

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

**LIGHTHOUSE WIND LLC'S MEMORANDUM OF LAW IN
OPPOSITION TO TOWN OF SOMERSET MOTION**

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On behalf of Lighthouse Wind LLC

I. PRELIMINARY STATEMENT

Lighthouse Wind LLC (the “Applicant” or “Lighthouse Wind”) opposes the motion made by the Town of Somerset (“Somerset” “Town” or “Movant”) dated May 31, 2016 and entitled “Motion to Require Full Stakeholder Participation in the Stipulation Process,” to the extent that the issues contained therein were already resolved during the April 27, 2016 teleconference with the parties (“April 27 teleconference”); that the Stipulations process has proceeded in keeping with those discussions; and because the motion once again mischaracterizes and misinterprets applicable statutes and regulations, despite the clarifications provided by the Hearing Examiners during the April teleconference. As with Somerset’s March 30, 2016 motion of the same name (“March 30 Motion”), the allegations contained in the present motion have no basis in fact or law and merely seek to detract from the ongoing Stipulations process. While Lighthouse Wind does not necessarily oppose the idea of having a written record of the articulated general principles and rules of engagement discussed during the April 27 teleconference, which could be helpful in protecting against inappropriate party conduct, the Town is essentially attempting to reargue its motion and its arguments are incorrect and unpersuasive.

Furthermore, the present motion raises for the first time a Freedom of Information Law (FOIL) issue not previously discussed in its March 30 motion or during the April 27 teleconference, which must also be rejected. The March 30 motion for which Somerset purports to seek reconsideration here did not include any reference to FOIL issues. Further, the Hearing Examiners have already confirmed that Somerset did not have a right to attend meetings held between the Applicant and state agencies, and the Town cannot now be permitted to attempt to rehash the issue; it was already raised, discussed, and deemed moot. Lastly, the Hearing Examiners did confirm that stipulations discussions for this proceeding are subject to general

PSC regulations protecting settlement discussions as confidential, but that confirmation cannot fairly or reasonably be characterized as a denial of access to records under FOIL.

II. THE STIPULATIONS PROCESS TO DATE

In accordance with the stipulations schedule and process discussed during the April teleconference, Lighthouse Wind has released three batches of draft stipulations proposals (Group 1 on May 6; Group 2 on May 20; and Group 3 on June 3), and has received comments and counterproposals from some of the parties on the first set of stipulations covering the subjects of Noise (Exhibit 19), Terrestrial Ecology and Wetlands (Exhibit 22), and Visual Impacts (Exhibit 24), the three topic areas which generated the greatest volume of pre-application stakeholder comments to date. Additional stakeholder comments and counterproposals are anticipated on Group 2 stipulations¹ by June 10, 2016, and on Group 3 stipulations² by June 24, 2016.

Department of Public Service Staff has notified the parties of significant scheduling constraints during the dates proposed for Stipulations Work Sessions, which has presented some difficulties in selecting an appropriate date and location for these sessions. Ultimately, a telephone conference is being considered for the first session in order to accommodate schedules. However, it appears that the first session will not take place the week of June 13. Lighthouse Wind is continuing its efforts to arrange meetings during which participating parties can gather and productively work through topic areas for which agreement can be reached.

¹ Concerns had been raised during the April 27 teleconference regarding the volume of draft stipulations which would be included in the second round of proposed stipulations. Those exhibits were further divided into Group 2 and Group 3, with two weeks separating the release of each batch, and a three-week comment period provided for responses to each group. Group 2 Stipulations proposals covered Exhibits 1-3, 10-13, 18, 20, 25, 28, 34-35, 38-39, and a general stipulation stating that Exhibits 7, 16-17, 30, 36-37 and 41 do not apply to the proposed Project.

² Group 3 Stipulations proposals covered Exhibits 4-6, 8, 9, 14-15, 21, 23, 26-27, 29, 32-33 and 40.

Lighthouse Wind continues to assert, consistent with the previous discussion with the ALJs, that Lighthouse is free to pursue stipulations with any or each party that is willing to agree on the scope and methodology of studies and submissions to be included in the Application and any necessary sessions to do so will be conducted as needed.

III. THE STATUTES AND REGULATIONS CITED DO NOT SUPPORT SOMERSET'S MOTION

Somerset's reiteration of the prior March 30 motion again mischaracterizes and misinterprets provisions of the Public Service Law and its implementing regulations. First, Somerset incorrectly claims that 16 NYCRR § 3.2 requires that the Hearing Examiners' discussions during the April 27 teleconference be memorialized and issued in writing, despite the Hearing Examiners' explicit decision not to make a formal ruling on these matters. In fact, 16 NYCRR § 3.2 is a rule of procedure governing Orders of the Public Service Commission ("PSC")—not informal clarifications of procedure and law provided by Presiding Examiners, or even formal Rulings made by a Presiding Examiner.

In practice before the PSC and Department of Public Service ("DPS"), "Order" is a term of art which designates a specific type of decision adopted by the full Commission, during a formal Commission session, which then must be filed with the Commission and served on those to whom the Order applies, in accordance with those requirements set forth in 16 NYCRR § 3.2. By contrast, determinations made by a Hearing Examiner, even where those decisions are formally adopted into the record, are not "Orders" of the Commission—they are "Rulings" of a Presiding Examiner, and are subject to different procedural rules, many of which are found in 16 NYCRR Part 4 and, in some instances, sections in 16 NYCRR Part 3 which draw clear distinctions between practice rules applicable where a Presiding Examiner has been assigned and rules applicable in other cases, where parties must direct their inquiries, motions, etc. to the

Secretary of the Commission. See, e.g., 16 NYCRR §§ 3.6 (b); 3.8 (d); 3.9 (b), (c)(3) and (d). Contrary to Somerset's assertion, the discussions held during the April 27 teleconference were not before the Commission, would not have culminated in an "Order" from the Commission even if they were formally adopted in writing, and are not subject to the rules set forth in 16 NYCRR § 3.2, which are not binding on a Hearing Examiner assisting in the informal resolution of pre-Application disputes between parties. The claim that the Hearing Examiners violated rules of PSC procedure by not issuing a written "Order" is incorrect.

Furthermore, Somerset's claim that the New York State Administrative Procedures Act ("SAPA") § 307(1) commands that the April 27 teleconference discussions be formalized in a written "Order" also misreads the law. This provision of SAPA requires that a "**final** decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing." SAPA § 307(1) [emphasis added]. Nothing contained within the April 27 teleconference involved a "final" decision on any substantive matter. The conference served to correct numerous misstatements and misapprehensions of law and regulation which undergirded Somerset's March 30, 3016 "Motion to Require Full Stakeholder Participation," and to clarify numerous rules of practice and procedure applicable to all proceedings before the PSC, and to the stipulations process in particular, as well as how those rules apply to these proceedings. Since Somerset's March 30 motion proceeded under an incorrect reading of Article 10's public participation requirements and stipulations provisions, the conference was necessary to clarify the parties' understanding of the law and rules moving forward.

In fact, the Hearing Examiners' discussions during the April 27 teleconference were presented as an explanation of "General Principles" guiding the stipulations process and setting forth the Examiners' expectations regarding party cooperation and participation, as well as the

availability of mediation options in the event an impasse is reached. Presiding Examiners are afforded considerable discretion in setting specific rules of engagement for proceedings they are tasked with overseeing. Even if the Presiding Examiner had issued a formal Ruling on the March 30 Somerset motion following the April 27 teleconference, the Town would not have had the right to pursue an interlocutory appeal of that Ruling unless it could demonstrate extraordinary circumstances warranting review of the Examiner's decision. 16 NYCRR § 4.7(a) ("interlocutory review of a ruling by a presiding officer . . . may be sought only in extraordinary circumstances"). The April 27 teleconference did not involve a final decision, did not affect the substantive rights of the parties, and, even if it had affected substantive rights of parties, a written Ruling memorializing its contents would not have conferred on the Town a right to appeal the decisions contained therein. Thus, not only is a formal written Ruling not required by regulation or statute under these circumstances, the issuance of one in response to this Motion would have little practical effect. In the next section of its motion, Somerset engages in a tortured analysis under 16 NYCRR Part 6—the regulations which contain the DPS' implementation of the state Freedom of Information Law (FOIL)—in an apparent attempt to equate the Hearing Examiners' verbal confirmation that confidentiality rules apply to settlement discussions with a denial of access to agency records. The Town raises these issues for the first time in this context, yet claims that the Hearing Examiners' decision denied information they claim to have requested under FOIL, and should have been set forth in a written decision. It is true that the Hearing Examiners confirmed that 16 NYCRR § 3.9's confidentiality protections apply to stipulations discussions under Article 10 during the April 27 teleconference. However, that confirmation was a clarification of existing, applicable rules made at the request of the parties, in response to Somerset's March 30 motion and at the specific request of Lighthouse

Wind—not a response to a FOIL request. The confidentiality rules contained in 16 NYCRR § 3.9 have existed in some form since 1992, and are applicable to all proceedings, as stated in the Title of 16 NYCRR Part 3. Their application to these proceedings should be no surprise to anyone familiar with the PSC’s procedural rules, and the Hearing Examiners’ confirmation that these rules apply here is not a FOIL determination.

Further, the application of these rules to future settlement discussions, to be held between parties to a legal proceeding in the coming months, is not a denial of access to “records,” since these meetings have not happened, and there were no “records” held by any agency about the settlement discussions at the time the motion was made, since no such discussions had occurred. NY Public Officers Law § 86(4). None of the documents allegedly circulated between Applicants and other agencies are records held or retained by the PSC which would be subject to a FOIL request.³ Where any document is relevant to the proceedings, and publicly disclosable, it is filed with the Commission and shared with any subscriber to the Service and Party Lists. To the extent a document pertains to stipulations discussions, it has been and will continue to be circulated among the parties under the confidential protections already established by law for such discussions, so long as those parties continue to be involved in stipulations negotiations. By its motion, Somerset makes a leap of logic to argue that, any time a meeting is held on any matter related to the Lighthouse Wind Project, this puts an affirmative burden on Lighthouse Wind and other agencies to file notes and records of meetings, even those protected by confidentiality, with the PSC, even where the PSC is not a participant in those meetings, so that such records can be shared in response to a FOIL request. This is not a reasonable reading of FOIL, and must be rejected.

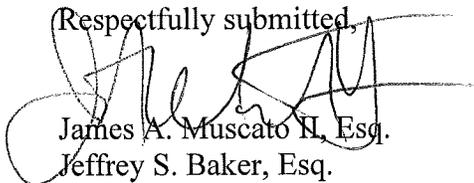
³ To the extent that parties wish to file FOIL requests with other agencies, they should pursue those requests with the appropriate agencies and not from the Hearing Examiners.

Finally, the Town has not been denied the ability to participate in the confidential stipulations discussions, and none of the documents circulated during those discussions have been withheld from any party. In fact, Somerset was copied on all three rounds of circulated draft stipulations, as well as the comments and responses by other parties. No denial of access to these discussions has occurred. The FOIL arguments made by Somerset are unavailing, particularly as applied to discussions which are explicitly protected as confidential pursuant to existing regulations.

IV. CONCLUSION

For the above reasons, the Somerset motion should be dismissed in its entirety.

Respectfully submitted,



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