restricted by the *ex parte* prohibitions, may create an appearance that an applicant or other party may be receiving preferential considerations, may improperly influence a Siting Board member, or that the member is engaged in acts that are in violation of the public trust. Therefore, while such communications are not barred, Siting Board members and their advisors should be mindful that such meetings, prior to the commencement of the adjudicatory phase of the proceeding, may create an appearance of impropriety.

In order to ensure transparency of the Article 10 process and to maintain accountability to the public, it is recommended that when a meeting is requested during the pre-application phase, that the Siting Board members and their advisors delegate the meeting to trial staff so that only trial staff will meet with the individuals or representatives. This would clearly obviate any claim of improper influence. If the Siting Board member or advisor feels that they must attend the proposed meeting, it is recommended that careful consideration should be given to opening the meeting to the public upon advance notice provided by the Secretary.

Project Sunlight

Project Sunlight, an important component of the Public Integrity Reform Act of 2011, is an online database that provides the public with an opportunity to see the individuals and entities that are interacting with government decision-makers. For the text of the law, see Chapter 399 Part A, § 4 of the Laws of 2011. Siting Board members should be aware that the provisions of Project Sunlight requires Siting Board members and their advisors to provide a public record of any interaction that is an in-person meeting or a video conference between them and applicants, individuals, advocacy groups, and their representatives related to any Article 10 adjudicatory proceeding. The location and formality of the interaction is irrelevant as to whether it constitutes an appearance, and it is irrelevant who initiates the interaction. There can be numerous appearances related to a single matter. Written communications and telephone conversations do not constitute such an interaction.