

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of )  
Black Fork Wind Energy, L.L.C. )  
for a Certificate to Site a Wind-Powered )  
Electric Generating Facility in )  
Crawford and Richland Counties, Ohio )

Case No. 12-0900

On Appeal from the Ohio Power Siting  
Board, Case No. 10-2865-EL-BGN

**MERIT BRIEF OF APPELLANTS GARY J. BIGLIN, BRETT A. HEFFNER,  
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## **STATEMENT OF FACTS**

This case arises from the Ohio Power Siting Board's (hereinafter "Board") issuance of a Certificate of Environmental Compatibility and Public Need for the Black Fork Wind Energy, LLC Facility, a wind-powered electric generating facility to be located in Crawford County, Ohio and Richland County, Ohio.

### **A. The Black Fork Wind Energy Project**

Black Fork Wind Energy, LLC (hereinafter "Black Fork"), a wholly-owned subsidiary of Element Power US, LLC, filed an application on March 10, 2011 with the Ohio Power Siting Board (Case No. 10-2865-EL-BGN) to construct a wind powered electric generation facility. (Application ("Applic."), ICN 4, (Supplement ("Supp." at 169)). The proposed facility, as approved in the Certificate, would consist of 91 wind turbines and generate electricity with an estimated capacity of 200 megawatts (MW) near Shelby, Ohio. (Opinion, Order, and Certificate ("Certif."), ICN 134, at 3 (Appendix ("Appx." 45, at 47)). Black Fork has considered a variety of wind turbine generator models including the Vestas V100, the General Electric 1.6. XLE and the Siemens SWT-2.3-101, with each model ranging in generation capacity from 1.6 MW to 3.0 MW. Applic., ICN 4, at 3 (Supp. at 172). The final turbine technology decision would be made prior to the start of construction. (Id.). Depending on which turbine model(s) are selected the maximum height will range from 130 meters (427 feet) to 150.5 meters (494 feet) when the rotor blade is at the top of its rotation. (Id., at 9 (Supp. at 174)). In addition, the facility would consist of access roads, electrical collection lines, a construction staging area, a concrete batch plant, a substation, and an operation and maintenance facility. (Id., at 1 (Supp. at 170)). The facility area would cover 24,200 acres of land located in the townships of Auburn, Jackson, Jefferson,

and Vernon in Crawford County, Ohio and the townships of Plymouth, Sandusky, and Sharon in Richland County, Ohio. Certif., ICN 134, at 3 (Appx. 45, at 47).

**B. Regulation of Wind Energy Facilities in Ohio**

In 2008, the Ohio Alternative Energy Portfolio Standard was enacted by the Ohio General Assembly with the passage of S.B. 221. Applic., ICN 4, at 2 (Supp. at 171). Under S.B. 221 a certain percentage of all electricity used in Ohio must come from renewable sources. (Id.). The percentage of supply of electricity used that must be from renewable sources increases each year until 2025 when at least 25% of the electricity sold in Ohio must be supplied by renewable energy resources. (Id.). Wind powered energy is recognized as an eligible renewable energy resource under R.C. §4928.01(A)(37). (R.C. §4928.01(A)(37) (Appx. 227, at 230)).

In addition, the General Assembly enacted Am. Sub. H.B. 562 in 2008, which directed the OPSB to implement rules governing the certificating of economically significant wind farms which have a generating capacity between five and fifty MW. R.C. §4906.13(A), R.C. §4906.20. (Appx. 224 and 225). The rules were to address aesthetics, wildlife protection, ice throw, noise levels, blade shear, shadow flicker, and decommissioning, etc. R.C. §4906.20(B)(2). (Appx. 225). The OPSB issued its rules in 2009 (Ohio Adm. Code Chapter 4906-17). The rules apply to all wind-powered electric generating facilities with a single interconnection to the grid and capable of operating at an aggregate capacity of five MW or more. Ohio Adm. Code §4906-17-01(A). (Appx. 250).

**C. Proceedings Below**

Black Fork filed its application with the Board on March 10, 2011. Applic., ICN 4, at 1 (Supp. at 169). Gary J. Biglin, Brett A. Heffner, Alan K. Price, Catherine A. Price and John Warrington (collectively “Appellants”) filed petitions for leave to intervene which were granted

on August 30, 2011. Certif., ICN 134, at 3 (Appx. 45, at 47); (O.A.C. §4906-7-03(A)(3) (Appx. 243)). The Board granted intervenor status to sixteen parties in addition to appellants: Crawford County Commissioners, Richland County Commissioners, Richland County Engineer, Plymouth Township Trustees, Sharon Township Trustees, Sandusky Township Trustees, Loren Gledhill, Carol Gledhill, Mary Studer, Thomas Karbula, Nick Rietschlin, Margaret Rietschlin, Bradley Bauer, Debra Bauer, Grover Reynolds and Karel Davis. (Id.).

On August 31, the Board's Staff conducted an investigation concerning the environmental and social impacts of the project and filed its report recommending approval of the project, subject to 71 conditions as to the construction, operation and decommissioning of the proposed facility. (Id.).

On September 9, 2011, at a prehearing conference, Administrative Law Judge ("ALJ"), Scott Farkas, explained some preliminary matters as to the procedures that would be followed in the case. (Supp. 1, at 2). Particularly, ALJ Farkas stated that the public hearing was scheduled for September 15, 2011, in Shelby, Ohio and that the evidentiary hearing was to be held on September 19, 2011 in Columbus, Ohio. (Id.). Moreover, ALJ Farkas explained that any party wishing to testify at the September 19, 2011 evidentiary hearing must have prefiled their written testimony by September 15, 2011. (Id.).

On September 15, 2011, Staff members: Timothy S. Burgener, Donald E. Rostofer, Nicholas E. Doss, Christopher K. Cunningham, Andrew Conway, Jon R. Whitis, Paul A. Laurent and Jon C. Pawley all submitted their prefiled testimony regarding each staff member's aspect of the Staff Report of Investigation. (Prefiled Testimony, ICN 97-104 (Supp. 5-48)). That same day, the Board held a local public hearing in Shelby, Ohio where twenty-five (25) witnesses gave public testimony. Certif., ICN 134, at 3 (Appx. 45, at 47).

On September 19, 2011, the adjudicatory hearing commenced. (Transcripts (“Trans.”), 09/19/2011, at 1 (Supp. 49)). ALJ Farkas determined at the hearing, pursuant to O.A.C. §4906-7-01(A)(2), that the Staff witnesses would testify on September 26<sup>th</sup> and 27<sup>th</sup>. (Appx. 241). Subsequently, the adjudicatory hearing was recessed to allow the parties an opportunity to conduct settlement negotiations. (Id.), at 17, lines 20-21 (Supp. 49, at 65 lines 20-21). On September 20, 2011, the parties requested that the evidentiary hearing be continued to October 11, 2011. (ICN 117 (Supp. 70)).

Following the hearing on September 19, 2011, Black Fork entered into a stipulation with the Board’s Staff and the Ohio Farm Bureau for revised conditions for the facility’s construction and operation on September 28, 2011. (Joint Stipulation, ICN 118 (Appx. 13)). On October 5, 2011, Black Fork, the Board’s Staff, the Ohio Farm Bureau and the Board of County Commissioners of Crawford County entered into an amended stipulation which added 9 more conditions to the 71 conditions. (Amended Stipulation, ICN 126 (Appx. 38)).

Thereafter, the evidentiary hearing reconvened and was held on October 11, 12 and 13, 2011. However, the Staff witnesses that prefiled their testimony on September 15, 2011, were pulled from the evidentiary hearing. The only Staff member made available as a witness for the Staff Report of Investigation during the evidentiary hearing was Jon C. Pawley. (Trans. 10/13/2011, at 514 (Supp. 72, at 75)).

**1. Testimony of Jon C. Pawley**

On October 13, 2011, the final day of the evidentiary hearing, Assistant Attorney General, Mr. John H. Jones, called Staff member, Jon C. Pawley, as a witness. (Trans. 10/13/2011, at 591 (Supp. 79)). Appellant Brett A. Heffner commented that he and the other appellants filed a list of issues that goes into great detail about each item that they would like to ask the Staff. (Id., at 592 (Supp. at 80)). Mr. Jones, in response, stated to Mr. Heffner,

The list of issues that were filed here by all the intervenors in the case predated the Stipulation that was filed in this case, so now being that the Stipulation is now the focus of our proceeding, *not the Application*, that's what's been developed since the time of the issues being filed. And we're calling Jon Pawley to be available to support both the Staff Report of Investigation and the Joint Stipulation recommendation, and he's prepared to answer questions related to those exhibits. (Id., at 593 (Supp. at 81)).

On direct examination, Jon C. Pawley identified himself as a utilities specialist 3 with the Public Utilities Commission of Ohio and that he managed a team of Staff that performed investigations in various areas, compiled the report and made sure it was timely filed. (Id., at 595 and 597 (Supp. at 83 and 85)). Additionally, in his prefiled testimony, Mr. Pawley stated that he did not write the entire Staff Report and that he was responsible for the issues not covered by the other Staff witnesses in their testimony. (Prefiled Testimony, ICN 104 (Supp. 43, at 46)). As stated above, the other Staff members that Mr. Pawley was referring to and their respective issues they were responsible for in the Staff Report of Investigation were thus:

<b>Timothy S. Burgener</b>	Demographics, Setbacks, Agriculture, Land Use, Regional Planning, Public Services, Recreational Areas, Aesthetics and Site Selection—(Id., ICN 97, at 2 (Supp. 5, at 7))
<b>Donald E. Rostofer</b>	Ecological Issues—(Id., ICN 98, at 3 (Supp. 10, at 13))
<b>Nicholas E. Doss</b>	Aviation, Shadow Flicker, Noise, Communications and Decommissioning—(Id., ICN 99, at 2-3 (Supp. 16, at 18-19))
<b>Christopher K. Cunningham</b>	Cultural Resources—(Id., ICN 100, at 2 (Supp. 22, at 24))
<b>Andrew Conway</b>	Project Description, Public and Private Water Supplies, Blade Shear, Ice Throw, High Winds, Safety Manuals, and Pipeline Protection—(Id., ICN 101, at 2 (Supp. 27, at 29))
<b>Jon R. Whitis</b>	Roads and Bridges—(Id., ICN 102, at 2 (Supp. 32, at 34))
<b>Paul A. Laurent</b>	Public Interest, Convenience, and Necessity (Id., ICN 103, at 2-3 (Supp. 37, at 39-40))

After said identification, Mr. Jones questioned Mr. Pawley as to certain Conditions contained in the Stipulation. In his testimony, however, Mr. Pawley ventured opinions on a broad range of subjects (examples below) for which he was not qualified for and/or for which no foundation was provided to demonstrate that he possessed the knowledge necessary to testify about them. Upon examination by ALJ Daniel Fullin, ALJ Scott Farkas and cross-examination by the appellants it became clear that the other seven Staff members should have been made available to testify.

a) Testimony concerning Ice Throw Warning System:

ALJ Fullin directed Mr. Pawley's attention to Condition 44 of the Stipulation, which refers to the installation of an ice warning system. (Trans. 10/13/2011, at 612-613 (Supp. 100-101)). Condition 44 of the Stipulation states:

The Applicant shall install and utilize an ice warning system that may include an ice detector installed on the roof of the nacelle, ice detection software for the wind turbine controller, automatic vibration monitoring software (Manufacturer warrants it will detect ice) or an ice sensor alarm that triggers an automatic shutdown. (Joint Stipulation, ICN 118, at 9 (Appx. 13, at 22)).

When Mr. Pawley was questioned as to whether one or more methods or models proposed in the condition would have to be chosen, Mr. Pawley claimed that he believed that one of those methods must be used because of the utilization of the word "shall install" contained in Condition 44. (Trans., at 612-613 (Supp. 100-101)). Furthermore, ALJ Fullin asked "if the staff wanted to enforce the 'shall install the ice warning system,' then 'why would you describe— Company witness said there were numerous methods-- much more numerous systems than the four included there'?" (Id., at 613 (Supp. 101)). "Why did they put 'may do something' because that is not like 'shall'?" (Id.). Mr. Pawley replied, "I can't speak for the Company" and "All I can say is Staff wasn't opposed to this because of the words 'shall install'". (Id.). Moreover, Mr.

Pawley also stated that he is “not sure what the Company is looking for” with regard to Condition 44. (Id.). This particular matter could have been addressed by Staff member, Mr. Andrew Conway, who contributed to the “Ice Throw” section of the Staff Report of Investigation. (Prefiled Testimony, ICN 101, at 2 (Supp. 32, at 34)). However, Mr. Conway was pulled from being a witness at the evidentiary hearing.

b) Testimony concerning distinction between Applicant and the facility owner and/or operator:

Mr. Pawley offered opinions as to the outcome if the application certificate issued in this case were to be transferred. Mr. Pawley expressed that such a transfer would have to be approved by the Board and that it is his understanding that all the conditions set forth in the Stipulation and Amended Stipulation would apply to the new holder of the certificate. (Trans., at 615 (Supp. 103)). ALJ Fullin and ALJ Farkas further asked Mr. Pawley to clarify whether there was a distinction between the “Applicant, the facility owner and/or operator” because the requirements listed under many of the conditions used that denomination to describe the entity responsible. (Id., at 616-617 (Supp. 104-105)). Mr. Pawley replied:

I would hate to get too far into that, your Honor, because there’s different conditions were written by the Staff. I don’t want to speak to this condition that has something to do with the operation of the turbine if there was a specific reason for that. I can try to get back to you, but I don’t—I don’t necessarily want to speak for other Staff on that instance. (Id.).

What I’m not suggesting nor do I want to suggest that we change conditions that may have been authored by other Staff to say the Applicant versus the operator or whatever. (Id., at 617 (Supp. 105)).

On cross-examination, Mrs. Price asked Mr. Pawley when talking about the distinction between Applicant and the facility owner and/or operator “could the Applicant be Black Fork and the facility owner Element”? (Id., at 642 (Supp. 130)). Mr. Pawley simply stated “I don’t know” and further remarked:

I really can't speak on that because they were conditions modeled by various Staff for various reasons and I don't want to speak for what those reasons might be. I can try to find out and report back or do something. But this is one of those things where I don't want to speak for other people I can't. (Id., at 643 (Supp. 131)).

This matter would clearly have been better clarified if all the staff members were present to testify at the hearing.

c) Testimony concerning the life period of the wind-energy facility:

Mr. Pawley opined that the Board would have to make the decision as to whether or not the useful life would be extended for the facility or for a turbine in accordance with Condition 66(c) of the Joint Stipulation. (Trans., at 625-626 (Supp. 113-114)). Mr. Pawley was then asked if there was a wind turbine in year ten (10) of its twenty-five (25) year life span that had to be fixed, would it be Staff's understanding that a new wind turbine could be substituted for that wind turbine, or would there no longer be a wind turbine at that site, or would it depend on how many years it would be into the project, to which Mr. Pawley replied, "I don't know. I don't know". (Id., at 626 (Supp. 114)). This particular matter could have been addressed by Staff member, Mr. Nicholas E. Doss, who authored the "Decommissioning" section of the Staff Report of Investigation. (Prefiled Testimony, ICN 99, at 2-3 (Supp. 16, at 18-19)). However, Mr. Doss was also pulled from being a witness at the evidentiary hearing.

d) Testimony concerning safety manuals:

On cross-examination, appellant, Mr. Gary J. Biglin, asked Mr. Pawley if he or the Staff received the manufacturers' safety manuals for all three of the proposed turbines, to which Mr. Pawley replied, "I don't know the answer to that". (Trans., at 660 (Supp. 148)). Mr. Pawley further noted,

I personally did not review them. I can't speak for other Staff, if they received those manuals or not. There may be reference in the Staff Report to that. Did you not see that? (Id.).

Mr. Biglin followed up by asking Mr. Pawley who would know if the manuals were or were not received? (Id., at 661 (Supp. 149)). Again, Mr. Pawley exclaimed, “The Staff member that worked on that piece”. (Id., at 661-662 (Supp. 149-150)). Later in the examination, Mr. Biglin explained that the reason why he mentioned safety manual was because the application specifically mentions GE as a manufacturer of a turbine possibly to be used in the Project and GE supplied their safety standard which was in appendix E of the Application. (Id., at 666 (Supp. 154)). Mr. Pawley simply stated, “I’m trying to be helpful in answering your questions but I’m not responsible for that section”. (Id.). Again, Mr. Andrew Conway was the Staff member responsible for the “safety manuals” section of the Staff Report of Investigation. But, as stated above, Mr. Conway was pulled from being a witness at the evidentiary hearing.

e) Testimony concerning TV/cell phone reception:

At the end of Mr. Pawley’s testimony, ALJ Fullin inquired about Condition 57 and 58 which pertain to the degradation of TV reception or cell phone reception due to the facility operation. (Id., at 676 (Supp. 164)). Mr. Pawley could not address one single question as evidenced by the following excerpt of his testimony (“Q” stands for the question posed by ALJ Fullin and “A” stands for Mr. Pawley’s answer to the question):

- Q. Who decides whether there has been a showing of TV or cell phone service degradation adequate to trigger the remedy that’s called for in this condition? From the Staff’s point of view I’m asking. I asked the questions to the Company, but I’m asking the Staff’s perspective what the language means from the Staff’s point of view.
- A. **Personally, I do not know.**
- Q. Can you tell me what steps or procedures should be followed and by whom, whoever that decision-maker is, to arrive at the conclusion that any residents have shown to experience a degradation of TV and cell phone reception due to facility operation?
- A. **I do not know.**

Q. Can you tell me from the Staff's point of view must there be a degradation to both TV and cell phone service, or should the language perhaps be revised to say either TV or cell phone reception?

A. **Again, I'm not—I don't disagree with what you're saying, but I'm not advocating changing anything without the other parties.**

Q. Your primary reason for that position you're taking personally, you know there's other parties involved and you're hesitant to revise language that's already been agreed to by other parties?

A. **Yes.**

Q. Can you tell me from the Staff's point of view how long this remedy was intended to extend once it's been granted?

A. **I cannot.**

Q. Can you tell me about what level of TV or cell service the Staff expects would be provided?

A. **I cannot.**

Q. And can you tell me what level of degradation the Staff expects must be shown in order for a remedy to be triggered?

A. **I cannot.**

(Id., at 676-678 (Supp. 164-166)).

As evidenced by the foregoing, the seven Staff members that were unilaterally pulled from the evidentiary hearing should have been made available to address the numerous aspects of the Staff Report of Investigation to which Mr. Pawley could not adequately do. The appellants were fundamentally foreclosed from the opportunity to address all the Staff members regarding their specific report, thereby severely restricting the appellants' right to due process.

## **2. Testimony Concerning Decommissioning:**

The record is completely deficient of any testimony or evaluation concerning the anticipated costs for decommissioning the wind turbines. Staff member Nicolas E. Doss did not testify at the evidentiary hearing regarding his report on decommissioning. (Prefiled Testimony., ICN 99, at 2-3 (Supp. 16, at 18-19)). Thus, there is no indication as to what the construction

costs for erecting the wind turbines would be which would have a direct link to the costs associated with decommissioning. What is important is whether there will be enough financial security posted to cover such costs. This determination will not take place until the Board, Staff and Black Fork decide which model of turbine will be used in the facility, however. When Alan K. Price and Catherine A. Price raised the issue of whether such financial security even exists, the Board, in its Entry on Rehearing, simply stated that the issue(s) regarding financial assurance/bonding were adequately addressed and resolved in condition 66 of the four-party Stipulation, to which the appellants did not stipulate to. (Entry on Rehearing, ICN 156, at 8-9 (Appx. 178, at 185-186)).

As explained later in this brief, the Board's ruling on this matter was unlawful in the sense that it was manifestly against the weight of the evidence and that it deprived the appellants of their statutory right to participation under R.C. §4906.08. (R.C. §4906.08 (Appx. 219)). The issue of decommissioning is a fundamental consideration for whether a certificate is to be granted and the Board failed to appropriately address the issue at the evidentiary hearing.

### **3. Certificate Issuance, Petition for Rehearing, and Appeal**

On January 23, 2012, the Board ruled in favor of Black Fork's wind-energy facility issuing Black Fork a certificate. Certif., ICN 134, at 1-75 (Appx. 45, at 45-119). Resolution 427-12, the regular minutes of the Board meeting, illustrate that on January 23, 2012 the certificate was not approved by a majority of the Board members but by only two: Todd A. Snitchler, Chairman of the Public Utilities Commission and Theodore Wymyslo, Board of Directors of the Department of Health. (Appx. 43). Nevertheless, the Board issued its 75 page Opinion, Order, and Certificate approving and adopting the Stipulation, as amended, and issued a certificate to Black Fork for the construction, operation, maintenance and decommissioning of the proposed wind-powered electric generating facility. Certif. ICN 134, at 1-75 (Appx. 45, at 45-119).

After the Board issued its January 23, 2012 Opinion, Order and Certificate the Appellants, pursuant to R.C. §4903.10, filed Applications for Rehearing on February 17, 2012 and February 21, 2012. (Applic. for Rehearing, ICN 135-139 (Appx. 120-175)). In their applications, Gary J. Biglin and Brett A. Heffner specifically raised the issue of the impropriety of the vote. (Id., ICN 135 and 139 (Appx. 120 and 146)). In addition, Mr. Biglin, Mr. Heffner and Mr. John Warrington all raised the issue concerning their inability to question Staff witnesses responsible for developing the reports in the Staff Report of Investigation. (Id., ICN 135, 138 and 139 (Appx. 120, 139 and 146)). Alan K. Price and Catherine A. Price specifically raised the issue of whether financial assurances exist for the decommissioning of the wind turbines. (Id., ICN 136 and 137 (Appx. 130 and 134)).

On March 26, 2012, the Board issued an Entry on Rehearing denying the Applications for Rehearing in their entirety. (Entry on Rehearing, ICN 156, at 31-32 (Appx. 178, at 208-209)). Resolution 432-12, the regular minutes of the Board meeting, demonstrates that Chairman Todd A. Snitchler moved to deny the request for rehearing and that Fred Shimp seconded the motion. (Appx. 177). Fred Shimp, however, is not a board member and had no authority to second the motion for making the decision. In fact, a review of Resolution 432-12 reveals that the only Board member present was Chairman Todd A. Snitchler. It appears from the resolution that the Board member for the Department of Agriculture, David Daniels, was present but that the Entry denying the rehearing was actually signed for him by Rocky Black who also signed the Opinion, Order and Certificate of January 23, 2012 for Mr. Daniels. (Entry on Rehearing, ICN 156, at 32 (Appx. 178, at 209)); Certif. ICN 134, at 75 (Appx. 45, at 119). Thus, only one Board member, Todd A. Snitchler, was actually present for the vote while the remaining six Board members were neither present for the vote nor signed the Entry denying the rehearing. (Appx. 176-177).

Thereafter, the Appellants filed their Notice of Appeal to this Court on May 24, 2012 from the Board's January 23, 2012, Opinion, Order and Certificate and from the March 26, 2012 Entry on Rehearing. (Notice of Appeal, ICN 158, at 1 (Appx. 1)).

## ARGUMENT

### STANDARDS FOR CERTIFICATION OF MAJOR UTILITY FACILITIES

No person shall commence to construct a major utility facility in the state of Ohio without first having obtained a Certificate for the facility. (R.C. §4906.04 (Appx. 216)). A facility constitutes a "Major Utility Facility" if it is an electric generating plant designed for, or capable of, operating at a capacity of fifty (50) megawatts (MW) or more. (R.C. §4906.01(B)(1)(a) (Appx. 211)).

Upon the receipt of an application to construct a major utility facility, the Board must hold a public hearing thereon before issuing a Certificate to the Applicant. (R.C. §4906.07(A) (Appx. 217)). Moreover, the Board is obligated to accept written or oral testimony from any person at the public hearing, however, the right to call and examine witnesses is reserved for parties, including intervenors. (R.C. §4906.08(A)(3) and R.C. §4906.08(C) (Appx. 219)).

The Board shall render a decision upon the record either granting or denying the issuance of the Certificate based on 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. (R.C. §4906.10(A) (Appx. 220)). Furthermore, 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 the following:

- (a) The basis of the need for the Project;
- (b) The nature of the probable environmental impact;

(c) 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;

(d) 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;

(e) That the facility will comply with Chapters 3704., 3734., and 6111. of the O.R.C. and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the O.R.C.

(f) That the facility will serve the public interest, convenience, and necessity.

(g) That the viability of agricultural districts established under Chapter 929 of the O.R.C. and the impacts resulting from the facility have been evaluated; and

(h) 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.

(R.C. §4906.10(A)(1)-(8) (Appx. 220)).

#### **STANDARD OF REVIEW**

This Court applies the same standard of review to Power Siting Board determinations as applied to orders by the Public Utilities Commission of Ohio. *Chester Twp. V. Power Siting Comm.* (1977), 49 Ohio St. 2d 231, 238, 361 N.E.2d 436. R.C. §4903.13 applies to board proceedings pursuant to R.C. §4906.12 and provides that “A final order 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”. (*Id.*) Under the

‘unlawful or unreasonable’ standard of R.C. §4903.13, this court will reverse or modify a Board’s determination if the appellant sustains its burden to demonstrate that the Board’s determination was manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. (Id). Furthermore, an order must show, “in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed in reaching its conclusion.” *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117, Ohio St.3d 486,493, 2008-Ohio-990, 885 N.E.2d 195, ¶30 (Case is referring to its standard of review of a PUCO order under the same statute). “A legion of cases” establishes that the OPSB “abuses its discretion if it renders an opinion on an issue without record support”. (Id).

**FIRST PROPOSITION OF LAW:**

**The Certificate Issued To Black Fork Violates The Requirements Under R.C. 4906.02(C) And Is Void Ab Initio, As The Opinion, Order, And Certificate And Judgment Denying Rehearing Were Not Approved By The Board But Rather By Unknown Individuals.**

The Opinion, Order and Certificate issued on January 23, 2012 and the ensuing Entry on Rehearing issued on March 26, 2012 is void ab initio as it was executed and voted on by non-Board members in violation of the Board’s enabling statute set forth under R.C. §4906.02. (R.C. §4906.02 (Appx. 214)).

Section 4906.02(A) creates within the Public Utilities Commission the Ohio Power Siting Board which is comprised of seven individuals: the Chairman of the Public Utilities Commission, Director of Environmental Protection, Director of Health, Director of Development, Director of Natural Resources, Director of Agriculture and an additional member appointed by the Governor. (Id.). More specifically, §4906.02(A) states that “a quorum of the board is a majority of its voting members”. (Id.). Thus, a quorum would consist of four out of

the seven Board members. Furthermore, §4906.02(C) expressly allows the Board to delegate many responsibilities to subordinates. More generally, R.C. §4906.02(C) states the following:

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.*" (Id.)

In the present case, the document issued by the Board on January 23, 2012 purporting to be its Opinion, Order and Certificate was neither voted on nor signed by a quorum of the members of the Board. Certif. ICN 134, at 75 (Appx. 45, at 119); (Regular Minutes (Appx. 43)). Only two of the seven Board members actually voted and signed the decision, to wit: Todd A. Snitchler, Chairman of the Public Utilities Commission and Theodore Wymyslo, Board of Directors of the Department of Health. Certif. ICN 134, at 75 (Appx. 45, at 119). The remaining Board members consisting of James Zehringer, Scott Nally, Tony Forshey and the Board member appointed by the Governor neither voted nor signed the decision. (Id.). The Board, in violation of its enabling statute, delegated its decision making process to ghost writers Rocky Black, Brian Cook, Chad Smith and Fred Shimp who are not Board members and are not identified as being affiliated with the Ohio Power Siting Board in any manner.

After the aforementioned decision, the appellants requested a rehearing. (Applic. for Rehearing, ICN 135-139 (Appx. 120-175)). The Board overruled the appellants request for rehearing in a document issued on March 26, 2012 purporting to be its Entry on Rehearing. (Entry on Rehearing, ICN 156 (Appx. 178)). Only one Board member, Todd A. Snitchler, Chairman of the Board, signed this Entry. (Id., at 32 (Appx. 178, at 209)). Christiane Schmenk, Scott Nally and the Board member appointed by the Governor did not sign nor were present for the vote. (Id.); (Regular Minutes (Appx. 176-177)). Ghost writer Fred Shimp not only signed for

Director James Zehring but also seconded the motion for which he had no authority to do, as he is not a Board member. (Id.). David Daniels, a Board member for the Department of Agriculture, appears to have been present, as indicated by the regular minutes, however, a clear reading of the Entry indicates that he never signed the Entry as it was actually signed by Rocky Black, who signed for the previous director, Tony Forshey. (Entry on Rehearing, ICN 156, at 32 (Appx. 178, at 209)); (Regular Minutes (Appx. 176-177)).

Ohio Administrative Code §4906-7-17(A)(3) requires that a “decision of the board shall be entered on the board journal and into the record of the hearing and that copies of the decision shall be served on all attorneys of record and all unrepresented parties”. (Appx. 248). Therefore, the only way the Board speaks is thru its journal. The only document that exists indicating that the Board granted a certificate to Black Fork was neither signed nor voted on by a majority of the Board. This clearly demonstrates the Board’s attempt to circumvent the decision making process to non-Board members which is specifically prohibited by R.C. §4906.02(C). (R.C. §4906.02(C) (Appx. 214)).

The Supreme Court of Ohio addressed this very same issue in *In re Application of Am. Transm. Sys., Inc.* *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-6718, 780 N.E.2d 427. In that case, this Court dealt with the issue as to whether there was an unlawful delegation of authority to an administrative law judge. (Id., at 334). The argument presented was that the Ohio Power Siting Board failed to make an independent determination as to whether the certificate should have been issued. (Id., at 336). This Court ruled that “in the absence of evidence to the contrary, public officers, administrative officers, and public board will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner”. (Id., at 337). Moreover, “to overcome a order’s facial validity and

presumed regularity, one cannot rely on bare allegations but must adduce evidence that unlawful delegation occurred”. (Id.).

Here, given the inaction taken by the Board, it is hard to imagine any evidence that would be more transparent than an unlawful delegation occurred. The Opinion, Order and Certificate issued on January 23, 2012 and the Entry on Rehearing issued on March 26, 2012 is unlawful in the highest degree. Due to the fact that the Board acted outside of the authority delegated to it by the state legislature it follows that the Certificate and Entry on Rehearing is void ab initio. This Court has previously held that a Court has an inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity. *Van DeRyt v. Van DeRyt* (1966), 6 Ohio St.2d 31, 215 N.E.2d 698. The Ohio Power Siting Board exceeded its scope of authority in this case and its issuance of the Certificate to Black Fork and Entry on Rehearing is void ab initio.

Therefore, this Court should reverse and remand this matter back to the Ohio Power Siting Board for a trial de novo requiring the Board to make an independent determination of all the enumerated factors required pursuant to R.C. §4906.10. (R.C. §4906.10 (Appx. 220-223)).

### **SECOND PROPOSITION OF LAW:**

**The Board Failed To Ensure That The Black Fork Wind Energy, LLC Wind-Powered Facility Will Serve The “Public Interest, Convenience And Necessity” As Required By R.C. 4906.10(a)(6) By Not Resolving The Material Issue of Posting A Decommissioning Bond And It Erred In Permitting Black Fork To Retain An Engineer To Estimate The Total Cost Of Decommissioning Without Public Input, Thereby Making The Board’s Determination Unlawful And Unreasonable.**

Intervenors/Appellants Alan K. Price and Catherine A. Price, raised the issue of whether any such funding for decommissioning exists and what would happen if the party responsible goes bankrupt before decommissioning funds are in place. (Applic. for Rehearing, ICN 136, at 2

(Appx. 130, at 131)). The Board, finding no merit in Mr. or Mrs. Price's arguments, stated that the issue(s) regarding financial assurance/bonding were adequately addressed and resolved in condition 66(h) of the four-party Stipulation. (Entry on Rehearing, ICN 156, at 8-9 (Appx. 178, at 185-186)). Condition 66(h) of the four-party Stipulation, as adopted by the document purporting to be the Board's decision, states that the applicant, facility owner, and/or facility operator shall:

Post and maintain for decommissioning, *at its election*, funds, a surety bond, or similar financial assurance in an amount equal to the per-turbine decommissioning costs multiplied by the sum of the number of turbines constructed and under construction. The funds, surety bond, or financial assurance need not be posted separately for each turbine so long as the total amount reflects the aggregate of the decommissioning costs for all turbines constructed or under construction. Prior to commencement of construction, the applicant, the facility owner, and/or the facility operator shall provide a statement from the holder of the financial assurance demonstrating that adequate funds have been posted for the scheduled construction. Once the financial assurance is provided, the applicant, facility owner and/or facility operator shall maintain such funds or assurance throughout the remainder of the applicable term and shall adjust the amount of the assurance, if necessary, to offset any increase or decrease in the decommissioning costs. (Joint Stipulation, ICN 118, at 15-16 (Appx. 13, at 28-29)).

In *Buckeye Wind*, a private developer, Buckeye Wind L.L.C., developed a plan to build 70 wind turbines in Champaign County, Ohio. *In re Application of Buckeye Wind, L.L.C.*, 030612 OHSC, 2010-1554, at ¶2. In April 2009, Buckeye Wind filed a 1,500 page application for a certificate of environmental compatibility and public need. *Id.*, at ¶4. The County and several local townships intervened and sought financial protection through bond requirements that would ensure adequate money was available to (1) repair the roads and (2) decommission the turbines if and when they became inoperable. *Id.*, at ¶4 and ¶6. The Board agreed to post a \$5,000.00 bond for the first year of operation, however, the County was dissatisfied with that bond amount. *Id.*, at ¶6. The County appealed on this particular issue to this court. *Id.*, at ¶7.

The majority upheld Buckeye Wind's \$5,000.00 bond because the evidence that was introduced at the hearing supported that was a sufficient amount to cover the period from the commencement of construction of the wind turbines through the first year. *Id.*, at ¶35 and ¶43. The dissent, however, disagreed that the \$5,000.00 bond per turbine set by the Board was sufficient to protect the public interest, due to the fact that the Board heard testimony from appellants' expert that decommissioning could cost as much as \$300,000.00 per turbine. *Id.*, at ¶43.

Here, unlike in *Buckeye Wind*, the record reflects that the Board did not even consider the issue of decommissioning, thereby making its order unreasonable and unlawful for the following reasons:

**A. The Board's Reliance On Condition 66(h) Of The Stipulation Fails To Meet The Requirements Set Forth In O.A.C. §4906-17-08(E)(6).**

Unlike in *Buckeye Wind*, Black Fork has not posted any type of bond or financial assurance for the commencement of construction or for when decommission occurs. The law requires that an applicant "describe 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) (Appx. 251, at 254)). Condition 66(h), upon which the Board relies, however, clearly does not describe any financial arrangements that Black Fork has made to assure that the requisite financial resources are in place when decommission occurs. Moreover, Condition 66(h) is not a finalized plan but rather a mere proposal for decommissioning which is subject to modification. The final plan for decommissioning is to be provided to the Board's Staff and the county engineers for review, at least thirty (30) days prior to the preconstruction conference. (Joint Stipulation, ICN 118, at 14 (Appx. 13, at 27)). This means that Condition 66(h) could be altered in such a way, prior to the preconstruction

conference, that the financial arrangements made by Black Fork would not cover the decommissioning costs on a per-turbine basis. Thus, the Board's adoption of Condition 66(h) as its resolution to the decommissioning issue fails as it does not adequately describe a plan but rather proposes a possible idea to the problem.

**B. The Board Failed To Realize That Condition 66(h) Is Contingent On Condition 66(g) Of The Stipulation And That Condition 66(g) Constitutes An Unlawful Delegation Of The Board's Duties To Black Fork Pursuant To R.C. §4906.02(C).**

The Board's reliance on Condition 66(h) as its reason for rejecting Alan and Catherine Price's arguments are also without merit because the Board failed to realize that Condition 66(h) is contingent upon Condition 66(g) of the four-party Stipulation. Condition 66(g) states:

Subject to approval by Staff, and seven days prior to the preconstruction conference, an independent, registered professional engineer, licensed to practice engineering in the state of Ohio, *shall be retained by the applicant, facility owner, and/or facility operator to estimate the total cost of decommissioning in current dollars, without regard to salvage value of the equipment.* (Id., ICN 118, at 15 (Appx. 13, at 18)).

Condition 66(g) constitutes an unlawful delegation of the OPSB's duties to Black Fork pursuant to R.C. §4906.02(C). (R.C. §4906.02(C) (Appx. 214)). R.C. Chapter 4906, the board's enabling statute, expressly allows the board to delegate many responsibilities to subordinates. (Id.). More generally, R.C. §4906.02(C) states the following:

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." (Id.).

Here, the Board is delegating one of the most intricate aspects for certifying Black Fork to Black Fork, that is, the ability to discern the total cost of decommissioning. The Board granted Black Fork the authority to obtain its own "independent" engineer to estimate the cost of decommissioning so long as the engineer is registered and licensed to practice in the state of

Ohio. Although subject to approval by the Board's Staff, this idea that Black Fork is to retain a so-called "independent" engineer to provide the estimation makes one wary of the engineer's rationale for arriving at his or her estimation. It is conceded that the Board may delegate many duties to their Staff, however, it cannot delegate a duty to both the Staff and the applicant like it did in this case.

In the end, the estimation proposed by Black Fork's "independent" engineer has the potential to eviscerate the public's interest in requiring reasonable protection for the decommissioning of the wind turbines and rendering the owners' property impacted by this project in perpetual jeopardy. Therefore, the Board unreasonably and unlawfully delegated one of its core duties to Black Fork.

**C. The Board And Black Fork's Ability To Make Post-Certificate Information Submissions And Alterations Concerning The Issue Of Decommissioning Violates The Appellants Of Their Statutory Rights Of Participation Under R.C. §4906.08.**

The appellants, as parties to this certification proceeding, have the statutory right to call and examine witnesses at the hearing pursuant to R.C. §4906.08. (Appx. 219). The appellants are denied this right because they are foreclosed from cross-examining the applicant's engineer on how he or she determined the estimated cost of decommissioning or from presenting evidence contrary to the engineer's estimation. These concerns could never have been addressed by the appellants substantively at the public hearing because the Board, Staff, and Black Fork have not determined which model of turbines would be used in constructing the facility, which would have a direct impact on the amount of financial assurance that would need to be posted. These were all matters that should have been addressed at the public hearing when all the parties were present and had the opportunity to be heard.

**D. The Appellants Right To Participate And Present Evidence Is Not Safeguarded By R.C. §4906.07 Because No Amendment Will Be Required Since The Issue Of Decommissioning Has Yet To Be Decided.**

Although R.C. §4906.07 requires that the Board hold a new hearing “where the amendment of a certificate involves any material increase in any environmental impact or substantial change in the location of all or a portion of the facility other than as set forth in the application” the section is not applicable here because the decommissioning plan has not been determined yet. (Appx. 217). Since the decommission plan is not to be determined until after the public hearing and thirty days prior to the preconstruction conference neither the Board nor its Staff will need to file an application for amendment. (Ohio Admin. Code §4906-5-10 (Appx. 239)). Due to the subjectivity of the decommissioning condition in question, there is no assurance that the Board or its Staff will require an amendment to the Certificate to adequately address the public’s interest concerning this issue. Simply put, no amendment is necessary as the issue has not been decided. Thus, the Appellants right to be heard on this issue is not safeguarded by R.C. §4906.07. (Appx. 217).

**E. The Board’s Unbridled Adoption Of Condition 66(h) As Its Resolution For Decommissioning Is Manifestly Against The Weight Of The Evidence As It Does Not Serve The “Public Interest, Convenience And Necessity” As Required By R.C. §4906.10(a)(6).**

The Board, as a condition for issuing a certificate, has the statutory duty to determine that it will serve the public interest, convenience, and necessity. (R.C. §4906.10(A)(6) (Appx. 220)). Public health, safety, and welfare are fundamental considerations in arriving at that determination. Yet the Board’s determination concerning decommissioning is manifestly against the weight of the evidence because, unlike in *Buckeye Wind*, there is no evidence. Rather than thoroughly addressing the issue at the evidentiary hearing the Board simply yielded to the proposed idea for decommissioning contained in the Stipulation. Since the decommissioning

plan has yet to be decided, the public was, indeed, foreclosed from discussing the issue in a substantive way at the public hearing. Essentially, the Board “fast-tracked” the proposed decommissioning plan and issued the certificate, reserving the discussion to take place at a later date without considering the public’s interest or the appellants’ due process right to be heard. There is no evidence in the record as to the removal costs for each wind turbine from the proposed site nor have any financial safeguards been secured by Black Fork. The onus is on the Board to insist that adequate financial protection is available to protect the public interest when decommission occurs, prior to the issuance of a certificate. These financial safeguards are critical to the people of Crawford County and Richland County who will have to live with these industrial-scale wind turbines on a daily basis. As the dissent in *Buckeye Wind* wrote, “The public at large has an interest because, ultimately, the state could be left to deal with the aftermath of a failed experiment”. *In re Application of Buckeye Wind, L.L.C.*, quoting Justice Pfeifer at ¶45.

Therefore, the Board’s unbridled adoption of the decommissioning proposal, as set forth in the Stipulation, is clearly unsupported by the record amounting to misapprehension, mistake and willful disregard of duty and should be remanded for further proceedings on this issue.

**THIRD PROPOSITION OF LAW:**

**The Board Violated The Appellants’ Right To Procedural Due Process By Disallowing The Appellants From Conducting Cross-Examination on Staff Members, Prohibiting The Presentation of Evidence And By Permitting Black Fork To Make Post-Certificate Alterations And Information Submissions Without A Hearing.**

The appellants were not afforded the opportunity to cross-examine the Staff members responsible for researching and developing the reports concerning the standards that need to be met under R.C. §4906.10(A) for issuing a certificate. Moreover, after the evidentiary hearing, the Board delegated to its Staff and Black Fork the task of reviewing additional relevant

evidence relating to the proposed facility. The appellants will have no right to notice and a hearing when Black Fork submits such additional evidence to the Staff. All this calls into question the basic fairness of the evidentiary hearing which the appellants participated in extensively.

Due Process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by Section 16, Article I, of the Ohio Constitution require that administrative proceedings comport with due process. *Mathews v. Eldridge* (1976), 424 U.S. 319; *LTV Steel Co. v. Indus. Comm'n* (2000), 140 Ohio App.3d 680. Thus, due process's requirement to conduct a "hearing" implies a "fair hearing" and the right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. *Ormet Corp. v. Ind. Comm'n* (1990), 54 Ohio St.3d 102, 104, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. Of Ohio* (1937), 301 U.S. 292, 304-305. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. *Ohio Bell Tel. Co. v. Pub. Util. Comm. Of Ohio*, at 305.

In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), 57 S.Ct. 724, 81 L.Ed. 1093, the Supreme Court of the United States held that the appellant was denied due process of law and, therefore, reversed the decision made by the Supreme Court of Ohio. (*Id.*, at 307). The subject matter of the case was the rates chargeable by the appellant, Ohio Bell Telephone Company, for intrastate telephone service to subscribers and patrons in Ohio. (*Id.*, at 293). The appellant filed with the Public Utilities Commission schedules of new rates that would be charged to communities where an increase was desired. (*Id.*, at 294). According to the statutes at the time, the increase could be suspended for 120 days and then the

increase would go into effect provided a bond for the repayment to consumers of such portion of the increased rate as the Commission, upon final hearing, would determine to be excessive. (Id.). The Commission proceeded to perform an investigation to determine the value of all the appellant's property and of the rates for service provided to all of its subscribers in Ohio. (Id., at 295). The statute the Commission was to abide by stated that the Commission "shall ascertain the value of the property as "of a date certain" to be named". (Id.). The Commission, rather than confining itself to a "date certain", took judicial notice of price trends during the years in question, modifying the value which it had discovered as of the date certain by the percentage of decline or rise for the years in question. (Id., at 296). The trends that the Commission took judicial notice of did not come from official sources nor had they been introduced in evidence. (Id., at 297). Appellant moved for a rehearing, arguing that it had not been granted the opportunity to explain or rebut the trend percentages that were accepted, thereby denying it a fair hearing under the requirements of the Fourteenth Amendment. (Id., at 298). The Supreme Court of Ohio affirmed the Commission's order, however, the Supreme Court of the United States reversed the decision. (Id., at 300).

The Supreme Court of the United States did not understand how it was possible for the appellate court to review the law and facts and intelligently decide the Commission's findings were supported by the evidence when the evidence that it approved was unknown or unknowable. (Id., at 303). The Court held that "what the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that". (Id., at 304). The Court stated, "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known". (Id.). Thus, the Supreme Court found that appellant was denied due process and reversed the Supreme Court of Ohio's decision. (Id., at 307).

The case at bar presents similar unfair circumstances. The Board, after the evidentiary hearing, delegated to its Staff and Black Fork the task of reviewing additional relevant evidence relating to the Project. In essence, the Staff and Black Fork are able to make significant decisions based on the information they secretly collect while denying the appellants an opportunity to inquire into those decisions. Unless Black Fork applies for an amendment to the Certificate, the appellants will presumably have no right to cross-examine the source of information or to present evidence on their own behalf.

Both the United States Supreme Court as well as the Supreme Court of Ohio apply the three-part test set forth in *Mathews v. Eldridge* as the basis for evaluating due process in administrative cases. *Mathews*, at 334. That test requires the court to consider three factors in determining the constitutional sufficiency of the administrative proceeding: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. (*Id.*, at 335).

In this case, the appellants have an interest in protecting themselves from the impacts of Black Fork's Facility that would adversely affect their health, safety, and their property. Furthermore, the appellants have an interest in ensuring that the government act responsibly and adhere to strict procedural safeguards, especially when it pertains to drastically transforming the landscape of Crawford County and Richland County with fifty-story mega structures.

With respect to the risk of erroneous deprivation of those interests and the probable value of additional procedural safeguards, there is a substantial risk of erroneous deprivation of the appellants' procedural due process rights for the following reasons:

- i. The Board unjustifiably relied on the Joint Stipulation to provide the answers to questions the appellants had, thereby foreclosing appellants from meaningfully inquiring into those matters.

As evidenced by the testimony of Mr. Pawley, it is clear that the seven Staff members that were unilaterally pulled from the evidentiary hearing should have been made available to testify. Since the other Staff members were responsible for developing specific sections of the Report they would have been able to address the numerous aspects of their particular Report which Mr. Pawley could not adequately do. Without the presence of the other Staff members, the appellants could not meaningfully inquire into the matters they asked Mr. Pawley about because he did not know. The appellants were thereby forced to answer their own questions by accepting the claims put forth in the conditions of the Stipulation, to which they did not stipulate to and to which still left a whole host of issues unresolved.

The Board's unbridled adoption of the Stipulation made between Black Fork, the Board's Staff, the Ohio Farm Bureau and the Board of County Commissioners of Crawford County was unreasonable because the Board reached its final decision by relying on the ALJs findings. The Board held that there was not sufficient evidence presented at the evidentiary hearing to warrant a finding that the four-party Stipulation was deficient. Specifically,

Upon review of the record, as a whole, we find that intervenors who were not parties to the Stipulation have not presented evidence sufficient to persuade the Board to reach a contrary finding. Any allegation presented in opposition to the Stipulation is hereby considered denied. Certif., ICN 134, at 69-70 (Appx. 45, at 113-114).

This finding by the Board is peculiar, especially since most of the questions that the ALJs posed to Mr. Pawley concerning the conditions of the Stipulation he did not know or could not answer. Nevertheless, the Board still approved and adopted the Stipulation. O.A.C. §4906-7-09 does provide that any two or more parties may enter into a written or oral stipulation concerning issues of fact or the authenticity of documents and that no stipulation shall be considered binding

upon the Board. (Appx. 245). If the Stipulation, which the Staff was a party to, was a product of serious bargaining among knowledgeable parties, then why would the Staff produce one witness on its behalf who could not answer any questions while not producing the Staff members responsible for authoring the reports? By only producing Mr. Pawley as a witness, in accordance with O.A.C. §4906-7-11(D), the appellants were inhibited from questioning the Staff in a meaningful manner on the reports it developed in support of the Project, therefore, violating the appellants' right to due process. (Appx. 246).

- ii. Appellants were deprived the opportunity to cross-examine the Staff members responsible for developing specific aspects of the Staff Report of Investigation concerning the Project in violation of R.C. §4906.08.

During the proceedings on September 19, 2011, the Staff witnesses to be presented in accordance with O.A.C. §4906-7-10(A)(3) were identified as thus: Timothy Burgener, Andrew Conway, Christopher Cunningham, Nicholas Doss, Paul Laurent, Donald Rostofer, John Whitis, and Jon C. Pawley. (Prefiled Testimony, ICN 97-104 (Supp. 5-48)). Each of the foregoing Staff members prefiled testimony regarding the specific tasks they were assigned to investigate the Project. (Id.). When the evidentiary hearing commenced, the only Staff member that was made available as a witness was Jon C. Pawley. This one Staff member cannot lay the foundation for the testimony of all the other Staff members, particularly, when that Staff member could not demonstrate that he possessed the knowledge necessary to testify to the reports prepared by the other Staff members. The Staff members that were unilaterally pulled from testifying at the evidentiary hearing prohibited the appellants from inquiring into those Staff members' reports in violation of R.C. §4906.08 and O.A.C. §4906-7-05. (Appx. 219 and 244). It is conceded that the Board's process for issuing a certificate to the Applicant must be done as 'expeditiously as possible' under R.C. §4906.07(A). (Appx. 217). Specifically, R.C. §4906.07(A) states:

“Upon the receipt of an application complying with section 4906.06 of the Revised Code, the Power Siting Board shall promptly fix a date for a public hearing thereon, not less than 60 nor more than 90 days after such receipt, and shall conclude the proceeding as expeditiously as practicable”. R.C. 4906.07(A). (Id.).

But at what cost does this expeditious certificating amount to? Here, the appellants were denied their opportunity to cross-examine the other Staff members, all in the name of convenience and expediency. The seven Staff members that were pulled from testifying played a critical role in the certificating process and should have been made available to address questions pertaining to their reports. By not having the Staff members available at the evidentiary hearing it effectively denied the appellants their statutory right of participation under R.C. §4906.08 and their right to procedural due process.

- iii. Appellants were deprived the opportunity to cross-examine the engineer on the estimation of decommissioning costs and to present evidence on their own behalf in accords with R.C. §4906.08.

Finally, as stated above, posting financial security when decommissioning occurs is an integral feature of the certificating process which is to be done prior to issuing a certificate. Here, the appellants were denied their right to procedural due process concerning the issue of decommissioning. The appellants’ statutory right to cross-examine Black Fork’s engineer pursuant to R.C. §4906.08, as to the estimation costs associated with decommissioning, was completely removed from the Board’s proceedings. This is so because the turbine model used in constructing the facility has yet to be chosen, which has a direct impact on the amount of financial security that will need to be posted by Black Fork. The exclusive ability of the Board, Staff, and Black Fork to reserve such decisions and make post-certificate alterations after the public hearing conveniently deprives the appellants their right to procedural due process. This not only violates R.C. §4906.08 but is also constitutionally unacceptable. The matter should

have been openly discussed and dealt with at the public hearing where the parties could have presented evidence in rebuttal and conducted cross-examination. To allow this type of practice to continue is to negate the purpose of having a public hearing and creates a system where hearings and appeals are no more than empty forums.

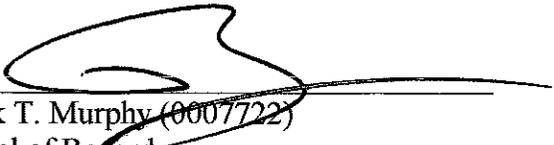
With respect to the government's interest, requiring specific witnesses to be available for the full evidentiary hearing would impose some costs on the Board and Staff, however, the countervailing benefits would far outweigh such burdens. By not having the Staff members, responsible for specific aspects of the report, available as witnesses at the evidentiary hearing and subject to cross-examination how can the Board justifiably issue a certificate to Black Fork in accordance with §4906.10(A)? The Board unilaterally dismissed the seven (7) Staff members from testifying at the evidentiary hearing. The one staff member that did testify to the reports at the hearing was unable to answer various questions posed to him because he was only responsible for overseeing the Staff members that actually developed the reports. In this case, the Board's desire for convenience and expediency with regard to issuing its certificate to Black Fork fundamentally overshadowed the appellants' right to a fair hearing. *Ohio Bell Tel. Co.*, at 305. In short, the public hearing concerning Black Fork's facility was a façade which merely gave the appearance that the appellants were afforded due process when in actuality they were denied the process due to them.

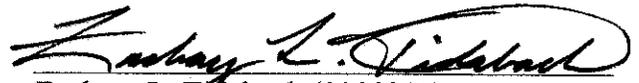
For all the above reasons, the Board's actions constitute an unlawful violation of the appellants' right to procedural due process as incorporated through the Fourteenth Amendment of the United States Constitution and Section 16, Article I of the Ohio Constitution and should be remanded for a new hearing. (Appx. 256 and 257).

**CONCLUSION:**

Accordingly, the Appellants request that this Honorable Court vacate and remand the Ohio Power Siting Board's Opinion, Order and Certificate of January 23, 2012 and its Entry on Rehearing of March 26, 2012 with instructions to take the following actions to address the errors described by each Proposition of Law (the parenthetical numbers correspond to the Propositions of Law): (1) declare the Opinion, Order and Certificate of January 23, 2012 and Entry on Rehearing of March 26, 2012 as a nullity and void ab initio and/or remand the issue back to the Ohio Power Siting Board requiring it to make an independent evaluation and decide the issues before it in accordance with §4906.10(A) via a new hearing; (2) direct the Ohio Power Siting Board to reopen the hearing record and/or conduct a new hearing to receive evidence on the issue of decommissioning of the wind turbines and affording the appellants a fair opportunity to cross-examine and present evidence before the Board; (3) direct the Ohio Power Siting Board to reopen the hearing record and/or conduct a new hearing requiring the Staff members responsible for developing the specific aspects of the Staff Report of Investigation, in accords with §4906.10(A), to testify and be subject to cross-examination by appellants.

Respectfully submitted,

  
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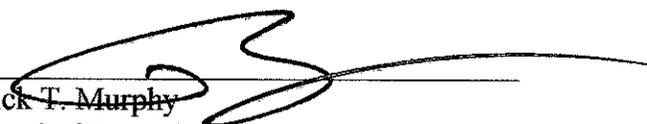
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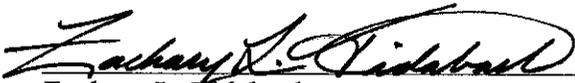
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## **4906-17-01 Applicability and definitions.**

(A) This chapter details the application filing requirements for all wind-powered electric generation facilities consisting of 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 megawatts or more.

(B) As used in this chapter:

(1) "Project area" means the total wind-powered electric generation facility, including associated setbacks.

(2) "Wind-powered electric generation facility" or "wind-energy facility" or facility means all the turbines, collection lines, any associated substations, and all other associated equipment.

(C) With regard to certification applications under this chapter, the board shall approve, or modify and approve, a certification application for the construction, operation, and maintenance of a wind farm or shall deny, grant or grant upon such terms, conditions, or modifications as the board considers appropriate a certification application for a major utility facility, pursuant to the requirements set forth in section 4906.10 of the Revised Code.

Effective: 05/07/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4906.03, 4906.20

Rule Amplifies: 4906.01, 4906.03, 4906.06, 4906.13, 4906.20

## **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.

Effective: 05/07/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4906.03, 4906.20

Rule Amplifies: 4906.03, 4906.06, 4906.20

CONSTITUTION OF UNITED STATES  
AMENDMENTS

*Current through 2012*

**Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Ohio Constitution**  
**Article I. Bill of Rights**

*Current through the November, 2011 General Election*

**§ 16. Redress in courts**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

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APPX000257

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 27<sup>th</sup>, 2012, a copy of the foregoing Appendix (Volume I) was served by regular mail on the following counsel and party:

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