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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 10-057

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]**

#### 1. Statutory Authority

a. Section 66.0401, Stats., as affected by 2009 Wisconsin Act 40, provides in part that: (1) a political subdivision choosing to regulate wind energy systems must enact an ordinance that is no more restrictive than the applicable standards established by the commission by rule; and (2) the political subdivision may not deny or impose a restriction on an application for approval unless it enacts such an ordinance. Section 196.378 (4g) (b), Stats., created by Act 40, in turn directs the commission to promulgate rules specifying the restrictions a political subdivision may impose on the installation or use of a wind energy system. The commission nominally addresses the requirements in s. PSC 128.13 (2) (a) by stating that a political subdivision may not establish distance or height requirements different than those in ch. PSC 128.

However, the extent of the applicability of ch. PSC 128 is unclear. Section PSC 128.02 (1) (a) provides that the chapter applies to wind energy systems, but there is no indication of whether the rule is meant to regulate only the approval process engaged in by political subdivisions, as mandated by Act 40, or whether the standards in subch. II of ch. PSC 128 are also meant to apply directly to developers, owners, and operators of wind energy systems that operate at a capacity of less than 100 megawatts in a political subdivision without an appropriate ordinance. [See also s. 196.491, Stats.] If the rule is intended to apply to developers, owners, and operators of wind energy systems throughout the state in political subdivisions without an appropriate ordinance, the rule should clearly state this and the commission should clearly and carefully explain its statutory authority. If the rule is intended merely to comply with Act 40, the

text of the rule should state clearly that the standards contained in the rule are those that must be contained in a political subdivision ordinance that imposes an approval process on developers, owners, and operators of wind energy systems.

b. Section 66.0401 (4) (a) 3., Stats., as created by Act 40, provides that on the same day that an applicant makes an application for approval of a wind energy system, the applicant must mail or deliver written notice of the application to the owners of land adjoining the site of the wind energy system. Sections PSC 128.10 and 128.30 (5) contain additional notice requirements. What is the statutory authority for the additional requirements? [Arguably, the notice requirement in s. PSC 128.18 (5) is part of the enforcement process that the commission is required to regulate under s. 196.378 (4g) (c) 4., Stats.]

## **2. Form, Style and Placement in Administrative Code**

a. The rule preface compares the rule to the law in the State of Ohio. While an agency may compare a rule to any state in the country, s. 227.14 (2) (a) 4., Stats., requires a comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota. The rule preface should include information about Iowa law.

b. Section PSC 128.02 (2) is a broad grant of authority to the commission to take any action it desires without regard to ch. PSC 128. If the commission's intent is to create a system by which a variance may be obtained, some standards for granting a variance should be stated in the rule.

c. In s. PSC 128.10 (3) (a) and (b), "Department of Transportation" should be changed to the lowercase. It appears that s. "PSC 128.10 (5)" should be changed to s. "PSC 128.10 (4)."

d. Section PSC 128.14 (3) (f) provides that the commission must establish a noise measurement protocol that will be revised as necessary and made available to the public on the commission's website. It appears that the noise measurement protocol, or at least a reference to a recognized standard, should be incorporated into the text of the rule.

e. In s. PSC 128.17 (1), the sentence should begin with the phrase "A developer." [See also sub. (3).]

f. In s. PSC 128.18 (2) (a), the notation "Wis. Adm. Code" is unnecessary and should be deleted.

g. In s. PSC 128.31 (1), the notation "s." should be inserted before the reference to "PSC 128.40."

h. Section PSC 128.40 requires the commission to establish detailed application filing requirements for applications filed for political subdivision review of a wind energy system. The commission may revise these requirements and place the requirements on the commission's website. It appears that the filing requirements should be placed in the text of the rule.

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The rule makes frequent use of the phrase “developer, owner, or operator.” When the disjunctive word “or” is used, and the rule imposes a mandate, is it clear who is required to comply with the rule? Will this be a matter typically settled by contract?

b. In s. PSC 128.13 Table 1, should “participating residences” be changed to “participating properties,” which is a defined term under s. PSC 128.01 (13)? See also sub. (1) (d) and s. PSC 128.15 (1).

c. In s. PSC 128.14 (3) (a), what does “seasonally-reduced” mean? In sub. (3) (d), “nighttime hours” should be defined. In sub. (3) (e), “under par. (f)” should be added after “noise measurement protocol.”