

In The
Supreme Court of Ohio

ORIGINAL

Union Neighbors United, Robert
McConnell, Diane McConnell, and Julia
F. Johnson,

and

Champaign County and Goshen, Salem
and Union Townships,

Appellants,

v.

Ohio Power Siting Board,

Appellee.

Case No. 10-1554

On appeal from the Ohio Power Siting
Board, Case No. 08-666-EL-BGN, *In the
Matter of the Application of Buckeye
Wind LLC for a Certificate to Install
Numerous Electricity Generating Wind
Turbines in Champaign County to be
Collected at an Electric Substation in
Union Township, Champaign County.*

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SUBMITTED ON BEHALF OF APPELLEE,
OHIO POWER SITING BOARD**

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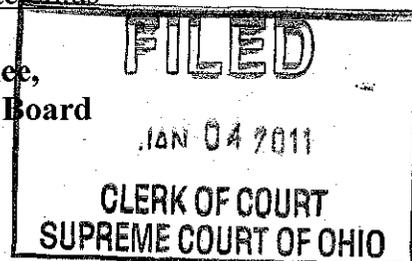
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**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
OHIO POWER SITING BOARD**

INTRODUCTION

This case demonstrates why the General Assembly created the Ohio Power Siting Board (Board), and vested it with broad authority to site utility facilities. As is often the case, this siting application pits private landowner and developer interests against larger public policies established by the General Assembly. The Board is charged with balancing these competing goals, and did so properly in this case.

Amended Substitute Senate Bill No. 221 (S.B. 221) represents a fundamental change in utility regulation in Ohio. The 2008 law evinces the General Assembly's decision to encourage electricity generation from alternative energy sources. A significant portion of

alternative energy portfolios must be met through generating facilities located here in the State of Ohio. Ohio Rev. Code Ann. § 4928.64(B)(2) (West 2010), App. at 16.¹ Wind power is specifically recognized as an eligible renewable energy resource under R.C. 4928.01(A)(35) (West 2010), App. at 12. Buckeye Wind, LLC (Buckeye) was the first applicant to pursue development of a wind-powered electric generating facility in Ohio, in large part because of the opportunities created by S.B. 221.

Buckeye selected Champaign County as the site of the proposed wind farm, among other reasons, because it offers some of the best wind resources in Ohio. Some 60 landowners have chosen to put wind turbines on their land. Most of these landowners are farmers who want to preserve agricultural land use choices for future generations. Wind turbines provide host farms with a significant source of revenue, and supplement farming revenues that have eroded due to encroaching residential and commercial development.

Were it left to the appellants, no wind farm project would ever be built in Ohio. But the public debate over the desirability of wind farms has already taken place. The Board is charged with effectuating the public policy established by the legislature. It applied its judgment and expertise to evaluate the merits of Buckeye's application, carefully balancing private interests with public policy. Based on the extensive record before it, the Board found

¹ References to appellant UNU's appendix are denoted "UNU App. Vol. ___ at ___," and references to its supplement are denoted "UNU Supp. Vol. ___ at ___." References to County's and Townships' appendix are denoted "County and Townships App. at ___," and references to their supplement are denoted "County and Townships Supp. at ___." References to appellee's appendix attached hereto are denoted "App. at ___," and references to its supplement are denoted "Supp. at ___."

that Buckeye's project, with certain modifications and conditions, satisfied statutory and regulatory requirements. Its decision is reasonable and lawful, and should be affirmed.

STATEMENT OF THE FACTS AND CASE

On April 24, 2009 Buckeye Wind, LLC, a wholly-owned subsidiary of EverPower Wind Holdings, Inc., filed an application requesting a Certificate of Environmental Compatibility and Public Need to construct a wind-powered electric generating facility in Champaign County. Application at 1, UNU Supp. Vol. I at 1. As proposed, the project would consist of 70 wind turbines and related facilities. Buckeye filed information supplementing its application on August 28 and September 1, 2009.

Following an investigation, the Board staff filed a Staff Report on October 14, 2009. Sixteen parties were granted intervention in the case. The adjudicatory hearing began on November 9, 2009, and concluded on December 2. Testimony was provided by Buckeye, intervenors, and the Board staff.

On March 22, 2010, the Board unanimously voted to issue an Opinion, Order, and Certificate finding that all requirements of R.C. 4906.10 had been met. The Board did modify certain aspects of the proposal, including rejecting construction of 16 of the proposed turbines. In addition, the Board imposed 70 conditions designed to ensure compliance and further promote the public interest, both during construction and continuing into the operational phase of the project. *In the Matter of the Application of Buckeye Wind, LLC for a Certificate to Install Numerous Electricity Generating Wind Turbines in Champaign County to be Collected at an Electrical Substation in Union Township, Champaign County, Ohio*, Board

Case No. 08-666-EL-BGN (hereinafter *Buckeye Wind*) (Opinion, Order, and Certificate) (March 22, 2010), UNU App. Vol. I at 52-156, County and Townships App. at 7-111.

Intervenors Union Neighbors United, Robert McConnell, Diane McConnell, and Julia F. Johnson (jointly “UNU”), and the Board of Commissioners of Champaign County, Ohio, along with the Boards of Trustees of the Townships of Union, Goshen, Rush, Salem, Urbana, and Wayne (jointly “County and Townships”) filed applications for rehearing that were denied by the Board on July 15, 2010. *Buckeye Wind* (Entry on Rehearing) (July 15, 2010), UNU App. Vol. II at 242-280. These appeals ensued.

ARGUMENT

Proposition of Law No. I:

The Power Siting Board adopted a noise control plan that was reasonable and lawful under R.C. 4906.10. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St. 3d 333, 928 N.E.2d 427 (2010).

Marginal noise impacts from the operation of the Buckeye facility will be minimized by conditions the Board has imposed in Buckeye’s certificate. The Board adopted noise parameters for the facility from Buckeye’s comprehensive noise study as a condition of the Company’s certificate. The study provides operational noise parameters for the facility that must be met. The Board found that these noise parameters will mitigate noise emissions during operation. *Buckeye Wind* (Opinion, Order, and Certificate at 58, 64) (March 22, 2010), UNU App. Vol. I at 111, 117; County and Townships App. at 68, 74; *Buckeye Wind* (Entry on Rehearing at 29-30) (July 15, 2010), UNU App. Vol. II at 270-271, County and Townships App. at 140-141.

Condition 6 ordered by the Board addresses the acceptable outside sound levels for both residences and property lines of nonparticipating property owners. It requires Buckeye to operate within the noise parameters identified in its own noise study. The noise parameters at the property line and residence are the predicted sound contour (dBA) plots for “typical” and “worst-case” daytime and nighttime conditions in Buckeye’s noise study. Environmental Sound and Survey and Noise Impact Assessment at Plots 1A, 1B, 1C, 1D, 2A, 2B, 2C, 2D, 3A, 3B, Supp. at 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.

Nothing in Ohio law or the Board’s rules mandates a hard and fast noise standard. To the contrary, determining acceptable operational noise levels is a matter of judgment and discretion that lies with the Board, a matter highly dependent upon the facts and circumstances of each case. Nonetheless, UNU argues that the Board acted unlawfully because it failed to adopt UNU’s rigid, absolute noise standards. UNU is wrong.

The Board found, as a matter of fact, that the noise parameters from Buckeye’s study were adequate to comply with R.C. 4906.10(A)(3). The Board acted reasonably and lawfully in adopting these parameters and rejecting Buckeye’s extreme position that, if adopted, would virtually guarantee that no turbines would be constructed.

Pursuant to R.C. 4906.12, the Court must apply the same standard of review to Power Siting [Board] determinations as it applies to orders by the Public Utilities Commission. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St. 3d 333, 928 N.E.2d 427 (2010), *citing Chester Twp. v. Power Siting Comm’n*, 49 Ohio St. 2d 231, 238, 361 N.E. 2d 436 (1977). R.C. 4903.13 applies to board proceedings pursuant to R.C. 4906.12 and provides that an order “shall be reversed, vacated, or modified by this court only when, upon consideration of

the record, the court finds the order to be unlawful or unreasonable.” *Constellation NewEnergy, Inc. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 820 N.E.2d 885, ¶ 50 (2004).

Under the ‘unlawful or unreasonable’ standard of R.C. 4903.13, the Court should not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Chester Twp. v. Power Siting Comm’n*, 49 Ohio St. 2d 231, 238, 361 N.E. 2d 436 (1977). The appellant bears the burden of showing that the [Board’s] decision is against the manifest weight of the evidence or clearly unsupported by the evidence. *AK Steel Corp. v. Pub. Util. Comm’n*, 95 Ohio St. 3d 81, 765 N.E.2d 862 (2002).

The Court has consistently refused to substitute its judgment for that of the [Board] on evidentiary matters. *See, e.g., Payphone Ass’n v. Pub. Util. Comm’n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). Deference should be shown to Board determinations where, as here, the Board applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm’n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000).

UNU and Buckeye presented separate noise studies, each containing different opinions on what should be the acceptable sound level for Buckeye’s wind facility. The Board considered both studies and decided that Buckeye’s noise assessment, in conjunction with the certificate conditions² that also address noise complaints and mitigation, reasonably represented the minimum adverse environmental impact to nonparticipating property owners

² The Board also adopted Condition 8(j) requiring an informal complaint resolution procedure to address complaints on noise and other issues.

under R.C. 4906.10. UNU asks the Court to reweigh the evidence and substitute its judgment for that lawfully exercised by the Board. UNU requests that the Court reverse the Board and amend the certificate by replacing the Board's noise condition with that of UNU's condition adopting absolute noise standards, which the Board considered and properly rejected below. But the Court's function is not to reweigh the evidence or to choose between alternative, fairly debatable alternatives. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St. 2d 105, 108, 75 O.O.2d 172, 346 N.E.2d 778 (1976).

UNU's proposed noise standards are rigid, impractical, and extremely conservative. The law does not require that major wind facilities in Ohio operate completely devoid of noise nor does it preclude the possibility of any adverse reaction to noise under all atmospheric conditions. Such a standard is as impractical as it is unrealistic. The threshold of potential disturbance for wind turbine projects should not be rigidly defined as a specific absolute decibel level, as UNU poses, because reaction to wind turbine noise is highly subjective and individual.

The law requires the Board to balance the interests of various stakeholders. The Board did just that. *Buckeye Wind* (Opinion, Order, and Certificate at 48-64) (March 22, 2010), UNU App. Vol. I at 101-117, County and Townships App. at 58-74. In balancing the interests of the project developer, participating neighbors, nonparticipating neighbors, and electric distribution utilities seeking supply from renewable energy resources to supply customers and satisfy regulatory benchmarks, the Board properly rejected a hard and fast boundary between acceptable and unacceptable sound levels as UNU advocated. There is no recognized universal industry noise standard either in the United States or in other parts of

the world. And no noise standard is mandated in R.C. Chapter 4906. Here, as it is charged to do, the Board found and determined that the noise parameters proffered by Buckeye in its noise study “represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” Ohio Rev. Code Ann. § 4906.10(A)(3) (West 2010), App. at 3. The Board satisfied its statutory obligation in this case.

In contrast, UNU proposed noise standards to virtually ensure that no turbines would be built in Champaign County. Rebuttal Test. of D. Hessler at 2, UNU Supp. Vol. III at 382; Direct Test. of D. Hessler at 7, UNU Supp. Vol. III at 356; Tr. III at 848, Supp. at 157. But much more than this project is at stake if UNU is successful in having this Court make its noise standards as the new regulatory limit in Ohio for wind projects. UNU’s position will adversely impact Ohio’s economy. Both jobs and taxes would be lost as development of economically significant wind farms and major wind facilities in Champaign County and perhaps anywhere else in Ohio is hindered if not altogether precluded. UNU’s standards are contrary to Ohio law, public policy, and the public interest, because they would effectively preclude the development of major wind facilities anywhere in Ohio.

For example, S.B. 221 requires all electric distribution utilities in Ohio to derive a portion of their electric supply from renewable energy resources pursuant to R.C. 4928.64. The statute delineates benchmarks that must be met and under UNU’s view of the world, can not be met. The renewable energy resource benchmarks increase every year until a threshold level of 12.5 percent is met in 2024 and maintained at that level every year thereafter. R.C. 4928.64 requires at least one-half of the renewable energy resources implemented by

utilities must be met through facilities located in Ohio. UNU's unrealistic standards would make it difficult, if not impossible, to satisfy the statutory requirements.

Across the nation, states are competing for green power companies to locate in their territories and develop facilities using advanced technology to generate alternative and renewable energy. The Ohio legislature has made a policy choice to require the growth of significant wind farm development for the generation of renewable energy in Ohio. Many families in Champaign County made the choice to lease property on their farms to Buckeye for the construction and operation of turbines for this facility. Consideration paid to farmers under these leases will provide much needed income to supplement declining farm incomes while preserving their farmlands from urban sprawl.

The legislature has also mandated, under R.C. 4928.02, that state policy facilitate and ensure diversity of electricity supplies and suppliers; encourage the development of small generation facilities; and protect at-risk populations when considering the implementation of any new renewable energy resource. All of the choices made by the legislature, farmers, and developers, are legal and benefit Ohio. But these policy choices are undermined if UNU is able to substitute the Board's judgment with its own impractical and excessive noise standards.

In reality, UNU opposes the Buckeye facility in favor of their own competing private development interests that they wish to pursue. UNU's interest is limited to protecting their investment properties and ability "to develop their yards, fields, and undeveloped acreage," but they have couched these interests under the guise of minimizing the facility's adverse environmental impacts. UNU Merit Brief at 19. Whether the development interests of UNU

should be afforded higher policy status than a proposal to create new renewable energy sources and attendant jobs is for the General Assembly, not this Court, to determine. The General Assembly has clearly spoken. Promoting the greater public interests over the much narrower interests of a few neighbors having competing development plans is why the General Assembly created the Board. Here, the Board weighed the evidence and made a determination supported by the record. Nothing more is required. The Board should be affirmed.

A. The Board ordered a complaint process to monitor and address noise levels that exceed allowable parameters.

Under its certificate, Buckeye is reasonably expected to operate its facilities at noise assessment levels set forth in its noise study and application at nonparticipating property lines and residences. Condition 8(j) of the certificate incorporates an informal complaint process to enable the Board to reasonably review noise impacts at nonparticipating properties and residences. The informal complaint condition reads:

(8) At least 30 days prior to the preconstruction conference, Buckeye shall provide the following documents to staff for review and acceptance:

(j) A completed informal complaint resolution procedure, including, at a minimum, a process to periodically inform staff of the number and substance of complaints received by Buckeye.

By adopting this complaint process, the Board has recognized the importance of maintaining ongoing compliance with acceptable noise levels, and the need for effective enforcement mechanisms if and when compliance falls short. The Board adopted a two-tiered complaint process to address complaints, such as noise, involving the operation of the

facility. *Buckeye Wind* (Opinion, Order, and Certificate at 79-80) (March 22, 2010), UNU App., Vol. I at 132-133, County and Townships App. at 89-90. One tier is addressed by Condition 8(j) involving informal complaints being resolved with Buckeye, with notification to staff, which would be limited to mitigation and performance. The other tier already exists in the law and involves a formal complaint process for a certificate violation to the Board under R.C. 4906.97 and R.C. 4906.98, and O.A.C. 4906-9-01.

B. The Board adopted enforceable noise parameters.

The noise condition was developed from an environmental sound survey and noise impact assessment (“Study”) conducted by David Hessler, an acoustical consultant with Hessler Associates, Inc. In the Study, Mr. Hessler evaluated ambient background sound levels and performed computer modeling analysis of projected turbine sound levels. Environmental Sound Survey and Noise Impact Assessment, UNU Supp. Vol. I at 14. A field survey of existing environmental sound levels in the project area was performed under wintertime conditions. Direct Test. of D. Hessler at 3, UNU Supp. Vol. III at 352. The objective of the survey was to determine how much natural sound was likely to be present and consistently available throughout the site area to mask, or obscure, potential noise from the project. *Id.* The impact from any new power generation project is essentially a function of how much, if at all, its noise exceeds the background sound level that would otherwise exist. *Id.*

The survey data was reduced to day and night conditions and considered both the average (*Leq*) and residual (*L90*) sound levels. *Id.* at 4, UNU Supp. Vol. III at 353. The *Leq* is literally the average sound level that is “typical” and most likely to be observed at any given moment. Environmental Sound Survey and Noise Impact Assessment at 1, UNU

Supp. Vol. I at 14A. The L90 sound level is a conservative measure of background sound levels. It is the level exceeded during 90% of the measurement interval, and has the quality of filtering out short-duration, sporadic noise events that cannot be relied upon to provide consistent and continual masking noise to obscure potential turbine noise. *Id.* at 10, Supp. at 12. As such, it is the near “worst case” background level with regard to evaluating potential impacts from a new source since it represents essentially the lowest amount of masking sound. *Id.* Background sound levels were compared to turbine sound levels, and Mr. Hessler determined that the “worst case scenario” occurred at six meters per second (m/s) during the day and at five m/s at night, as follows:

Under critical wind conditions of 5 and 6 m/s – when the turbine sound output is highest relative to the amount of background noise – mean L90 background levels of 29 and 35 dBA were found, for nighttime and daytime conditions, respectively.

Direct Test. of D. Hessler at 4, UNU Supp. Vol. III at 353; Environmental Sound Survey and Noise Impact Assessment at 25, Supp. at 14. It is important to note the fact that UNU's assessment and Buckeye's assessment of the background noise differed by only 2 dBA. *Buckeye Wind* (Opinion, Order, and Certificate at 55) (March 22, 2010), UNU App., Vol. I at 108; County and Townships App. at 65. UNU assessed a background noise of 27 dBA for nighttime. Direct Test. of R. James at 12, UNU Supp. Vol. IV at 564.

1. Noise parameter at property line of non-participating property owner.

Plots 3A and 3B in the Buckeye noise study were prepared to show the relationship between the 50 dBA sound contour and the boundaries of participating land parcels. Environmental Sound Survey and Noise Impact Assessment at 28, Plots 3A and 3B, Supp. at 17,

29, 30. The Buckeye noise study adopts an absolute design goal of 50 dBA at non-participating property lines, which is typical where property line noise limits have been imposed on wind turbine developments. Environmental Sound Survey and Noise Impact Assessment at 22, UNU Supp. Vol. I at 16; Direct Test. of D. Hessler at 9, UNU Supp. Vol. III at 358; Staff Report at 17, UNU Supp. Vol. III at 419. This has been Buckeye's experience with dozens of projects. *Id.* Staff witness Ray Strom testified that the term "design goal" is almost like a target. Tr. VIII at 1882, Supp. at 169. It is something that Buckeye is attempting to achieve, but not necessarily achieve. *Id.* After reviewing the graphs in the noise study, Mr. Strom could not find any location where the sound level is predicted to exceed 50 dBA at any non-participating property lines. Tr. VIII at 1883-1884, Supp. at 170-171.

At the property lines of non-participating land parcels it is not practical to use an ambient-based, incremental design criterion since that would effectively limit any development to a few turbines on vast tracts of land. *Id.* This is why the relative design criterion is only considered appropriate for application at existing permanent residences where people actually are most of the time. *Id.* At the boundaries of non-participating owners' property lines a low project sound level is unnecessary in just about every case because no one is usually permanently present at the fringe of a land parcel to be potentially affected by noise. *Id.* Staff witness Strom testified that if Buckeye exceeds this parameter but it doesn't impact anybody, it may not be of any significance. Tr. VIII at 1905, Supp. at 174. The significance comes when somebody is impacted. *Id.* Mr. Strom added "the old saying that if a tree falls in the forest and nobody's there, does it make a noise?"

2. Noise parameter outside at residence of non-participating property owner.

Staff witness Ray Strom testified that the sound levels shown on the various plots in the noise study are what Buckeye is expected to comply with. Tr. VIII at 1901, Supp. at 172. In the noise study are several graphs of the facility site that are identified by plots. Environmental Sound Survey and Noise Impact Assessment, Attachments, Supp. at 21-31. Plots 1A and 1B provide the sound contours for typical daytime conditions. *Id.* Plots 1C and 1D provide the sound contours for worst case daytime conditions. Plots 2A and 2B provide the sound contours for typical nighttime conditions. *Id.* Plots 2C and 2D provide the sound contours for worst case nighttime conditions. *Id.*

Mr. Strom testified that if Buckeye operated outside of these parameters over extended periods of time during the normal course of operation, then it would be a violation of the certificate. *Id.* In other words, one specific instance over the course of a year where the sound level reaches 35 dBA, instead of the sound contour of 34 dBA that is shown for that plot, Mr. Strom wouldn't consider that a violation of the certificate. Tr. VIII at 1902, Supp. at 173.

Mr. Hessler testified that "[a]lthough there are many hundreds of houses in general proximity to proposed turbine locations at this site, very low sound levels in the 30s dBA are expected at almost all of them." Rebuttal Test. of D. Hessler at 4, UNU Supp. Vol. III at 384.

The sound contours provided in the plots represent outside noise levels. In analyzing the noise impact at the residence of non-participating property owners. Buckeye's noise study states that "inside levels should be 10 to 20 dBA lower" in the residence. Environ-

mental Sound Survey and Noise Impact Assessment, UNU Supp. Vol. I at 14; *Buckeye Wind* (Opinion, Order, and Certificate at 58) (March 22, 2010), UNU App., Vol. I at 111, County and Townships App. at 68. To put all of these sound levels in perspective Mr. Hessler testified that conventional speech is between 50 and 60 dBA. Tr. IV at 901, Supp. at 160.

The noise modeling methodology used for the Buckeye project was very conservative because it used a worst-case condition at any given receptor point based on the following assumptions: critical wind speeds, wintertime background levels, conservative L90 background level, low ground porosity, observer outside, and downwind sound level. Environmental Sound Survey and Noise Impact Assessment at 26, Supp. at 15.

Buckeye's acoustical expert used worst-case conditions during normal atmospheric conditions because the perceptibility of turbine noise varies with atmospheric conditions, such as temperature inversions and periods of unusual wind stratification. *Id.* at 28, UNU Supp. Vol. I at 18. Mr. Hessler states in his Sound Survey and Noise Assessment that higher or lower sound levels may actually occur depending on the presence or absence of temperature inversions and unusual wind stratification, as follows:

Consequently, there are likely to be times, when these conditions exist, when the actual sound will exceed the conservatively predicted levels in the plots. Of course, there will also be times, probably the majority of the time, when the perceptibility of Project noise will be less than indicated in the graphics.

Id. These unusual conditions occur infrequently. Accordingly, the Board adopted the sound contours for typical and worst case daytime and nighttime conditions in the plots attached to Buckeye's noise study, as the parameters for Condition 6 of the Certificate.

C. The record shows that noise parameters imposed by the Board will adequately protect human health.

UNU's assertions that turbine noise above 35 dBA causes unacceptable annoyance, discomfort, and sleep disturbance are not supported by the record. Indeed, Buckeye witness Dr. Kenneth A. Mundt, the only health expert in the case, testified that there is no reason to believe, based on the available evidence, that human health will be harmed, given the setbacks of turbines to residences in the noise study presented in Buckeye's application. Direct Test. of K. Mundt at 6-7, 15-16, UNU Supp. Vol. III at 320-321, 329-330. An epidemiologist with 20 years of experience, Dr. Mundt testified that, based on the available scientific evidence, the setbacks proposed in the application appear to adequately protect human health, as well as reduce the level and frequency of annoyance. *Id.* at 16, UNU Supp. Vol. III at 330. More specifically, he concluded that "[b]ased on my review of the relevant published peer-reviewed scientific literature, I found no consistent or any substantiated association between residential proximity to industrial wind turbines and any serious health effect." *Id.* at 6-7, UNU Supp. Vol. III at 320-321. While Dr. Mundt testified that residents living near wind turbines will intermittently experience noise associated with their operation, he nonetheless concluded that "exposure to turbine noise or shadows, while potentially distracting or irritating to some people, are not known to harm human health." *Id.* at 5-7, UNU Supp. Vol., III at 319-321.

Even UNU witness Richard James, an acoustical engineer who offered testimony on health concerns, admitted under cross-examination that he is not qualified to opine on medical judgments. Tr. VI at 1428-1429, Supp. at 164-165. Studies and articles presented by

UNU suffered from a host of scientific infirmities rendering them of questionable probative value.

Despite UNU's representations to the contrary, the Minnesota Department of Health Literature review ("Public Health Impact of Wind Turbines," UNU Supp. Vol. IV at 612-616), the 2007 Pedersen and Waye study ("Wind Turbine Noise, Annoyance, and Self-Reported Health and Well-Being in Different Living Environments," UNU Supp. Vol. IV at 605-611), and the testimony of UNU witness James in the aggregate, do not support its claims that noise levels in excess of 35 dBA cause unacceptable sleep disturbance, annoyance, discomfort, and health problems. In fact, the Minnesota Department of Health review ultimately concluded that a higher dBA standard, 40 to 50 dBA, be applied, which levels are consistent with that ordered by the Board ("Public Health Impacts of Wind Turbines" at 26, Supp. at 109).

The study performed by Pedersen and Waye did not find any correlation between turbine noise and sleep disturbance. "Perception and Annoyance Due to Wind Turbine Noise – A Dose – Response Relationship" at 3468, UNU Supp. Vol. IV at 602. The study concluded that "the number of respondents disturbed in their sleep, however, was too small for meaningful statistical analysis, but the probability of sleep disturbances due to wind turbine noise can not be neglected at this stage." The lack of reliable analysis that sleep disturbance will *probably* result is a far cry from UNU's assertions that unacceptable sleep disturbances will occur. Therefore, the 2004 Pedersen and Waye study does not support UNU's claims. *Id.* at 3461-3462, 3467-3468, UNU Supp. Vol. IV at 595-596, 601-602; Rebuttal Tr. I at 2350-2351, UNU Supp. Vol. II at 279-280.

Buckeye expert witness Dr. Mundt opined that Dr. Amanda Harry's study ("Wind Turbine, Noise and Health," Supp. at 46-107) Wind Turbines, Noise and Health, dated February 2007, lacked any scientific value because it was a survey provided to persons that were known to be suffering from problems that such persons believed was attributable to proximity to wind turbines (*Id.* at 3, Supp. at 48; Tr. II at 498, UNU Supp. Vol. I at 140). Given the preconceived notion that proximity to turbines caused health problems for the people surveyed, the results and recommendations of the study are hardly surprising and scientifically questionable at best.

The record in this case supports the Board's finding that operational noise from the turbines will not have an adverse impact at nonparticipating properties. This factual finding, which was made following an exhaustive review by the Board, should be affirmed.

D. Applying an absolute limit of L90 plus 5 dBA is impractical and would preclude development of wind projects in Ohio contrary to important state policies.

While UNU's noise standard of 5 dBA above background is a reasonable design goal it is not generally practical to achieve that standard. Tr. III at 848, UNU Supp. Vol. II at 181.

Buckeye witness Mr. Hessler testified, as follows:

The background L90 plus five dBA metric is useful as an ideal design goal but it is not typically practical to use this approach as a regulatory limit, or standard, because for wind projects in rural areas mixed with scattered residences, it is seldom, if ever, possible to limit project noise to less than 5 dBA above the near minimum background level - at least under the critical wind speed conditions we use for assessment purposes; i.e. at wind speeds usually in the five to six m/s range.

Rebuttal Test. of D. Hessler at 2, UNU Supp. Vol. III at 382.

UNU witness Mr. James testified that the distance to be maintained between the turbines, randomly located, and nearby residences to enforce the standard of five decibels above background sound levels is 1.25 miles. Direct Test. of R. James at 9, Supp. at 146. Mr. James also testified that the distance increases to 2 miles if the turbines are arranged in rows. *Id.* Mr. Hessler testified that applying those distances for an absolute limit of L90 plus 5 dBA would preclude development of wind projects east of the Mississippi River, including in Ohio. Direct Test. of D. Hessler at 7, UNU Supp. Vol. III at 321. How does Mr. James' standard preclude major wind development in most of the country? Because Mr. James' standard requires a setback distance of 1.25 miles from every house, which is a circular area over the diameter of 2.5 miles, the buffer for each turbine would be over 3,000 acres, and Ohio has few sites that could satisfy this standard. Tr. IV at 886, Supp. at 159. UNU asks the Court to second guess the Board's judgment and apply a standard, as a condition in the certificate, which is neither industry-accepted nor practical.

Relying on the testimony of Richard James, Larry Wunsch and Rene Taylor and the studies by Pedersen and Harry, UNU jumps to the conclusion that anything but the L90 plus five background limit lead to widespread discomfort, property damage, sleep deprivation and health problems. Yet, Mr. James admitted he was not qualified to opine on medical judgments (Tr. VI at 1428, UNU Supp. Vol. II at 208), Larry Wunsch indicated no issues with sleep deprivation or health problems in his testimony (Direct Test. of L. Wunsch, Supp. at 110-115) and Rene Taylor's testimony indicated that many health problems existed prior to the turbines' construction and operation, and it was clear from her testimony that her precon-

struction turbine bias influenced her testimony (Tr. V at 1089-1095, UNU Supp. Vol. II at 196-202).

UNU also argues there is no enforceable noise limit because it speculates that the noise contours in Buckeye's noise study "could be" off five decibels. UNU misstates the testimony of Mr. Hessler, who testified that wind turbine noise is variable and, with atmospheric conditions, will fluctuate +/- 5.0 dBA, about the mean predicted level for short periods of time during unusual wind conditions. Direct Test. of D. Hessler at 10, UNU Supp. Vol. III at 359. Mr. Hessler testified that the variation in the wind turbine noise is not due to the calculation method; rather, it is due to variability in the turbine sound. Tr. III at 752-753, 761, Supp. at 153-154, 155, UNU Supp. Vol. I at 156.

While this margin of error is an acceptable measurement tool, it is mitigated by the fact that Mr. Hessler assumed the worst-case conditions for his noise study. After factoring the worse-case scenario to the margin of error it is unlikely that noise will exceed the sound levels in the plots of Buckeye's noise study. Therefore, the +/- 5.0 dBA is most likely absorbed by the conservative assumptions made by Mr. Hessler for Buckeye's noise study.

UNU next argues that the noise contours in Buckeye's noise study are based on the wrong turbine model. Buckeye's noise impact assessment was performed utilizing the RePower MM92, a turbine model under consideration at the time the assessment was conducted. Environmental Sound Survey and Noise Impact Assessment at 23, UNU Supp. Vol. I at 17. Witness Shears stated that Buckeye fully intends (as it must) to select a turbine that will operate within the noise profiles set forth in the application. Tr. II at 284-285, UNU

Supp. Vol. I at 86-87. Any excess noise impacts will be monitored, evaluated, and examined, if needed, in a complaint case before the Board.

Further, the Board imposed a condition requiring Buckeye to provide to Board staff, at least 60 days prior to the commencement of construction, a full description of the model of the wind turbine(s) to be installed. *Buckeye Wind* (Opinion, Order, and Certificate at 92) (March 22, 2010), UNU App., Vol. I at 145, County and Townships App. at 102. If Buckeye selects a turbine model that is different than the models listed in its application, it must provide adequate assurances that no additional negative impacts will be introduced. *Id.* Buckeye must operate the facility within the noise parameters set forth in its noise study referenced in the application. There simply is no issue here.

E. Today's wind turbine technology significantly reduces low frequency noise levels.

The record shows that Buckeye addressed low frequency noise for this project site in its noise study and application. Application at 99-100, Supp. at 3-4; Environmental Sound Survey and Noise Impact Assessment at 29-30, Supp. at 18-19. The evidence shows that modern wind turbines proposed in Buckeye's application do not generate low frequency noise to any significant extent and no impact of any kind is expected from this project site. Environmental Sound Survey and Noise Impact Assessment at 29-30, Supp. at 18-19. Current blade technology significantly muffles noise impacts, contrary to UNU's contentions.

Buckeye did, in fact, use generally accepted computer modeling software, developed for wind turbine noise measurement, or similar wind noise methodology, for surveying noise (dBA) emissions from this project site. Application at 87, Supp. at 2; Environmental Sound

Survey and Noise Impact Assessment at 1, UNU Supp. Vol. I at 14A. Low frequency sound is not filtered out of dBA weighting. Tr. III at 722, Supp. at 152. Instead, it is adjusted so that the frequency spectrum corresponds to the way you actually perceive the sound. *Id.* The model does consider low frequency noise in the sense that the input sound power level for the turbine includes the frequency spectrum starting at 31.5 hertz and going up from there. *Id.* at 806, Supp. at 156. The result of the calculation is the a-weighted sound contours, but the input incorporates the low frequency spectrum without modification. *Id.*

But with new technology, modern wind turbines now come equipped with an upwind blade arrangement, which does not generate enough low frequency noise to have any impact on the environment. Environmental Sound Survey and Noise Impact Assessment at 29, Supp. at 18.

The Board held that the record does not support the adoption of low frequency noise limits, as proposed by UNU. *Buckeye Wind* (Entry on Rehearing at 24-26) (July 15, 2010), UNU App. Vol. II at 28-30, County and Townships App. at 135-137.

There is no evidentiary basis for UNU's requested noise standards for low frequency noise at nonparticipating property lines. UNU witness James admitted that he did not focus on and did not propose a low frequency noise level in this proceeding. Tr. VI at 1486-1487, UNU Supp. Vol. II at 214-215. UNU failed to present a witness to support its recommended low frequency noise limit.

In contrast, Buckeye witness Hessler explained that amplitude modification (the swishing sound of the turbine rotors) is sometimes confused with "low frequency" noise. Direct Test. of D. Hessler at 7-8, UNU Supp. Vol. III at 356-357. He conducted a wind tun-

nel test and published an article on the issue which is cited in the application. *Id.* at 8, UNU Supp. Vol. III at 357. Mr. Hessler's test revealed that "wind-induced false-signal noise occurs only in the low frequencies, making the A-weighted sound level relatively insensitive to this effect." Environmental Sound Survey and Noise Impact Assessment at 7, Supp. at 12. Furthermore, according to Mr. Hessler's testing, skewing of the A-weighted sound level only began to occur at wind speeds of around 15 m/s to 20 m/s, which is above the range for a wind project. *Id.*

Mr. Hessler testified that his firm found that, when examining low frequency noise complaints in other contexts, the low frequency sound emanating from wind turbines is inconsequential and difficult to differentiate from the background sound level in rural communities. Direct Test. of D. Hessler at 7-8, UNU Supp. Vol. III at 356-357. While older downwind blade technology emitted a low frequency pulse with each rotation, such is not the case with current upwind rotor designs. Environmental Sound Survey and Noise Impact Assessment at 29, Supp. at 18; Direct Test. of D. Hessler at 8, UNU Supp. Vol. III at 357. For these reasons, UNU's reliance on low frequency noise levels emanating from wind turbines as a basis for requesting that the Board adopt two low frequency noise standards is unfounded. Direct Test. of D. Hessler at 7-9, UNU Supp. Vol. III at 356-358; Rebuttal Test. of D. Hessler at 2, UNU Supp. Vol. III at 388.

The evidence supports the Board's finding relative to low frequency noise. Additionally, the Board directed that, as a condition of the certificate, Buckeye operate the project pursuant to the noise assessment levels predicted in the application, and required the implementation of a complaint process by Buckeye. With those conditions in place, the Board

determined that, as a factual matter, low frequency noise will occur at sufficiently inconsequential levels to constitute even a minor adverse impact.

For these reasons, the Board's decision, applying R.C. 4906.10(A)(3) and adopting enforceable operational noise limits for the Buckeye facility, was reasonable and lawful, and should be affirmed by this Court.

Proposition of Law No. II:

The Power Siting Board's decision satisfies the requirements of R.C. 4906.10 where it shows the facts in the record upon which the order is based in sufficient detail, and the reasoning followed in reaching its conclusion. *Indus. Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486 (2008).

Ohio law establishes minimum distances that wind turbines must be set back from adjoining properties. The Board found, based on the record, that the statutory minimum setbacks were sufficient to adequately serve the public interest, convenience, and necessity. The Court should reject UNU's invitation to reweigh the evidence, and to impose greater setbacks intended to defeat the project.

Nordex, one of the potential manufacturers that Buckeye considered, published a document that proposed greater setbacks than ordered by the Board. Buckeye witness Shears testified that the company did not consider the document to be relevant; that it merely represented "general guidance." Tr. I at 104, Supp. at 148. Mr. Shears did not agree with the document's recommended setback between turbines and residences. *Id.* The Board found no reason to reject Mr. Shears' conclusion.

The Board also found the evidence regarding blade shear and ice throw was sufficient to ensure that the public would be protected from harm. Other than the general setback

guidelines, Ohio law contains only one provision specific to blade shear. The Board's rules require that an applicant "evaluate and describe the potential impact from blade shear at the nearest property boundary, including its plans to minimize potential impacts if warranted." Ohio Admin. Code § 4906-17-08(A)(5) (West 2010), App. at 34. The Board found that Buckeye satisfied this requirement. The Board found, as a matter of fact, that Buckeye "sufficiently demonstrated that the setbacks, as currently configured, when combined with advances in wind turbine technology, are sufficient to protect residents from any risk of blade shear." *Buckeye Wind* (Opinion, Order, and Certificate at 42-43) (March 22, 2010), UNU App. Vol. I at 97-98, County and Townships App. at 52-53. The Board's Condition 33 went further. It adopted its staff's recommendation that Buckeye provide a formula that supports its consultant's calculations that a blade can be thrown up to a distance of 500 feet, to further mitigate the risk of blade shear.

Likewise, the Board found that Buckeye satisfied this requirement that it "evaluate and describe the potential impact from ice throw at the nearest property boundary, including its plans to minimize potential impacts if warranted." Ohio Admin. Code § 4906-17-08(A)(4) (West 2010), App. at 34. Ice throw can occur when accumulated ice on the wind turbine blades separates from the blade and falls or is thrown from the blade. The evidence showed that a turbine's computer controls would typically shut down the turbine until the ice melts, leading to a tendency for ice to drop off and fall near the base of the turbine. Application at 105, Supp. at 5. In addition, the record indicates that there here have been no reported injuries caused by ice throw. *Id.* Consequently, the Board found, as a matter of fact, "that the risk of ice throw has been adequately addressed by Buckeye." *Buckeye Wind* (Opinion,

Order, and Certificate at 43) (March 22, 2010), UNU App. Vol. I at 98, County and Townships App. at 53. Nonetheless, the Board imposed an additional condition that Buckeye conduct appropriate training to instruct construction and maintenance workers on potential hazards of wind turbines, including ice conditions, to further minimize the risk of ice throw. *Id.* at 90, UNU App. Vol. I at 143, County and Townships App. at 100.

The Court will not reverse factual determinations unless they are against the manifest weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988).

A Board “order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed” in reaching its conclusions. *Indus. Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 885 N.E.2d 195 (2008), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987). As long as there is a basic rationale and record supporting the Order, there is no “misapprehension, mistake or willful disregard of duty.” Because the Board adequately articulated its basic rationale and the record supports its decision, the Board’s order should be affirmed.

UNU’s further argument that any setback should be measured from the property line rather than a residence is also without merit. The General Assembly, in choosing minimum setbacks for public health, safety, and welfare reasonably concluded that setbacks should be

measured both from adjoining residences, and adjoining property lines. Ohio Rev. Code Ann. § 4906.20(B)(2) (West 2010), App. at 5-6. The Board, in adopting rules to implement that legislation, reasonably chose the same measures. Ohio Admin. Code § 4906-17-08(C)(1) (West 2010), App. at 36. The choice between current clean energy development and speculative future “development rights” has already been made. UNU’s argument is with the legislature, not the Board. Contrary to UNU’s claim, the record in this case demonstrates that there is no health-based or scientific justification for any greater setback than those adopted by the Board.

Proposition of Law III:

The Power Siting Board enjoys broad discretion to determine how best to manage its docket and promote efficient adjudication of disputes before it. *Weiss v. Pub. Util. Comm’n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000). The Board is authorized to make reasonable rulings as to the competency, admissibility and scope of expert testimony, and to determine the weight to be accorded that testimony. *Chester Twp. v. Power Siting Comm’n*, 49 Ohio St. 2d 231, 238, 361 N.E.2d 436, 440 (1977).

It is the Board’s function, and not the Court’s, to weigh the evidence before it. *Consumers’ Counsel v. Pub. Util. Comm’n*, Slip Opinion No. 2010-Ohio-6239 (2010). The Board relied on testimony from Buckeye witness Christopher Shears, a senior vice president with the applicant as an expert witness based on his years of experience in the wind power generation business. The Board’s rejection of the testimony of Dr. Michael Nissenbaum was practical and lawful. The witness refused to appear at the hearing in person. The Board did not abuse its discretion with respect to either witness, contrary to UNU’s assertions. It properly exercised its authority to rule on the competency, admissibility and scope of expert testimony, and to determine the weight to be accorded that testimony.

The Board, as part of the Public Utilities Commission, enjoys broad discretion in conducting its hearings to determine how best to manage its docket and promote efficient adjudication of disputes before it. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000); *see also Duff v. Pub. Util. Comm'n*, 56 Ohio St. 2d 367, 384 N.E.2d 264 (1978). The Court will only interfere with that discretion in extreme cases where the discretion is abused. *Sanders Transfer, Inc. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 21, 23, 387 N.E.2d 1370, 1372 (1979).

More importantly, the Court has correctly recognized the authority of the finder of fact to make reasonable rulings as to the competency, admissibility and scope of expert testimony, and to determine the weight to be accorded that testimony. *Chester Twp. v. Power Siting Comm'n*, 49 Ohio St. 2d 231, 238, 361 N.E.2d 436, 440.n (1977). The ALJs reasonably admitted the testimony of Buckeye witness Shears, and the Board determined the weight to accord it. In essence, UNU is asking this Court to reweigh the evidence and assign less weight to Shears' testimony than the Board did. The Court has consistently found that this function lies with the trier of fact, and not the Court. *Util. Serv. Partners, Inc. v. Pub. Util. Comm'n*, 124 Ohio St. 3d 284, 921 N.E.2d 1038 (2009), *Consumers' Counsel v. Pub. Util. Comm'n, supra*, ¶ 32 (2010).

Mr. Shears sponsored a number of Buckeye's studies. These studies were required by Board rules prescribing that an applicant "evaluate and describe" a number of social and ecological factors, including, for example, noise, impact on land use and economic development. Ohio Admin. Code § 4906-17-08 (West 2010), App. at 33-39. The Board specifically found that Mr. Shears was an officer of EverPower, Buckeye's parent company, with 15

years of experience in the industry, including 60 wind projects. It also found that Mr. Shears had experience offering testimony before the government of the United Kingdom as the Chairman of the British Wind Energy Association. *Buckeye Wind* (Opinion, Order, and Certificate) (March 22, 2010) at 13, UNU App. Vol. I at 66. In admitting Mr. Shears' testimony, the Board, noted that:

it is a long-standing practice in Board proceedings for an applicant to sponsor exhibits to an application through the testimony of a witness that is an officer or experienced employee of the applicant. The Board has admitted the testimony of a witness, and the related exhibits, where the witness demonstrates that the exhibits or studies were performed at the applicant's request, under the witness' direct or indirect supervision, and that the officer is sufficiently knowledgeable about the information in the exhibit or study to offer testimony.

Id. at 12, UNU App. Vol. I at 65.

Although UNU assails the sufficiency of Mr. Shears' knowledge of those studies, the Court has properly recognized that the Board is authorized and uniquely qualified to evaluate sponsoring testimony. In the *Chester Twp.* case the Court found, for example, that the Board properly admitted and relied on the testimony of an engineer whose opinion testimony, it was unsuccessfully argued, was outside the engineer's field, experience or discipline. Specifically, the Court found that:

The finder of fact has the power to make reasonable rulings as to the competency, admissibility and scope of expert testimony and to determine the weight to be accorded that testimony. *Railroad Co. v. Defiance* (1895), 52 Ohio St. 262, 40 N.E. 89, paragraph nine of the syllabus; McCormick on Evidence (2 Ed.) 29, Section 13; 21 Ohio Jurisprudence 2d 425, Evidence, Section 416. This rule is especially applicable to an R.C. Chapter 4906 proceeding because the General Assembly has granted the commission discretion, in its fact-finding role, to require such information, conduct such studies and adopt such rules of evi-

dence as it deems necessary. R.C. 4906.10, 4906.03, and 4906.09. * * * Given the context in which the expert opinions * * * were elicited, this court does not find that the commission abused its discretion in admitting and weighing their testimony.

Chester Twp., 49 Ohio St. 2d 231, 238, 361 N.E.2d 436, 440. Moreover, just weeks ago, the Court expressly rejected the invitation of the Office of the Ohio Consumers' Counsel to reweigh evidence, noting that to assume such a role would interfere with the competence and jurisdiction of the Commission, and thrust the Court into a role that it is ill-suited to exercise. *Consumers' Counsel v. Pub. Util. Comm'n*, Slip Opinion No. 2010-Ohio-6239 (2010), citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St. 2d 105, 108, 346 N.E.2d 778 (1976).

UNU's claim that the ALJs applied an arbitrary and prejudicial double standard by permitting Mr. Shears' testimony while refusing to admit the testimony of Dr. Michael Nissenbaum is equally without merit. Despite adequate opportunity to do so, Dr. Nissenbaum refused to travel to testify in person at the hearing, a decision that was not finally communicated to the parties until the evidentiary hearing was well under way (in its fourth day). While UNU offered to present Dr. Nissenbaum's testimony by trial deposition, the ALJs reasonably determined that doing so would be impractical and unnecessary, finding that:

[a]s UNU admits, Dr. Nissenbaum is not UNU's only witness to offer testimony as to the health affect [*sic*] of wind turbines, but rather an additional witness who offered to provide testimony under the condition that he not be required to travel to the hearing in Ohio to present live testimony. All other witnesses will be required to be available during the hearing. Given that Dr. Nissenbaum is not UNU's only witness on the health effects of wind turbines and the extra obligations that would be placed on

other parties to this proceeding, as well as the Board, to accommodate Dr. Nissenbaum, it is unreasonable to accept Dr. Nissenbaum's deposition in lieu of live testimony in this proceeding as UNU requests.

Buckeye Wind (Entry at 3) (October 21, 2009), UNU App. Vol. I at 48.

The Court has previously found that, as a necessary concomitant to the Commission's broad discretion in how it conducts its hearings, the Commission is not stringently confined by the Rules of Evidence. *Greater Cleveland Welfare Rights Organization, Inc. v. Pub. Util. Comm'n*, 2 Ohio St. 3d 62, 68, 442 N.E.2d 1288, 1294-95 (1982). In that case, the appellants argued that the Commission erred when it failed to overturn rulings by the hearing officer striking portions of a witness' testimony as inadmissible hearsay. *Id.* In upholding the Commission, and reaffirming the Commission's broad discretion in such matters, the Court noted that the hearing officer's ruling did not, in view of the totality of the evidence, prejudice the appellants. In a similar vein, the ALJs' refusal to admit Dr. Nissenbaum's testimony did not prejudice UNU, particularly given that UNU presented other evidence on the health effects of wind turbines. This Court has consistently refused to reverse an order "absent a showing of prejudice by the challenging party." *Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 595 N.E.2d 873 (1992); *see also Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 syllabus (1980). None was shown here.

Proposition of Law IV:

The Power Siting Board may grant an application upon such conditions and modifications as it considers appropriate and may delegate the enforcement of certificate conditions and modifications to its staff. Ohio Rev. Code Ann. § 4906.10(A) (West 2010), App. at 2-3; *In re Am. Transm. Sys. Inc.*, 125 Ohio St. 3d 333, 928 N.E.2d 427 (2010).

UNU mistakenly asserts that certain conditions ordered by the Board are unlawful. While some conditions permit the Board staff to perform certain functions after the certificate has issued, this neither “defers” consideration of issues until after the evidentiary hearing, nor allows the Board to circumvent its statutory responsibility under R.C. 4906.10. These conditions neither relieved Buckeye of its burden of proof, nor do they act to deny UNU either the right of participation or to due process of law.

The siting process is a dynamic one. It does not end with the Board’s issuance of a certificate. The work of the Board’s staff continues at the project site where it monitors construction activity to ensure compliance with certificate conditions. The General Assembly recognized this and vested the Board with explicit authority to do exactly what UNU complains about. R.C. 4906.10(A) authorizes the Board to grant an application “upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate,” and to issue a “conditional operating permit.” Ohio Rev. Code Ann. § 4906.10(A) (West 2010), App. at 1. The statute specifies that operation in compliance with a conditional operating certificate does not violate the certificate. *Id.* As long as an applicant complies with the Board’s conditions, Ohio law

requires no further process.³ If an affected party believes that a developer has violated its certificate, Ohio law provides both a meaningful process and adequate remedies. Ohio Rev. Code Ann. §§ 4906.97, 4906.98 (West 2010), App. at 6-7, 7.

Furthermore, as the Court recently observed:

R.C. Chapter 4906, the board's enabling statute, expressly allows the board to delegate many responsibilities to subordinates. * * * More generally, R.C. 4906.02(C) states, "The chairman of the public utilities commission may assign or transfer duties among the commission's staff." * * *

One responsibility, however, cannot be delegated: "the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself." R.C. 4906.02(C).

In re Application of Am. Transm. Sys. Inc., 125 Ohio St. 3d 333, 336, 928 N.E.2d 427, 430 (2010). The delegations made by the Board to its staff in the conditions that UNU complains about are not prohibited delegations of certificate-granting authority. Only the Board has certificate-granting authority. Rather, these are delegations of *enforcement* authority. Even UNU acknowledged that many of these issues "were debated at length by the parties and witnesses at the evidentiary hearing." UNU Brief at 43. It can hardly be said that Board "consideration" has been deferred or that UNU was denied a right to participate in that debate. This is both practical and entirely proper as the Board's staff is responsible for compliance oversight in the field and initiating enforcement actions, where needed. There is no improper delegation of authority or deferral of issues.

³ The lone exception provided in Ohio's comprehensive statutory scheme is where the Board conditions a certificate modifying the location of all or a part of a facility. In that limited case, municipal corporations, counties, and residents affected by the modification must be given reasonable notice. Ohio Rev. Code § 4906.10(B) (West 2010), App. at 4.

UNU objects to six separate conditions, which it categorizes as (1) allowing turbine relocation (Conditions 45 and 46), and (2) information submission relevant to key issues (Conditions 8, 33, 40, and 49). None of these conditions represents an improper delegation of authority by the Board, nor do they require decisions that the Board is statutorily required to make. All represent lawful and reasonable delegations of responsibility to the Board staff. UNU received due process and a full and fair opportunity to be heard. That is all that is required.

A. Conditions Permitting Turbine Relocation

Conditions 45 and 46 pertain to separate turbines that could not be approved in their proposed locations given other conditions imposed by the Board. Specifically, those conditions provided that:

(45) Buckeye shall not construct Turbine 70, as proposed. If Buckeye elects to modify the location of proposed Turbine 70, Buckeye shall provide staff a hard copy of the geographically referenced electronic data, all changes in relation to the proposed relocation of Turbine 70, and any associated facilities. All changes will be subject [sic] staff review and approval prior to construction *and shall comply* with the conditions set forth in this opinion, order, and certificate.

(46) Buckeye shall propose an adjusted location for Turbine 57 *so that it complies* with the minimum property line setback, pursuant to Rule 4906-17-08(C)(1)(c), or, in the alternative, obtains waiver of the setback by the affected property owner.

Buckeye Wind (Opinion, Order, and Certificate at 91; emphasis added) (March 22, 2010), UNU App. Vol. II at 144, County and Townships App. at 101. In both cases, the Board has approved the siting of these turbines so long as they comply with the conditions in the certificate. Contrary to UNU's claim, relocation would not be "based on information not pre-

sented at the public information meeting, in the Application, or at the hearing.” UNU Brief at 43. Rather, any relocation would have to be based on conditions imposed by the Board based explicitly on information presented *at* the public information meeting, *in* the Application, and *at* the hearing. Ongoing staff review and approval is authorized expressly to ensure compliance with conditions ordered by the Board. There is no deferral of contested issues as UNU mistakenly asserts.

B. Information Relevant To Key Issues

The Board’s rules require applicants to file a detailed description of the proposed facility. Ohio Admin. Code § 4906-17-03, *et seq.* (West 2010), App. at 28-29. Because the Board can order that changes or modifications be made, as it did in this case, many of the originally proposed details may also have to change. The Board’s Condition 8 requires Buckeye to submit a variety of reports that contain final detailed descriptions of its construction plan. While UNU argues that post-certificate submission of these documents prevents them from litigating issues that might be raised by those reports, virtually none of the additional information was required for issuance of the certificate. Board rules do not require Buckeye to file any information with its application relating to an equipment delivery route or transportation routing plan (Condition 8a), a stream crossing plan or a detailed frac-out contingency plan for stream crossings (Conditions 8c and 8d), a tree clearing plan (Condition 8f), or fire protection and medical emergency plans (Condition 8i). Nonetheless, the Board issued conditions requiring applicant compliance in these cases. While not required by statute or rule, the Board also required that Buckeye develop an informal complaint resolution procedure to address concerns that may arise both during construction and after operation

(Condition 8j). Beyond that, UNU had ample opportunity at hearing to inquire about what the conditions mean and are intended to address and achieve.

To the extent that the reports in Condition 8 directly bear on information filed as part of the application, the Board made it clear that the purpose for submitting the report after issuance of the certificate was so that the staff could confirm that the final project design was *in compliance* with the terms of the certificate (e.g.: Condition 8b). The Board required that Buckeye file a final electric collection system plan, specifically identifying the planned location of all lines, indicating whether the lines will be buried or located overhead (Condition 8e). As part of its application Buckeye was required to file a map showing the proposed collection lines. Ohio Admin. Code § 4906-17-05(B)(2)(b) (West 2010), App. at 32. Both because the Board permitted Buckeye to propose new locations for two of the turbines, and because Buckeye had pledged to change its collection system as an accommodation to the Urbana Country Club, a final report was necessary to ensure compliance with the Board's conditions.

Condition 33 refers to blade shear, or what UNU calls "blade throw information." Blade shear occurs when a rotor blade drops or is thrown from the turbine. The record demonstrates that instances of blade shear are extremely rare. Tr. VIII at 1984-1986, Supp. at 175-177. Specifically, Condition 33 provides that:

(33) Prior to the preconstruction conference, Buckeye shall provide staff with both the maximum potential distance for a blade shear event from the three turbine models under consideration and the formula used to calculate the distance.

Buckeye Wind (Opinion, Order, and Certificate at 90) (March 22, 2010), UNU App. Vol. I at 143, County and Townships App. at 100.

Other than the general setback guidelines, the Board's rules require that an applicant "evaluate and describe the potential impact from blade shear at the nearest property boundary, including its plans to minimize potential impacts if warranted." Ohio Admin. Code § 4906-17-08(A)(5) (West 2010), App. at 34. UNU does not argue that the Board erred in finding that Buckeye evaluated and described the potential impact of blade shear, or its mitigation efforts. Buckeye was not erroneously relieved of its burden of proof as UNU claims; Buckeye met its burden. The Board found, as a matter of fact, that Buckeye "sufficiently demonstrated that the setbacks, as currently configured, when combined with advances in wind turbine technology, are sufficient to protect residents from any risk of blade shear." *Buckeye Wind* (Opinion, Order, and Certificate at 42-43) (March 22, 2010), UNU App. Vol. I at 95-96, County and Townships App. at 52-53. The Board's Condition 33 actually went further. It adopted its staff's recommendation that Buckeye provide a formula that supports Buckeye's consultant's calculations, further mitigating the risk of blade shear.

Condition 40 relates to microwave interference. Microwave telecommunication systems are wireless point-to-point links that communicate between two antennas. *Id.* at 66, UNU App. Vol. I at 119. According to Buckeye's application, only proposed Turbine 37 had the "potential" to cause microwave interference, based on a worst-case scenario. Application at 194, Supp. at 6. As a result, the Board adopted Condition 40, which states that:

(40) Buckeye shall conduct an in-depth vertical Fresnel-zone analysis to determine if Turbine 37 will cause microwave interference. Pursuant to staff review and approval. Buckeye shall

shift the location of, or eliminate, Turbine 37 based on the results of the aforementioned study.

Buckeye Wind (Opinion, Order, and Certificate at 91) (March 22, 2010), UNU App. Vol. I at 144, County and Townships App. at 101.

This modification is intended to ensure compliance with other conditions imposed by the Board. Specifically, the Board also mandated that Buckeye meet all FCC requirements where communications might be affected, and to mitigate any effects or degradation to such communication, including television coverage, cellular/PCS and AM/FM reception. *Id.* at 90-91, UNU App. Vol. I at 143-144, County and Townships App. at 100-101.

Finally, UNU objected to Buckeye being permitted to choose a turbine model other than those proposed in the original application. UNU asserts that identification of the turbine model to be used for the project is essential in order to adequately model its noise impacts. Buckeye has not been handed a blank check, however. The Board imposed Condition 49 that provides:

(49) At least 60 days prior to construction, Buckeye shall file a letter with the Board that identifies which of the three turbine models listed in the application has been selected. If Buckeye selects a turbine model other than one of the three models listed in the application, in addition to the letter, Buckeye shall also: file copies of the safety manual for the turbine model selected and manufacturer contact information; and provide assurances that no additional negative impacts would be introduced by the model selected.

Id. at 92, UNU App. Vol. I at 145, County and Townships App. at 102.

In the first instance, there is no issue unless Buckeye selects a turbine model other than one that it originally proposed. But even if it did, the Board required that there be assurances that there would be no negative impacts. Board staff witness Siegfried testified

that the staff performed its evaluation of the proposed turbines based on a worst case scenario (*e.g.*: choice of technology with the greatest potential impact). Tr. VII at 1734, Supp. at 167. To the extent that Buckeye would choose a different turbine, any potential impacts would have to be less than those upon which the Board based its conditions. Were that not the case, the turbine would necessarily violate the conditions imposed by the Board, and Buckeye would be subject to the penalties set forth in R.C. 4906.97.

UNU's improper delegation arguments are impractical and at odds with Board statutes and the jurisprudence of the Court, and should be rejected.

Proposition of Law V:

The power to grant certificates of environmental compatibility and public need is vested exclusively in the Power Siting Board. *State ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St. 3d 705, 654 N.E.2d 106 (1995). No political subdivision may require any other condition for the construction or operation of facility authorized by a certificate issued by the Board. Ohio Rev. Code Ann. § 4906.13(B) (West, 2010), App. at 4-5.

As one of its conditions for approval of the certificate, the Board required that:

(56) Prior to the commencement of construction, Buckeye shall secure a road bond(s), or other similar surety, through the Champaign County Engineer's Office to provide adequate funds to repair any damage to public roads resulting from the construction or decommissioning of the proposed facility. Buckeye shall submit proof of the bond or other similar surety, for staff's approval in coordination with ODOT.

Buckeye Wind (Opinion, Order, and Certificate at 93) (March 22, 2010), UNU App. Vol. I at 146, County and Townships App. at 103. The County and Townships wrongly argue that the County Engineer should be the official establishing the *amount* of a bond sufficient to repair

any damage to public roads. The Board's decision delegating this responsibility to its staff was both reasonable and lawful.

There is neither a statutory nor a regulatory requirement that an applicant provide, or that the Board impose, a bond for the repair of public roads. The law only requires that an applicant "[e]valuate and describe the anticipated impact to roads and bridges associated with construction vehicles and equipment delivery," and [d]escribe measures that will be taken to repair roads and bridges to at least the condition present prior to the project." Ohio Admin. Code § 4906-17-08(E)(5) (West 2010), App. at 38.

Buckeye did just that. It prepared a Route Evaluation Study to identify probable equipment delivery routes; identify preliminary constraints that would require roadway improvements; describe required state permits; and describe the types of road impacts typical for the development of a wind turbine facility. Buckeye pledged to video-document the roadways to be used for delivering equipment and materials prior to construction to establish existing conditions, and to return all roadways to their pre-construction condition upon completion of the project. Buckeye further pledged that the process of documenting roadway conditions and restoring impacted roads would be performed in conjunction with state and local permitting, and that it would work with the Champaign County Engineer to ensure that any damage is repaired. Application at 196-198, Supp. at 7-9. Buckeye's proposal included a road bond, or other similar surety, to be established through the Engineer's Office to provide adequate funds to repair any damage to public roads. *Id.* at 198, Supp. at 9. Quite clearly, the County Engineer will play a significant role in determining how damage to affected roadways under its jurisdiction will be addressed and resolved.

Buckeye's application satisfied all statutory and regulatory requirements, and the Board could have reasonably and lawfully approved the Company's Roads and Bridges plan without further condition. But the Board went further. It charged its staff with coordinating with the Ohio Department of Transportation (ODOT) to approve a fair and reasonable bond. Buckeye was ordered to work with the Champaign County Engineer's Office to secure the bond, and the Board fully expects that it will do so. With assistance from ODOT expertise, the Board's staff will develop a just and reasonable bond amount that assures that local roadways will be adequately maintained and repaired.

The Board does not dispute that the County Engineer has responsibility for public roads within its jurisdiction, and that authority remains unaffected by the Board's order. That, however, does not empower the County Engineer to make determinations that affect power siting projects within the purview of the Power Siting Board. R.C. 4906.13 specifically prohibits local officials from imposing any condition for the construction or operation of a utility facility authorized by a certificate issued pursuant to R.C. Chapter 4906. Ohio Rev. Code Ann. § 4906.13(B) (West 2010), App. at 4-5. It is long-established that power siting projects are exempt from local regulation. *State ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St. 3d 705, 654 N.E.2d 106 (1995). This is so because, the Court has said, "[i]n R.C. Chapter 4906, the General Assembly created a comprehensive scheme addressing the process for applying for and granting certificates . . . such as the one at issue here. That scheme expresses the General Assembly's intention that such powers are vested exclusively in the board." *Id.* at 707; *see also Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150, 573 N.E.2d 655, 658 (1991).

Consequently, the Board held that, while Buckeye was to secure a road bond or similar surety *through* the Champaign County Engineer's Office, the bond or surety level is to be *approved* by the Board staff in tandem with ODOT.⁴ *Buckeye Wind* (Entry on Rehearing at 14) (July 15, 2010), UNU App. Vol. II at 255, County and Townships App. at 125. To allow otherwise would be to permit local officials to determine the terms and conditions on which projects approved by the Power Siting Board can be constructed. Such a result would run afoul of R.C. 4906.13, and would frustrate important state goals and policies. The Board's finding should be affirmed.

Proposition of Law VI:

Failure to raise an issue in a rehearing application to the Power Siting Board deprives this Court of jurisdiction to consider that issue. Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1-2; *Consumers' Counsel v. Pub. Util. Comm'n*, Slip Opinion No. 2010-Ohio-6239 (2010).

The Court lacks jurisdiction to consider the County and Townships' second proposition of law regarding applicability of R.C. 5727.75. That statute provides that wind projects can receive an exemption from tax liability if certain requirements are met. The issue has not been properly raised for the Court's consideration. Furthermore, the statute has no applicability to this case.

A. This issue is not properly raised.

R.C. 5727.75 became effective on June 17, 2010, almost two full months after the County and Townships filed their application for rehearing in this case. Although the Board

⁴ The Board neither precluded nor discouraged its staff from consulting with the Champaign County Engineer as to the appropriate amount of the bond.

did not issue its Entry on Rehearing until after the effective date of R.C. 5727.75, the County and Townships failed to bring this “new authority” to the Board’s attention. Instead, they urge this Court to find that the Board’s orders violate R.C. 5727.75 without even asking the Board to consider what impact, if any, the law might have in a rehearing application as required by R.C. 4903.10. The County and Townships’ failure to raise this issue in an application for rehearing prevents this Court from considering the issue. Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1. *Consumers’ Counsel v. Pub. Util. Comm’n*, Slip Opinion No. 2010-Ohio-6239 (2010).

The General Assembly required that such matters be specifically presented to the Board as a ground for rehearing as a prerequisite to asserting it on appeal.

Such an application [for rehearing] shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the [Board’s] order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1. This Court has consistently refused to consider matters that were not raised in a rehearing application. *The Cincinnati, New Orleans and Texas Pacific Ry. Co. v. Pub. Util. Comm’n*, 31 Ohio St. 2d 81, 82, 285 N.E.2d 371, 372-373 (1972); *Agin v. Pub. Util. Comm’n*, 12 Ohio St. 2d 97, 98-99, 232 N.E.2d 828, 829 (1967). Specifically, this Court has stated that:

On an appeal from an order of the Public Utilities Commission, the Supreme Court cannot consider any matter which was *not specifically set forth* in an application * * * for a rehearing as a ground on which the appellant considered the order * * * to be unreasonable or unlawful.

Agin, 12 Ohio St. 2d at 98-99, 232 N.E.2d at 829 (emphasis added).

Since the County and Townships did not raise this proposition of law on rehearing, the Court cannot consider it on appeal.

B. R.C. 5727.75 is not applicable to this case.

Even assuming, *arguendo*, that the County and Townships had timely raised this issue before the Board, it has no application to this case. R.C. 5727.75(F)(4) R.C. 5727.75 is a tax statute that delineates what an owner or lessee of a qualified energy project must do to receive a tax exemption. But a wind project only qualifies if application is made “to the director of development for certification of an energy project as a qualified energy project.” Ohio Rev. Code Ann. § 5727.75(E)(1)(a) (West 2010), App. at 22. If a project developer wants a tax break, it must meet certain requirements, including specific bonding requirements. There was no evidence presented to the Board that Buckeye had, or ever intended to, apply for R.C. 5727.75 qualified energy project certification. The bonding requirements of R.C. 5727.75 were not, and could not have been considered by the Board. It had no reason to consider those requirements. The Court should reject the County and Townships’ second proposition of law.

Proposition of Law VII:

The Power Siting Board does not abuse its discretion by requiring a financial assurance bond during the first year of a wind turbine’s operation where record evidence demonstrated that no such assurance was necessary.

The Board required that, “[p]rior to construction of each turbine, Buckeye shall post and maintain financial assurance for said turbine in the amount of \$5,000. This financial assurance shall be in place until such time that the facility has been operational for one year.”

Buckeye Wind (Opinion, Order, and Certificate at 95) (March 22, 2010), UNU App. Vol. I at 148, County and Townships App. at 105 (Condition 69). The County and Townships argue that the \$5,000 bond amount is unsupported by the record and is therefore unreasonable and unlawful.

There is neither a statutory nor a regulatory requirement that an applicant provide, or that the Board impose, any financial assurance for the first year that a wind turbine is in operation. The law requires only that an applicant “[d]escribe the plan for decommissioning the proposed facility, including a discussion of any financial arrangements designed to assure the requisite financial resources.” Ohio Admin. Code § 4906-17-08(E)(6), App. at 38. Buckeye developed a plan for decommissioning and described it, and its financial assurances, in considerable detail. Application at 199, Supp. at 10. Although that plan did not include a financial assurance for the first year of operation, it still satisfied all statutory and regulatory requirements. While the Board could have reasonably and lawfully approved the Company’s decommissioning plan as submitted, it instead modified the plan to include even greater assurances, including the \$5,000 financial assurance for the first year of operation challenged by the County and Townships. While Buckeye initially opposed this additional financial obligation, it ultimately accepted the Board’s decision.

The law does not require that Buckeye provide any financial assurance whatsoever during the first year of operation. The record reflects that the parties assumed widely varying positions were taken on this issue. It also reflects that the Board considered all of those positions, and the evidence supporting them, and reached a fair and balanced result. *Buckeye*

Wind (Opinion, Order, and Certificate at 72-76) (March 22, 2010), UNU App. at Vol. I at 125-129, County and Townships App. at 82-86.

Buckeye's position, for example, was that the record did not support the imposition of any financial assurance during the first year of operation. Buckeye witness Shears testified that it was inconceivable that the project would need to be decommissioned in the early years of operation. Tr. I at 192-193, Supp. at 149-150. Buckeye also argued that a \$5,000 per turbine bond requirement was not necessary, given the high salvage value amount of the equipment. *Buckeye Wind* (Opinion, Order, and Certificate at 74) (March 22, 2010), UNU App. Vol. I at 127, County and Townships App. at 84. It argued that equipment warranties, insurance, or potential equipment resale value would cover any cost of decommissioning in the first few years of operation. *Id.*

Similarly, the Board staff concluded in its Staff Report of Investigation that a decommissioning bond is not necessarily required to be in place at the onset of construction. Staff Report of Investigation at 52-53, UNU Supp. Vol. III at 454-455. Staff noted that "[s]ome states allow five to ten years of operation before a bond or other financial assurance must be secured for decommissioning; others require it initially." *Id.* at 53, UNU Supp. Vol. III at 455.

By contrast, UNU witness Stamberg testified about the risks and uncertainties in estimating decommissioning costs, and the need for an appropriate financial assurance mechanism to account for those risks and uncertainties. Direct Test. of J. Stamberg, Supp. at 116-144. Mr. Stamberg testified that net decommissioning costs for wind turbines can fluctuate significantly over time due to significant price volatility in the scrap metal market. *Id.* at 8,

10, Supp. at 123, 125. Mr. Stamberg even testified that the cost could be as much as \$300,000 per turbine to decommission a wind farm. Tr. V at 1118, Supp. at 162. All of this, even if true, ignores the fact that these risks are not likely to occur in the initial year of operation. The Board took a very conservative view and required a bond for the first year of operation. The Board found that:

[D]ecommissioning and the associated financial assurance is an important issue that must be evaluated in our consideration of the proposed project. Having thoroughly reviewed the concerns and proposals raised by the parties on this issue, the Board believes that some financial assurance is appropriate upon construction and we have set forth such a requirement in the Conclusion and Conditions Section of this opinion, order, and certificate. * * * [W]ith these conditions for decommissioning and financial assurance in place, public interest will be protected.

Buckeye Wind (Opinion, Order, and Certificate at 76) (March 22, 2010), UNU App. Vol. I at 129, County and Townships App. at 86.

Nor was the Board's decision in this case based on decisions in other cases, as the County and Townships claim. It was based upon, and limited to, the facts and circumstances of this case. Contrary to the County and Townships' mistaken assertion, the Board actually found that it was not appropriate to harmonize this case with its other decisions:

[T]he order in this case represents the balancing of competing evidence and viewpoints that were represented to the Board during the evidentiary hearings, as summarized in the subsequent briefs. Accordingly, the Board does *not* find it appropriate to grant rehearing for the purpose of bringing our decision in this case, which was based on our careful consideration of

the evidence presented in this heavily litigated case, into conformity with stipulations negotiated by different parties in other cases.

Buckeye Wind (Entry on Rehearing at 11) (July 15, 2010), UNU App. Vol. II at 252, County and Townships App. at 122 (emphasis added). Indeed, the Board specifically distinguished this case from others where the issue was raised.

The Board thoroughly considered the issue of decommissioning and ordered a reasonable and lawful bond requirement for the initial year of operation. Buckeye was not required to provide any specific financial assurance for its first year of operation, nor was the Board required to impose a bond. Having carefully decided to include a financial assurance requirement for the initial year of operation, despite record evidence that no such assurance was necessary, the Board's decision was both reasonable and lawful, and should be affirmed.

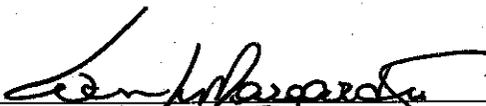
CONCLUSION

This was the first wind farm siting case in Ohio. It was fully and thoroughly litigated. The record evidence is extensive, and sufficient to support a wide range of outcomes, outcomes that pit private property interests against important state policies, and often against one another. The Board is charged with balancing these competing goals, and did so properly in this case. The record supports its decision, and its actions. Based on the foregoing, the Board respectfully submits that the Court affirm its decision

Respectfully submitted,

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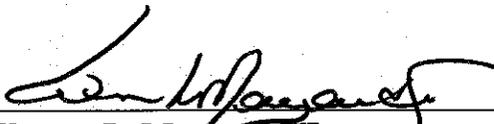
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I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, Ohio Power Siting Board, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 4th day of January, 2011.



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APPENDIX

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§ 4903.10. Application for rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the

commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

§ 4903.13. Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4906.09. Record of hearing

A record shall be made of the hearing and of all testimony taken. Rules of evidence, as specified by the power siting board, shall apply to the proceeding. The board may provide for the consolidation of the representation of parties having similar interests.

§ 4906.10. Basis for decision granting or denying certificate

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and rules adopted under sections 1501.33, 1501.34, and 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code. The period of initial operation under a certificate shall expire two years after the date on which electric power is first generated by the facility. During the period of initial operation, the facility shall be subject to the enforcement and monitoring powers of the director of environmental protection under Chapters 3704., 3734., and 6111. of the Revised Code and to the emergency provisions under those chapters. If a major utility facility constructed in accordance with the terms and conditions of its certificate is unable to operate in compliance with all applicable requirements of state laws, rules, and standards pertaining to air pollution, the facility may apply to the director of environmental protection for a conditional operating permit under division (G) of section 3704.03 of the Revised Code and the rules adopted thereunder. The

operation of a major utility facility in compliance with a conditional operating permit is not in violation of its certificate. After the expiration of the period of initial operation of a major utility facility, the facility shall be under the jurisdiction of the environmental protection agency and shall comply with all laws, rules, and standards pertaining to air pollution, water pollution, and solid and hazardous waste disposal. The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

(1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

(B) If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon that modification, provided that the municipal

corporations and counties, and persons residing therein, affected by the modification shall have been given reasonable notice thereof.

(C) A copy of the decision and any opinion issued therewith shall be served upon each party.

§ 4906.12. Procedures of public utilities commission to be followed

Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.

§ 4906.13. No local jurisdiction

(A) As used in this section and sections 4906.20 and 4906.98 of the Revised Code, "economically significant wind farm" means wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of five or more megawatts but less than fifty megawatts. The term excludes any such wind farm in operation on the effective date of this section.

(B) No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility or wind farm nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility or economically significant wind farm for which a certificate has been granted under this chapter.

§ 4906.20. Certificate required to construct certain wind farms

(A) No person shall commence to construct an economically significant wind farm in this state without first having obtained a certificate from the power siting board. An economically significant wind farm with respect to which such a certificate is required shall be constructed, operated, and maintained in conformity with that certificate and any terms, conditions, and modifications it contains. A certificate shall be issued only pursuant to this section. The certificate may be transferred, subject to the approval of the board, to a person that agrees to comply with those terms, conditions, and modifications.

(B) The board shall adopt rules governing the certifying of economically significant wind farms under this section. Initial rules shall be adopted within one hundred twenty days after this section's effective date.

(1) The rules shall provide for an application process for certifying economically significant wind farms that is identical to the extent practicable to the process applicable to certifying major utility facilities under sections 4906.06, 4906.07, 4906.08, 4906.09, 4906.11, and 4906.12 of the Revised Code and shall prescribe a reasonable schedule of application filing fees structured in the manner of the schedule of filing fees required for major utility facilities.

(2) Additionally, the rules shall prescribe reasonable regulations regarding any wind turbines and associated facilities of an economically significant wind farm, including, but not limited to, their location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement and including erosion control, aesthetics, recreational land use, wildlife protection, interconnection with power lines and with regional transmission organizations, independent transmission system operators, or similar organizations, ice throw, sound and noise levels, blade shear, shadow flicker, decommissioning, and necessary cooperation for site visits and enforcement investigations. The rules also shall prescribe a minimum setback for a wind turbine of an economically significant wind farm. That minimum shall be equal to a horizontal distance, from the turbine's base to the property line of the wind farm property, equal to one and one-tenth times the total height of the turbine structure as measured from its base to the tip of its highest blade and be at least seven hundred fifty feet in horizontal distance from the tip of the turbine's nearest blade at ninety degrees to the exterior of the nearest, habitable, residential structure, if any, located on adjacent property at the time of the certification application. The setback shall apply in all cases except those in which all owners of property adjacent to the wind farm property waive application of the setback to that property pursuant to a procedure the board shall establish by rule and except in which, in a particular case, the board determines that a setback greater than the minimum is necessary.

(C) The board shall approve, or may modify and approve, an application for economically significant wind farm certification if it finds that the construction, operation, and maintenance of the economically significant wind farm will comply with the rules adopted under division (B) of this section. The certificate shall be conditioned upon the economically significant wind farm complying with rules adopted under section 4561.32 of the Revised Code.

§ 4906.97. Notice and hearing of complaint

(A) Upon a finding by the power siting board that there are reasonable grounds to believe that a person has violated a provision of section 4906.98 of the Revised Code, the board shall fix a time for hearing such complaint and shall notify the person. The notice shall be served not less than fifteen days before the date of hearing and shall state the matters that are the

subject of the complaint. Parties to the complaint are entitled to be heard, to be represented by counsel, and to have process to enforce the attendance of witnesses.

(B) The power siting board by order or its chairperson, with written notice to the person and opportunity to respond, may require that any activity that is the subject of a complaint under division (A) of this section be suspended for the duration of the board's consideration of the complaint. Upon a showing by the party against which the complaint was filed that all matters have been addressed satisfactorily, the chairperson shall terminate the suspension.

(C) After notice and opportunity for hearing in accordance with division (A) of this section and upon a finding by the board that a person has violated a provision of section 4906.98 of the Revised Code, the board by order may assess a forfeiture of not more than five thousand dollars for each day of the violation, but the aggregate of forfeitures for a related series of violations shall not exceed one million dollars. In determining the amount of any forfeiture, the board shall consider all of the following:

- (1) The gravity of the violation;
- (2) The person's history of prior violations;
- (3) The person's good faith efforts to comply and undertake corrective action;
- (4) The person's ability to pay the forfeiture;
- (5) The cost of the project;
- (6) The effect of the forfeiture on the person's ability to continue as an applicant;
- (7) Such other matters as justice requires.

(D) The attorney general, upon written request of the board, shall bring a civil action to recover any forfeiture assessed under division (C) of this section but not paid, or to seek other appropriate relief, including injunctive relief. The action shall be brought in the court of common pleas of Franklin county. The court shall give precedence to the action over all other cases.

(E) All forfeitures collected under division (C) or (D) of this section shall be deposited into the state treasury to the credit of the general revenue fund.

§ 4906.98. Prohibited acts

(A) No person shall construct a major utility facility or economically significant wind farm without first obtaining a certificate.

(B) No person shall construct, operate, or maintain a major utility facility or economically significant wind farm other than in compliance with the certificate the person has obtained.

(C) No person or economically significant wind farm shall fail to comply with any order issued pursuant to this chapter or with a suspension otherwise required under division (B) of section 4906.97 of the Revised Code.

§ 4928.01. [Effective 9/13/2010] Competitive retail electric service definitions

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent

that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income

payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM).

(g) Demand-side management and any energy efficiency improvement.

(35) "Renewable energy resource" means solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. "Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to,

a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy. As used in division (A)(35) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

- (a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.
- (b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.
- (c) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.
- (d) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.
- (e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.
- (f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.
- (g) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.
- (h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

§ 4928.02. State policy

It is the policy of this state to do the following throughout this state :

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

§ 4928.64. Electric distribution utility to provide electricity from alternative energy resources

(A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2)(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing the compliance of electric distribution utilities and electric services companies with division (B) of this section and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

§ 5727.75. Exemption on tangible personal property and real property of certain qualified energy projects

(A) For purposes of this section:

(1) "Qualified energy project" means an energy project certified by the director of development pursuant to this section.

(2) "Energy project" means a project to provide electric power through the construction, installation, and use of an energy facility.

(3) "Alternative energy zone" means a county declared as such by the board of county commissioners under division (E)(1)(b) or (c) of this section.

(4) "Full-time equivalent employee" means the total number of employee-hours for which compensation was paid to individuals employed at a qualified energy project for services performed at the project during the calendar year divided by two thousand eighty hours.

(5) "Solar energy project" means an energy project composed of an energy facility using solar panels to generate electricity.

(B)(1) Tangible personal property of a qualified energy project using renewable energy resources is exempt from taxation for tax years 2011 and 2012 if all of the following conditions are satisfied:

(a) On or before December 31, 2011, the owner or a lessee pursuant to a sale and leaseback transaction of the project submits an application to the power siting board for a certificate under section 4906.20 of the Revised Code, or if that section does not apply, submits an application for any approval, consent, permit, or certificate or satisfies any condition required by a public agency or political subdivision of this state for the construction or initial operation of an energy project.

(b) Construction or installation of the energy facility begins on or after January 1, 2009, and before January 1, 2012. For the purposes of this division, construction begins on the earlier of the date of application for a certificate or other approval or permit described in division (B)(1)(a) of this section, or the date the contract for the construction or installation of the energy facility is entered into.

(c) For a qualified energy project with a nameplate capacity of five megawatts or greater, a board of county commissioners of a county in which property of the project is located has adopted a resolution under division (E)(1)(b) or (c) of this section to approve the application submitted under division (E) of this section to exempt the property located in that county from taxation. A board's adoption of a resolution rejecting an application or its failure to

adopt a resolution approving the application does not affect the tax-exempt status of the qualified energy project's property that is located in another county.

(2) If tangible personal property of a qualified energy project using renewable energy resources was exempt from taxation under this section for tax years 2011 and 2012 and the certification under division (E)(2) of this section has not been revoked, the tangible personal property of the qualified energy project is exempt from taxation for tax year 2013 and all ensuing tax years if the property was placed into service before January 1, 2013, as certified in the construction progress report required under division (F)(2) of this section. Tangible personal property that has not been placed into service before that date is taxable property subject to taxation. An energy project for which certification has been revoked is ineligible for further exemption under this section. Revocation does not affect the tax-exempt status of the project's tangible personal property for the tax year in which revocation occurs or any prior tax year.

(C) Tangible personal property of a qualified energy project using clean coal technology, advanced nuclear technology, or cogeneration technology is exempt from taxation for the first tax year that the property would be listed for taxation and all subsequent years if all of the following circumstances are met:

(1) The property was placed into service before January 1, 2017. Tangible personal property that has not been placed into service before that date is taxable property subject to taxation.

(2) For such a qualified energy project with a nameplate capacity of five megawatts or greater, a board of county commissioners of a county in which property of the qualified energy project is located has adopted a resolution under division (E)(1)(b) or (c) of this section to approve the application submitted under division (E) of this section to exempt the property located in that county from taxation. A board's adoption of a resolution rejecting the application or its failure to adopt a resolution approving the application does not affect the tax-exempt status of the qualified energy project's property that is located in another county.

(3) The certification for the qualified energy project issued under division (E)(2) of this section has not been revoked. An energy project for which certification has been revoked is ineligible for exemption under this section. Revocation does not affect the tax-exempt status of the project's tangible personal property for the tax year in which revocation occurs or any prior tax year.

(D) Except as otherwise provided in this division, real property of a qualified energy project is exempt from taxation for any tax year for which the tangible personal property of the qualified energy project is exempted under this section.

(E)(1)(a) A person may apply to the director of development for certification of an energy project as a qualified energy project on or before the following dates:

(i) December 31, 2011, for an energy project using renewable energy resources;

(ii) December 31, 2013, for an energy project using clean coal technology, advanced nuclear technology, or cogeneration technology.

(b) The director shall forward a copy of each application for certification of an energy project with a nameplate capacity of five megawatts or greater to the board of county commissioners of each county in which the project is located and to each taxing unit with territory located in each of the affected counties. Any board that receives from the director a copy of an application submitted under this division shall adopt a resolution approving or rejecting the application unless it has adopted a resolution under division (E)(1)(c) of this section. A resolution adopted under division (E)(1)(b) or (c) of this section may require an annual service payment to be made in addition to the service payment required under division (G) of this section. The sum of the service payment required in the resolution and the service payment required under division (G) of this section shall not exceed nine thousand dollars per megawatt of nameplate capacity located in the county. The resolution shall specify the time and manner in which the payments required by the resolution shall be paid to the county treasurer. The county treasurer shall deposit the payment to the credit of the county's general fund to be used for any purpose for which money credited to that fund may be used.

The board shall send copies of the resolution by certified mail to the owner of the facility and the director within thirty days after receipt of the application, or a longer period of time if authorized by the director.

(c) A board of county commissioners may adopt a resolution declaring the county to be an alternative energy zone and declaring all applications submitted to the director of development under this division after the adoption of the resolution, and prior to its repeal, to be approved by the board.

All tangible personal property and real property of an energy project with a nameplate capacity of five megawatts or greater is taxable if it is located in a county in which the board of county commissioners adopted a resolution rejecting the application submitted under this division or failed to adopt a resolution approving the application under division (E)(1)(b) or (c) of this section.

(2) The director shall certify an energy project if all of the following circumstances exist:

(a) The application was timely submitted.

(b) For an energy project with a nameplate capacity of five megawatts or greater, a board of county commissioners of at least one county in which the project is located has adopted a resolution approving the application under division (E)(1)(b) or (c) of this section.

(c) No portion of the project's facility was used to supply electricity before December 31, 2009.

(3) The director shall deny a certification application if the director determines the person has failed to comply with any requirement under this section. The director may revoke a certification if the director determines the person, or subsequent owner or lessee pursuant to a sale and leaseback transaction of the qualified energy project, has failed to comply with any requirement under this section. Upon certification or revocation, the director shall notify the person, owner, or lessee, the tax commissioner, and the county auditor of a county in which the project is located of the certification or revocation. Notice shall be provided in a manner convenient to the director.

(F) The owner or a lessee pursuant to a sale and leaseback transaction of a qualified energy project shall do each of the following:

(1) Comply with all applicable regulations;

(2) File with the director of development a certified construction progress report before the first day of March of each year during the energy facility's construction or installation indicating the percentage of the project completed, and the project's nameplate capacity, as of the preceding thirty-first day of December. Unless otherwise instructed by the director of development, the owner or lessee of an energy project shall file a report with the director on or before the first day of March each year after completion of the energy facility's construction or installation indicating the project's nameplate capacity as of the preceding thirty-first day of December. Not later than sixty days after the effective date of this section, the owner or lessee of an energy project, the construction of which was completed before the effective date of this section, shall file a certificate indicating the project's nameplate capacity.

(3) File with the director of development, in a manner prescribed by the director, a report of the total number of full-time equivalent employees, and the total number of full-time equivalent employees domiciled in Ohio, who are employed in the construction or installation of the energy facility;

(4) For energy projects with a nameplate capacity of five megawatts or greater, repair all roads, bridges, and culverts affected by construction as reasonably required to restore them to their preconstruction condition, as determined by the county engineer in consultation with the local jurisdiction responsible for the roads, bridges, and culverts. In the event that the county engineer deems any road, bridge, or culvert to be inadequate to support the construction or decommissioning of the energy facility, the road, bridge, or culvert shall be rebuilt or reinforced to the specifications established by the county engineer prior to the construction or decommissioning of the facility. The owner or lessee of the facility shall post a bond in an amount established by the county engineer and to be held by the board of county commissioners to ensure funding for repairs of roads, bridges, and culverts affected during the construction. The bond shall be released by the board not later than one year after the date the repairs are completed. The energy facility owner or lessee pursuant to a sale and leaseback transaction shall post a bond, as may be required by the Ohio power siting board in the certificate authorizing commencement of construction issued pursuant to section 4906.10

of the Revised Code, to ensure funding for repairs to roads, bridges, and culverts resulting from decommissioning of the facility. The energy facility owner or lessee and the county engineer may enter into an agreement regarding specific transportation plans, reinforcements, modifications, use and repair of roads, financial security to be provided, and any other relevant issue.

(5) Provide or facilitate training for fire and emergency responders for response to emergency situations related to the energy project and, for energy projects with a nameplate capacity of five megawatts or greater, at the person's expense, equip the fire and emergency responders with proper equipment as reasonably required to enable them to respond to such emergency situations;

(6) Maintain a ratio of Ohio-domiciled full-time equivalent employees employed in the construction or installation of the energy project to total full-time equivalent employees employed in the construction or installation of the energy project of not less than eighty per cent in the case of a solar energy project, and not less than fifty per cent in the case of any other energy project. In the case of an energy project for which certification from the power siting board is required under section 4906.20 of the Revised Code, the number of full-time equivalent employees employed in the construction or installation of the energy project equals the number actually employed or the number projected to be employed in the certificate application, if such projection is required under regulations adopted pursuant to section 4906.03 of the Revised Code, whichever is greater. For all other energy projects, the number of full-time equivalent employees employed in the construction or installation of the energy project equals the number actually employed or the number projected to be employed by the director of development, whichever is greater. To estimate the number of employees to be employed in the construction or installation of an energy project, the director shall use a generally accepted job-estimating model in use for renewable energy projects, including but not limited to the job and economic development impact model. The director may adjust an estimate produced by a model to account for variables not accounted for by the model.

(7) For energy projects with a nameplate capacity in excess of two megawatts, establish a relationship with a member of the university system of Ohio as defined in section 3345.011 of the Revised Code or with a person offering an apprenticeship program registered with the employment and training administration within the United States department of labor or with the apprenticeship council created by section 4139.02 of the Revised Code, to educate and train individuals for careers in the wind or solar energy industry. The relationship may include endowments, cooperative programs, internships, apprenticeships, research and development projects, and curriculum development.

(8) Offer to sell power or renewable energy credits from the energy project to electric distribution utilities or electric service companies subject to renewable energy resource requirements under section 4928.64 of the Revised Code that have issued requests for proposal for such power or renewable energy credits. If no electric distribution utility or electric service company issues a request for proposal on or before December 31, 2010, or accepts an offer for power or renewable energy credits within forty-five days after the offer

is submitted, power or renewable energy credits from the energy project may be sold to other persons. Division (F)(8) of this section does not apply if:

(a) The owner or lessee is a rural electric company or a municipal power agency as defined in section 3734.058 of the Revised Code.

(b) The owner or lessee is a person that, before completion of the energy project, contracted for the sale of power or renewable energy credits with a rural electric company or a municipal power agency.

(c) The owner or lessee contracts for the sale of power or renewable energy credits from the energy project before the effective date of this section as enacted by this act.

(9) Make annual service payments as required by division (G) of this section and as may be required in a resolution adopted by a board of county commissioners under division (E) of this section.

(G) The owner or a lessee pursuant to a sale and leaseback transaction of a qualified energy project shall make annual service payments in lieu of taxes to the county treasurer on or before the final dates for payments of taxes on public utility personal property on the real and public utility personal property tax list for each tax year for which property of the energy project is exempt from taxation under this section. The county treasurer shall allocate the payment on the basis of the project's physical location. Upon receipt of a payment, or if timely payment has not been received, the county treasurer shall certify such receipt or non-receipt to the director of development and tax commissioner in a form determined by the director and commissioner, respectively. Each payment shall be in the following amount:

(1) In the case of a solar energy project, seven thousand dollars per megawatt of nameplate capacity located in the county as of December 31, 2010, for tax year 2011, as of December 31, 2011, for tax year 2012, and as of December 31, 2012, for tax year 2013 and each tax year thereafter;

(2) In the case of any other energy project using renewable energy resources, the following:

(a) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of not less than seventy-five per cent, six thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year;

(b) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of less than seventy-five per cent but not less than sixty per cent, seven thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year;

(c) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of less than sixty per cent but not less than fifty per cent, eight thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year.

(3) In the case of an energy project using clean coal technology, advanced nuclear technology, or cogeneration technology, the following:

(a) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of not less than seventy-five per cent, six thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year;

(b) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of less than seventy-five per cent but not less than sixty per cent, seven thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year;

(c) If the project maintains during the construction or installation of the energy facility a ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees of less than sixty per cent but not less than fifty per cent, eight thousand dollars per megawatt of nameplate capacity located in the county as of the thirty-first day of December of the preceding tax year.

(H) The director of development in consultation with the tax commissioner shall adopt rules pursuant to Chapter 119. of the Revised Code to implement and enforce this section.

Ohio Admin. Code § 4906-9-01. Enforcement investigations by the board

(A) Upon finding reasonable grounds, the board shall initiate a proceeding to investigate an alleged violation of section 4906.98 of the Revised Code.

(B) The board shall conduct a violation proceeding under sections 4906.97 and 4906.98 of the Revised Code, and in accordance with Chapter 4906-7 of the Administrative Code to the extent not inconsistent with section 4906.97 of the Revised Code.

(C) While an alleged violation of section 4906.98 of the Revised Code is under board investigation, the board or its chairperson or designee may order the suspension of the involved activity. A suspension order may be terminated by the board or its chairperson or designee at any time during the board's investigation of the alleged violation.

(D) Unless otherwise ordered by the board or an administrative law judge, the staff of the board shall file with the board, and serve upon the person alleged to have violated section 4906.98 of the Revised Code and all other parties, a written report of investigation within twenty-one days after initiation of the involved proceeding. The report shall include the staff's findings on the alleged violation and staff's recommendations for board action.

(E) The board shall require an evidentiary hearing on the alleged violation. The hearing may include evidence on corrective action, forfeitures, and other remedies.

(F) The complaining party (which may include staff) shall have the burden to prove the occurrence of the violation by a preponderance of the evidence.

(G) If, after a hearing, the board finds that a violation of section 4906.98 of the Revised Code occurred, the board may order appropriate remedies, which may include one or more of the following:

(1) Direct the person to cease the violation.

(2) Direct the person to comply with the certificate and/or a board order or suspension.

(3) Direct the person to take corrective action and include a date by which such corrective action must be taken or completed.

(4) Assess forfeitures in accordance with sections 4906.97 and 4906.99 of the Revised Code.

(5) Direct the attorney general to seek enforcement of board orders, including orders assessing forfeitures and appropriate remedies, in state or federal court.

(6) Approve other appropriate remedies.

(H) The board may request that the attorney general seek enforcement and other appropriate relief in common pleas court, if necessary to enforce its order.

Ohio Admin. Code § 4906-17-03. Project description in detail and project schedule in detail

(A) An applicant for a certificate to site a wind-powered electric generation facility under this chapter shall provide a detailed description of the proposed facility.

(1) For its proposed project area and any alternative project area(s), the applicant shall submit:

(a) Type(s) of turbines or, if a specific model of turbine has not yet been selected, the potential type(s), estimated number of turbines, estimated net demonstrated capability, annual capacity factor, hours of annual generation, and the project developer to be utilized for construction and operation of the facility, if different than the applicant.

(b) Land area requirement or, for off-shore projects, the off-shore boundaries, the construction impact area in acres and the basis of how such estimate was calculated, and the size of the permanent project area in acres.

(2) The applicant shall submit a description of the major equipment including, but not limited to, the footprint of the turbine, the height of the turbine measured from the tower's base, excluding the subsurface foundation, and the blade length.

(3) The applicant shall submit a brief description of any new transmission line(s) required for the proposed project.

(B) Detailed project schedule.

(1) Schedule. The applicant shall provide a proposed schedule in bar chart format covering all applicable major activities and milestones, including:

(a) Acquisition of land and land rights.

(b) Wildlife surveys/studies.

(c) Preparation of the application.

(d) Submittal of the application for certificate.

(e) Issuance of the certificate.

(f) Preparation of the final design.

(g) Construction of the facility.

(h) Placement of the facility in service.

(2) Delays. The applicant shall describe the impact of critical delays on the eventual in-service date.

Ohio Admin. Code § 4906-17-05. Technical data

(A) Project area site. Information on the location, major features, and the topographic, geologic, and hydrologic suitability of the proposed project area site and any proposed alternative project area site(s) shall be submitted by the applicant. If this information is derived from reference materials, it shall be derived from the best available and current reference materials. The applicant shall provide the following for each project area site alternative.

(1) Geography and topography. The applicant shall provide a map(s) of 1:24,000 scale containing a five-mile radius from the proposed facility and showing the following features:

- (a) The proposed facility.
- (b) Major population centers and geographic boundaries.
- (c) Major transportation routes and utility corridors.
- (d) Bodies of water which may be directly affected by the proposed facility.
- (e) Topographic contours.
- (f) Major institutions, parks, and recreational areas.
- (g) Residential, commercial, and industrial buildings and installations.
- (h) Air transportation facilities, existing or proposed.

(2) An aerial photograph containing a one-mile radius from the proposed facility, indicating the location of the proposed facility in relation to surface features.

(3) A map(s) of 1:12,000 scale of the project area site, showing the following existing features:

- (a) Topographic contours.
- (b) Existing vegetative cover.
- (c) Land use and classifications.
- (d) Individual structures and installations.
- (e) Surface bodies of water.
- (f) Water and gas wells.
- (g) Vegetative cover that may be removed during construction.

(4) Geology and seismology. The applicant shall provide a map(s) of suitable scale and a corresponding cross-sectional view, showing the geological features of the proposed project area and the location of proposed test borings. The applicant shall also:

(a) Describe the suitability of the site geology and plans to remedy any inadequacies.

(b) Describe the suitability of soil for grading, compaction, and drainage, and describe plans to remedy any inadequacies.

(5) Hydrology and wind. The applicant shall:

(a) Provide the natural and the man-affected water budgets, including the ten-year mean and critical (lowest seven-day flow in ten years) surface flows and the mean and extreme water tables during the past ten years for each body of water likely to be directly affected by the proposed facility.

(b) Provide an analysis of the prospects of floods and high winds for the project area, including the probability of occurrences and likely consequences of various flood stages and wind velocities, and describe plans to mitigate any likely adverse consequences. Identify any portion of the proposed facility to be located in a one hundred-year flood plain area.

(c) Provide existing maps of aquifers which may be directly affected by the proposed facility.

(B) Layout and construction. The applicant shall provide information on the proposed layout and preparation of the proposed project area site and any proposed alternative project area site(s) and the description of proposed major structures and installations located thereon.

(1) Project area site activities. The applicant shall describe the proposed project area site preparation and reclamation operations, including:

(a) Test borings, including closure plans for such borings.

(b) Removal of vegetation.

(c) Grading and drainage provisions.

(d) Access roads.

(e) Removal and disposal of debris.

(f) Post-construction reclamation.

(2) Layout. The applicant shall supply a map(s) of 1:12,000 scale of the proposed wind-powered electric generation facility, showing the following features of the proposed (and existing) facility and associated facilities:

- (a) Wind-powered electric generation turbines.
- (b) Transformers and collection lines.
- (c) Construction laydown area(s).
- (d) Transmission lines.
- (e) Substations.
- (f) Transportation facilities and access roads.
- (g) Security facilities.
- (h) Grade elevations where modified during construction.
- (i) Other pertinent installations.

(3) Structures. The applicant shall describe, in as much detail as is available at the time of submission of the application, all major proposed structures, including the following:

- (a) Estimated overall dimensions.
- (b) Construction materials.
- (c) Color and texture of facing surfaces.
- (d) Photographic interpretation or artist's pictorial sketches of the proposed facility from public vantage points within five miles of the proposed facility.
- (e) Any unusual features.

(4) Plans for construction. The applicant shall describe the proposed construction sequence.

(5) Future plans. The applicant shall describe any plans for future additions of turbines to the proposed facility (including the type and timing) and the maximum electric capacity anticipated for the facility.

(C) Equipment.

(1) Wind-powered electric generation equipment. The applicant shall describe the proposed major wind-powered electric generation equipment for the proposed project area and any proposed alternative project area(s).

(2) Safety equipment. The applicant shall describe:

(a) All proposed major public safety equipment.

(b) The reliability of the equipment.

(c) Turbine manufacturer's safety standards. Include a complete copy of the manufacturer's safety manual or similar document.

(3) The applicant shall describe any other major equipment not discussed in paragraphs (C)(2)(a) to (C)(2)(c) of this rule.

(D) Regional electric power system. The applicant shall provide the following information on interconnection of the facility to the regional electric power grid.

(1) Interconnection queue(s). The applicant shall provide the following information relating to its generation interconnection request:

(a) Name of queue.

(b) Web link of queue.

(c) Queue number.

(d) Queue date.

(2) System studies. The applicant shall provide system impact studies on its generation interconnection request. The studies shall include, but are not limited to, the following:

(a) Feasibility study.

(b) System impact study.

Ohio Admin. Code § 4906-17-08. Social and ecological data

(A) Health and safety.

(1) Demographic. The applicant shall provide existing and ten-year projected population estimates for communities within five miles of the proposed project area site(s).

(2) Noise. The applicant shall:

(a) Describe the construction noise levels expected at the nearest property boundary. The description shall address:

- (i) Dynamiting activities.
- (ii) Operation of earth moving equipment.
- (iii) Driving of piles.
- (iv) Erection of structures.
- (v) Truck traffic.
- (vi) Installation of equipment.

(b) For each turbine, evaluate and describe the operational noise levels expected at the property boundary closest to that turbine, under both day and nighttime conditions. Evaluate and describe the cumulative operational noise levels for the wind facility at each property boundary for each property adjacent to the project area, under both day and nighttime operations. The applicant shall use generally accepted computer modeling software (developed for wind turbine noise measurement) or similar wind turbine noise methodology, including consideration of broadband, tonal, and low-frequency noise levels.

(c) Indicate the location of any noise-sensitive areas within one mile of the proposed facility.

(d) Describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation.

(3) Water. The applicant shall estimate the impact to public and private water supplies due to construction and operation of the proposed facility.

(4) Ice throw. The applicant shall evaluate and describe the potential impact from ice throw at the nearest property boundary, including its plans to minimize potential impacts if warranted.

(5) Blade shear. The applicant shall evaluate and describe the potential impact from blade shear at the nearest property boundary, including its plans to minimize potential impacts if warranted.

(6) Shadow flicker. The applicant shall evaluate and describe the potential impact from shadow flicker at adjacent residential structures and primary roads, including its plans to minimize potential impacts if warranted.

(B) Ecological impact.

(1) Project area site information. The applicant shall:

(a) Provide a map of 1:24,000 scale containing a half-mile radius from the proposed facility, showing the following:

(i) The proposed project area boundary.

(ii) Undeveloped or abandoned land such as wood lots, wetlands, or vacant fields.

(iii) Recreational areas, parks, wildlife areas, nature preserves, and other conservation areas.

(b) Provide the results of a survey of the vegetation within the facility boundary and within a quarter-mile distance from the facility boundary.

(c) Provide the results of a survey of the animal life within the facility boundary and within a quarter-mile distance from the facility boundary.

(d) Provide a summary of any studies which have been made by or for the applicant addressing the ecological impact of the proposed facility.

(e) Provide a list of major species from the surveys of biota. "Major species" are those which are of commercial or recreational value, or species designated as endangered or threatened in accordance with the United States and Ohio threatened and endangered species lists.

(2) Construction. The applicant shall:

(a) Estimate the impact of construction on the areas shown in response to paragraph (B)(1)(a) of this rule.

(b) Estimate the impact of construction on the major species listed under paragraph (B)(1)(e) of this rule.

(c) Describe the procedures to be utilized to avoid, minimize, and mitigate both the short- and long-term impacts due to construction.

(3) Operation. The applicant shall:

(a) Estimate the impact of operation on the areas shown in response to paragraph (B)(1)(a) of this rule.

(b) Estimate the impact of operation on the major species listed under paragraph (B)(1)(e) of this rule.

(c) Describe the procedures to be utilized to avoid, minimize, and mitigate both the short- and long-term impacts of operation.

(d) Describe any plans for post-construction monitoring of wildlife impacts.

(C) Economics, land use and community development.

(1) Land uses. The applicant shall:

(a) Provide a map of 1:24,000 scale indicating general land uses, depicted as areas on the map, within a five-mile radius of the facility, including such uses as residential and urban, manufacturing and commercial, mining, recreational, transport, utilities, water and wetlands, forest and woodland, and pasture and cropland.

(b) Provide the number of residential structures within one thousand feet of the boundary of the proposed facility, and identify all residential structures for which the nearest edge of the structure is within one hundred feet of the boundary of the proposed facility.

(c) Describe proposed locations for wind turbine structures in relation to property lines and habitable residential structures, consistent with no less than the following minimum requirements:

(i) The distance from a wind turbine base to the property line of the wind farm property shall be at least one and one-tenth times the total height of the turbine structure as measured from its tower's base (excluding the subsurface foundation) to the tip of its highest blade.

(ii) The wind turbine shall be at least seven hundred fifty feet in horizontal distance from the tip of the turbine's nearest blade at ninety degrees to the exterior of the nearest habitable residential structure, if any, located on adjacent property at the time of the certification application.

(iii) Minimum setbacks may be waived in the event that all owners of property adjacent to the turbine agree to such waiver, pursuant to rule 4906-1-03 of the Administrative Code.

(d) Estimate the impact of the proposed facility on the above land uses within a one-mile radius.

(e) Identify structures that will be removed or relocated.

(f) Describe formally adopted plans for future use of the site and surrounding lands for anything other than the proposed facility.

(g) Describe the applicant's plans for concurrent or secondary uses of the project area.

(2) Economics. The applicant shall:

(a) Estimate the annual total and present worth of construction and operation payroll.

(b) Estimate the construction and operation employment and estimate the number that will be employed from the region.

(c) Estimate the increase in county, township, city, and school district tax revenue accruing from the facility.

(d) Estimate the economic impact of the proposed facility on local commercial and industrial activities.

(3) Public services and facilities. The applicant shall describe the probable impact of the construction and operation on public services and facilities.

(4) Impact on regional development. The applicant shall:

(a) Describe the impact of the proposed facility on regional development, including housing, commercial and industrial development, and transportation system development.

(b) Assess the compatibility of the proposed facility and the anticipated resultant regional development with current regional plans.

(D) Cultural impact.

(1) The applicant shall indicate, on the 1:24,000 map referenced in paragraph (C)(1)(a) of this rule, any registered landmarks of historic, religious, archaeological, scenic, natural, or other cultural significance within five miles of the proposed facility.

(2) The applicant shall estimate the impact of the proposed facility on the preservation and continued meaningfulness of these landmarks and describe plans to mitigate any adverse impact.

(3) Landmarks to be considered for purposes of paragraphs (D)(1) and (D)(2) of this rule are those districts, sites, buildings, structures, and objects which are recognized by, registered with, or identified as eligible for registration by the national registry of natural landmarks, the Ohio historical society, or the Ohio department of natural resources.

(4) The applicant shall indicate, on the 1:24,000 map referenced in paragraph (C)(1)(a) of this rule, existing and formally adopted land and water recreation areas within five miles of the proposed facility.

(5) The applicant shall describe the identified recreational areas within one mile of the proposed project area in terms of their proximity to population centers, uniqueness, topography, vegetation, hydrology, and wildlife; estimate the impact of the proposed facility on the identified recreational areas; and describe plans to avoid, minimize, or mitigate any adverse impact.

(6) The applicant shall describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting,

and facility coloration. In no event shall these measures conflict with relevant safety requirements.

(E) Public responsibility. The applicant shall:

(1) Describe the applicant's program for public interaction for the siting, construction, and operation of the proposed facility, i.e., public information programs.

(2) Describe any insurance or other corporate programs for providing liability compensation for damages to the public resulting from construction or operation of the proposed facility.

(3) Evaluate and describe the potential for the facility to interfere with radio and TV reception and, if warranted, describe measures that will be taken to minimize interference.

(4) Evaluate and describe the potential for the facility to interfere with military radar systems and, if warranted, describe measures that will be taken to minimize interference.

(5) Evaluate and describe the anticipated impact to roads and bridges associated with construction vehicles and equipment delivery. Describe measures that will be taken to repair roads and bridges to at least the condition present prior to the project.

(6) Describe the plan for decommissioning the proposed facility, including a discussion of any financial arrangements designed to assure the requisite financial resources.

(F) Agricultural district impact. The applicant shall:

(1) Separately identify on a map(s) of 1:24,000 scale all agricultural land and all agricultural district land located within the proposed project area boundaries, where such land is existing at least sixty days prior to submission of the application.

(2) Provide, for all agricultural land identified under paragraph (F)(1) of this rule, the following:

(a) A quantification of the acreage impacted, and an evaluation of the impact of the construction, operation, and maintenance of the proposed facility on the following agricultural practices within the proposed facility boundaries:

(i) Field operations (i.e., plowing, planting, cultivating, spraying, harvesting, etc.).

(ii) Irrigation.

(iii) Field drainage systems.

(b) A description of any mitigation procedures to be utilized by the applicant during construction, operation, and maintenance to reduce impacts to the agricultural land.

(3) Provide, for all agricultural land identified under paragraph (F)(1) of this rule, an evaluation of the impact of the construction and maintenance of the proposed facility on the viability as agricultural land of any land so identified. The evaluation shall include impacts to cultivated lands, permanent pasture land, managed woodlots, orchards, nurseries, livestock and poultry confinement areas, and agriculturally related structures. Changes in land use and changes in methods of operation made necessary by the proposed facility shall be evaluated.