JACKSONKELLY
ATTORNEYS AT LAW PLLC
500 LEE STREET EAST • SUITE 1600 • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1000 • TELECOPIER: 304-340-1130
www.jacksonkelly.com

Direct Dial No. (304) 340-1251
Fax No. (304) 340-1080
e-mail: ccallas@jacksonkelly.com
State Bar ID No. 10820

May 4, 2012

Via Hand Delivery
New Request for Expedited Consideration

Ms. Sandra Squire
Executive Secretary
Public Service Commission
of West Virginia
201 Brooks Street
Charleston, WV 25301

04:45 PM MAY 04 2012 PSC EXEC SEC DIV

Re: Case No. 12-0251-E-C
Richard L. Braithwaite v. Pinnacle Wind, LLC

Dear Ms. Squire:

Pinnacle Wind, LLC wishes to respond to the Commission Staff's April 24 Further Joint Staff Memorandum ("Further Memo").

Pinnacle is pleased that the Staff has concluded that the noise projections Pinnacle provided during Pinnacle's Siting Certificate case were accurate and reliable. Pinnacle believes this conclusion should have led the Staff to recommend dismissal of the complaint. Instead, the Staff recommended that Pinnacle be ordered to prepare completely new and different noise studies, over a much broader area than the Commission's Siting Rules require for new applicants, to "verify the noise levels are not greater than what was predicted" in the Siting Certificate case. Further Memo at 3.

Pinnacle has grave concerns about this recommendation, and asks the Commission to rule that no additional studies are required. The Staff recommendation, if adopted, would infringe upon Pinnacle's property interest in the Siting Certificate, damage the Project's economic viability, violate Pinnacle's procedural due process rights, and unfairly shift the burden of proof from the complainant to Pinnacle. These adverse consequences would not only harm Pinnacle – they would also undermine the finality of other certificate orders, encourage post-certificate complaints at generating facilities, and stifle infrastructure investment in West Virginia. The Commission should reject the Staff recommendation and dismiss the complaint. In order to complete a pending financing of the Project, Pinnacle respectfully urges the Commission to grant ***expedited consideration*** of this case, and to issue an order ***not later than June 15, 2012*** rejecting the Staff recommendation and dismissing the complaint.

I. Staff Recommendations in Further Memo

Pinnacle has cooperated in the Staff's investigation of the complaint, and at the same time continued its own investigation of noise-related concerns, an investigation that Pinnacle initiated long before the complaint was filed. Responding to Staff's request that Pinnacle provide all noise-related investigations, Pinnacle submitted three different analyses prepared by ATCO Noise Management with its April 9, 2012 filing. The ATCO analyses demonstrated that Pinnacle is in compliance with the Siting Certificate. These analyses also validated the effectiveness of Pinnacle's voluntary commitment to install acoustic louvers (what Staff calls "mufflers" in the Further Memo) on all Project turbines as a means to reduce the Project's noise footprint. Pinnacle has voluntarily initiated additional investment of approximately $500,000 to install acoustic louvers on all 23 Project turbines. As noted in its April 9 filing, Pinnacle made this voluntary commit to address community concerns first expressed in late 2011, and not necessarily in response to Mr. Braithwaite's formal complaint.

In the Further Memo, Staff appears to acknowledge that the ATCO studies validate the noise level projections Pinnacle submitted in the Siting Certificate case, and that Pinnacle's voluntary commitment to install the acoustic louvers would significantly reduce the Project's noise profile. Further Memo at 2, 3. The Commission might reasonably expect that these conclusions would have supported a Staff recommendation of dismissal. After all, as the Staff conceded in its March 23 initial memo, there still has been no allegation that Pinnacle has violated any material term or condition of the Siting Certificate.

Instead, Staff recommended that Pinnacle be required to undertake a wide-ranging noise investigation, not simply to investigate Mr. Braithwaite's complaint, but "to obtain a full picture of the noise generated by the Project." Further Memo at 3. Based on Mr. Walker's personal assessment that the Project has generated "unwanted, unpredicted noise" (*id.*),[1] Staff recommended that Pinnacle be "ordered" to perform an additional, dramatically different noise study,

> including receptors corresponding to the locations used in the previous noise studies as well as including receptors located at the Complainant's home and ***any residence within two miles of the nearest turbine***. The noise test should include the full range of the Project's generation and should be done over a period of time

[1] In this connection, it is important to note this Commission's conclusion in the Siting Certificate Order that the Project was expected "to emit some noise, but [that] the operational noise levels should not be objectionable," based on the analyses Pinnacle provided, and that any impacts were expected to be minimally disruptive. Siting Certificate Order at 25. Consequently, it is inaccurate to suggest that noise impacts should be considered "unpredicted."

> sufficient to obtain a full picture of the noise generated by the Project.

Id. (emphasis added). Staff concluded that while studies both before and after installation of the acoustic louvers would be preferred, a post-installation study alone would "provide sufficient data for a determination of a successful resolution of this complaint." *Id.*

The Staff recommendation is patently overbroad and inappropriate. In its broad scope, the Staff Recommendation utterly ignores:

- the guidelines for noise studies in the Commission's Siting Rules, which require far less for noise analyses than the Staff now recommends;
- the Commission's own findings on the validity and reliability of Pinnacle's noise analyses in the Siting Certificate case;
- the months of voluntary expert investigation Pinnacle has already completed, the results of which Staff has not questioned; and
- Pinnacle's voluntary financial commitment to install acoustic louvers on all Project turbines.

Moreover, the Staff-recommended post-installation studies could not even begin until July 2012, when acoustic louver installation has been completed; would thereafter take weeks or even months to complete; and would require very significant additional expense extending through much of 2012 and beyond. Second, although Mr. Braithwaite has filed the only formal complaint relating to the Project, Staff recommends noise analysis at each of the five receptors used in Acentech's initial noise study in 2009 ("Acentech Study"), as well as at any residence within ***two miles*** of the nearest turbine. This would include not only the 60 residences within one mile of the turbines identified (but not visited or tested) in the Acentech Study, but an undetermined number of residences (dozens, or even hundreds?) located between one and two miles from the Project.

Not only is there no evidence of any noise concerns this far away from the Project, the Commission's Siting Rules require projections only up to one mile from a proposed Project's property line. Siting Rule 3.1.m.4.C.1. Moreover, the Commission's practice, which Acentech adopted in completing Pinnacle's noise study, was to require only a few receptors in the collection of ambient noise data – not data collection at ***every residence*** within the one-mile area, which is effectively what the Staff recommends here. This additional scope would require noise analyses over an area of approximately 17 square miles in Mineral County. Staff does not even suggest how much this might cost, whether it is feasible, how long it would take or, most

importantly, how it would relate to the allegations in the complaint. Nothing in the Siting Rules or the Commission's past certification processes for wind energy projects even remotely contemplates the broad scope of testing, pre- or post-certification, that the Staff now recommends. For these reasons alone, Staff's recommendation should be rejected.

II. Engineering Problems Associated with the Staff-Recommended Studies

Nor does the Staff consider whether its recommended additional study could be meaningfully compared to the results of the Acentech Study, which was the basis of the Commission's findings in the Siting Certificate Order. The noise level predictions in the Acentech Study can no longer be validated through field measurements because ambient noise levels vary dramatically over time and are often ***higher*** than the turbine noise contribution. For example, Figure 11 of the Acentech Study shows that the hourly equivalent sound level (Leq) at Location 1, the sensitive receptor nearest to Mr. Braithwaite's home, varied from 22 dBA to 71 dBA over the 12 day measurement period during November/December 2007. This is huge range, covering noise levels ranging from a quiet rural setting to a loud, densely populated urban environment.

In the Acentech Study, for example, the calculated Pinnacle turbine contribution at Mr. Braithwaite's home is a worst-case 40 dBA hourly Leq. However, it is important to note that this noise level was exceeded by background ambient and other sources ***at least half the time*** during the Acentech study period in 2007, long before the Project was built. Moreover, in the four and a half years since then, the background noise has likely increased due to the construction of additional residences, increases in vehicular traffic, air traffic, etc. In addition, the background measurements were conducted in winter when many of the surrounding trees were without leaves. Conducting the same background noise study in the summer would have yielded higher ambient noise levels due to, among other things, sound generated by wind passing through foliage.

Even if one were to ignore, for the moment, the likely increase in background noise since 2007 and other important seasonal effects, in order for Pinnacle to conduct meaningful field measurements of turbine noise levels, the following environmental conditions would need to occur simultaneously:

1. Each turbine would need to emit maximum sound power, which occurs with a wind speed of 8 m/s or greater measured at 10 meters;

2. The wind direction would need to be out of the southeast, in order for Mr. Braithwaite to be downwind;

3. The ground level wind speed would need to be less than 11 mph for measurements to be conducted per ANSI standards; and

4. The background or ambient noise level would need to be well below 40 dBA, so as not to significantly contribute to the overall noise level

The likelihood of all of these conditions occurring simultaneously at each measurement location for a period of at least an hour is extremely remote, even if measurements occurred continuously over several weeks. Again, Figure 11 of the Acentech Study showed that quiet nighttime background noise levels occur when wind speeds are low. At low wind speeds, the turbines are likely not emitting maximum sound power or even operating at all. At high wind speeds, the turbines are generating maximum sound power, but the background noise in the heavily forested surroundings is very high, corrupting field measurements. In short, there is no reasonable way to perform new field measurements as Staff has proposed.

Nevertheless, the CadnaA model is designed to show just what the Staff seeks. Based on actual field measurements of background ambient sound and other input parameters (including, by way of example, actual topography from USGS and other recognized sources), the CadnaA model creates "worst case" scenarios of turbine noise impacts. More specifically, the CadnaA model assumes, for example, that all of turbines are producing at maximum power, and that the wind direction is directly toward each potential receptor. This is why the Commission has endorsed the use of the CadnaA model, and why an analysis that validates the inputs used in the initial CadnaA modeling is critical and, in fact, is the only way now to create a useful "apples to apples" comparison. In other words, the only meaningful analysis at this point would be to validate that the actual sound power levels generated by the turbines coincide with the inputs used in the Acentech Study – which is exactly what Staff acknowledges that Pinnacle has ***already*** done, through ATCO's efforts detailed in Pinnacle's April 9 filing.

For these reasons, Staff's recommendations for new studies are ill-conceived and inappropriate. Nevertheless, there are significant policy reasons why requiring siting certificate holders to attempt to validate projections made in Siting Certificate cases is inappropriate, especially when there is no basis to believe that the holder violated any term of its certificate.

III. Pinnacle's Property Interest in the Siting Certificate

The Staff's recommendation questionably impairs Pinnacle's property interest in the Siting Certificate. It is well established that "[s]ecurity of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible."[2] The Commission recently recognized the importance of finality in its orders in In re Trans-Allegheny Interstate Line Co.:

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[2] State ex rel. Shannon v. Sponburgh, 401 P. 2d 635, 640 (Wash. 1965), quoting Matter of Evans v. Monaghan, 118 N.E.2d 452, 457 (N. Y. 1954) (rule applied in the context of res judicata).

> Generally, this Commission is of the opinion that it is inappropriate to second guess our decisions or to apply '20/20 hindsight' to one of our decisions, since to do so deprives them of finality, and we take the position that, under normal circumstances, a Commission order should not be revised retroactively, to reflect new knowledge or information presented to the Commission, which was not before us during our deliberations on the case in the first instance.[3]

Pinnacle's property interest in the Siting Certificate, and the harm that could result from impairment of that interest, are more than mere abstract concepts – Pinnacle is experiencing harmful impacts of that impairment right now. In reliance on the Siting Certificate's finality, Pinnacle invested approximately $150 million to build the same facility, with the same turbines in the same locations, that the Commission authorized in the Siting Certificate. It also entered into a power purchase agreement ("PPA") to sell the Project energy and renewable energy credits, with this sale predicated on the Project's normal, unimpaired commercial operations. To finance this investment on a permanent basis, Pinnacle secured commitments from a group of lenders for a term loan financing initially scheduled to close weeks ago; delays arising from this proceeding have caused Pinnacle to incur substantial additional, unnecessary costs, and forced Pinnacle and the lending group to endure the financing uncertainty that the pendency of the complaint has created. If Pinnacle does not receive a favorable decision rejecting the Staff recommendation and dismissing the complaint by mid-June, then this financing would be in significant jeopardy.

Pinnacle's investors, creditors, suppliers, and related entities have relied on the Siting Certificate's finality in making important decisions about their participation in the Project's construction and financing. The public agencies buying power under the PPA are also relying on the availability of the energy the Project will generate. These are real world examples of how the complaint proceeding itself, to say nothing of the Staff's overbroad recommendation, can create uncertainty regarding the finality of West Virginia's permitting processes, undercut investor expectations, and create a very poor atmosphere for investment in West Virginia. More importantly, however, the relief Mr. Braithwaite seeks in the complaint – the curtailment of

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[3] In re Trans-Allegheny Interstate Line Co., Case No. 07-0508-CN (Commission Order dated February 13, 2009) at 17 (quoting Monongahela Power Company, Case No. 9665 (Commission Order dated May 25, 1982) at 11). *See also* Gwinn v. Crab Orchard-MacArthur Public Service District, Case No. 86-217-S-C, *et al.* (Commission Order Denying Petition to Reopen dated October 18, 1989) at 4 ("[A]n agency decision becomes a property interest to the participating parties and its finality is a fundamental element of that interest") (citing Truax-Traer Coal Co. v. Compensation Commissioner, 17 S.E.2d 330 (W. Va. 1941)).

Project operations at night, throughout the entire year – not only jeopardizes the completion of the financing, but threatens the economic feasibility of the Project going forward.

IV. Requiring the Staff-Recommended Studies Would Violate Pinnacle's Procedural Due Process Rights

Neither the complainant nor the Staff has questioned Pinnacle's adherence to the Commission's guidelines for the preparation and submission of the Acentech Study. Pinnacle and Acentech relied upon the Commission's previous endorsement of the CadnaA model in developing noise-level projections. Pinnacle has now proved that the sound power inputs used in the CadnaA model are generally equivalent to the levels the Project turbines are generating today. See April 24 filing at p. 8 and Exhibit B. Staff's recommendation, however, would effectively question the accuracy of the CadnaA model Acentech used, even though the Commission had endorsed the very same model in the past, and found no fault with Pinnacle's noise presentation in the Siting Certificate case.

The Commission has long recognized the importance of procedural due process in utility regulation, following the holdings of the Supreme Court of Appeals and the U.S. Supreme Court. Our Supreme Court of Appeals has held

> [t]hat the Due Process Clause, Art. III, § 10, W. Va. Const. requires procedural safeguards against State action which affects a liberty or property interest. For the purpose of due process analysis a "property interest" includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.[4]

Due process requires, for example, that notice be given before the Commission can revise long-standing interpretations of rules or orders.

In C&P Telephone Co. v. Public Service Commission, a telephone utility appealed an order changing Commission policy with respect to the need for a lead/lag study in determining the utility's entitlement to cash working capital. The utility generally did not include a lead/lag study in its rate filing, but just three weeks prior to hearing, the Staff argued that this study was required, and the Commission sided with Staff. Relying on a U.S. Supreme Court decision, the Supreme Court of Appeals held that where a company reasonably relied on a manner of agency

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[4] Kisner v. Pub. Service Comm'n, 163 W. Va. 565, 569-570, 258 S.E.2d 586, 588-589 (1979) (internal citations omitted).

regulation, to change that regulatory approach without sufficient notice to the utility would deprive it of its due process rights.[5]

On behalf of Pinnacle, Acentech followed the Commission's very specific rules and precedent in preparing the Acentech Study used in the Certificate Case. No party has suggested otherwise. Evaluating the noise projections made in the Acentech Study, the Commission generally concluded that "the Project will emit some noise, but the operational noise levels should not be objectionable." Certificate Order at 25.

The Staff has legitimately inquired about Pinnacle's recent efforts to demonstrate that the Acentech inputs into the CadnaA model were accurate. The ATCO studies prepared following the October 2011 noise complaints, and filed with the Commission before the Further Memo was issued, show that Pinnacle's projections were accurate and reliable. The Staff does not question the accuracy or usefulness of the Acentech Study or the ATCO studies. To require further testing at this point – over two years after the Certificate was issued – amounts to a retroactive invalidation of the methodology Pinnacle and Acentech used, and the Commission explicitly endorsed, in the Certificate Case.

V. Staff's Recommendation Unfairly Shifts the Burden of Proof from the Complainant to Pinnacle

Requiring Pinnacle to conduct further studies to prove that it is in compliance with the materials terms and conditions of the Certificate Order unfairly shifts the burden of proof from Mr. Braithwaite to Pinnacle. In a formal complaint case, the complainant must "establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the complaint." Procedural Rule 6.2.g. As Pinnacle explained in its April 9 Letter at pages 3-5, the Complainant has submitted no reliable evidence to support his claims. Moreover, the Staff recommendation in the Further Memo appears to be primarily based on Mr. Walker's assessment that noise outside Mr. Braithwaite's residence was "prominent," without any discrimination for the various causes that might have contributed to it. To require Pinnacle to conduct the expensive, time consuming studies the Staff recommends, before the Complainant submits any credible evidence, unfairly and improperly shifts the burden of proof in the matter to Pinnacle.

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[5] C&P Telephone v. PSC, 171 W. Va. 708, 714, 301 S.E.2d 798, 803-804 (1983), *citing* W. Ohio Gas Co. v. Pub. Utilities Comm'n, 294 U.S. 63, 70, 55 S.Ct. 316, 320 (1935) (recognizing a due process deprivation in a public utility commission's change of allocation method without timely notice to utility).

VI. Update on Road Resurfacing Efforts

In its April 24 filing, Pinnacle noted that in cooperation and consultation with the West Virginia Department of Highways, Pinnacle had committed to resurface specific roads, and that this work was expected to be completed by early summer 2012. These efforts are well underway. Pinnacle has selected a contractor to complete the resurfacing work, contract terms and conditions have been agreed to, and the contractor is slated to begin work in early June.

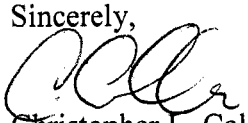
VII. Conclusion

Utilities, their lenders, investors, and other providers of capital must be able to rely on the fairness and finality of Commission siting orders if they are to undertake projects in this State. Uncertainty about the finality of siting orders can have a devastating impact on capital-intensive projects such as the Project, and can dampen investors' willingness to consider West Virginia in siting an energy facility. If this finality is undermined, independent power producers will have to bear far more risk, and may be unable to attract the significant amount of capital required to build facilities such as the Project.

This outcome would contravene the Legislature's directive, expressed in the Alternative and Renewable Energy Portfolio Act, that "West Virginia should encourage the development of more efficient, lower-emitting and reasonably priced alternative and renewable resources," to make best use of the State's energy resources and "to continue its success in attracting new businesses and jobs." W. Va. Code § 24-2F-2(3)-(5). And, in Pinnacle's situation, the relief requested in the complaint, if granted, would jeopardize the Project financing and threaten the economic feasibility of the Project. For these reasons, Pinnacle respectfully urges the Commission to grant ***expedited consideration*** of this case, and to issue an order ***not later than June 15, 2012*** rejecting the Staff recommendation and dismissing the complaint.

Please file this letter, and provide twelve copies to the appropriate parties at the Commission. We also ask that you date stamp the extra copy provided and return it with our messenger. As always, we appreciate your assistance.

Sincerely,



Christopher L. Callas

CLC/mrb
c: Richard Braithwaite
John Auville, Esq.
Mike Blasik, Esq.
Adam Connolly, Esq.