NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

IN THE MATTER OF:

Case No. 14-F-0485

Application by Lighthouse Wind LLC for a Certificate of Environmental Compatibility and Public Need to Construct up to a 201-MW Wind-Powered Electric Generating Facility in the Towns of Somerset and Yates, Niagara and Orleans Counties, New York

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OPPOSITION TO TOWN OF SOMERSET MOTION AND REQUEST FOR ADOPTION OF STIPULATIONS PROCEDURES AND SCHEDULE

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On behalf of Lighthouse Wind LLC

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I. PRELIMINARY STATEMENT

Lighthouse Wind LLC (the "Applicant" or "Lighthouse Wind") opposes the motion made by the Town of Somerset ("Somerset" or "Movant") dated March 30, 2016 and entitled "Motion to Require Full Stakeholder Participation in the Stipulation Process," to the extent that it wholly mischaracterizes the nature of certain technical sessions convened with government technical staff and otherwise misinterprets the intent and purpose of the Article 10 regulations. Lighthouse Wind reiterates its intention that, once meetings regarding stipulations commence, all parties to this proceeding will be afforded an opportunity to participate in the stipulations process. In furtherance of establishing a procedural framework for the stipulations process, Lighthouse Wind also proposes a schedule for stipulations discussions, which the Applicant seeks to have adopted for this proceeding by the Hearing Examiners to potentially minimize issues for litigation and aid in productive discussions among parties participating in good faith. The remaining allegations in the Town's motion have no basis in fact and merely seek to detract from the diligent work by the Lighthouse Wind Project team, which continues to implement the approved Public Involvement Program Plan; thoroughly responded to hundreds of comments on the Preliminary Scoping Statement, as evidenced by the extensive PSS response submission; continues to implement the

necessary pre-application study work to assist in defining the Project component locations and potential for avoiding and minimizing potential environmental impacts; and is participating in ongoing consultations with stakeholders needed to facilitate the pre-project planning and development through Article 10.

II. TECHNICAL AND EXPLORATORY MEETINGS, THE STIPULATIONS PROCESS, AND PUBLIC ENGAGEMENT

Applicants and private parties routinely consult with agency technical experts and staff regarding issues involving development of projects and the studies necessary for certain regulatory programs. Informal meetings and technical sessions with agency staff are important tools for any prospective Applicant's efforts to gather information, review data that informs formal submissions and potentially guides next steps, and seek advice from those charged with implementing and overseeing those regulatory programs. Sometimes, the information sought from certain agencies is not otherwise publicly available, and informal consultations are a useful method for obtaining information on such sensitive topics as data and location of endangered and threatened species, or critical utility infrastructure, for example. Further, the agencies themselves use these informal technical sessions to enable their staff to review early data and findings of scientific studies which have not yet been finalized, but which may provide information which was not previously available to the agency.

Moreover, Article 10 encourages consultation with stakeholders—including governmental stakeholders—as part of the Public Involvement Program (PIP) Plan process. Pursuant to 16 NYCRR 1000.4(a), it is the Board's policy "to encourage stakeholders to participate at the earliest opportunity in the review of the Applicant's proposal so that their input can be considered."[1]

[1] 16 NYCRR 1000.4(a)

Article 10 and the Applicant's approved PIP require meetings with stakeholders to solicit information regarding stakeholders' positions on studies, aspects of the Project, and particular issues of concern. An Applicant is required, through its PIP, to engage in "(1) consultation with the affected agencies and other stakeholders; (2) pre-application activities to encourage stakeholders to participate at the earliest opportunity; (3) activities designed to educate the public as to the specific proposal and the Article 10 review process; (4) the establishment of a website to disseminate information to the public; (5) notifications; and (6) activities designed to encourage participation by stakeholders in the certification and compliance process."[2] As noted in the Lighthouse Wind PIP, the Applicant has conducted and will continue to conduct outreach to stakeholders, which necessarily entails outreach to identified governmental stakeholders, including local and regional governmental units as well as interested State and federal agencies.[3] Further, Article 10 clearly and specifically requires that Applicants engage in pre-application consultation with affected State and Federal agencies, since a discussion of those outreach efforts must be included in an Article 10 Certificate Application. In Exhibit 2 of a Certificate Application, the Applicant must identify "significant issues raised by the public and affected agencies during such [public involvement] program and the response of the Applicant to those issues."[4]

The technical consultation meeting referenced by Somerset in its motion, held on March 30, 2016 between representatives of Lighthouse Wind and technical staff from the New York State Department of Environmental Conservation (DEC) central office and regional staff, and the U.S. Fish and Wildlife Service (FWS), was an informal technical consultation session among biologists on data collected and ongoing studies regarding potential impacts to wildlife. The meeting was

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[2] 16 NYCRR § 1000.4(c).
[3] Lighthouse Wind PIP (Revised January 15, 2015) at pages 8-9, 15-16, and Appendix A, which includes a list of Government Agency Stakeholders identified for outreach efforts.
[4] 16 NYCRR § 1001.2(c).

convened to allow Lighthouse Wind and biologists from DEC and FWS to discuss initial study results for wildlife studies conducted to date for this Project. These studies have not been finalized, and some of them are ongoing. The final studies and results will be provided in the Article 10 Application. Importantly, some of these studies must be conducted in accordance with protocols set by DEC and/or FWS. Among the topics discussed at the technical session were endangered species and questions and clarifications regarding the study work being conducted. Ultimately, the goal of this meeting was to enable Lighthouse Wind to continue its efforts to develop the facts and analysis it is required to include in the Article 10 Application.[5]

However, the March 30, 2016 meeting was not, as Somerset incorrectly claims, a stipulations discussion. These parties were not represented by counsel at this meeting and the session was not a negotiation regarding the scope or methodology of stipulations relating to the wildlife studies conducted for the Project. As stated by the DEC to the Town of Somerset prior to the meeting, and confirmed by Lighthouse Wind, the meeting was a technical session and not a formal Article 10 meeting. Somerset was aware of this and proceeded with the motion anyway. Somerset's allegations that Lighthouse Wind is attempting to "freeze stakeholders out of the stipulations process" are particularly unavailing given that there have been no meetings or any discussions with any stakeholder regarding stipulations.

Further, the Movant makes a huge leap in logic between asserting that the meeting between Lighthouse Wind, DEC and FWS would *involve* discussions of avian and bat studies related to the Project and incorrectly concluding that such a meeting is "clearly a stipulation meeting." Stipulations, in the Article 10 process, involve negotiated written agreements among some or all of the Parties as to the scope or methodology of studies proposed, or as to information to be

[5] 16 NYCRR § 1001.22.

submitted as part of a complete Article 10 Certificate Application. The purpose of the stipulations process is to set forth a signed agreement on all of those issues for which there is accord between the parties, and to narrow the issues potentially in dispute, before the Application is submitted. This avoids wasted time and money associated with holding hearings on issues over which the parties can negotiate an agreement, or which are otherwise not disputed. But in order for a meeting to be a "stipulations discussion," those in attendance should actually be discussing potential stipulations, attempting to achieve some compromise or agreement on issues in dispute to which the parties would stipulate, or otherwise negotiating—not simply exchanging information. Neither Article 10 nor its implementing regulations require notice to all stakeholders of every conversation which pertains in any way to a proposed Project, nor does the law prohibit the informal, technical consultations with regulators, or transform those discussions into "stipulations negotiations" simply by virtue of the fact that the topics discussed relate in some way to a potential Project.

In fact, the Article 10 regulations specifically state that "the applicant **may** commence stipulations consultations and seek agreement by stipulation with **any** interested person, agency or municipality including, but not limited to, the staff of DPS, DEC, and DOH, as appropriate, as to **any aspect** of the preliminary scoping statement and the methodology or scope of any study or program of studies made or to be made to support the application."[6] The regulations do not say the Applicant **must** commence stipulations, and seek agreement by stipulation with **all** interested persons. Were the Hearing Examiners to hold otherwise, it would require that every party attend every meeting regarding stipulations, which would result in an unworkable process and frustrate the intent of stipulations. That is clearly not what Article 10 intended. Nevertheless, Lighthouse Wind is committed to holding stipulations discussions with all parties willing to participate.

[6] 16 NYCRR § 1000.5(j)[emphasis added].

However, the meeting with DEC that the Movants complain of was not even a stipulations discussion, it was an informal technical consultation. Granting Movants relief with respect to the meeting at issue would prohibit crucial informal technical consultation, and would hamstring both the development of projects—particularly projects seeking to make important contributions to state renewable energy policy, such as the Lighthouse Wind Project—and regulatory bodies, and would have a chilling effect on countless otherwise routine informational consultations between agencies and applicants. Such precedent would be particularly problematic in the Article 10 context, at this stage in a proceeding, when an Applicant is required by Article 10 and its approved PIP to reach out to all stakeholders and consult on the Project, to obtain and provide information relevant to the Application, as well as to answer questions from stakeholders. Somerset's motion seeks the Hearing Examiners to hold essentially that all meetings, whether in furtherance of the PIP and stakeholder outreach or otherwise, about any aspect of a proposed Project, requires the participation of every party to the Article 10 proceeding. Logically, such a holding is unworkable, and would severely impair Applicants and State agencies from sharing technical information, maintaining access between technical staff, discussing environmental and technical protocols with substantial lead time and many months of advance notice, and evaluating potential regulatory interpretation issues. Movants are well aware of the obstacles such a holding would impose on the process, which is, in fact, the real reason behind Movant's motion.

Finally, Article 10 and its implementing regulations require a robust public engagement strategy, and Lighthouse Wind continues to "actively seek public participation" throughout this process, in accordance with its obligations.[7] Lighthouse Wind has filed and updated its PIP and, in accordance with that plan, has engaged in outreach to stakeholders through information sessions,

[7] 16 NYCRR § 1000.4(a).

social media, mailings, and via the Project website (www.lighthousewind.com), and has filed regular tracking logs recording meetings and public outreach efforts; provided a staffed Project office in the Village of Barker; filed a Preliminary Scoping Statement (PSS) and recently an extensive PSS Comment Response, which spanned 55 pages, included a 150-page comment matrix responding to all public comments filed on the PSS, and was accompanied by 12 appendices; and has otherwise engaged stakeholders in the Article 10 process throughout, in accordance with its obligations to "provide information to and effective opportunities for input from the public, affected agencies, and other stakeholders concerning the proposal."[8] Further, all of these pre-application public outreach efforts—from October 31, 2014 to the present—have taken place *before* Lighthouse Wind has even filed an Article 10 Certificate Application. Stakeholders will be afforded the opportunity to participate in the stipulations process, once it commences, and in review of the Project Application, once that is filed.

It is ironic that Somerset now complains about its attendance at meetings given that Lighthouse Wind has attempted to engage with Somerset and Save Ontario Shores ("SOS") as stakeholders to these proceedings, but these parties have been unresponsive. Officials from SOS have persistently refused to meet with Lighthouse Wind after several attempts to schedule a meeting to discuss the group's concerns.[9] Further, Lighthouse Wind has twice made written requests to the Town Somerset seeking input on required visual simulations, but the Town has not responded with the requested information.[10] In fact, Lighthouse Wind has previously discussed the Project at Town Board meetings, but has recently been criticized by Somerset for doing so. Somerset's refusal to respond to repeated requests for stakeholder participation is disappointing,

[8] 16 NYCRR § 1000.5(b).
[9] See attached correspondence with SOS, Exhibit A.
[10] See attached Second Request for Visual Simulation Information, Exhibit B.

given that stakeholder participation is precisely what Somerset claims to seek by its motion, and particularly given the opportunity Somerset has with respect to the development of this renewable energy project in the Town. Contrary to Somerset's claims that it is being shut out of this Project's pre-application phase, Lighthouse Wind has repeatedly tried to engage with stakeholders, including Somerset and SOS, to no avail.

Lighthouse Wind has actively conducted, and continues to conduct, an extensive and thorough public outreach and stakeholder input process, as outlined in its PIP. Because of its interest in delaying and opposing the Project, the Movant reads into Article 10 obligations which simply do not exist. The public engagement requirements of Article 10 and its regulations do not prohibit an Applicant from engaging in precisely the kind of stakeholder consultation that is required here.

III. PROPOSED PROCEDURES AND SCHEDULE FOR COMMENCING STIPULATIONS

In a departure from the schedule set forth in the Article 10 regulations, due to the extension requests and resultant delays relating to submission of comments on the PSS, the pre-application conference was held prior to the submission of PSS comments and the Applicant's response. As a result, although the parties had a short general session to discuss the topic of stipulations, the parties did not have an opportunity to discuss a stipulations schedule with the Hearing Examiners during the conference. As noted above, the stipulations process is designed to identify issues upon which the Parties are in agreement as to (1) the scope and methodology of a proposed study by the Applicant, and/or (2) the information, documentation, and other support which will be provided by Applicant in its formal Article 10 Certificate Application. This process aids in narrowing issues about proposed studies and/or the contents of the Application, over which there

is agreement from some or all of the Parties. By signing a stipulation, signatory Parties signal their consent on an issue or area of issues, and agree not to challenge those issues addressed in the stipulation, during the hearing process or at any later point.[11] The Commission, as a general policy, encourages settlement of issues by methods such as stipulations, as they aid in reducing the time, money and effort required by all parties where issues are litigated, allow more meaningful participation by parties with limited resources for litigation, and enable the decision-making body, as well as all involved stakeholders, to better allocate resources toward matters of potential concern.

In order to commence the stipulations review process, Lighthouse Wind soon will be reaching out to all of the Parties to determine whether, based upon the proposed process and schedule set forth below, each Party is interested in executing certain stipulations in accordance with NY Public Service Law § 163(5) and 16 NYCRR § 1000.5(j)-(k). Lighthouse Wind is proposing to the Parties a schedule to aid in directing the stipulations in a productive and efficient manner. This proceeding has many Parties, which would make it quite cumbersome and ineffective to attempt to informally circulate multiple draft versions of the proposed stipulations amongst the many entities represented in this matter, as has been done in other proceedings. Further, it may not be possible to craft comprehensive stipulations upon which all Parties could agree in all respects. However, there may be issues or specific studies for which stipulations could be signed by most or all of the Parties, if the Parties are willing to participate and coordinate on identifying specific Exhibits of concern, even if consensus on all issues proves impossible.

It is Lighthouse's position that, absent a set of stipulations to which all Parties could unanimously agree, any stipulation on any individual Application Exhibit or study would aid in

[11] 16 NYCRR § 1000.5(k).

narrowing potential issues for hearings on the Application, and would advance the purposes of the Article 10 pre-application process. Therefore, Lighthouse Wind contemplates the Parties identifying the particular Exhibits for which they are interested in discussing stipulations and moving through the stipulations process, to attempt to find consensus on as many Exhibits and studies as possible, rather than rely on an "all or nothing" approach to the stipulations process.

To that end, Lighthouse Wind is proposing that it will notify all parties by letter of its intention to discuss specific stipulations and to determine which Parties, if any, are willing to engage in this process (hereinafter "Participating Parties"). The Participating Parties will be asked to provide an indication of the Exhibits or studies for which they are interested in entering into stipulations. The Participating Parties would be provided proposed stipulations for review and comment. A comment deadline will be established, as set forth below, so that all changes from the Participating Parties could be addressed into further revised iterations of the stipulations documents.

Lighthouse Wind also suggests holding a "work session" on the proposed stipulations to allow Participating Parties interested in working toward consensus on a given issue to gather together for more targeted work on a specific study area or Exhibit. The work session could be held in person, at a location to be determined, with telephone participation available to those who cannot travel, or could be entirely by phone if circumstances so require. In advance of the work session, Lighthouse Wind would circulate an agenda to identify the topic to be discussed, as well as any revisions to the stipulations to be discussed at the session. Lighthouse Wind proposes the following preliminary schedule for engaging in stipulations discussions with parties wishing to participate.

April 11, 2016 – Letter to all Parties providing notification of upcoming stipulations discussion and soliciting interest in participating therein. Request responses from Parties of their intent to participate and identification of interested Exhibits by **April 25, 2016**.

April 29, 2016—Applicant to Circulate Draft Stipulations to Participating Parties. Request responses and comments from Participating Parties by **May 20, 2016**.

June 1, 2016—Stipulations Work Session with Participating Parties.

June 14, 2016— Circulate Revised Stipulations to Participating Parties.

In order to ensure that the stipulations process is productive, and results in signed stipulations on some or all of the studies and Application Exhibits to be undertaken and submitted by the Applicant, it is expected that all Participating Parties engaging in the stipulations process are doing so based on a genuine, good faith intention to come to some agreement on some or all of the proposed stipulations. If at any time a party determines that it will not sign any stipulation on a specific study or Exhibit, regardless of how the Applicant revises its contents, the party shall notify Lighthouse Wind in writing of the stipulation at issue and the party's objections or reasons for refusing to sign.

To facilitate a productive stipulations negotiation process, we would request that the Hearing Examiners adopt the following conditions for participation in the stipulations process:

- Participation in the Stipulations process must be undertaken in good faith;
- Discussions and communications about draft stipulations, including draft language, correspondence, and/or discussions at work sessions, are to be kept confidential and cannot be disclosed to any individual or organization who is not a Participating Party until stipulations are finalized and submitted for review by the Hearing Examiners;
- Participating Parties will not seek concessions on an issue about which they are reasonably certain they will be unable to join in agreement;
- In the event that it becomes clear that a Participating Party will not be able to agree to a stipulation on a given issue, that Party will notify the Applicant and the other Participating Parties of that issue;

- Participating Parties will be provided with notification of Stipulations Work Session(s) or communications regarding issues about which they have expressed a willingness to discuss stipulations, however, to the extent that a Participating Party indicates it will not be willing to enter into a stipulation or stipulations on certain issues, notice to those parties of Work Sessions or communications on those issues is not required;

- The above shall not impair the Applicant's or any Party's ability to engage in informal caucuses or exploratory discussions with individual or multiple Parties;

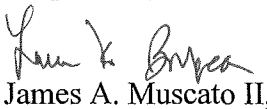
- Following the execution of stipulations resulting from this process, if any, to the extent that issues remain unsettled which the Applicant wishes to resolve prior to submission of the formal Application, the Applicant may seek the intervention of the Presiding Examiners.

It is Lighthouse Wind's position that the above terms will serve the interests of all Participating Parties in furthering the stipulations process in an efficient and ordered manner. Therefore, Lighthouse Wind respectfully requests that the Hearing Examiners adopt these proposed stipulations procedures and schedule for this Project, and provide oversight of the process where necessary and appropriate.

IV. CONCLUSION

For the above reasons, the Somerset motion should be dismissed in its entirety, and the Hearing Examiners should affirm that there is no prohibition on private parties meeting with technical staff from the agencies regarding the development of a Project. Separately, we request that the Hearing Examiners consider the stipulations procedures and schedule proposed by Lighthouse Wind for these proceedings, so that stipulations sessions can commence in the near future.

Respectfully submitted,



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