STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8613

Investigation pursuant to 30 V.S.A. §§ 30 and	)
209 into sound levels from the Georgia	)
Mountain Community Wind, LLC wind electric	)
generation facility in Georgia, Vermont	)

Order entered: 1/26/2017

ORDER

I. Introduction and Background

On September 18, 2015, Melodie Mclane filed with the Vermont Public Service Board (the "Board") an e-mail complaining about the sound levels at her house that night from the operation of the Georgia Mountain Community Wind, LLC ("GMCW") wind electric generation facility on Georgia Mountain (the "Project").

On November 18, 2015, the Board issued an order initiating this investigation and appointed me as Hearing Officer to examine "whether operation of the Project resulted in sound levels at the McLane residence on the evening and night of September 18, 2015, in excess of the applicable limits."[1]

In today's order, for the reasons discussed below, I recommend that the Board direct GMCW to offer to perform exterior-to-interior sound level attenuation testing ("attenuation testing") at the McLane residence to determine the actual attenuation value of that structure under windows open, windows partially open, and windows closed conditions. Assuming the McLanes accept that offer, GMCW should be required to report the results of that testing to the Board and other parties to this proceeding within 30 days of its completion. Assuming the Board accepts my recommendation, I also recommend that the Board remand this matter to me for further proceedings.

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1. Docket 8613, Order of 11/18/15 at 2.

II. PROCEDURAL HISTORY

On September 18, 2015, Melodie McLane filed a complaint (the "McLane Complaint") with the Board.

By memorandum issued September 30, 2015, the Board directed GMCW to reply to the McLane Complaint, and established a date for the Vermont Department of Public Service ("DPS" or "Department") to reply to both the McLane Complaint and GMCW's response.

On October 9, 2015, GMCW filed a letter describing why it believed no further action was warranted in response to the McLane Complaint.

On October 16, 2015, the Department filed a reply stating that GMCW's response was insufficient to support a determination that no additional action was warranted, and contended that GMCW must at a minimum perform sound modeling to determine exterior sound levels at the McLane residence for the night of the complaint.

On November 2, 2015, GMCW filed a response to the Department's comments in which GMCW outlined its disagreement with the Department's position.

On November 18, 2015, the Board issued an order initiating this investigation.

On November 30, 2015, I convened a prehearing conference in this matter. During the prehearing conference, the parties indicated that in order to craft a schedule for this proceeding the Board would need to rule on what, if any, additional actions are required of GMCW under its approved sound monitoring plan (the "Monitoring Plan") in response to the McLane Complaint,.

On December 15, 2015, I issued an order directing GMCW to perform sound modeling of the exterior sound levels from the Project at the McLane residence for the evening and night of September 18, 2015, and report the results of that modeling to the Board and parties. The parties were provided an opportunity to file comments on how to proceed in this matter once the results of the modeling were filed.[2]

On January 29, 2016, GMCW filed the results of the modeling it performed in response to the December 15, 2016, order.

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2. Docket 8613, Order of 12/15/15 at 7.

On May 20, 2016, after several extensions to the schedule to accommodate the exchange of information among the parties, the Department filed its comments and recommendations in response to GMCW's modeling report filed January 29, 2016.

On June 3, 2016, GMCW responded to the Department's May 20th comments and recommendations.

On August 8, 2016, I conducted a status conference and attempted to reach consensus among the parties on next steps for this proceeding. When no such consensus was reached, I directed the parties to file certain additional information so that I could make a determination regarding any necessary additional process.

On August 10, 2016, I issued a status conference order memorializing, among other things, the directives that I gave to the parties during the August 8, 2016, status conference.

On August 18, 2016, the Department filed its response to the August 10th order.

On August 19, 2016, GMCW filed its response to the August 10th order.

On September 7, 2016, the Department filed a reply to GMCW's August 19th filing.[3]

On September 14, 2016, GMCW filed a reply to the Department's August 18 and September 7, 2016, filings.

III. POSITIONS OF THE PARTIES

GMCW

According to GMCW, the Project did not violate the exterior sound limit the evening of September 18, 2015, based on the sound modeling it performed using data gathered during the sound monitoring that was conducted during the first year of Project operations.[4] Additionally, GMCW contends that it is not required to perform attenuation testing at the McLane residence because: 1) the sound modeling performed for September 18, 2015, indicates sound levels that night were well below the 40 dBA threshold that would trigger the obligation for GMCW to offer attenuation testing to the McLanes; 2) the Department's modeling is unreliable because it does not follow the procedures set forth for sound monitoring in the Monitoring Plan and therefore did

3. On September 12, 2016, the Department filed a correction to its September 7th filing.
4. GMCW Report dated 1/28/16.

not isolate Project-only sound levels from background sound levels; and 3) the highest recorded sound level at the McLane residence during the first-year monitoring period was 39.5 dBA, again below the 40 dBA threshold that would trigger an obligation for GMCW to offer attenuation testing to the McLanes.[5] GMCW also argues that Project-only sound levels recorded at the McLane residence during the first year of operations that were within 5 dBA of the 45 dBA exterior limit cannot be used in this proceeding because they are from periods with high winds, and such data is to be excluded under the Monitoring Plan.[6]

The Department

The Department recommends that the Board require GMCW to perform attenuation testing at the McLane residence because its consultant concluded that there is a "reasonable possibility" that Project-only sound levels were within 5 dBA of the 45 dBA exterior sound limit at that residence on the night of September 18, 2015.[7]

According to the Department, its analysis properly isolated Project-only sound levels by focusing on the audibility of the turbines based on the acoustic signature of the blades. The Department reasons that if the turbines are clearly audible, then background sound is contributing very little to the recorded levels; thus enabling the Department to determine if there was a "reasonable possibility" that Project-only sound levels were within 5 dBA of the 45 dBA exterior sound limit at the McLane residence on the night of September 18, 2015. According to the Department, its analysis revealed two occasions during the sound monitoring period with meteorological conditions similar to those experienced on September 18, 2015, during which Project-only sound levels were within 5 dBA of the 45 dBA exterior sound limit at the McLane residence.[8]

The Department also notes that the sound-monitoring report that GMCW filed that detailed the results of the sound monitoring conducted during the first year of Project operations (the "Report") identified at least five occasions when Project-only sound levels at the McLane

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5. Letters from Andrew Raubvogel, Esq. to Judith Whitney, Clerk of the Board, dated June 3, 2016, August 19, 2016, and September 14, 2016.
6. Letter from Andrew Raubvogel, Esq. to Judith Whitney, Clerk of the Board, dated September 14, 2016.
7. Department Comments dated May 20, 2016.
8. Department Comments dated August 18, 2016, at attachment.

residence were within 5 dBA of the 45 dBA exterior limit. In spite of the presence of gusty winds on these occasions, the Department asserts that they represent evidence demonstrating a "reasonable possibility" that Project-only sound levels were within 5 dBA of the applicable limit, triggering GMCW's obligation to offer to perform attenuation testing at the McLane residence.[9]

The McLanes

The McLanes did not provide comments on either the sound modeling analyses performed by GMCW and the Department, or the recommendations made by each of those parties.

IV. DISCUSSION

On June 11, 2010, the Board issued a final order and certificate of public good ("CPG") in Docket 7508 approving the construction and operation of the Project. The CPG contains the following three conditions relevant to the McLane Complaint:

> 23. GMCW shall construct and operate the Project so that it emits no prominent discrete tones pursuant to American National Standards Institute (ANSI) standards at the receptor locations; and Project- related sound levels at any existing surrounding residences do not exceed 45 dBA(exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).
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> 24. In the event noise from operation of the Project exceeds the maximum allowable levels, the Petitioner shall take all remedial steps necessary to bring the sound levels produced by the turbine(s) into compliance with allowable levels, including modification or cessation of turbine(s) operation.
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> 25. GMCW shall submit, for Board approval, a noise monitoring plan to be implemented during the first full year of operation. The plan shall establish a monitoring program to confirm under a variety of seasonal and climatic conditions compliance with the maximum allowable sound levels described above. Parties will have three weeks, from the date this plan is filed with the Board, to comment on the plan. GMCW cannot commence operations until the plan is approved.[10]

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9. Department Comments dated September 7, 2016.

10. Docket 7508, *Petition of Georgia Mountain Community Wind, LLC*, CPG dated 6/11/10 at 5. GMCW's CPG was subsequently amended on November 9, 2012. However, the amendments did not change the language or requirements of Conditions 23 through 25 from the June 11, 2010, CPG.

On December 20, 2012, the Board approved GMCW's proposed Monitoring Plan.[11] The Monitoring Plan contains a complaint resolution protocol (the "Protocol"), pursuant to which GMCW must respond to complaints about Project sound levels.[12] The Protocol is distinct from the procedures that governed the sound monitoring that took place during the first year of Project operations and is in place for the life of the Project.[13]

The Protocol requires GMCW to investigate a complaint about Project sound levels at an existing residence located within 0.9 miles of the turbines and, if "based on monitoring and/or modeling, there appears a reasonable possibility that the Project sound level is within 5 dBA of the exterior CPG noise limit at the complaint location, and not related to abnormal Project operation or maintenance," then GMCW must offer to perform attenuation testing at the complainant's residence.[14]

The Department and GMCW disagree over whether GMCW must offer to perform attenuation testing at the McLane residence.

According to the Department, its analysis showed two occasions where Project-only sound levels at the McLane residence were within 5 dBA of the exterior sound limit under weather conditions similar to those experienced on September 15, 2015, the night of the McLanes' complaint.

GMCW counters the Department's position by arguing that the Department's analysis does not follow the procedures established for sound monitoring in the Monitoring Plan because it does not properly isolate Project-only sound levels from pre-existing ambient sound levels, producing artificially high results.

The Department also relies on five instances in the Report filed by GMCW where GMCW itself reported Project-only sound levels within 5 dBA of the exterior limit that should have triggered GMCW's obligation to offer attenuation testing to the McLanes.

According to GMCW, this argument must also be rejected because the times when those sound levels were recorded included periods of high winds, and under the Monitoring Plan

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11. Docket 7508, Order of 12/20/12 at 4.
12. *See* Monitoring Plan at 3-5.
13. *See* Monitoring Plan at Section 2.
14. Monitoring Plan at 4.

periods of such winds are to be removed when determining Project compliance with the applicable sound limits.

At issue in the instant case is whether GMCW must offer to perform attenuation testing for the McLanes.[15] Such an offer must be made if there is a "reasonable possibility" that Project-only sound levels at the McLane residence were within 5 dBA of the 45 dBA exterior limit for the Project.[16]

Based on the information provided to date in this investigation, I am not persuaded that the Department's modeling properly isolated Project-only sound levels, and therefore I am not relying solely on that modeling in making my recommendation. I recognize there may be practical limits on what the Department can bring to its analysis in attempting to isolate Project sound levels from background sound levels because of its inability to turn the turbines off and on. This appears to be an obstacle to determining background sound levels for a given time frame unless that information had in fact been developed for that same time frame during the monitoring conducted by GMCW during the first year of operations. Absent this information, the Department would have to develop its own methodology for determining Project-only sound levels. While I found the Department's approach to be facially reasonable, I am unable to conclude that by itself it supports a recommendation that the Board direct GMCW to offer attenuation testing to the McLanes.

However, I find that GMCW should have offered to perform attenuation testing at the McLane residence based on the five monitored instances during the first year of Project operations for which GMCW reported Project-only sound levels within 5 dBA of the exterior limit at that residence, something GMCW failed to do.

I recommend the Board reject GMCW's argument that these self-reported sound levels should not be used as a basis for ordering GMCW to offer attenuation testing to the McLanes. GMCW is correct that periods of high winds are required to be excluded from the data set when

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15. Neither GMCW nor the Department contend that the exterior sound limit was violated at the McLane residence on the evening of September 16, 2015. However, attenuation testing, if required by the Board, would allow for the application of a structure-specific attenuation value to the modeled exterior levels to determine what the interior sound levels were from the Project that evening and night at the McLane residence.

16. Monitoring Plan at 4.

determining compliance with the sound limits applicable to the Project. However, the procedures by which those periods are excluded from the data set are set forth in Section 2 of the Monitoring Plan, the section that details the procedures to be followed when GMCW performed sound monitoring to assess the Project's CPG compliance during the first year of Project operations. Because such a determination would result in a finding of either compliance or non-compliance with the CPG, the procedures set forth in Section 2 of the Monitoring Plan must be followed as set forth in that plan in making such a finding.

However, the Monitoring Plan contains a separate section, Section 3, that sets forth the procedures for resolving sound complaints for the life of the Project (i.e. the Protocol). Paragraph 6 of the Protocol establishes the requirement that GMCW investigate sound complaints when there appears to be a "reasonable possibility" that Project-only sound levels are within 5 dBA of the exterior limit at a complainant's residence. Subparagraph c of paragraph 6 states that if "the sound level is within 5 dB of the exterior sound limit, then GMCW will offer the homeowner testing to determine the attenuation value of the affected structure." The offer to conduct attenuation testing under subparagraph c is part of the investigation that GMCW must undertake under the "reasonable possibility" standard of paragraph 6. In other words, if there is "reasonable possibility" that Project-only sound levels at the exterior of the McLane residence were within 5 dBA of the exterior limit, GMCW was required to offer attenuation testing to the McLanes.

In the Report, GMCW reported Project-only Leq sound levels at the exterior of the McLane residence as follows:

1. February 17, 2013, < 42 dBA;
2. February 20, 2013, < 44 dBA;
3. November 10, 2013, 43 dBA;
4. November 11, 2013, < 44 dBA; and
5. November 11, 2013, < 42 dBA.[17]

With respect to these reported levels, the Report contains the following caveats:

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17. Report at 29-30.

1) in some instances the Project-only sound levels are too low to substantially raise the background sound level and therefore cannot be accurately calculated; and 2) some of the above instances are dominated by wind sounds so Project sounds are either not discernible or only occasionally discernible.[18]

Based on these caveats, the Report describes these recorded instances as unreliable for making a determination regarding compliance with the CPG sound limits. However, the Report still describes these levels as estimates of turbine-only sound after removal of background sound levels. While I agree with GMCW that such "estimates" should not be used to determine compliance with the CPG under the procedures set forth in Section 2 of the Monitoring Plan, I do believe that they provide a sufficient basis for the Board to conclude that a "reasonable possibility" exists that Project-only sound levels were within 5 dBA of the exterior sound limit on those dates and that attenuation testing should have been offered to the McLanes at that time.

Additionally, while I am unable to conclude that the Department's analysis regarding exterior sound levels on the evening and night of September 18, 2015, properly isolated Project-only sound levels for that evening, I do conclude that the Department's analysis lends further support to a finding that there exists a reasonable possibility that Project-only exterior sound levels at the McLane residence were within 5 dBA of the exterior limit on the five occasions identified by GMCW in the Report.

Based on the foregoing, I recommend that the Board find that there exists a reasonable possibility that exterior sound levels at the McLane residence were within 5dBA of the exterior sound limit applicable to the Project on the five occasions identified in the Report. I also recommend that the Board direct GMCW to offer to perform attenuation testing at the McLane residence to determine the actual attenuation value of that structure under windows open, windows partially open, and windows closed conditions. Assuming the McLanes accept that offer, the Board should direct GMCW to report the results of that testing to the Board and other parties to this proceeding within 30 days of its completion. Assuming the Board accepts my recommendation, I also recommend that the Board remand this matter to me for further proceedings.

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18. Report at 31.

Dated at Montpelier, Vermont, this 27 day of October, 2016.

John J. Cotter, Esq.
Hearing Officer

V. BOARD DISCUSSION

On November 14, 2016, GMCW filed comments on the Hearing Officer's report and recommendation.

No other party filed any comments on the report and recommendation.

On November 30, 2016, the Board heard oral argument in this matter in the Susan M. Hudson Hearing Room located in Montpelier, Vermont.

After careful consideration of the report and recommendation, GMCW's comments thereon, and the arguments advanced during the oral argument, we decline to accept the Hearing Officer's recommendation that GMCW must offer attenuation testing to the McLanes. We reach this decision because we are persuaded by GMCW's arguments that it is appropriate for GMCW to eliminate periods of contaminated data from the five instances for which GMCW reported Project-only sound levels within 5 dBA of the exterior limit at the McLane residence during the first year of Project operations. However, the McLanes and the Department may request additional process in this matter if they reasonably believe that through discovery or cross-examination of GMCW's expert they can show that GMCW's recent representations regarding the turbine sound levels at those times are not correct.

GMCW

GMCW contends that the report and recommendation must be rejected by the Board because it relies on an irrational reading of the Protocol, relies on invalid data, and fails to give consideration to the modeling performed by GMCW in response to the Hearing Officer's December 15, 2015, Order.[19]

According to GMCW, the same methodology that is set forth in the Monitoring Plan for use in performing sound monitoring during the Project's first year of operations must be used for processing complaints about sound levels from the Project. GMCW argues that data that is not valid for use in determining compliance with the applicable sound limits cannot be used for determining whether a "reasonable possibility" exists that sound levels at the McLane residence were high enough to require an offer of attenuation testing to the McLanes. According to

19. GMCW comments at 9.

GMCW, the "reasonable possibility" language in the Protocol only applies where sound level data was not actually collected at a particular residence and is only to be used to extrapolate sound levels at a residence where monitoring was not performed.[20]

GMCW also asserts that the five instances during the first year of Project operations for which GMCW reported Project-only sound levels within 5 dBA of the exterior limit at the McLane residence contain contaminated data that, once removed, demonstrate that the actual sound levels at those times were below 40 dBA. Therefore, GMCW concludes, it was improper for the Hearing Officer to rely on those reported levels to recommend that GMCW be required to offer attenuation testing to the McLanes.[21] GMCW further contends that the Board cannot rely on the five instances during the first year of Project operations for which GMCW reported Project-only sound levels within 5 dBA of the exterior limit to impose a requirement for attenuation testing without first conducting an evidentiary hearing on those reported levels.[22]

GMCW further argues that the report and recommendation violate due process by expanding the scope of the investigation without proper notice. According to GMCW, the purpose of the investigation is to determine whether the Project operated within applicable sound limits on the evening of September 18, 2015. GMCW argues that this was accomplished when it performed sound modeling to demonstrate that exterior levels at the McLane residence that evening were below 45 dBA. GMCW asserts that it was a violation of due process for the Hearing Officer to rely on GMCW's own reported sound levels from the monitoring done during the first year of Project operations to conclude that attenuation testing must be offered to the McLanes.[23]

GMCW also claims that the Hearing Officer violated due process by relying on the "reasonable possibility" language applicable to complaint resolution without also incorporating the requirements imposed on the sound monitoring conducted during the first year of Project operations. According to GMCW, this results in a "standardless adjudication."[24]

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20. GMCW comments at 10-13.
21. GMCW comments at 13-17.
22. GMCW comments at 20-21.
23. GMCW comments at 17-19.
24. GMCW comments at 19-20.

Department

The Department did not file any written comments on the report and recommendation. However, the Department did participate in the oral argument and voiced its reasons in support of the Hearing Officer's recommendation.

According to the Department, application of the procedures required for use in conducting sound monitoring during the first year of Project operations to the resolution of complaints about sound levels from the Project eliminates the ability to fully assess the validity of a sound complaint. This, the Department contends, is because those procedures require that the turbines be placed in pause mode to determine the level of background sound to be used in calculating Project-only sound levels. Absent the ability to require GMCW to shut down the turbines, the Department will not be able to determine background sound levels pursuant to the Monitoring Plan and will therefore not be able to calculate a Project-only sound level. As a result, the Department believes that other approaches must be available to determine Project-only sound levels for processing complaints under the "reasonable possibility" standard of the Protocol. The Department sees the analysis used by its consultants together with the Hearing Officer's reliance on GMCW's own reported sound levels as an appropriate basis for finding that there was a reasonable possibility that sound levels at the McLane residence were at or above 40 dBA and that attenuation testing should therefore be offered. The Department emphasizes that GMCW explained in great detail in its sound monitoring report why the reported sound levels relied on by the Hearing Officer were Project-only sound levels and questions the newly recalculated levels contained in GMCW's November 14th comments.[25]

The Department agrees with GMCW that the question before the Board is ultimately whether Project operations on the evening of September 18, 2015, were within applicable sound limits. However, the Department asserts that the most GMCW can represent about sound levels that evening is that the exterior level of 45 dBA was not exceeded. According to the Department,

25. Tr. 11/30/16 at 10-14 (Kisicki).

it is not possible to know with certainty whether the 30 dBA interior limit was complied with in the absence of attenuation testing at the McLane residence.[26]

The McLanes

The McLanes did not file any written comments on the Hearing Officer's report and recommendation. However, Mr. McLane participated in the oral argument and stated his opinion that interior sound levels inside his residence are regularly over the 30 dBA interior limit. Mr. McLane expressed skepticism that his residence actually provides a high enough attenuation value to reduce exterior sound levels in the 40-45 dBA range to an interior level that complies with the 30 dBA limit.[27]

Mr. McLane was also critical of the data that was collected through the sound monitoring that was performed during the first year of Project operations because it did not capture enough times when the turbines were operating at full power output. According to Mr. McLane, the limited data collected means that the modeling recently performed by GMCW to determine exterior sound levels at his residence on September 18, 2015, was unreliable.[28]

1. Complaint Resolution Methodology

We agree with GMCW that it is appropriate for GMCW to eliminate data that is deemed contaminated by the sound monitoring methodology when, in response to a complaint, it assesses whether a reasonable possibility exists that the 40 dBA threshold has been reached. GMCW submitted an affidavit from its expert explaining that once the contaminated data is removed from the five instances for which GMCW reported levels in excess of 40 dBA, the Project-only sound levels for those times were actually below 40 dBA.

However, we disagree with GMCW that following the sound monitoring requirements is the only way to demonstrate whether a reasonable possibility exists that exterior levels at a particular residence have reached 40 dBA or higher when responding to a sound complaint. Adopting the rigid approach advanced by GMCW would mean that it would be impossible for a complainant or the Department to demonstrate that attenuation testing is required because the

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26. Tr. 11/30/16 at 14 (Kisicki).
27. Tr. 11/30/16 at 7-9 (McLane).
28. Tr. 11/30/16 at 17-19 (McLane).

procedures advanced by GMCW require turbine shutdowns to assess background sound levels, something neither complainants nor the Department have the ability to bring about short of petitioning for a Board order directing such a shutdown.

Therefore, while we find no fault in GMCW's application of the sound monitoring procedures to the data relied upon by the Hearing Officer in making his recommendation, we expressly note that it is also appropriate for other individuals and entities to adopt other methodologies in order to demonstrate whether the "reasonable possibility" standard has been met. The validity and credibility of any such methodologies will need to be evaluated on a case-by-case basis and would be subject to challenge by GMCW in the event such a proceeding came before the Board. In the instant case, the Department did rely on an alternate methodology in reaching its conclusion that attenuation testing must be offered. However, the Department also conceded at oral argument that the results of its analysis were a "very close call" and characterized as "fair" the Hearing Officer's conclusion that, by itself, the Department's analysis did not support a finding of "reasonable possibility."[29] As a result, there is no basis on which we can conclude that GMCW must offer attenuation testing to the McLanes.

Related to this issue is a concern we have regarding GMCW's initial reporting of the five instances in question. GMCW asserts that it was not necessary for it to remove the contaminated data prior to filing its sound monitoring report because the reported levels were below 45 dBA even with that data present, demonstrating compliance with the levels imposed by the CPG.[30]

We are concerned that GMCW did not fully appreciate its obligations under the Monitoring Plan, particularly those set forth in the Protocol, when it prepared and filed its monitoring report. The Protocol requires GMCW to offer attenuation testing to a homeowner if there is a reasonable possibility that exterior levels reached 40 dBA at a residence. If GMCW had originally reported its results at the levels it now asserts are accurate, it may well have rendered some of the resource expenditures in this proceeding unnecessary.

GMCW's decision not to remove the contaminated data before filing its report appears to have been based on a mistaken belief that it was not obligated to offer attenuation testing to the

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29. Tr. 11/30/16 at 13 (Kisicki).
30. GMCW comments at 16.

McLanes if levels of 40 dBA or above were reached at their residence. It appears that it was only recently that GMCW realized that it had such an obligation. GMCW apparently previously believed that it was up to the McLanes to review the sound monitoring report to see if there were any instances when sound levels reached or exceeded 40 dBA, and if so, to request attenuation testing from GMCW.[31]

GMCW's failure to remove the contaminated data, and its representations in the sound monitoring report that the levels in question were Project-only levels, provided a common-sense basis for the Department to advocate and the Hearing Officer to recommend that the "reasonable possibility" standard for attenuation testing had been met, even if those reported sound levels were not valid for determinations of compliance with the limits imposed by the CPG.

Given that GMCW continued to represent that Project-only sound levels were in excess of 40 dBA on those five instances until after the Hearing Officer issued his report and recommendation, we will provide the Department and the McLanes an opportunity to request additional process to test the validity of GMCW's recent assertions regarding those levels. Any such request must be filed no later than ten business days from the date of this order, set forth the steps that are being requested and a schedule for their implementation, and include an explanation as to why such additional process is likely to lead to a determination that GMCW's calculations are incorrect.

2. Scope of the Investigation

We disagree with GMCW that the Hearing Officer improperly expanded the scope of this investigation in derogation of GMCW's due process rights.

This investigation was noticed to determine "whether operation of the Georgia Mountain Community Wind, LLC ("GMCW") wind electric generation facility resulted in sound levels at the residence of Melodie McLane on the evening and night of September 18, 2015, in excess of

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31. *See* Letter from Andrew N. Raubvogel, Esq. to Susan M. Hudson, Clerk of the Board, dated November 2, 2015 ("Finally, DPS argues that the Protocol 'directs GMCW to offer a complainant outdoor-to-indoor attenuation testing' if the sound level is within 5 dBA of the CPG exterior sound limit. This is simply wrong. The Protocol provides that GMCW will conduct attenuation testing only 'at the homeowner's request.'")

applicable limits."[32] There is nothing in the report and recommendation that indicates the Hearing Officer went beyond that scope.

Based on GMCW's own reported numbers from the first year of sound monitoring, the Hearing Officer concluded that attenuation testing needed to be offered to the McLanes. The results of that testing would then have been applied to the modeled exterior levels that GMCW provided in response to the Hearing Officer's order of December 15, 2015, to determine whether the Project operated within the applicable interior limit on September 18, 2015.

While we disagree with the Hearing Officer's ultimate recommendation, we find no fault in the process he followed to reach that recommendation.

3. The "Reasonable Possibility" Standard

We also disagree with GMCW that the "reasonable possibility" standard applicable to resolving sound level complaints is intended only to be used when it is necessary to extrapolate data from a monitoring location to determine sound levels at an unmonitored residence. The Protocol states:

> GMCW will investigate as described below if the complaint represents a permanent residence within 1.5 km (0.9 miles) of the turbine string, and, ***based on monitoring and/or modeling, there appears a reasonable possibility*** that the Project sound level is within 5 dBA of the CPG exterior noise limit at the complaint location, and not related to abnormal Project operation or maintenance.[33]

The language quoted above is clear on its face. The "reasonable possibility" standard applies to both modeled and monitored levels. While the Protocol may provide information that would ultimately be used to determine compliance with the interior sound limit imposed by the CPG (i.e., the results of any required attenuation testing), it serves the distinct and separate purpose of determining what actions must be taken in response to a complaint. If a "reasonable possibility" exists, based on either monitoring or modeling, that the 40 dBA level has been reached or exceeded, then attenuation testing, performed pursuant to a specified standard, is used

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32. Docket 8613, Order of 11/18/15 at 2.
33. Monitoring Plan at 4.

to obtain a residence-specific attenuation level. That attenuation level would be used in conjunction with data obtained pursuant to the requirements of the sound monitoring portion of the Monitoring Plan to determine compliance with the indoor 30 dBA standard. The actual compliance determination is not based on the "reasonable possibility" standard but is made with reference to the standards identified in the Monitoring Plan. Therefore, there is no "standardless adjudication" as claimed by GMCW, and therefore no due process problem.

4. The Need for an Evidentiary Hearing

Because we have declined to accept the Hearing Officer's recommendation, GMCW's final argument regarding the need for an evidentiary hearing is moot. However, as discussed above, we are giving the Department and the McLanes an opportunity to request additional process to test GMCW's current representations regarding the five reported instances of sound levels in excess of 40 dBA at the McLane residence.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The report and recommendation of the Hearing Officer is accepted except as modified above. Georgia Mountain Community Wind, LLC ("GMCW") is not at this time required to offer to perform outdoor-to-indoor attenuation testing at the McLane residence.

2. The Department of Public Service ("Department") and the McLanes may request additional process for the purpose of challenging the accuracy of the exterior sound levels at the McLane residence reported at page 16 of GMCW's November 14, 2016, comments on the Hearing Officer's report and recommendation. Any such request for additional process must be filed no later than close of business ten business days from the date of this order, and shall include the steps that are being requested and a schedule for their implementation, as well as an explanation as to why such additional process is likely to lead to a determination that GMCW's calculations are incorrect. The Board will rule on any such request as soon as reasonably practicable.

3. If neither the Department nor the McLanes file a request for additional process pursuant to paragraph 2, above, this docket shall be deemed closed without further action by the Board.

Dated at Montpelier, Vermont, this 26th day of January, 2017.

PUBLIC SERVICE BOARD OF VERMONT

OFFICE OF THE CLERK

FILED: January 26, 2017

ATTEST: Judith C. Whitney
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

PSB Docket No. 8613 - SERVICE LIST

Sent 1/26/2016 Dmm

Parties:

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