

ORIGINAL

In The
SUPREME COURT OF OHIO

Alan K. Price, et al.,	:	Case No. 2012-0900
	:	
Appellants,	:	On appeal from the Ohio Power Siting
	:	Board, Case No. 10-2865-EL-BGN, <i>In</i>
v.	:	<i>the Matter of the Application of Black</i>
	:	<i>Fork Wind Energy, LLC, for a</i>
The Ohio Power Siting Board,	:	<i>Certificate to Site a Wind-Powered</i>
	:	<i>Electric Generating Facility in</i>
Appellee.	:	<i>Crawford and Richland Counties, Ohio.</i>

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

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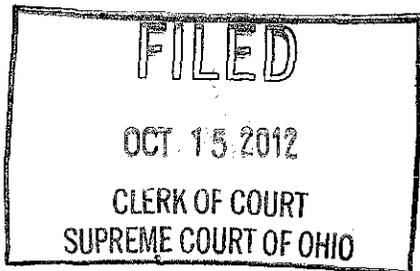
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	:	<i>Electric Generating Facility in</i>
Appellee.	:	<i>Crawford and Richland Counties, Ohio.</i>

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

INTRODUCTION

In the case below, the Ohio Power Siting Board (Board) considered the evidence of record and issued a decision in accordance with that record. Appellants are dissatisfied with that outcome and attempt to raise arguments against it. Their arguments are either not properly before this Court, unsupported in law, contra-factual or a combination of these. This is an appeal, not a trial *de novo*. Appellants have had their chance and failed. They cannot get another bite at the apple here. The Board should be affirmed.

STATEMENT OF THE FACTS AND CASE

On March 10, 2011, Black Fork filed an application seeking authority to construct a major utility facility commercial wind farm. *In the Matter of the Application of Black Fork Wind Energy, LLC, for a Certificate to Site a Wind-Powered Electric Generating Facility in Crawford and Richland Counties, Ohio*, Case No. 10-2865-EL-BGN (hereinafter *In re Black Fork*) (Opinion, Order, and Certificate at 2) (January 23, 2012), Appellants' App. at 46.¹ As proposed, the project would encompass up to 91 turbines with 200 megawatts of generating capacity in a project area located in several townships in Crawford and Richland Counties. *Id.* at 3, Appellants' App. at 47. The Staff of the Board completed their investigation of the project and filed their report on August 31, 2011. *Id.* at 3, Appellants' App. at 47.

A local public hearing was held on September 15, 2011 where 25 witnesses presented public testimony both for and against the proposed facility. *Id.* at 5, Appellants' App. at 49. In addition to the named appellants in this case, a number of other individuals and local governmental entities sought and were granted intervention in the case. *Id.* at 2-3, Appellants' App. at 46-47. Additionally, on behalf of the many farming families who leased property for the project, the Ohio Farm Bureau Federation intervened and supported the project.

¹ References to Appellants' appendix are denoted "Appellants' App. at ____;" references to Appellant's supplement are denoted "Appellants' Supp. at ____;" references to Appellee's appendix attached to its merit brief are denoted "App. at ____;" and references to Appellee's supplement are denoted "Supp. at ____."

An adjudicatory hearing was held over a three-day period from October 11-13, 2011. The focus of the hearing was a Stipulation signed by the applicant, the Board Staff, and the Ohio Farm Bureau, that jointly recommended project approval subject to over 70 conditions intended to mitigate project impacts to the area. One week later, Crawford County joined the Joint Stipulation in support of the project. The Board issued its Opinion, Order, and Certificate approving the project, with extensive conditions, on January 23, 2012. Several persons (no local governmental entities) that principally include appellants in the instant case, filed for rehearing which was denied by the Board on March 26, 2012.

This appeal ensued. The appellant group consists of area landowners.

ARGUMENT

Proposition of Law No. I:

This Court does not have jurisdiction to consider any grounds for reversal of an Ohio Power Siting Board order that were not raised specifically to the Board in a rehearing application. R.C. 4903.10, 4906.12, Appellants' App. at 210, 223; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶15, 874 N.E. 2d 550, 557.

R.C. 4903.10 applies to any proceeding or order of the Board in the same manner as it applies to proceedings and orders of the Public Utilities Commission of Ohio.

R.C. 4906.12, Appellants' App. at 223. R.C. 4903.10(B) requires applications for rehearing to "set forth *specifically* the ground or grounds on which the applicant considers the [Board's] order to be unreasonable or unlawful." That subsection further provides that no

party can rely upon “any ground for reversal, vacation, or modification not so set forth [specifically] in the application [for rehearing]” (emphasis added). Accordingly, rehearing applications limit the Court’s jurisdiction to the grounds raised specifically in their applications. R.C. 4903.10, Appellants’ App. at 210; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶14-16, 874 N.E. 2d 764, 768; *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E. 2d 550, 552-553.

A mere, general reference to a subject-area, such as “decommissioning”, is insufficient to trigger the Court’s jurisdiction. *Consumers’ Counsel v. Pub. Util. Comm’n*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E. 2d 550, 552-553. This Court explained “the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the Appellants’ application for rehearing used a shotgun instead of a rifle to hit that question.” *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 378, 86 N.E. 2d 10, 41 (1949); see also *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E. 2d 550, 552-553. Appellants must present a *specific* ground to the Board, first, as a jurisdictional prerequisite to then present it to the Court. R.C. 4906.10, Appellants’ App. at 220-222; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶14-16, 874 N.E. 2d 764, 768; *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E. 2d 550, 552-553.

Appellants’ applications for rehearing do not contain any of the specific grounds they now assert in their Propositions of Law I and II as required under R.C. 4003.10 and

this Court's jurisprudence. Accordingly, the Court lacks jurisdiction to review those alleged grounds.

A. Appellants did not complain in any application for rehearing about the signatories to the Board's orders.

In their first proposition, Appellants complain about the signatories to the Board's orders; they claim here, for the first time, that the Board's orders are void *ab initio* because they were approved by "unknown individuals" rather than Board members. But, no party raised this issue in an application for rehearing. No one even questioned the Board's orders because of the signatories. No one claimed the signatories lacked authority to sign orders or that the Board's actions were void *ab initio*. Consequently, the Court lacks jurisdiction to consider this belated claim. R.C. 4906.10, Appellants' App. at 220-222; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶14-16, 874 N.E. 2d 764, 768; *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 1994-Ohio-469, 638 N.E. 2d 550, 552-553.

Additionally, Appellants "void *ab initio*" claim does not confer jurisdiction. If the Board's order was executed by unauthorized persons as alleged by appellants, and appellants have not shown that it was, the Board's order would be *voidable*, not "void *ab initio*" as asserted. *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 385, 2012-Ohio-2845, ¶ 17, 972 N.E. 2d 568. As this Court explained, a judgment is void where a court lacks subject-matter jurisdiction. *Id.* at ¶¶ 13, 14, 17. Appellants have nowhere alleged that the Board lacked jurisdiction to act; they assert instead merely that certain designated

signatories lacked authority to sign on behalf of the Board.² Appellants have nowhere alleged that the Board lacked jurisdiction to act; they assert instead merely that certain designated signatories lacked authority to sign on behalf of the Board. Where mere signature irregularities exist but the Court has subject-matter jurisdiction, its judgment is voidable, not void. *Id.* at ¶ 17. In *Miller*, the Court has held: “the lack of a valid signature is an irregularity that has no bearing on the subject-matter jurisdiction of the trial court and renders the judgment voidable rather than void.” *Id.* ¶17.

Here, no question exists concerning the Board’s jurisdiction. The General Assembly vested the Board with jurisdiction to decide the application. R.C. 4906.10, Appellants’ App. at 220-222. Accordingly, the Board’s judgment would be voidable, not void, if signature irregularities existed, and they do not.

Nor have Appellants shown that the signatories were not designated persons. A presumption of regularity attends the Board’s decisions and Appellants bear the burden of proof to show irregularity. *In re Application of American Transmission Systems, Inc., et al*, 125 Ohio St.3d 333, 337, 2010-Ohio-1841, ¶23, 928 N.E. 2d 427, 431. Given the express authorization under R.C. 121.05, and related Ohio Attorney General opinions, this is no reason for the Court to disturb the presumption.

² R.C. 121.05 expressly permits Department directors to designate any of his/her assistant directors or a deputy director to serve in the director’s place as a member of any board, committee, etc. of which the director is by law a member. The designee, when present, shall be counted in determining whether a quorum is present at any meeting. Had this alleged error been raised by any of the appellants in their rehearing applications (which it was not), the Board could have addressed the issue.

Were this issue properly before the Court, which it is not, the Court should uphold the decision as lawful. Proper designees signed and voted and the action was thus of and by the Board. There is no error.

B. No party pled with requisite specificity the subject of financial assurances for decommissioning in their applications for rehearing and, thus, this issue is not properly before the Court.

This jurisdictional flaw repeats itself in appellants' second proposition of law concerning financial assurances for decommissioning the turbines. Mr. and Mrs. Price were the only appellants to voice any concern regarding decommissioning in their applications for rehearing. They erroneously stated that the certification lacks a requirement for posting financial assurances for decommissioning before the applicant began construction on the turbines

Financial assurances were required prior to turbine construction as the Board found, stating:

Upon review, we note that Condition 66 (h) of the Stipulation, summarized at pages 48-49 of the order, *clearly imposes an obligation on the Applicant to provide, prior to construction, a financial assurance instrument such as a surety bond, for purposes of demonstrating that adequate funds have been posted for scheduled construction. Because this condition of the Stipulation imposes a bonding obligation on the Applicant prior to construction, Mr. Price's [and Ms. Price's] rehearing argument to the contrary is without merit, does not justify rehearing of the order, and should be denied.*

In re Black Fork Wind Energy (Entry on Rehearing at ¶14) (March 26, 2012) (emphasis added), Appellants' App. at 181. Moreover, the Board correctly found, in denying Mr. Price's assignment of error on decommissioning, that "the issue of decommissioning was

fully addressed and resolved in the Stipulation and on the record in this case.” *Id.* at ¶ 34, Appellants’ App. at 186.

Neither the Prices nor any other appellant raised on rehearing any of the issues and arguments that they attempt here to raise for the first time on appeal.

Because none of the issues concerning decommissioning that the appellants now seek to argue were presented to the Board in an application for rehearing, the Court does not have jurisdiction to consider them. R.C. 4906.12, 4903.10, Appellants’ App. at 223, 210.

Proposition of Law No. II:

A Board decision will be reversed only where it is unlawful or so unsupported by the record that it is against the manifest weight of the evidence and results from mistake, misapprehension, or neglect of duty. *Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992).

The standard of review applicable to orders of the Public Utilities Commission of Ohio applies also to Board orders. R.C. 4906.12, Appellants’ App. at 223; *In re Application of American Transmission Systems, Inc.*, 125 Ohio St.3d 333, 2010 Ohio 1841, 928 N.E.2d 427, ¶ 17, citing *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238, 361 N.E. 2d 436 (1977).

This Court has articulated the standard for reviewing a Commission/Board order many times. *Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370, 1373 (1992). R.C. 4903.13 requires this Court to affirm an order of the Board unless the appellants show that the order is *unlawful* or *unreasonable*.

R.C. 4903.13, App. at 5; *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370, 1373 (1992).

Appellants bear the burden of proof on appeal. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 540, 2004-Ohio-6767, ¶ 50, 820 N.E.2d 885, 894. Appellants must show the evidence of record does not support the Board's factual determinations to satisfy their burden of demonstrating the Board's order is *unreasonable*. *Id.* This is not a *de novo* review and the Court does not second-guess the Commission's determinations. The Court upholds the Board's determinations of fact where, as here, the record contains sufficient probative evidence to show that the Board's decision was not against the manifest weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Id.*

This is a heavy burden. The Court will not weigh the evidence and it will not choose between debatable alternatives. *Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 526-527, 2010-Ohio-6239, ¶ 13, 941 N.E.2d 757, 761; *AT&T Communications of Ohio v. Pub. Util. Comm.*, 551 Ohio St.3d 150, 154, 555 N.E.2d 288, 292 (1990). The Court defers to the Board's judgment in matters requiring special expertise and judgment regarding factual matters, such as those in this case. *Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 289, 292, 2008-Ohio-860, ¶ 10, 883 N.E.2d 1025, 1028. The Court will not substitute its discretion for the Board's discretion. *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 48, 2004-Ohio-1798, ¶ 16, 806 N.E.2d 527, 531.

Regarding questions of law, this Court has complete and independent power. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 210,

2007-Ohio-4790, ¶ 11, 874 N.E.2d 764, 767. Nevertheless, the Court gives substantial weight to the Board's determinations in the areas of its expertise. The Court may rely on the Board's expertise in interpreting a law where highly specialized issues are involved and, therefore, where the Board's expertise is helpful in discerning the intent of the General Assembly. *Id.* at 210, 2207-Ohio-4790 at ¶ 11, 874 N.E.2d at 767; *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370, 1373 (1979). Additionally, this Court has noted that due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility, such as the Board. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 540, 2004-Ohio-6767, ¶ 51, 820 N.E.2d 885, 894.

This case, in part, is about the Board's factual determinations when granting a certificate for the construction of a major utility facility, Black Fork's wind farm. Even if it involved questions of law, the Court should rely on the Board's expertise and defer to the Board's interpretations. The case involves areas of the Board's expertise. As this Court knows, this is a complex area and it is one the General Assembly entrusted to the Board's oversight. *See e.g.*, R.C. 4909.15, App. at 6-9. Discretionary decisions get deferential review. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 570, 2011-Ohio-4129, ¶ 11, 954 N.E.2d 1183, 1185.

Finally, appellants must show that they were prejudiced by any errors they demonstrate. This Court will not reverse a Commission order absent appellant showing that it is harmed or prejudiced by the order. *Ohio Partners for Affordable Energy v. Pub. Util.*

Comm., 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, 767; *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992). No prejudice has been shown.

Proposition of Law No. III:

Ohio Power Siting Board members who are department heads may designate assistant and deputy directors to serve in their place as a member of the Board. The designee shall be counted in determining a quorum and may vote and participate in all proceedings of the Board. R.C. 121.05, App. at 4.

Appellants complain about the signatories to the Board's orders and claim the orders are invalid because some of the signatories are not the department heads identified in R.C. 4906.02(A). As noted in Proposition of Law I, this question is not properly before the Court. Even if the question were properly before the Court, Appellants offered no proof of invalidity beyond the signatures on the orders and claim that is sufficient to show the orders were improperly executed. Appellants are wrong.

Appellants ignore R.C. 121.05 which authorizes Board members relevant here to designate "any of the director's assistant directors or a deputy director *to serve in the director's place as a member of any board, committee, authority, or commission of which the director is, by law, a member*" (emphasis added). R.C. 121.05, App. at 4. The five Board members relevant here are the directors of: Agriculture, Development, Environmental Protection, Health, and Natural Resources; a designee of each of them signed at least one of the Board's orders below. *In re Black Fork* (Opinion, Order, and Certificate at 75) (January 23, 2012), Appellants' App. at 119; *In re Black Fork* (Entry on Rehearing at 32) (March 26, 2012), Appellants' App. at 209. Significantly, they are members of the

Board by law. R.C. 4906.02 makes any one holding any of those positions a Board member. R.C. 4906.02(A), Appellants' App. at 214. Accordingly, they can designate an assistant or deputy director to act for them on the Board. R.C. 121.05, App. at 4. The signature of another for the director on the Board's orders evidences a lawful designation under R.C. 121.05. There is no error or prejudice shown.

Simply, the signatures on the Board's order do not indicate irregularity, much less invalidity as appellants claim. They incorrectly rely only upon R.C. 4906.02 but that statute must be read *in pari materia* with R.C. 121.05 that specifically allows for designated signatories. R.C. 1.51, App. at 4.

Appellants failed in their burden to prove the order is invalid. This Court presumes public officers, administrative officers and the Ohio Power Siting Board, as well as all public boards, properly performed their duties and have acted regularly, in a lawful manner. *In re Application of American Transmission System, Inc., et al*, 125 Ohio St.3d 333, 337, 2010-Ohio-1841, ¶22, 928 N.E. 427, 431. To overcome the order's facial validity and presumed regularity, appellants cannot rely on bare allegations but must adduce *evidence* of irregularity. *Id.* They have not done so. Appellants have not shown the identities of signatories who are not directors. Their merit brief suggests they do not know who these individuals are, referring to them as "unknown." Appellants also have not shown that these individuals were not designated by the relevant directors or that their positions were not of an appropriate level. In short, appellants failed to sustain their burden to prove the Board's orders were not properly executed.

Proposition of Law No. IV:

The Board's order fully addresses decommissioning and should be affirmed. R.C. 4906.12, Appellants' App. at 223; R.C. 4903.13, App. at 5.

As discussed in Proposition of Law I, appellants raise issues for the first time in this appeal, issues not raised on rehearing, and, consequently, appellants deprived the Board of the opportunity to respond and deprived this Court of the Boards' discussion. Appellants' pursuit of complaints that were not raised on rehearing also deprives this Court of jurisdiction to consider them. R.C. 4903.10, Appellants' App. at 210. While the Court should decide the issues appellants raise in their second proposition of law on that basis, the Board believes the Court should also recognize that appellants' claims are groundless. The Board's order is lawful and reasonable.

- A. The decommissioning conditions, including those involving financial assurances, are within the Board's discretion the General Assembly entrusted to the Board and, accordingly, the Board's order is lawful.**

The decommissioning provisions are within the discretion that the General Assembly entrusted to the Board. The General Assembly authorized the Board to exercise broad discretion in determining the appropriate conditions. The General Assembly empowered the Board to grant a certificate, "upon *such conditions*, or modifications ... of the major utility facility *as the board considers appropriate*" (emphasis added). R.C. 4906.10, Appellants' App. at 220-222. The General Assembly did not limit this discretion regarding decommissioning. The General Assembly did not even require the

certificate include a decommissioning provision, leaving it to the Board's informed discretion. *Id.*

The Board exercised this discretion in granting Black Fork's certificate on the conditions it considered appropriate after its review of the record. That is what the General Assembly empowered it to do. Its order is legal.

B. The evidence of record supports the decommissioning requirements, including financial assurances, ordered by the Board.

Contrary to appellants' claim, the Board resolved the decommissioning issue, including financial assurances. The evidence of record supports the Board's decommissioning condition, including financial assurances, and, accordingly, that condition, and the Board's order, are reasonable.

Condition 66 to the Board's order and certificate, which includes financial assurance provisions, governs decommissioning and originates in the Staff Report rather than the Stipulation as appellants assert. Staff Report at 63-65, condition 66, Supp. at 125-127. In the Staff Report, Staff recommended the Board include that decommissioning condition in Black Fork's certificate as a precondition to the Board finding, as a factual matter, the R.C. 4906.10 criteria, including the project's probable environmental impact, and that the project represented the minimum adverse environmental impact. Staff Report at 26, 39, 63-65, Supp. at 113, 114, 125-127. Subsequently, the stipulating parties recommended that condition practically verbatim to the Board. *Compare*, Staff Report at 63-65 (Supp. at 125-127) *with* Joint Stipulation at 14-16 (Appellants' App. at 27-29). Ultimately, the decommissioning condition recommended in the Stipulation, and the Staff

Report, was adopted by the Board and became part of Black Fork's certificate. *In re Black Fork* (Opinion, Order, and Certificate at 74) (January 23, 2012), Appellants' App. at 118. The decommissioning condition is supported by the record evidence, including the Staff Report, and the Stipulation, both of which provide significant and credible evidentiary support.

Appellants cite no evidence contesting the decommissioning provision, including its financial assurances provisions, but they would have only presented a weight-of-the-evidence question if they had. Accordingly, Appellants, at best, ask this Court to second-guess the Board. The Court repeatedly and consistently has refused to do that.

Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 540, 2004-Ohio-6767, ¶ 50, 820 N.E.2d 885, 894.

C. Appellants' erroneous arguments do not satisfy their burden to show the Board's order and certificate is unlawful or unreasonable.

Appellants cannot satisfy their burden of proof simply through their characterizations and erroneous claims. Appellants' arguments are not based on the record. They do not cite evidence supporting their claims, much less evidence of such monument as to impeach, negate, and overcome the evidence supporting the Board's order and rendering that order against the manifest weight of the evidence. Appellants' claims are not a substitute for evidence and they do not satisfy their burden of proof. Simply, Appellants' claims are wrong.

- 1. Appellants are wrong claiming that O.A.C. 4906-17-08(E)(6) imposes requirements on Board certificates and claiming the final decommissioning plan can alter the Board mandates identifying what decommissioning involves.**

Appellants erroneously suggest that O.A.C. 4906-17-08(E)(6) applies to Board *decisions*. It does not. That rule, like all of O.A.C. Chapter 4906-17, applies only to *applications for certificates*, identifying the subjects an application for a certificate should address. Ohio Adm. Code 4906-17-01, 4906-17-08. It does not apply to Board orders or certificates. Moreover, the Board's order resolves decommissioning, and associated financial assurances, contrary to Appellants' claims. The order and certificate specifically describe what is required for decommissioning and how it will be accomplished. The order and certificate require applicant to obtain financial assurances for decommissioning prior to the commencement of construction. The order and certificate even provided a method for updating requirements. *In re Black Fork* (Opinion, Order, and Certificate at 74) (January 23, 2012), Appellants' App. at 27-29. The Board's order exacts specific, explicit requirements. Appellants' factual claims are erroneous.

Appellants' contention that the "decommissioning plan" given to Staff and county engineers 30 days before the pre-construction conference might result in modifications to what the Board requires for decommissioning is wrong. The Board directed, in straightforward language, *what* must be accomplished in decommissioning, including the financial assurances, in certificate condition 66, sub-paragraphs (c) through (f) and the Board described financial assurances in sub-paragraphs (g) through (i). Joint Stipulation at 14-

15, Appellants' App. at 27-28. Specifically, the Board defined "decommissioning" at this facility as including:

- Removing the wind-turbines and transporting them offsite;
- Removing buildings, cabling, electrical components, access roads, and associated facilities unless otherwise mutually agreed upon by the facility owner and/or operator and the landowner;
- Removing all physical material pertaining to the facility and associated equipment to a depth of three feet beneath the soil surface and transporting it off-site;
- Restoring any disturbed areas to the same physical condition that existed before the facility was constructed;
- Repairing damaged field-tile systems to the satisfaction of the landowner.

Id. at 14-15, condition 66(d), Appellants' App. at 27-28.

The Board provided for decommissioning comprehensively. It not only defined *what* must be done to decommission, the Board also defined *when* decommissioning had to occur and the Board set deadlines within which the applicant must complete decommissioning of the facility and individual wind turbines. *Id.* at 14, condition 66(c), Appellants' App. at 27.

The dismantling, removing, repairing and restoring defining "decommissioning" are different from the elements of the "decommissioning plan." Joint Stipulation at 14-16, condition 66(c)-(f), and (g)-(i), Appellants' App. at 27-29. The Board also described

the “decommissioning plan” explicitly; a description ignored by appellants. *Id.* The Board directed the plan shall:

- i. Indicate the intended and future use of the land following reclamation;
- ii. Describe the following: engineering techniques and major equipment to be used in decommissioning and reclamation; a surface water drainage plan and any proposed impacts that would occur to surface and ground water resources and wetlands; and a plan for backfilling soil stabilization, compacting, and grading; and,
- iii. Provide a detailed timetable for the accomplishment of each major step in the decommissioning plan, including the steps taken to comply with applicable air, water, and solid waste laws and regulations and any applicable health and safety standards in effect as of the date of submittal.

Id.

Decommissioning is, by definition, forward-looking and will require, as better information becomes available, review and adjustment at stated intervals by an independent financial consultant versed in such matters. These reviews could involve revisions to “reflect advancements in engineering techniques and reclamation equipment and standards.” *Id.* None of what the “decommissioning plan” encompasses allows Black Fork to alter the decommissioning standards outlined above and detailed in condition 66, subparagraphs (c) through (i). *Id.* Appellants’ contrary claims are wrong.

2. The Board did not delegate its duties to Black Fork.

Appellants’ claim that the Board unlawfully delegated the ability to discern the total cost of decommissioning to Black Fork is wrong. The Board did not delegate anything; nothing existed to delegate. No statute or rule required the Board to include a

decommissioning provision in the certificate. Only the record and the proper exercise of the Board's discretion based upon it, support the decommissioning provision, including financial assurances. The Board decided this case based on the record.

The Board based the financial assurances provision upon the evidence of record. The financial assurances requirements the Board included in the certificate were recommended in the Staff Report and the Stipulation. Staff Report at 64-65, Supp. at 126-127; Joint Stipulation at 15-16, condition 66(g)(h)(i), Appellants' App. at 28-29. Appellant simply chose to ignore that the Board based its condition on the uncontested evidence of record in the appropriate exercise of its discretion.

The Board is not required to adopt any condition concerning financial assurance for decommissioning. The Board's discretion is not limited by any requirement to specify an amount for the applicant to post for financial assurances. In this case, in fact, the record did not support such a structure. The evidence recommended the structure adopted by the Board where the amount posted for financial assurances is estimated in a manner prescribed by the certificate based on specific criteria. Staff Report at 64-65, condition 66(g)(h), Supp. at 126-127.

Appellants ignore the benefits of the condition the Board adopted. The system recommended to, and adopted by, the Board logically allows for adjustments to account for changes in conditions over time that would impact total decommissioning costs. Economic conditions, inflation/deflation, over 10, 20, or more years, obviously, can impact the cost of decommissioning. Changes in equipment, techniques, and standards also can impact the identity of appropriate methods of decommissioning, reclamation and disposal

that can impact the cost of decommissioning. The potential for other changes over time that might affect decommissioning costs also exist. For this reason, if no other, the flexible approach recommended in the Staff Report and the Stipulation and adopted by the Board provides for the amount of the financial assurance to change throughout the life of the project.

3. There is no statutory right to participate beyond the case involving Black Fork's application for a certificate.

Appellants' claim to a "statutory right to participation" beyond the hearing on the application for a certificate is wrong. They cite R.C. 4906.08 as authority. R.C. 4906.08 identifies parties, it does not grant a right to participate beyond the certification proceeding. R.C. 4906.08, Appellants' App. at 219. Appellants' status as parties in the proceedings on Black Fork's certificate application does not provide them a special right to oversee the project. See, e.g. R.C. 4906.97, App. at 5-6. Appellants participated in the proceeding involving Black Fork's application for a certificate because the Board granted them intervention in that proceeding. That proceeding ended with the Board's decision on Black Fork's application leading to the final appealable order which is now before this Court. See, R.C. 4903.13, App. at 5. Simply, the *General Assembly* did not grant the statutory right appellants claim.

4. Appellants are wrong claiming the decommissioning provision is against the manifest weight of the evidence.

Finally, appellants are wrong claiming the Board's decommissioning condition, condition 66, is manifestly against the weight of the evidence because of appellants'

claim it does not serve the public interest, convenience, and necessity. Again, appellants do not cite any evidentiary support for their claims. Appellants ignore the Board's order regarding decommissioning is supported by the evidence of record in this case, as discussed previously. Appellants ignore the statutory subject of the public interest, convenience, and necessity finding. That finding does not apply to a condition but, instead, it is a finding relating to the "facility," the entire project. R.C. 4906.10(A)(6), Appellants' App. at 220. Appellants do not argue the evidence of record does not support the Board's finding that the *facility* supports the public interest, convenience, and necessity. Finally, the Board decided decommissioning, contrary to Appellants' claims.

The Board's order is lawful and reasonable. It results from the Board's appropriate exercise of its discretion and it is supported by the evidence of record. The Board should be affirmed.

Proposition of Law No. V:

Appellants' right to participate in the power siting process is statutory, not constitutional, and Appellants were provided the process required by R.C. Chpt. 4906. *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248, 638 N.E.2d 550, 553 (1994).

The record shows that the Board provided Appellants with the statutory process they were entitled to pursuant to R.C. Chpt. 4906. The Board based its decision upon the extensive record developed in the hearing process – a process that Appellants participated in at every step. And, contrary to Appellants' claims, the Board's decision is not based solely upon the Stipulation. Rather, the Stipulation was a recommendation to the Board and only a single, albeit important, piece of an extensive evidentiary record. The Board

only adopted this recommendation after carefully weighing all the evidence including the Staff Report which also recommended the conditions adopted by the Board. Thus, the Board's adoption of the Stipulation is completely consistent with the Court's precedent. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 19. The Board acted in conformity with the R.C. Chpt. 4906 and, therefore, the Appellants' alleged "due process" claim must fail.

A. Appellants were provided the statutory process set forth in R.C. Chpt. 4906, which is the only process the Appellants are entitled to by law.

Appellants incorrectly claim that their constitutional "procedural due process" rights were violated by the Board. A party is entitled only to the "due process" protections of the United States or Ohio Constitutions if the party shows that it was actually deprived of a constitutionally protected property or liberty interest. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 6, 773 N.E.2d 502. A property interest has been defined as a legitimate claim of entitlement to a tangible benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A liberty interest has been defined as freedom from bodily restraint and punishment. *Hayden at* ¶ 14.

Appellants have no constitutionally protected property or liberty interest at issue here. Appellants have no property interest because none of the turbines will be located on the Appellants' property. Nor will the turbines limit the Appellants' usage of their property. Further, the Appellants have no liberty interest at stake because they are not being restrained or punished in any fashion. The Board's siting authority was created by

the General Assembly. This Court has stated in various decisions that there is no constitutional right to participate in a statutorily created process. *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248, 1994-Ohio-469, 638 N.E.2d 550, 553 (1994). This precedent applies to this case with equal vitality.

This Court previously recognized that R.C. Chpt. 4906 is the applicable statutory process for involving stakeholders in the power siting process. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012 -Ohio- 878, 966 N.E.2d 869. That process includes that contained in R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23.

R.C. 4906.12, Appellant's App. at 223. In *Buckeye Wind*, the Court was presented with the same argument as here but the Court did not apply accept the argument, rather it focused instead on whether the Board followed all the procedural requirements of R.C. Chpt. 4906. *Id.* at ¶¶ 8-12. The *Buckeye Wind* Court held that the Board's procedure was lawful because it was consistent with the requirements of R.C. Chpt. 4906. *Id.*

As it did in *Buckeye Wind*, the Court should focus on whether or not the statutory process set forth in R.C. Chpt. 4906 was followed in this case. The following are the numerous procedural steps the Board took to ensure a fair, open and lawful process:

- A public informational hearing was held on December 16, 2010, shortly after the Company notified the Board of its intention to apply for a certificate.
- The Company filed its application on March 10, 2011, which was available to the public on the Board's docketing information system.

- On August 30, 2011, the Appellants were granted intervention in the case. *In re Black Fork* (Entry) (August 30, 2011), Supp. at 1-7 (Entry granting the Appellants' motions to intervene). This provided each Appellant "party status" and allowed each Appellant the right to call and examine witnesses. R.C. 4906.08(A)(3) and (C), Appellants' App. at 219.
- The Staff Report was filed on August 31, 2011 and was served on all Appellants. R.C. 4906.07(C), Appellants' App. at 217. The Staff Report was also available to the public through the Board's public docketing information system. *Id.*
- A local public hearing was held in Shelby, Ohio on September 19, 2011.
- All Appellants were able to participate in pre-hearing settlement discussions. All Appellants were able to provide input or criticism regarding application, the Staff Report, and Stipulation. Ohio Adm. Code 4906-7-10, App. at 3-4.
- All Appellants were able to review the proposed Stipulation prior to the adjudicatory hearing. The Stipulation was filed on the public docketing system and served on the Appellants prior to the adjudicatory hearing.
- An adjudicatory hearing was held October 11, 12, and 13, 2011. All Appellants attended and participated in the adjudicatory hearing. All of the Appellants provided direct testimony at the adjudicatory hearing. Tr. Vol. IV at 516-517, Appellants' Supp. at 77-78 (Transcript Index, indicating that

all of the Appellants' testimony was admitted into the record). They also cross-examined Company and Staff witnesses. Ohio Adm. Code 4906-7-05, Appellants' App. at 244.

- All of the Appellants were allowed to make closing arguments at the end of the adjudicatory hearing and filed post-hearing briefs.
- The Board issued a 75 page Opinion, Order, and Certificate that thoroughly discusses all the evidence admitted into the record.
- All Appellants filed applications for rehearing regarding the Opinion, Order, and Certificate. The Board considered the issues raised by the Appellants in their applications for rehearing and addressed each Appellants' arguments in the Entry on Rehearing.

At every step of the hearing process, Appellants were actively engaged and involved. They attended and testified at a public hearing and all witnesses helped develop an evidentiary record, filed post-hearing briefs, and sought rehearing before filing this appeal. Thus, the Board's process was in conformity with the R.C. Chpt. 4906 and Appellants' due process claims are baseless.

B. Appellants mischaracterize the extent of Staff Witness Jon Pawley's testimony and ignore the fact that they were allowed to cross-examine Mr. Pawley on any subject area.

Staff Witness Pawley testified extensively in support of the Stipulation. Tr. Vol. IV at 595-679, Appellants' Supp. at 83-167. He answered questions from Staff's attorney, the Company's attorney, both ALJs, and all of the Appellants. *Id.* He responded to

over 100 questions while testifying. *Id.* Despite all this, Appellants point to a handful of instances when Mr. Pawley was unable to answer a question and claim that this constitutes a violation of their due process rights. The record, however, shows that Appellants' allegations are unfounded.

Mr. Pawley was the project manager on the Black Fork Staff investigation. He managed the team of Staff members that performed investigations on the project and oversaw the drafting of the Staff Report by the various Staff members. Tr. Vol. IV at 597, Appellants' Supp. at 85; Supplemental Direct of Jon Pawley at 2, Supp. at 10. Although Appellants claim that Mr. Pawley "was not qualified" to testify regarding certain subject areas, none of the Appellants objected to Mr. Pawley's qualifications or his testimony during the hearing. During the hearing, Mr. Pawley discussed in detail why Staff supported the Stipulation and clarified certain questions the ALJs had regarding specific conditions. Specifically, during his direct testimony, Mr. Pawley discussed conditions 5, 12, 13, 18, 23, 25, 31, 33, 37, 44, 51, 53, 57, 58, 65 and 66(C). Tr. Vol. IV at 595-626, Appellants' Supp. at 83-114. This testimony supports the Board's adoption of the Stipulation and dispels any claim that Mr. Pawley did not have the "knowledge necessary to testify" about the conditions and Stipulation.

Appellants ignore the vast majority of Mr. Pawley's testimony that supports the Board's decision. They, instead selectively point to the few portions of Mr. Pawley's testimony where he allegedly didn't know an answer. This misrepresents the record and, more importantly, it fails to prove Appellants' alleged "due process" claim. Although Appellants may not like some of Mr. Pawley's answers, it's undeniable they had the

opportunity to cross-examine Mr. Pawley. Tr. Vol. IV at 629-676, Appellants' Supp. at 117-164 (Cross-examination of Jon Pawley by Appellants Mr. Warrington, Ms. Price, Mr. Heffner and Mr. Biglin). At no time did Staff or the ALJs prevent the Appellants from asking Mr. Pawley any questions except for questions that were objected to for evidentiary reasons. In fact, Appellants were encouraged by the ALJs to ask Mr. Pawley any question they wanted and were told that the ALJs would not "prejudge" any of the Appellants' questions. Tr. Vol. IV at 593-595, Appellants' Supp. at 81-83. Mr. Pawley's inability to answer a handful of questions does not prove that Appellants were denied due process. Rather, appellants' questions and Mr. Pawley's testimony were simply more factors the Board considered when it weighed all the evidence. The Board determined, as the fact-finder, that Mr. Pawley's testimony, in conjunction with all the other evidence in the record, supported adoption of the Stipulation.

Although Appellants label their argument as a "due process claim", they are really asking this Court to second-guess the factual determinations made by the Board. But the Appellants already had their "day in court" and it is inappropriate to ask this Court to reweigh the evidence considered by the Board. *Chester Twp. v. Power Siting Comm'n*, 49 Ohio St.2d 231, 238, 361 N.E.2d 436, 440 (1977) (The Court recognized that the Board, as the finder of fact, has been granted considerable discretion by the General Assembly to determine the weight to be accorded to testimony)

C. Appellants had the opportunity to cross-examine twelve different witnesses regarding the proposed Stipulation.

Appellants paint an inaccurate picture of the proceeding below by suggesting that Staff Witness Pawley was the only witness that testified in support of the Stipulation and the only witness that could answer the Appellants' questions. In reality, twelve witnesses testified in support of the Stipulation. Black Fork, who had the burden of proof, presented nine of these witnesses. Tr. Vol. II at 25, Supp. at 20; Tr. Vol. III at 264, Supp. at 26 (transcript index pages, indicating list of Company witnesses)³ Not only did Appellants have the ability cross-examine all witnesses regarding their concerns, Appellants actually cross-examined witnesses regarding the very issues Appellants raise in their merit brief.

For example, Appellants highlight the fact that Mr. Pawley was unable to answer some questions regarding condition 44 (regarding ice throw) of the Stipulation. Merit Brief at 6. However, Company Witness Jay Haley testified specifically about that condition at some length. Prefiled Supplemental Testimony of Jay Haley at 2, Supp. at 16. Mr. Haley was available and subject to cross-examination regarding condition 44, and four of the Appellants actually cross-examined him. More importantly, three of the Appellants asked Mr. Haley specific questions about ice throw, which condition 44 specifically addresses. Tr. Vol. III at 367, 375, 376, Supp. at 27, 28, 29. In addition, Appellants claim that they were "deprived" of their "statutory right" to cross-examine

³ The following Company witnesses filed written direct testimony and testified live the hearing: David Stoner, Scott Hawken, James Mawhorr, Barry Yurtis, Courtney Dohoney, Dale R. Arnold, Jay Haley, Kenneth Kaliski, and Diane J. Mundt.

witnesses regarding decommissioning. Appellants' Merit Brief at 11, 30-31. This too is not true. Appellants Price and Biglin both questioned Black Fork witness Scott Hawken about decommissioning and condition 66, which specifically addresses decommissioning. Tr. Vol. II at 145-146, 176-177, Supp. at 21-22, 23-24. Further, as discussed above in Proposition of Law No. IV, the record contains substantial evidence regarding condition 66 and decommissioning. This evidence went largely unchallenged by the Appellants.

Appellants had ample opportunity to cross-examine any witnesses regarding any issue. Simply because they failed to do so does not mean the Appellants' "due process" rights were violated. To the contrary, Appellants were provided every opportunity to fully participate in the hearing process as required by R.C. Chpt. 4906.

D. Appellants had the opportunity to subpoena and cross-examine Staff witnesses but failed to do so.

The Appellants claim that "they were not afforded an opportunity to cross-examine" certain Staff members. Appellants' Merit Brief at 29-30. This is not correct. The Appellants could have subpoenaed any Staff members they wanted pursuant to the Board's rules. Ohio Adm. Code 4906-7-08(A), App. at 1. The fact they chose not to do so is their omission and not the fault of the Board or its Staff. Appellants may claim that they were unaware of their right to subpoena Staff witnesses because they were not represented by counsel. This Court has rejected such excuses on numerous occasions. "It is well established that *pro se* litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel." *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800

N.E.2d 25, ¶ 10, quoting *Sabouri v. Ohio Dept. of Jobs & Family Servs.*, 145 Ohio App. 3d 651, 654, 763 N.E.2d 1238 (2001). Appellants chose to proceed *pro se* in the case below. They should be held to the same standard as litigants represented by counsel, which includes a presumed knowledge of the Board's rules.⁴

Appellants' entire due process argument is based upon the incorrect assumption that Staff was obligated to call certain witnesses. For purposes of the adjudicatory hearing before the Board, Staff was considered a party just like the Appellants and the Company. Ohio Adm. Code 4906-7-03(C), Appellants' App. at 243. Staff had the right to decide what witnesses it would present in support of its case. Although Staff initially prefiled testimony of various Staff witnesses, once the Stipulation was reached and signed, Staff decided to present only Jon Pawley in order to support the Stipulation. The pre-filed testimony of other Staff witnesses was never sponsored or admitted into the record, nor did the Board consider or rely upon it in any way. Staff, however, had no obligation to call any particular witness, let alone call certain witnesses simply to appease adversarial parties. Appellants were provided the exact process they were entitled to under R.C. Chpt. 4906. They were not entitled to anything more.

E. Appellants testified live and filed written direct-testimony, all of which was admitted into evidence and weighed by the Board in its decision.

It is undeniable that all of the Appellants had a full and fair opportunity to present evidence in support of their case. All of the Appellants filed written direct testimony,

⁴ The appellants demonstrated familiarity with Board rules during the case. CITES.

which was admitted into the record.⁵ Tr. Vol. IV at 516-517, Appellants' Supp. at 77-78 (transcript Index, indicating that Appellants' testimony was admitted into the record). All the Appellants had the ability to testify live at the adjudicatory hearing. *Id.* at 692-713, Supp. at 31-52 (John Warrington's testimony); *Id.* at 713-723, Supp. at 52-62 (Alan Price's testimony); *Id.* at 724-732, Supp. at 63-71 (Catherine Davis' testimony); *Id.* at 732-743, Supp. at 71-82 (Brett Heffner's testimony); *Id.* at 743-770, Supp. at 82-109 (Gary Biglin's testimony). Further, the Board considered and weighed Appellants' testimony, as discussed in the Board's order. *In re Black Fork* (Opinion, Order, and Certificate at 52-70) (January 23, 2012), Appellants' App. at 96-114. Thus, Appellants' claim that they were "prohibited from presenting evidence" is patently false.

The Appellants' own words best describe the steps the ALJs and Staff Witness Pawley took to ensure that Appellants received a fair process. Ms. Price thanked the ALJs for "taking the time to teach" the Appellants about the process and "leading [the Appellants] through" the hearing process. Tr. Vol. IV at 806, Supp. at 111. She also thanked Staff Witness Jon Pawley, stating that "he couldn't have been nicer" and that he "treated [the Appellants] as if they were human beings and not intruders" throughout the hearing process. *Id.* Mr. Biglin also thanked the ALJs for their patience. Tr. Vol. IV at 803, Supp. at 110. These do not sound like the words of people who were denied a fair hearing. Appellants received the process they were entitled to and more. Their purported "due process" claims should be denied.

⁵ Objectionable portions of testimony, of course, would not have been admitted.

F. *Ohio Bell* is distinguishable from this case and does not support Appellants' due process claim.

Appellants rely heavily upon *Ohio Bell Tel. Co. v. Public Util. Comm.*, 301 U.S. 292 (1937) to support their "due process" argument. The facts of *Ohio Bell*, however, are readily distinguished. In *Ohio Bell*, the United States Supreme Court held that Public Utilities Commission of Ohio denied a utility's right to a fair and open hearing. *Id.* at 300. While setting the utility's rates, the Commission took judicial notice of property value information that was not introduced at the hearing and was not part of the record. *Id.* at 296-298. The Commission denied the utility an opportunity to examine, explain, or challenge the property value information and did not disclose the underlying documents that allegedly supported its decision. *Id.* at 298. The Commission's actions ultimately cost the utility millions of dollars in customer rebates. *Id.*

Unlike in *Ohio Bell*, the Board here based its decision solely upon evidence in the record. All of this evidence was admitted during a hearing that the Appellants actively participated in without limitations. They had the opportunity to examine and challenge all the evidence that supported the Board's decision and to present their own evidence at the hearing. Further, unlike the utility in *Ohio Bell*, which had a substantial property interest at stake, the Appellants have no identifiable property or liberty interest at stake. Rather, Appellants have only a statutory right to be involved in the siting process. Because the Board's conduct was completely consistent with the statutory process set forth in R.C. 4906, Appellants' due process rights were not violated.

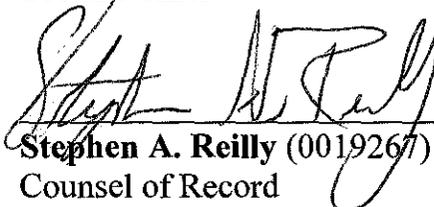
CONCLUSION

Based upon the foregoing, the Board's decision should be affirmed.

Respectfully submitted,

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Ohio Attorney General

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Section Chief



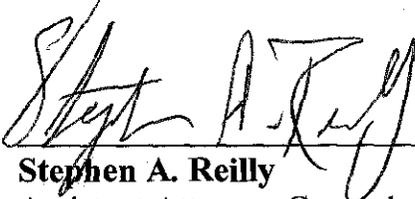
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 15th day of October, 2012.



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4906-7-08 Subpoenas.

(A) The board, any board member empowered to vote, or the administrative law judge assigned to a case may issue subpoenas, upon their own motion or upon motion of any party or the staff. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such a person to produce the books, papers, documents, or other tangible things described therein. A copy of the motion for a subpoena and the subpoena itself should be submitted to the board, any board member entitled to vote, or the administrative law judge assigned to the case for signature of the subpoena. A copy of the motion for a subpoena and a copy of the signed subpoena shall be docketed and served upon the parties of the case.

(B) Arranging for service of a signed subpoena is the responsibility of the requesting person. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy to such person, or by reading it to him or her in person, or by leaving a copy at his or her place of work or residence. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division.

(C) The board or the administrative law judge may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

(D) A subpoena may require a person, other than a member of the board staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in paragraph (A) of rule 4906-7-07 of the Administrative Code. Such a subpoena is subject to the provisions of paragraph (H) of rule 4906-7-07 of the Administrative Code as well as paragraph (C) of this rule.

(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the board no later than five days prior to the commencement of the hearing.

(F) Any persons subpoenaed to appear at a board hearing, other than a party or an officer, agent, or employee of a party, shall receive the same witness fees and mileage expenses provided in civil actions in courts of record. For purposes of this paragraph, the term "employee" includes consultants and other persons retained or specially employed by a party for purposes of the proceeding. If the witness is subpoenaed at the request of one or more parties, the witness fees and mileage expenses shall be paid by such party or parties. If the witness is subpoenaed upon motion of the board, any board member entitled to vote, or the administrative law judge, the witness fees and mileage expenses shall be paid by the state, in accordance with section 4903.05 of the Revised Code. Unless otherwise ordered, an application for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit sufficient to cover the required witness fees and mileage expenses for one day's attendance. The deposit shall be

tendered to the fiscal officer of the board, who shall retain it until the hearing is completed, at which time the officer shall pay the witness the necessary fees and expenses, and shall either charge the party making the deposit for any deficiency or refund to such party any surplus remaining from the deposit.

(G) If any person fails to obey a subpoena issued by the board, any board member entitled to vote or an administrative law judge, the board may seek appropriate judicial relief against such person under section 4903.02 or 4903.04 of the Revised Code.

(H) A sample subpoena is provided in the appendix to this rule.

ted to the board, any board member entitled to vote, or the administrative law judge assigned to the case for signature of the subpoena. A copy of the motion for a subpoena and a copy of the signed subpoena shall be docketed and served upon the parties of the case.

(B) Arranging for service of a signed subpoena is the responsibility of the requesting person. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy to such person, or by reading it to him or her in person, or by leaving a copy at his or her place of work or residence. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division.

(C) The board or the administrative law judge may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

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of the Revised Code. Unless otherwise ordered, an application for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit sufficient to cover the required witness fees and mileage expenses for one day's attendance. The deposit shall be tendered to the fiscal officer of the board, who shall retain it until the hearing is completed, at which time the officer shall pay the witness the necessary fees and expenses, and shall either charge the party making the deposit for any deficiency or refund to such party any surplus remaining from the deposit.

(G) If any person fails to obey a subpoena issued by the board, any board member entitled to vote or an administrative law judge, the board may seek appropriate judicial relief against such person under section 4903.02 or 4903.04 of the Revised Code.

(H) A sample subpoena is provided in the appendix to this rule.

4906-7-10 Prehearing conferences.

(A) In any proceeding, the board or the administrative law judge may, upon motion of any party or upon their own motion, hold one or more prehearing conferences for the purpose of:

(1) Resolving outstanding discovery matters, including:

(a) Ruling on pending motions to compel discovery or motions for protective orders.

(b) Establishing a schedule for the completion of discovery.

(2) Ruling on any other pending procedural motions.

(3) Identifying the witnesses to be presented in the proceeding and the subject matter of their testimony.

(4) Identifying and marking exhibits to be offered in the proceeding.

(5) Discussing possible admissions or stipulations regarding issues of fact or the authenticity of documents.

(6) Clarifying the issues involved in the proceeding.

(7) Discussing or ruling on any other procedural matter which the board or the administrative law judge considers appropriate.

(B) Reasonable notice of any prehearing conference shall be provided to all parties. Unless otherwise ordered for good cause shown, the failure of a party to attend a prehearing conference constitutes a waiver of any objection to the agreements reached or rulings made at such conference.

(C) Following the conclusion of a prehearing conference, the board or the administrative law judge may issue an appropriate prehearing order, reciting or summarizing any agreements reached or rulings made at such conference. Unless otherwise ordered for good cause shown, such order shall be binding upon all persons who are or subsequently become parties, and shall control the subsequent course of the proceeding.

1.51 Special or local provision prevails as exception to general provision.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

121.05 Assistant directors.

Except as otherwise provided in this section, in each department, there shall be an assistant director designated by the director of that department. In the department of health, there shall be two assistant directors, each of whom shall be designated by the director of health. In the department of transportation, there shall be an assistant director for business management, an assistant director for field operations, and an assistant director for transportation policy, each of whom shall be designated by the director of transportation. In the department of insurance, the deputy superintendent of insurance shall be the assistant director. In the department of administrative services, there shall be two assistant directors, each of whom shall be designated by the director of administrative services. In the department of commerce, there shall be two assistant directors, each of whom shall be designated by the director of commerce. In the department of job and family services, there may be up to two assistant directors, each of whom shall be designated by the director of job and family services. In each department with an assistant director, the assistant director shall act as director in the absence or disability of the director and also shall act as director when the position of director is vacant, except that in the department of transportation, the department of health, the department of commerce, the department of administrative services, and the department of job and family services, the director shall designate which assistant director shall act as director in the director's absence. In each department without an assistant director, the director shall designate a deputy director to act as director in the absence or disability of the director.

A director may designate any of the director's assistant directors or a deputy director to serve in the director's place as a member of any board, committee, authority, or commission of which the director is, by law, a member. The designee, when present, shall be counted in determining whether a quorum is present at any meeting. The designee may vote and participate in all proceedings and actions of the board, committee, authority, or commission, provided that the designee shall not execute or cause a facsimile of the designee's signature to be placed on any obligation, or execute any trust agreement or indenture. The designation shall be in writing, executed by the designating director, filed with the secretary of the board, committee, authority, or commission, and shall be in effect until withdrawn or superseded by a new designation.

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.

4906.97 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.

4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making

process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas company, not later than the end of the test period.

(D) A natural gas company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges,

tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.