ORIGINAL

In The
SUPREME COURT OF OHIO

Union Neighbors United, Robert McConnell, Diane McConnell, and Julia F. Johnson, *et al.*	:	Case No. 13-1874
Appellants,	:	On appeal from the Ohio Power Siting Board, Case No. 12-160-EL-BGN, *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

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MERIT BRIEF
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INTRODUCTION

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

Applicant Champaign Wind, LLC selected Champaign County as the site of the proposed wind farm, among other reasons, because it offers some of the best wind resources in Ohio. A substantial number of landowners have chosen to put wind turbines on their land. Most of these landowners are farmers who want to preserve agricultural land use choices for

future generations. Wind turbines provide host farms with a significant source of revenue, and supplement farming revenues that have eroded due to encroaching residential and commercial development.

No major utility project is "impact free." That is both impractical and nowhere required by law. Ohio law promotes alternative energy sources, such as wind power, and has empowered the Board to make this happen. The law contemplates that the Board act responsibly when considering a project such as the one proposed here, and responsible regulatory oversight equates with identifying potential impacts and directing reasonable minimization (not elimination) of those impacts. The Board did that below when it issued a certificate to construct and operate a commercial wind farm subject to over 70 different conditions that comprehensively address reasonably anticipated impacts, including many of the concerns[1] raised by the appellants in this case. These conditions strike a careful balance between public and private interests and provide reasonable "impact mitigation" while allowing the proposed commercial wind farm to move forward.

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

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[1] For example, noise (Condition 46), shadow flicker (Condition 47), setbacks (Condition 44), transportation routes and road improvements and repairs (Conditions 27-30), ice throw (Condition 42), and decommissioning (Condition 52) to name a few.

isfied statutory and regulatory requirements. Its decision is reasonable and lawful, and should be affirmed.

STATEMENT OF THE FACTS AND CASE

Champaign Wind, LLC (Champaign Wind, Company, or Applicant) sought permission to construct a commercial wind-powered electric generation facility on approximately 13,000 acres of leased private land (largely rural farmland) in Champaign County Ohio. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN (*Champaign Wind*) (Opinion, Order, and Certificate at 2-3) (*Order*) (May 28, 2013), UNU App. at 13-14.[2] It proposed to construct up to 56 wind turbine generators as part of this project often referred to as "Buckeye II." This case is, in many respects, not unlike its predecessor case, "Buckeye I," where the Board granted Buckeye Wind, LLC, a certificate to construct a similar size wind farm in Champaign County.[3] Nonetheless, the application in this case was subjected to significant scrutiny by all parties.

The Board-ordered conditions[4] are supported by substantial evidence adduced during several weeks of adjudicatory hearings. This support includes the project application itself, considerable supporting testimony, both pre-filed and live, and related documentary evi-

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[2] References to the appendix of appellant UNU, Robert & Diane McConnell, and Julia Johnson are denoted "UNU App. at ___;" references to the supplement of appellant UNU are denoted "UNU Supp. at ___;" references to appellee's attached appendix are denoted "App. at ___;" references to appellee's supplement are denoted "Supp. at ___."

[3] On appeal, the Board's decision was affirmed by the Court. *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869.

[4] In all, the Board ordered the appellant to comply with over 70 conditions designed to reasonably mitigate known or foreseeable project impacts.

dence. There was, to be sure, conflicting testimony offered as well, a testament in part to the great lengths to which appellant was afforded opportunities to be heard below. In all, 36 witnesses presented over 3,000 pages of transcribed testimony and sponsored hundreds of pages more in well over 100 documentary exhibits presented during the three weeks of hearings. This was on the heels of a local public hearing held in North Lewisburg, Ohio, where members of the public appeared to present their viewpoints, both pro and con, in over 400 pages of transcribed remarks. In addition to the lengthy hearing, the Board afforded the appellant two rounds of issue briefing and, following issuance of the Board's Order and Certificate, the opportunity to plead its case on rehearing to the Board.

While the appellants agree with many of the conditions imposed by the Board, they also advocate for precision and impractical extremes in other conditions that appear intended simply to defeat the proposed project. The Court must decide, in the main, two principal questions: (1) does the certificate, subject to its numerous and comprehensive conditions, reasonably minimize anticipated project impacts; and, (2) are the required findings under R.C. 4906.10 made by the Board supported by some evidence of record? The Court's studied review of the Board's decision will support an affirmative answer on both questions.

The Court should affirm.

ARGUMENT

Proposition of Law No. I:

> **"Constitutional issues should not be decided by this Court unless absolutely necessary."** ***In re Boggs*****, 50 Ohio St.3d 217, 221, 553 N.E.2d 676 (1990).**

This Court does not determine the constitutionality of a statute unless "such a determination is essential to the rendition of a proper judgment in the case." *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, ¶ 13, quoting *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944), syllabus. The Court need not decide the constitutional issue in this case to render a proper judgment. Appellants Union Neighbors United, Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively UNU) lack standing to challenge the statute's constitutionality. Furthermore, the Board's passing reference to R.C. 4928.64(B)(3) neither renders the Board's decision unlawful nor does it do any harm to UNU.

A. UNU lacks standing to challenge the constitutionality of R.C. 4928.64(B)(3).

"The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied." *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547, 557, 629 N.E.2d 414 (1994). The constitutional issue before the Court here is analogous to that in *Industrial Energy Consumers*. There, a group of environmental intervenors made a Commerce Clause challenge to a state statute that, they argued,

created a preference for Ohio coal. *Id.* The Court found that the intervenors lacked standing because they were not within the class against whom the statute applied. *Id.*

Similarly, UNU is not within a protected class. It argues that R.C. 4928.64(B)(3) is unconstitutional because it treats Ohio electric distribution utilities and out-of-state renewable energy suppliers that participate in the renewable energy market differently. UNU Merit Brief at 12-16. UNU is neither an electric distribution utility nor an out-of-state renewable energy supplier. In fact, UNU does not participate in the renewable energy market at all, and this case does not even involve a renewable energy market transaction. Consequently, UNU is not within the class against whom the statute applies and does not have standing to challenge the statute.[5]

Even if this case did involve a renewable energy market transaction between an Ohio electric distribution utility and an out-of-state supplier, the Board would not apply R.C. 4928.64(B)(3) because it lacks the authority to do so. The Board's enabling statutes are contained in R.C. Chapter 4906. The Board may cite R.C. 4928.64, as it did, to justify its decisions from a public policy standpoint, but it has no authority to decide matters under R.C. 4928.64.

Indeed, the Board did not base its decision on R.C. 4928.64(B)(3) at all. In its Order, the Board found that the project was in the public interest as required by R.C. 4906.10(A)(6), by recognizing the potential benefit of the project as it relates to R.C. 4928.64. *Champaign*

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[5] UNU also challenges the constitutionality of R.C. 4928.61 alleging that it redistributes Advanced Energy Fund monies in a "geographically discriminatory manner." UNU Merit Brief at 15. UNU similarly does not have standing to make this challenge. General state taxpayers do not have standing to raise claims based on State expenditures because their injury is not direct. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345, 126 S.Ct. 1854, 164 L.E.2d 589 (2006).

Wind (Order at 35) (May 28, 2013), UNU App. at 46. In response to UNU's argument, the Board, in its Entry on Rehearing, stated that "even if Section 4928.64(B), Revised Code, were not at issue, the Board finds that the project serves the purpose of delivering energy to Ohio's bulk power transmission system in order to serve the generation needs of electric utilities and their customers..." *Champaign Wind* (Entry on Rehearing at 20-21) (Sep. 30, 2013), UNU App. at 134-135.

UNU also lacks standing under the Commerce Clause. The Commerce Clause grants rights to entities attempting to do business across state boundaries. *Dennis v. Higgins*, 498 U.S. 439, 448, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). It benefits those engaged in interstate commerce. *Id.* at 449. UNU is not engaged in interstate commerce. It is a group of individual residents and a nonprofit corporation formed to promote the safety and well-being of the Champaign County community opposing a wind project's siting. UNU Merit Brief at 2-3. UNU does not have standing to raise this constitutional challenge.

B. The Board's reference to R.C. 4928.64(B)(3) neither affects the outcome of the case nor harms UNU.

This Court need not reach the constitutional implications of a question if it does not affect the outcome of a case. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, 931 N.E.2d 1061, ¶20. The constitutional question at issue does not affect the outcome of the case and the Court should decline to decide it.

To grant a certificate for a major utility facility, the Board must find that a project is in the public interest, convenience, and necessity. R.C. 4906.10(A)(6), App. at 2.[6] The

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[6] R.C. 4906.10(A)(6) does not provide how the Board is to make this determination.

Board provided adequate justification, apart from R.C. 4928.64, for this finding. It found that the Champaign Wind project will:

- benefit "the environment and consumers,"
- deliver energy to Ohio's bulk power transmission system to serve the generation needs of electric utilities and their customers,
- have minimal aesthetic impact on the local community,
- appropriately address health and safety concerns, and
- avoid alteration of transportation and communication resources available to the community.

Champaign Wind (Order at 72-73) (May 28, 2013), UNU App. at 83-84; (Entry on Rehearing at 20-21) (Sep. 30, 2013), UNU App. at 134-135.

UNU mistakenly asserts that the "only basis" for the Board's finding was R.C. 4928.64(B), which requires "at least one-half of the renewable energy resources implemented by the utility or company" to be met through facilities located in Ohio. UNU Merit Brief at 12. This is simply false. The Board specifically stated that the in-state renewable energy requirement merely "adds support" to a finding that the project is in the public interest, convenience and necessity. *Champaign Wind* (Order at 35) (May 28, 2013), UNU App. at 46.

The Board's decision would not change even if, *arguendo*, this Court finds R.C. 4928.64(B)(3) unconstitutional. The Board found that, *even without considering R.C. 4928.64(B)*, the project would satisfy the public interest, convenience, and necessity because the project would deliver energy to Ohio's bulk power transmission system. *Champaign Wind* (Entry on Rehearing at 20-21) (Sep. 30, 2013), UNU App. at 134-135.

The project will satisfy the alternative energy benchmarks in R.C. 4928.64(B)(1) and (2) regardless of whether the Court finds R.C. 4928.64(B)(3) unconstitutional.

Even if the Court were to find R.C. 4928.64(B)(3) unconstitutional, UNU has established no prejudice, requiring the Court to uphold the Board's decision. "It is well-settled that this court will not reverse an order of the commission as unreasonable or unlawful because of an error of the commission, if such error did not prejudice the party seeking such reversal." *City of Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 161 378 N.E.2d 480 (1978). *See City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 365, 86 N.E.2d 10 (1949).

The Board found the project to be in the public interest, convenience, and necessity. Even without reference to R.C. 4928.64(B)(3), the Board had ample support to find that the project satisfied the public interest, convenience, and necessity. Because the Board's reference to R.C. 4928.64(B)(3) does not affect the outcome of the case, a decision about the constitutionality of R.C. 4928.64(B)(3) is not essential to render a judgment. The reference to R.C. 4928.64(B)(3) did no harm to UNU.

If the Court reaches the merits of this argument and finds R.C. 4928.64(B)(3) unconstitutional then this Court should find that this provision is severable from the rest of the statute. R.C. 1.50 states:

> if any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the

> invalid provision or application, and to this end the provisions are severable.

The mandates of R.C. 4928.64 can be achieved without giving effect to R.C. 4928.64(B)(3). Therefore, if found unconstitutional, this provision should be severed from the statute. *Cleveland v. State,* Slip Opinion, 2014-Ohio-86.

In sum, this case is not the proper vehicle for UNU's challenge. The Court declines to hear constitutional issues unless absolutely necessary. It is far from necessary to decide the constitutional issue presented by UNU. Therefore, the Court should decline to decide this issue.

C. Should the Court choose to reach the merits, it should find that R.C. 4928.64(B)(3) is constitutional.

The application of R.C. 4928.64(B)(3) falls outside the scope of the Dormant Commerce Clause because the State is acting as a market participant and therefore the market-participant doctrine applies. The market-participant doctrine differentiates between a State acting in its distinctive governmental capacity and a State acting in the more general capacity of a market participant. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). A state is only subject to the limitations of the Commerce Clause if it is acting in its governmental capacity. Here, the State is acting as a market participant. The State has created and branded its own product in commerce. Therefore, the State has not violated the Dormant Commerce Clause by enacting R.C. 4928.64(B)(3).

Furthermore, if this Court finds that the dormant Commerce Clause does apply then it should still find the statute to be valid. The "'negative' aspect of the Commerce Clause pro-

hibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening-out-of-state competitors." *Gen. Motors Corp. v. Tracy*, 73 Ohio St.3d 29, 30-31, 652 N.E.2d 188 (1995), *aff'd*, 519 U.S. 278, 117 S.Ct. 811 (1997). However, the Commerce Clause's limitation on state regulatory power "is by no means absolute" and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). State statutes that specifically distinguish interstate commerce from other forms of commerce are struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Gen. Motors Corp. v. Tracy*, 73 Ohio St.3d 29, 31, 652 N.E.2d 188 (1995).

R.C. 4928.64(B)(3) is not a regulatory measure designed to benefit in-state economic interests by burdening out-of-state competitors. Rather, the statute is intended to promote alternative energy generation that protects the State's environment. Electricity must be generated to satisfy the insatiable energy demands of residential, small business, and large industrial customers. The Court should find that the statute promotes legitimate state policy and economic ends unrelated to economic protectionism.

Proposition of Law No. II:

> **The Commission has broad discretion in the conduct of its hearings. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264, 273 (1978).**

The proceeding fully complied with the applicable statutes and constitutional principles of due process. This Court has repeatedly recognized the Board's broad discretion to regulate its proceedings and manage its docket. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d

15, 19, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264, 273 (1978). As the Court has stated, "[i]t is well settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214 (1982). The Court applies the same standard of review to Power Siting [Board] determinations as it applies to orders by the Public Utilities Commission. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427. The Court will only interfere with that discretion in extreme cases where the discretion is abused. *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St.2d 21, 23, 387 N.E.2d 1370 (1979). No such extreme circumstances are present here.

Contrary to appellants' assertions, all parties were afforded due process. This Court has observed that the fundamental requirements of procedural due process are notice and an opportunity to be heard. *Disciplinary Counsel v. Spicer*, 106 Ohio St.3d 247, 2005-Ohio-4788, 834 N.E.2d 332, ¶ 28. Appellants had ample notice of the contents of the application and the Staff Report, both of which were filed well in advance of the hearing. They also had the opportunity to participate in an evidentiary hearing that extended nearly three weeks. The parties were permitted to call witnesses and to cross-examine other parties' witnesses, including members of the Board Staff. Three dozen witnesses offered testimony at hearing. The Board gave appellants an opportunity to present rebuttal testimony, to present argument through two post-hearing briefs, and to file an application for rehearing. Finally, the parties

had, and UNU exercised, the right to request reopening of the hearing for good cause shown prior to the issuance of the final order. Ohio Adm. Code 4901-1-34, App. at 3. In no sense did the Board deny the parties a reasonable opportunity to be heard.

A. Discovery

Parties to board proceedings are entitled to full discovery. R.C. 4903.082, App. at 1. The Board's rules provide that "any party to a board proceeding may obtain discovery of any matter, not privileged which is relevant to the subject matter of that proceeding." Ohio Adm. Code 4906-7-07(2), App. at 4. On motions to quash from both Champaign Wind and third parties, the Attorney Examiners properly limited the scope of the subpoenas to the subject matter of this proceeding – the safety of the proposed turbines. The Board did nothing to "thwar[t] UNU's attempt to discover evidence vital to this case." UNU Merit Brief at 22.

The subpoenas issued to UNU were served on third-party entities, not participants in the proceedings. They requested an overly broad amount of information, including all studies, reports, and documents relating to adverse effects and complaints, without limitation. Even to the extent that the subpoenas pertained to a specific blade shear incident, at a wind farm certificated by the Board in a different case, they requested information about turbine models that were not, or were no longer, under consideration in this project. Even UNU acknowledges that the information that it sought was not directly relevant to the models under consideration when it stated that the "records would not provide a representative picture of the problems experienced by commercial class turbines." UNU Merit Brief at 20. The Attorney Examiners correctly determined that the third-party subpoenas were overbroad, sought information unrelated to this proceeding, and were burdensome. *Champaign Wind*

(Entry at 10-11) (Oct. 22, 2012), UNU App. at 173-174. In affirming the Attorney Examiners, the Board specifically found that:

> it would be unreasonable to force a nonparty to expend its time and resources toward a request that is unlimited in scope. The unreasonableness of the request is further compounded by UNU's own admission that it could refine the scope of its requests, including narrowing the subject matter and the types of documents to be produced (UNU Oct. 15, 2012, Memorandum Contra Motion to Quash at 15-16). Despite UNU's offer to subpoenaed entities to narrow the scope of its requests, UNU never filed an amended or revised subpoena * * *

Champaign Wind (Opinion, Order, and Certificate at 12-13) (May 28, 2013), UNU App. at 23-24.

This proceeding involved specific turbine models proposed to be sited at specific locations. Information about models not proposed for this project is simply irrelevant. In light of UNU's ability, but refusal, to narrow its requests in a manner that could result in relevant discovery, it should not now be heard to complain. This ruling should be affirmed.

B. Hearing Procedures

1. The Company's use of a corporate executive to sponsor its Application was proper.

The Board has a long-standing practice to allow an applicant to sponsor an application and exhibits through the testimony of a witness who is an officer or an experienced employee of the applicant. Moreover, the Board has admitted testimony and related exhibits of a witness where the witness demonstrates that the exhibits or studies were performed at the applicant's request, under the witness' direct or indirect supervision, and that the officer is sufficiently knowledgeable about the information in the exhibit or study to offer testimony. *Champaign Wind* (Order at 12-13) (May 28, 2013), UNU App. at 23-24. This is exactly

what the Board did in this case. Although this practice was challenged by these same appellants in the earlier *Buckeye Wind* case, this Court found no reason to disturb it.

The Board found Champaign Wind's witnesses competent to testify and capable of sponsoring the Company's application. It found that Champaign witness Speerschneider had a wide range of experience in developing and permitting renewable energy projects, and, as a high-ranking corporate officer and the senior director of permitting, the answers to questions in his direct testimony clearly fell within his job description. Tr. Vol. I at 31-32, Supp. at 112-113; *Champaign Wind* (Order at 12) (May 28, 2013), UNU App. at 23. Mr. Speerschneider not only directed and supervised the selection and work of third-party consultants that were used in developing the application, but managed the production of the entire application, including its studies and exhibits. He was able to confirm that the information contained within the application was accurate and correct. Tr. Vol. I at 154-155, Supp. at 114-115. Similarly, the Board correctly found that Champaign witness Crowell was a senior project manager in ecological areas such as wetland surveys and permitting matters, and that his testimony was appropriate and consistent with his job description. A transportation route study included in the application was conducted under his direction. *Champaign Wind* (Order at 13) (May 28, 2013), UNU App. at 24.

The County and Townships argument that they were denied a fair hearing since they had "no meaningful opportunity to cross-examine the 'experts' regarding parts of the Application" (County Brief at 17) is simply untrue. As this Court found in a recent wind case, "[a] party is precluded from claiming a denial of the right of cross-examination when that party did not take advantage of the opportunity to subpoena the witness." *In re Application of Black Fork Wind Energy, L.L.C.*, 2013-Ohio-5478 at ¶18, citing *Richardson v. Perales*, 402

U.S. 389, 404-405, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). Appellants' failure to subpoena witnesses clearly precludes their claim of denial of due process.

Moreover, this Court addressed this very issue two years ago. Appellants in the *Buckeye Wind* case (UNU in that instance) similarly argued that the Board deprived them of the statutory right to call and examine witnesses at the hearing, and that the Board should not have allowed Company executives to "sponsor" the application exhibits and studies addressing those topics. The Court found that "the record belies this conclusion." *In re Buckeye Wind LLC*, ¶ 8.

Applying the Court's analysis from *In re Buckeye Wind*, it is clear that the record in this case does, as well. First, appellants were active participants throughout the administrative process in this case. Second, these intervening parties, as well as the general public, had ample opportunity to be heard, and at multiple stages – at a public informational meeting, a local public hearing, and 12 days of adjudicatory hearing. Third, the appellants conducted discovery before the hearing, participated in pretrial hearings, and filed motions to assure the presentation of written testimony and of witnesses. Thirty-six witnesses were called to testify, and the transcript of the proceeding extends in excess of 3,000 pages. One hundred nineteen exhibits were offered, more than half of those by these appellants. Finally, the Board's summary of the evidence, consideration of arguments, and careful recitation of the requirements of R.C. 4906.10(A) are clearly presented in its Opinion, Order, and Certificate. The 103-page order is every bit as thorough as the *Buckeye Wind* order was, and shows that the Board considered all points of view, including the intervenors' positions on every issue.

2. The presiding hearing examiner's decision not to exclude information about an unrelated wind development project was reasonable and appropriate.

There was testimony in the record about a turbine blade failure at the Timber Road II Wind Farm. UNU both sought discovery about this incident, and to cross-examine witnesses about the circumstances surrounding that incident. But Champaign Wind withdrew its consideration of the turbine model used at Timer Road II prior to issuance of the Staff Report. Tr. Vol. X at 2557-2558, Supp. at 142-143. As a result, the Board Staff no longer found it relevant to investigate the Timber Road incident for purposes of evaluating this application. *Id.*

The Board properly found that the Attorney Examiners reasonably excluded certain testimony about the Timber Road incident since, like the subpoena requests, it did not relate to any turbine proposed for this project. The Board found that:

> The distance in which turbine blades traveled at a different wind farm with a turbine model that is not under consideration in this proceeding is not a fact of consequence in determining whether the proposed setbacks considered within the application at hand are reasonable; thus, it is irrelevant. Furthermore, counsel for UNU was permitted to question Staff's witness on how the Timber Road II blade shear incident affected Staff's determination of appropriate setbacks in the instant application.

Champaign Wind (Order at 13) (May 28, 2013), UNU App. at 24. UNU had ample opportunity to inquire into matters relevant to this application. The Board's ruling should be affirmed.

3. The presiding hearing officer's decision to exclude the Caithness database and related testimony was reasonable and lawful.

The Company's witnesses and Staff's witnesses both offered expert testimony based on their experience in the industry. As with all experts, that experience is developed from many sources. While many of those sources might, in and of themselves, constitute hearsay if offered at hearing, expertise developed from them is not.

UNU witness William Palmer was also permitted to testify as an expert witness based both on his experience and knowledge derived from similar sources. He was permitted to testify about accidents due to blade throw that he had studied through his career, Tr. Vol. VI at 1445 (Supp. at 124), and specifically about his observations of the Timber Road II incident, Tr. Vol. VI at 1448 (Supp. at 125). He was not precluded from offering his opinion about the application, or the limits that he believed the Board should impose on any ultimately approved siting.

Mr. Palmer's specific reliance on a document of questionable reliability and veracity, however, was excluded. *Champaign Wind* (Order at 10) (May 28, 2013), UNU App. at 21. Neither Mr. Palmer nor UNU identified who authored or maintained the database, outside of noting that it was one of several citizen groups that track failures of wind turbine components. Other than representations that Mr. Palmer had himself offered contributions that he had verified, no possible way existed for UNU, Mr. Palmer, or the Attorney Examiners to independently verify whether the database's information was reliable.

Staff witness Conway testified that he had reviewed some of the reports contained in the Caithness database. He stated that a number of the links were broken, and that there

weren't many specifics regarding the reported incidents. Tr. Vol. X at 2507, Supp. at 140. Even UNU witness Palmer conceded that he could not attest to specific instances since there were not a lot of cases where data was given in detail. Tr. Vol. VI at 1481, Supp. at 128. He acknowledged that this was because many of the instances were merely press reports that did not perform rigorous measurements or analysis. Tr. Vol. VI at 1485, Supp. at 129.

The Caithness database that the Examiners excluded from the record in this case was not compiled by any or at the direction of any witness who testified in this case. UNU witness Palmer was properly permitted to testify with respect to his personal knowledge or general expertise. The Board's decision to exclude testimony based upon an unverified and unreliable source, however, was entirely correct, and should be affirmed.

4. The presiding law judge's finding that drafts of the application and Staff Report were inadmissible did not deprive parties of the right to meaningfully inquire into the development of positions and recommendations.

While the Board's discovery rules are and should be broadly construed, they should not, without a compelling demonstration, be extended to every version of any document. UNU's reliance on *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 is misplaced. The appellant in the *Consumers' Counsel* case sought to discover the existence and content of executed side agreements. While the Court found that concessions or inducements in side agreement may have been relevant to determining whether the parties seriously negotiated the stipulation at issue, they were *not* relevant to the merits of the terms of the stipulation itself. Quoting from its decision in *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶14, the Court noted that:

> no agreement among the signatory parties to the stipulation can change the terms of the stipulation. Either the terms of the stipulation are, on their face, beneficial to the ratepayers and the public or they are not. Even if there were side agreements among the signatory parties, those agreements would not change the public benefit or detriment of the stipulation.

Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶80.

The *Consumers' Counsel* case does not stand for the proposition that drafts of applications are relevant. Quite the contrary. The contents of an application either satisfy the statutory requirements or they do not. A draft application is no more relevant to a case than a draft stipulation would have been in the *Consumers' Counsel* case. UNU has failed to show what relevance draft versions of applications and reports would have when the final versions were available, produced, and witnesses were adduced to support them.

This case is equally distinguishable from the *Shore v. Best Cuts, Inc.*, 8th Dist. Cuyahoga No. 77340, 2000 WL 1754007 (Nov. 30, 2000) case relied upon by UNU. In that case, earlier, rejected drafts of agreements were permitted to be discovered since provisions were "extremely relevant to the meaning" of a provision in the disputed contract. By contrast, there are no contract provisions to interpret here. There is no issue here about the meaning of the contents of the application.

The same rationale applies to the draft Staff Report in this case. While counsel for UNU was not permitted to ask questions about the specific language in the draft, he was not precluded from asking questions about Staff's investigation leading to the final recommendations in the Staff Report. Indeed, the Attorney Examiners at no time prohibited counsel from asking questions about prior recommendations that may have been considered but not included in the final Staff Report. Tr. Vol. X 2563-2566, Supp. at 144-147. Either

the terms of the Staff Report, on their face, justify the Board Staff's recommendations or they do not.

But, more importantly, UNU has failed to demonstrate how its inability to inquire into specific language in drafts of the Staff Report and the application prevented it "from conducting a fair and reasonable inquiry into the protectiveness of the certificate conditions." The length of the evidentiary hearing, and the lengthy and comprehensive body of evidence adduced belie UNU's assertion and show otherwise.

C. Motion to Reopen

UNU filed a motion to reopen the hearing record for the admission of what it calls "newly discovered" evidence. Ohio Administrative Code 4906-7-17(C) authorizes the Board to reopen its hearing record prior to final decision for new evidence that is not merely cumulative. While the proffered report may not have been finalized before the conclusion of the hearing, the Board properly found that its admission would be cumulative in nature. *Champaign Wind* (Order at 15) (May 28, 2013), UNU App. at 26.

UNU's only argument in support of its proposition on appeal is that the proffered report "contradicts [Company witness] Hessler's opinion in BW II that a 44 dBA limit is protective and eviscerates the entire basis for OPSB's adoption of that limit." But, as the Board noted, evidence to that effect had already been offered by UNU and admitted into the record. The Board's review of the report revealed "that it is neither inconsistent nor contradictory with the position that UNU presents in this proceeding." *Champaign Wind* (Order at 15) (May 28, 2013), UNU App. at 26.

Proposition of Law No. III:

> **The Power Siting Board adopted a noise control plan that was reasonable and lawful under R.C. 4906.10. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427.**

Wind turbines produce noise. No-one doubts this. It is also well-established that some individuals will be bothered by the noise made by the turbines, but that individual responses vary greatly. Not everyone will have the same experiences or reactions to turbine noise.

It is simply not possible to satisfy everyone, or to eliminate all impacts that wind turbines will have in the community. And nowhere does Ohio law mandate that a wind project be noise-free.

The Board found, as a matter of fact, that the noise parameters from Champaign Wind's study were adequate to comply with R.C. 4906.10(A)(3). *Champaign Wind* (Order at 63) (May 28, 2013), UNU App. at 74. The Board reasonably and lawfully adopted these parameters and rejected UNU's extreme position that, if adopted, would virtually guarantee that no turbines would be constructed.

The law does not require a project to be impact-free. Rather, the law states that the Board may only grant a certificate for the construction, operation, and maintenance of a major utility facility if it finds and determines, among other things:

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

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

R.C. 4906.10(A)(3), (6), App. at 1.

UNU's claim that the Board violated its duty to approve projects with minimum adverse impacts represents its view of these standards. This view, however, that is neither reasonable, nor supported by the record in this case.

A. Noise levels adopted by the Board

The Board adopted noise parameters for the facility from Champaign Wind's comprehensive noise study as a condition of the Company's certificate. The study provides operational noise parameters for the facility that must be met. Champaign Wind proposed that the turbines be sited where sound levels at non-participating residences would be below the average sound level (L*eq*) for the site, plus 5 decibels (dBA). Champaign's nighttime noise design goal for the project, based on the average L*eq* of 39 dBA sound level, plus 5 dBA, is 44 dBA. Application at 76, Supp. at 7; Amended Direct Test. of D. Hessler at 5, 7, UNU App. at 337, 339.

The Staff recommended a condition (Condition 49) requiring Champaign Wind to operate its turbines at no more than 44 dBA during nighttime hours, as proposed, and no more than the greater of 44 dBA or the actual measured ambient L*eq* plus 5 dBA at the location of the receptor during daytime hours. Staff Report at 59, Supp. at 75. The Board adopted Champaign Wind's design criteria, as conditioned by its Staff, but modified Staff's condition to include an L*eq* averaging system to define short-term deviations and to further protect nonparticipating residents from an average L*eq* of 44 dBA over a 60-minute time

period. The Board found that these noise parameters would mitigate noise emissions during operation. *Champaign Wind* (Order at 63) (May 28, 2013), UNU App. at 74.

Champaign Wind presented noise studies and recommended an acceptable sound level for its wind facility. The Board determined that Champaign Wind's noise assessment, in conjunction with the certificate conditions, reasonably represented the minimum adverse environmental impact to nonparticipating property owners under R.C. 4906.10. UNU asks the Court to reweigh the evidence and substitute its judgment for that lawfully exercised by the Board. UNU requests that the Court reverse the Board and amend the certificate by replacing the Board's noise condition with its own, which the Board considered and properly rejected below. But the Court's function is not to reweigh the evidence or to choose between alternative, fairly debatable alternatives. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 108, 75 O.O.2d 172, 346 N.E.2d 778 (1976).

B. The Board's factual determinations are adequately supported by the evidence of record, and should be upheld.

1. Standard of Review

Pursuant to R.C. 4906.12, the Court must apply the same standard of review to Power Siting [Board] determinations as it applies to orders by the Public Utilities Commission. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 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). R.C. 4903.13 applies to Board proceedings pursuant to R.C. 4906.12, and provides that an order "shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable."

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

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

The Court has consistently refused to substitute its judgment for that of the [Board] on evidentiary matters. *See, e.g., Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 16. It should refuse to do so here, as well. Deference should be shown to Board determinations where, as here, the Board applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St.3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775 (2000).

2. The evidence supports use of the L*eq* metric as a reasonable standard for background noise.

UNU's objections to the noise limits adopted by the Board lack merit. UNU disputes Champaign's use of the L*eq* metric for setting noise limits, the 39 dBA average L*eq* level testified to by the Company's witness, and the Board's approval of these limits in light of its decision in the first phase of this project. But the evidence of record supports the Board's decision, which is entirely consistent with its other decisions in this field.

The noise condition recommended by the Board Staff and approved by the Board was developed from an Environmental Sound Survey and Noise Impact Assessment ("Study") conducted by David Hessler, an acoustical consultant with Hessler Associates, Inc. UNU Supp. at 15. The objective of the Study was to determine how much natural sound was likely to be present and consistently available throughout the site area to mask, or obscure, potential noise from the project. The impact from any new power generation project is essentially a function of how much, if at all, its noise exceeds the background sound level that would otherwise exist. *Id.* Testimony from UNU witness Richard James challenged Mr. Hessler's methodologies, findings, and conclusions.

The Board thoroughly evaluated all of the acoustical evidence in the record. It first considered whether Champaign's background noise evaluation was reliable. It reviewed factors such as farm equipment or other machinery, vegetation, and wildlife that could influence background noise levels. The Board found no undue influence or bias in the background noise study, and found that the record affirmed that the study was, in fact, reliable. *Champaign Wind* (Order at 61) (May 28, 2013), UNU App. at 72.

The Board then considered whether use of the *Leq* metric, as opposed to a residual (L90) sound level, was appropriate for measuring background sound. UNU argues that the *Leq* metric is not appropriate for measuring background sound. The *Leq* is literally The L90 sound level is a conservative measure of background sound levels. It is the level exceeded during 90% of the measurement interval, and has the quality of filtering out short-duration, sporadic noise events that cannot be relied upon to provide consistent and continual masking noise to obscure potential turbine noise. *Id.* at 55, UNU App. at 66.

The Board found, again as a matter of fact, that, "[a]lthough the evidence in the record indicates that the L90 noise metric is a higher threshold by measuring the quietest 10 percent of a time interval, there is no credible evidence that the use of the L*eq* to establish the background sound level is in anyway unreasonable or inappropriate." *Id.* at 61, UNU App. at 72. The fact that Company witness Hessler normally uses the L90 metric did not persuade the Board to reject the requested use of the L*eq* metric here:

> [U]ltimately, the record is devoid of any evidence that supports a finding that the Leq is unreasonable or that it is necessary for the Board to depart in our conclusion in this case from recent Board precedent. We point out that the governing statute is devoid of any mandate that applicants have to utilize a metric higher than the Leq, and we find that the Leq metric is reasonable and protects the public interest.

Id. at 62, UNU App. at 73. This is not, as UNU argues, an "abandonment" of the L90 metric. Rather, the Board adopted the L*eq* metric in this instance based on uncontroverted evidence of record.

3. The evidence supports adoption of 44 dBA as a reasonable noise limit for this project.

The Board's decision in this case does not, as UNU suggests, depart from past precedent. UNU argues the acceptance of a 44 dBA noise limit in this case is at odds with its finding that a 40 dBA was necessary to protect homeowners in the predecessor and companion *Buckeye Wind* project. UNU Merit Brief at 36. The fact that the Board has accepted a different level in this case does not reflect a departure from past practice. Indeed, it reflects quite the opposite.

Nothing in Ohio law or the Board's rules mandates a hard and fast noise standard. To the contrary, determining acceptable operational noise levels is a matter of judgment and dis-

cretion that lies with the Board, a matter highly dependent upon the facts and circumstances of each case. Nonetheless, UNU argues that the Board acted unlawfully because it failed to adopt UNU's more rigid, absolute noise standards. UNU is wrong.

There is no recognized universal industry noise standard either in the United States or in other parts of the world. And no noise standard is mandated in R.C. Chapter 4906. Here, as it is charged to do, the Board found and determined that the noise parameters proffered by Champaign Wind in its noise study "represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." R.C. 4906.10(A)(3), App. at 1.

Indeed, the Board has previously held that noise levels as high as 50 dBA are acceptable at property boundaries and residences. *See e.g., In re American Municipal Power-Ohio, Inc.* Case No. 06-1358-EL-BGN (Opinion, Order, and Certificate at 24) (Mar. 3, 2008) ("[o]perational noise is expected to be below 55 dBA at the fence line, which is within generally accepted federal and state standards for sensitive land uses such as nearby residential facilities"), App. at 23; *In re Fremont Energy Center, LLC,* Case No. 00-1527-EL-BGN (Opinion, Order, and Certificate at 16) (May 21, 2001), App. at 20 (noting that the applicant "shall maintain sound levels resulting from the operation of the facility at or below 50 decibels A scale at the nearest noise sensitive receptor").

This Court has rejected the notion that an absolute standard exists, or even should exist, for issues such as what noise level represents the minimum adverse impact. Specifically, the Court has said that a flexible standard "poses no legal problem — an agency, particularly when facing new issues, may proceed on an incremental, case-by-case basis." *In re Buckeye Wind, L.L.C.*, 2012-Ohio-878 at ¶ 33, citing *Securities & Exchange Comm. v.*

Chenery Corp., 332 U.S. 194, 202-203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) ("the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective").

The law requires the Board to balance the interests of various stakeholders. The Board did just that. In balancing the interests of the project developer, participating neighbors, nonparticipating neighbors, and electric distribution utilities seeking supply from renewable energy resources to supply customers and satisfy regulatory benchmarks, the Board properly rejected a hard and fast boundary between acceptable and unacceptable sound levels as UNU advocated. UNU's disappointment notwithstanding, the Board satisfied its statutory obligation below.

4. The record supports the Board's finding that authorized noise levels will have a minimum impact on health.

There is insufficient evidence in the record to support UNU's argument that wind turbines are a direct cause of health impacts to humans. Moreover, the only credible evidence demonstrates that no causal relationship between turbine noise and health impacts has ever been scientifically demonstrated.

Champaign witness Dr. Kenneth Mundt, an epidemiologist with 20 years of experience, testified that that there is no evidence to support UNU's claim that noise from wind turbines, including infrasound noise, causes adverse health effects. Application at 11, Supp. at 2; Direct Test. of K. Mundt at 28, Supp. at 90. In Dr. Mundt's uncontroverted expert opinion, it is inappropriate to conclude there are any causal health effects until there is affirmative and qualitative scientific evidence to support the premise. Direct Test. of K. Mundt at 17, 33-38, Supp. at 89, 91-96. Nothing in the record refutes his opinion, based on

epidemiological principles, that exposures to turbine noise or shadows, while potentially distracting or annoying to some people, have not been scientifically or epidemiologically demonstrated to harm human health.

Dr. Mundt' s testimony is the only credible testimony on the issue of health and wind turbines in this proceeding. Testimony on this issue was offered by UNU, but the Board found that "UNU's evidence in support of alleged health consequences lacks credibility." *Champaign Wind* (Order at 62) (May 28, 2013), UNU App. at 73. Specifically, the Board found that:

> UNU's reliance on UNU witness Punch's treatise is misguided, as the article not only failed to undergo proper peer review or scientific analysis, but also relied exclusively on self-reported complaints or symptoms of health effects, which casts doubt over the treatise's findings. Likewise, UNU's reliance on Dr. Michael Nissenbaum's study in requesting a 4,594 foot setback from property boundaries relies on self-reported health effects, and failed to meet epidemiological standards to prove an actual causal connection between turbine noise and health effects. The Board cannot in good conscience find that health disorders are caused by wind turbine noise based on UNU's reliance on studies that were not properly peer reviewed and were formed on the basis of self-reporting.

Id. The Board's finding is supported by substantial evidence, rests on a determination of the credibility of the witnesses, and deserves substantial deference on review. *Consumers' Counsel v. Fed. Energy Regulatory Comm.*, 808 F.2d 125, 257 (D.C. Cir. 1987).

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

5. The record supports the Board's finding to establish noise standards at nonparticipating landowners' residences, rather than at the property lines.

The Board reasonably found that noise limitations should be based on sound at the residence rather than at the property line. Because the Board found no record support for UNU's claims of adverse health effects from turbine noise, it properly denied the imposition of noise limits at property lines. *Champaign Wind* (Order at 62) (May 28, 2013), UNU App. at 73. In doing so, the Board logically noted that "the intent of a noise regulation is to control noise where people spend the majority of their time, particularly at night"; that is, in the residence. *Champaign Wind* (Entry on Rehearing at 44) (Sep. 30, 2013), UNU App. at 158.

The Board found UNU's contrary arguments to be entirely anecdotal or speculative. "UNU fail[ed] to cite to any record evidence supporting its assertion that nonparticipating landowners' rights to fully use their properties will be eliminated but for a noise limitation." *Id.* UNU's proposed noise standards are rigid and impractical. The law does not require that major wind facilities in Ohio operate completely devoid of noise nor does it preclude the possibility of any adverse reaction to noise. Such a standard is as impractical as it is unrealistic.

UNU's proposed noise standards virtually ensure that no turbines would be built in Champaign County. But much more than this project is at stake if UNU is successful in having this Court mandate a noise standard that is not set forth in the statute. UNU's standard would adversely impact Ohio's economy. Both jobs and taxes would be lost and development of economically significant wind farms and major wind facilities in Ohio would be hindered if not altogether precluded. UNU's standards are contrary to Ohio law, public pol-

icy, and the public interest, because they would effectively preclude major wind facility development in Ohio.

For example, Am. Sub. S.B. 221 required all electric distribution utilities in Ohio to derive a portion of their electric supply from renewable energy resources pursuant to R.C. 4928.64. The statute delineates benchmarks that must be met and under UNU's view of the world, can not be met. The renewable energy resource benchmarks increase every year until a threshold level of 12.5 percent is met in 2024 and maintained at that level every year thereafter. UNU's unrealistic standards ignore these statutory requirements, and render compliance difficult, in not impossible.

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

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

able to substitute the Board's judgment with its own impractical and excessive noise standards.

In reality, UNU opposes the Champaign Wind facility in favor of their own competing private development interests that they wish to pursue. UNU's interest is limited to protecting their investment properties, but they have couched these interests under the guise of minimizing the facility's adverse environmental impacts. UNU Brief at 44. Whether the UNU's development interests should be afforded higher policy status than a proposal to create new renewable energy sources and attendant jobs is for the General Assembly, not this Court, to determine. The General Assembly has clearly spoken. Promoting the greater public interests over the much narrower interests of a few neighbors having competing development plans is why the General Assembly created the Board. Here, the Board weighed the evidence and made a determination supported by the record. Nothing more is required. The Board should be affirmed.

C. Comprehensive conditions imposed by the Board assure that adverse impacts will be minimized, and that the public interest is adequately protected.

As noted above, the Board realizes that not all citizens will be equally affected by the noise from wind turbines. Marginal noise impacts from the operation of the Champaign Wind facility will be minimized by conditions the Board has imposed in Champaign Wind's certificate. The Board accepted further noise restrictions recommended by its Staff, and itself imposed additional restrictions on nighttime noise. Condition 46 ordered by the Board addresses the acceptable outside sound levels. *Champaign Wind* (Order at 88) (May 28,

2013), UNU App. at 99. This means that project sound levels will be limited to levels that do not lead to significant complaints.

In addition, Condition 48 of the certificate incorporates a complaint process to facilitate the mitigation of noise violations. The complaint condition reads:

> (48) The Applicant shall develop a complaint resolution process that shall include procedures for responding to complaints about excessive noise during construction, and excessive noise and excessive shadow flicker caused by operation of the facility. The complaint resolution process shall include procedures by which complaints can be made by the public, how complaints will be tracked by the Applicant, steps that will be taken to interact with the complainant and respond to the complaint, steps that will be taken to verify the merits of the complaint, and steps that will be taken to mitigate valid complaints. Mitigation, if required, shall consist of either reducing the impact so that the project contribution does not exceed the requirements of the certificate, or other means of mitigation reviewed by Staff for confirmation that it complies with this condition.

Id. at 89, UNU App. at 100.

By adopting this complaint process, the Board has recognized the importance of maintaining ongoing compliance with acceptable noise levels, and the need for effective enforcement mechanisms if and when compliance falls short. The Board found that this process "will protect the public interest by ensuring that nonparticipating residents will have an avenue by which their concerns about unacceptable levels of noise for the proposed project can be resolved." *Id.* at 63, UNU App. at 74.

This condition implements a two-tiered complaint process to address complaints, such as noise, involving the operation of the facility. Condition 48 creates one tier and provides for notification to Staff. It is limited to mitigation and performance. The other tier already

exists in the law and involves a formal complaint process for certificate violations under R.C. 4906.97 and R.C. 4906.98, and Ohio Adm. Code 4906-9-01.

Proposition of Law No. IV:

> **The setbacks adopted by the Board are reasonable, lawful, and supported by the record. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, ¶ 17 (2010).**
>
> **A. The setbacks approved by the Board comply with the setback requirements of R.C. 4906.20(B)(2).**

R.C. 4906.20(B)(2) has two minimum setback requirements: one for property lines and another for habitable residential structures. The statutory minimum setback from non-participating property lines is 541 feet, while the minimum setback from habitable residential structures is 919 feet.[7] *Champaign Wind* (Order at 36) (May 28, 2013), UNU App. at 47; Application at 135, Supp. at 9. All the turbine locations approved by the Board meet and, on average, exceed statutory requirements. *Champaign Wind* (Order at 36) (May 28, 2013), UNU App. at 47; Application at 135, Supp. at 9. In fact, the average set back distance

[7] Under the R.C. 4906.20(B)(2), the property line setback is determined by multiplying the maximum height of the turbines (492 ft.) times 1.1 (492 x1.1 = **541 ft.**). For the residential setback, R.C. 4906.20(B)(2) requires that the turbine be at least 750 ft. away from the tip of the of the turbine's nearest blade at 90 degrees (169 ft.). 750 ft. + 169 ft. = **919 ft.**, the statutory minimum residential setback.

from residential structures is 1,521 feet, well in *excess* of the statutory minimum.[8] Application at 135, Supp. at 9.

B. The setbacks approved by the Board will serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

The appellants argue that R.C. 4906.20 does not offer enough setback protection.[9] Whether the Board-approved setbacks are reasonable is a question of fact, and the Court should not reverse or modify a factual determination of the Board "unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238, 361 N.E.2d 436 (1977).

In the main, the Court has already heard and decided arguments regarding blade shear and setback adequacy. *In re Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶¶ 20-21, 34. Like here, the appellants in *Buckeye* argued that all setbacks

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8 H.B. 59 amended R.C. 4906.20(B)(2) to increase the minimum setback requirement for habitable residential structures effective on September 29, 2013. Although the General Assembly increased the statutory minimum setback requirements for habitable residential structures after the certificate was issued in this case, these new setback requirements do not apply here. The current version of R.C. 4906.20(B)(2) states that "for any ...existing certification applications that have been found by the chairperson to be in compliance with division (A) of section 4906.06 of the Revised Code before the effective date of the amendment of this section by H.B. 59 of the 130th general assembly, the distance shall be seven hundred fifty feet instead of one thousand one hundred twenty-five feet." The Board Chairman found that Champaign Wind's application complied with R.C. 4906.06(A) on July 11, 2012.

9 UNU claims the wind facility does not "represent the minimum adverse impact" under R.C. 4906.10(A)(3). The Board did not analyze the setbacks under R.C. 4906.10(A)(3). Rather, the Board found that the setbacks serve the public interest under R.C. 4906.10(A)(6). Regardless, the record clearly shows the setbacks are reasonable and will protect the public under either R.C. 4906.10(A)(3) or R.C. 4906.10(A)(6).

should be measured in relation to property lines and not from residential structures. *Id.* The Court rejected those arguments because it found that the setbacks and the Board-approved conditions were reasonable. *In re Buckeye Wind, LLC* at ¶¶20, 21, and 34 ("The neighbors' fourth proposition contends that the board-approved setbacks are not supported by the record, but ample evidence supports the order, and numerous conditions in the order will ensure their adequacy.") The Court should reach the same conclusion here.

1. The setbacks for occupied structures and heavily-traveled roads far exceed the statutory minimum and those recommended by the turbine manufacturers.

The record shows that the setbacks adopted by the Board comply with Ohio law and are reasonable. Staff witness Andrew Conway, a registered professional engineer, reviewed the setbacks for this project. Conway Direct at 2-6, Supp. at 100-104; *Champaign Wind* (Order at 35-45) (May 28, 2013), UNU APP. at 46-56. Mr. Conway has to date assisted in the investigation of nine wind farm projects. Tr. Vol. X 2502, Supp. at 139. Mr. Conway examined the turbine manufacturers' safety manuals. Conway Direct at 3-5, Supp. at 101-103. He also contacted each turbine manufacturer to determine whether their recommendations warranted a greater setback distance than that required by Ohio law. *Id.*

In addition, Mr. Conway considered a formula that GE Energy uses to determine appropriate setbacks for turbines operating under icy conditions. Conway Direct at 4, Supp. at 102. Using the GE Energy formula, he determined that a 991 foot setback from all occupied structures was reasonable. Conway Direct at 4, Supp. at 102; *Champaign Wind* (Order at 43) (May 28, 2013), UNU App. at 54; Staff Report at 31-32, Supp. at 47-48. Again, this distance exceeds the statutory minimum. It also exceeds the requirements of

R.C. 4906.20(B)(2) because it applies to *all* occupied structures and heavily-traveled roads, not just "habitable residential structures." R.C. 4906.20(B)(2), App. at 3. Further, the 991 foot setback recommended by Mr. Conway even surpasses the manufacturers' recommended setback distances. *Champaign Wind* (Order at 42-43) (May 28, 2013), UNU App. at 53-54.

While the appellants claim that a 1000-foot setback should apply to all roads, Mr. Conway's decision to distinguish between heavily traveled roads and lightly traveled roads was reasonable. Tr. Vol. X 2491- 2492, Supp. at 136-137. Relying upon the Ohio Department of Transportation's definition of roadways, Mr. Conway determined that interstate, arterial, and US routes were "heavily traveled roads" and he logically applied a 991 foot setback to these roads. Tr. Vol. X 2489, 2491-2492, Supp. at 135, 136-137. Mr. Conway also researched roadway setbacks in other jurisdictions, such as Minnesota, and determined that a 541 foot setback for lightly traveled roads was reasonable. Tr. Vol. X 2488- 2489, Supp. at 134-135.

The Board's decision to adopt a 991-foot setback for occupied structures and heavily traveled roads was a fact-based determination, supported by record evidence. The Board's decision should be affirmed. *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 29.

2. Champaign Wind will use various safety mechanisms and procedures that will protect the public from a potential blade shear incident.

Board-approved setbacks are just one of the project's many safety measures that will protect the public. All of the turbines proposed in the application were approved according to international engineering standards and meet all applicable federal, state, and/or local

codes. *Champaign Wind* (Entry on Rehearing at 26) (Sep. 30, 2013), UNU App. at 140; Staff Report at 31, Supp. at 47; Application at 83, Supp. at 8. During the project design phase, licensed professional engineers will review and approve the structural elements of the turbines as required by state and local law. Application at 83, Supp. at 8.

The turbines are equipped with unique safety features that substantially reduce the likelihood of blade failure. These include dual-independent braking systems, pitch controls, sensors, speed controls, lightning protection systems, and monitoring systems that shut down the turbines automatically. *Champaign Wind* (Entry on Rehearing at 26) (Sep. 30, 2013), UNU App. at 140; Application at 83, Supp. at 8. In addition, if Champaign Wind decides to use a turbine model that was not proposed in the application, Champaign Wind must file an application for an amendment with the Board. *Champaign Wind* (Entry on Rehearing at 26) (Sep. 30, 2013), UNU App. at 140. This allows the Board to ensure that, no matter what turbine Champaign Wind finally selects for the project, the turbine will have the appropriate safety mechanisms and meet rigorous safety standards.

The Board also approved several conditions that direct Champaign Wind to implement a number of additional safety measures. For example, Condition 26 requires Champaign Wind to "restrict public access to the facility with appropriately placed warning signs or other necessary measures." *Champaign Wind* (Order at 82) (May 28, 2013), UNU App. at 93. Condition 39 requires Champaign Wind to coordinate with local first responders to develop a medical emergency plan, to aid first responders in assessing and responding to any situations that might arise. *Id.* at 87, UNU App. at 98. Condition 70 requires Champaign Wind to "provide all local fire and emergency service personnel with turbine layout maps, tower diagrams, schematics, turbine safety manuals, and an emergency 24-hour

toll-free telephone number for Champaign [Wind]." *Id.* at 74-75, 98, UNU App. at 85-86, 109. Champaign Wind has also agreed to implement site specific safety procedures and conduct annual safety training for company personnel and local first responders. Application at 83, Supp. at 8.

These various safety measures, as well as the Board-approved setbacks, will maximize public protections in the unlikely event of a blade failure incident.

3. Blade shear is a very remote risk and there has been no reported injury to any member of the public.

Appellants paint an unrealistic and unsupported picture that the public is in imminent danger of blade shear if this wind project moves forward. Appellants' claims are contrary to a record that shows blade shear to be extremely rare, and that it has never injured any member of the public. *Champaign Wind* (Order at 82) (May 28, 2013), UNU App. at 93; (Entry on Rehearing at 22-27) (Sep. 30, 2013), UNU App. at 136-141. Champaign Wind witness Christopher Shears, who has 20 years experience in the wind industry, testified that blade shear has never injured a member of the public. Direct Test. of C. Shears at 1-3, Supp. at 107-109. Champaign Wind witness Michael Speerschneider, who has worked in the wind industry for a decade, testified that blade shear is extremely rare and that there are no reported cases of any member of the public being harmed by blade shear. Speerschneider Direct at 2, 9, UNU Supp. at 285, 292. *See also* Poore Direct at 5, UNU Supp. at 325. Champaign Wind witness Robert Poore, who has over 30 years of experience in the wind industry, testified that blade shear is an unusual occurrence despite the fact that over 200,000 turbines are installed worldwide. *Id.* at 1-5, and 9, UNU Supp. at 321-325.

Staff witness Conway personally researched whether or not any member of the public has ever been injured because of blade shear. Tr. Vol. X 2547, UNU Supp. at 249. Mr. Conway discovered that no member of the public has been injured due to blade shear and that blade shear incidents are extremely rare. Tr. Vol. X 2493, 2547, UNU Supp. at 236, 249. Even UNU's own witness, William Palmer, admitted that "[blade] failure rate is relatively low as human experience dictates." Palmer Direct at 19, UNU Supp. at 410.

While appellants exaggerate the threat of injury due to blade shear, the record tells another story. The evidence shows that blade shear rarely happens, and that it has never injured a member of the public. Nowhere does Ohio law require an impact- or damage-free project.

4. The Board's decision to reject the appellants' proposed 1,640-foot setbacks was reasonable based upon the record.

The appellants' proposed setback distance of 1,640 feet was based primarily upon an inaccurate interpretation of the turbine manufacturers' safety manuals. *Champaign Wind* (Order at 42) (May 28, 2013), UNU App. at 53; (Entry on Rehearing at 22-27) (Sep. 30, 2013), UNU App. at 136-141. No turbine manufacturer recommends such extreme setbacks for normal turbine operations. The 1,640-foot clearance distance discussed in the turbine safety manuals relates strictly to temporary emergency situations, to ensure that the area is adequately cordoned-off in the event of a turbine incident. *Champaign Wind* (Order at 42) (May 28, 2013), UNU App. at 53; (Entry on Rehearing at 26) (September 30, 2013), UNU App. at 140. Champaign Wind witness Shears testified that these emergency situations would be akin to measures taken in the event of a gas leak by a road. Tr. Vol. IV at 909-910, Supp. at 117-118. The Board agreed, finding that these "refer to recommended temporary

clearance areas in the event of temporary safety situations such as fire or overspeed, akin to temporary evacuations that might take place during a gas leak, and are not recommended permanent setback distances." *Champaign Wind* (Order at 42) (May 28, 2013), UNU App. at 53.

For example, UNU relies upon the turbine manufacturer RePower's safety manual. UNU Brief at 34. The RePower safety manual, however, recommends a temporary clearance area of 1,640 feet *only* when the turbine is on fire or spinning uncontrollably. Application, Exhibit R- RePower Safety Manual at 76 (excerpt); Supp. at 153. The turbines do not *normally* operate while on fire or spinning uncontrollably. In addition, this recommendation relates to temporarily removing *people* from the clearance area if these emergency situations occur. *Id.* This recommendation does not suggest that the clearance areas should apply to residences or property lines during *normal* operations.

Appellants misconstrue the language of the Nordex and the Gamesa safety manuals, as well. UNU Brief at 34; County/Townships Brief at 11. The clearance areas contained in the Nordex and Gamesa safety manuals address temporary clearances for fire emergencies, not setbacks for normal operations. Application, Exhibit R- Nordex Safety Manual at 52 (excerpt), Supp. at 151; Application, Exhibit R- Gamesa Safety Manual at 42 (excerpt), Supp. at 148. Because these emergency distances were never intended to be applied as setbacks for normal turbine operations, appellants' arguments for 1,640-foot setbacks were found to be unreasonable. *Champaign Wind* (Order at 42) (May 28, 2013), UNU App. at 53; (Entry on Rehearing at 26-27) (Sep. 30, 2013), UNU App. at 140-141.

In addition to its flawed interpretation of the turbine manufacturers' safety manuals, UNU's reliance upon its witness Palmer is no more availing. UNU Merit Brief at 32. He

developed his 1,640-foot setback recommendation based on two alleged incidents of blade shear. *Id.* In one instance, a blade part allegedly traveled 1,640 feet during a blade failure incident in Denmark. Mr. Palmer, however, admitted that it is unusual for blade pieces to travel 1,640 feet when there is a blade shear incident. Tr. Vol. VI at 1473-1474; Supp. at 125-127. Because there was very little evidentiary support for Mr. Palmer's 1,640-foot setback recommendation, the Board correctly rejected his proposal.

UNU also argues that the blade shear incident at the Timber Road II wind farm justifies a deviation from the statutory setback requirements. UNU Merit Brief at 33. Timber Road II, however, involved the Vestas turbine model, which was not approved for use in this project. *Champaign Wind* (Order at 4) (May 28, 2013), UNU App. at 15. The Board also found the testimony of UNU witness Milo Schaffner, who testified about the blade shear incident at Timber Road II, was not credible. *Champaign Wind* (Order at 41) (May 28, 2013), UNU App. at 52; (Entry on Rehearing at 25) (Sep. 30, 2013), UNU App. at 139. The Board discussed the weaknesses of Mr. Schaffner's testimony in its Opinion and Order:

> [A]lthough UNU claims that testimony regarding the Timber Road II blade shear incident demonstrates that sheared blade pieces have travelled a distance of approximately 1,500 feet, the Board notes that UNU witness Schafner (sic) acknowledged that: he did not view the pieces until two to three days after the incident; he did not actually measure distances until four to five days after the shear occurred; the small pieces of fiberglass may have been blown further from their original landing spots; he did not know whether the pieces had been moved; and children in the area were picking up the blade pieces. Opinion and Order at 41.

The Board reasonably rejected Mr. Schaffner's testimony, relying instead on the official Timber Road II incident report that was the product of a thorough investigation. *Champaign Wind* (Order at 41) (May 28, 2013), UNU App. at 52. The official Timber Road

II report indicated that the larger pieces of debris traveled as far as 764 feet (233 meters). Timber Road II Incident Report at 4, UNU Supp. at 436. The Court should not substitute its judgment for that of the Board on this evidentiary issue. *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006 Ohio 2988, 849 N.E.2d 4, ¶ 34.

Proposition of Law No. V:

> **The decommissioning plan ordered by the Board is comprehensive and adequately durable to meet future obligations.**

Decommissioning is one of many factors to be considered by the Board when it reviews a commercial wind application. *See, e.g.* Ohio Adm. Code 4906-17-08, App. at 13-18. Unless replaced or repowered, megawatt-scale turbine generators typically have a life expectancy of 20-25 years, after which they are retired and the obligation to decommission is triggered. *Champaign Wind* (Application at 159) (May 15, 2012), Supp. at 10; *Id.* (Staff Report at 36) (Oct. 10, 2012), Supp. at 52. The applicant's decommissioning plan is composed of two primary components: (1) dismantling and removal from the site of turbines and associated facilities; and (2) financial insurance to assure that adequate funds are available to accomplish the job.[10] *Champaign Wind* (Application at 159) (May 15, 2012), Supp. at 10.

The Board noted that decommissioning is an important issue in its deliberations. Champaign Wind (Order at 72) (May 28, 2013), UNU App. at 83. To address this subject, the Board approved Condition 52 to the certificate. This condition is very comprehensive

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[10] To be clear, the applicant's obligation to local highway authorities to fund roadway improvements and repairs to damaged roads is *NOT* on appeal in this case. While the obligation could arise during any phase of the project, including turbine decommissioning, it is addressed in different certificate conditions, 27-30, which the County has not challenged. County and Townships Merit Brief at 9-10.

and durable, as it must be to address an obligation that arises likely many years into the future. *Id.* at 91-95, UNU App. at 102-106. In summary, the condition directs that Champaign Wind file a final decommissioning plan not less than 30 days prior to the pre-construction conference that must:

- Designate future uses of reclaimed land, describe engineering and equipment to be used and include a timetable for various actions to be taken;
- Revise and submit an updated plan every five years to reflect engineering and reclamation advancements;
- Obligate the certificate holder to fund,[11] at its sole expense, the expenses associated for each turbine decommissioned where the turbine reaches the end of its useful life or can no longer be operated within the terms of the certificate;
- Mandate recycling of materials to the fullest extent possible;
- Require hiring and use of an independent certified professional engineer to estimate total decommissioning costs (without regard to equipment salvage value) and to calculate and allocate total costs on a per timeline basis for all turbines constructed or under construction; and,
- Require a certified statement from the construction operator that funds adequate to cover the obligation have been posted.

Appellant County and Townships concur with the lion's share of the decommissioning condition approved and ordered by the Board. *See, e.g.* Tr. Vol. VI at 1383-1384, Supp. at 121-122; Tr. VIII at 2084-2085, Supp. at 131-132. The County argues that total decommissioning costs should be considered without regard to equipment salvage value, as proposed by the applicant, due to its market volatility. Tr. VI at 1398, Supp. at 123. The Board agrees

[11] A decommissioning fund is created as "back stop" funding – that is, money deposited or security obtained in a particular amount to be drawn upon only if the wind farm operation cannot meet its decommissioning obligations out of then-available operating funds. Tr. Vol. VI at 1378, Supp. at 120.

and made that quite explicit in the condition that it approved. *Champaign Wind* (Order at 93 (Condition 52(g)) (May 28, 2013), UNU App. at 104. The certificate requires that an independent registered professional engineer be hired to estimate the *total cost* (including a 10% contingency adder) to implement the approved decommissioning plan. The engineer must review and revise (as necessary), cost estimates based upon current information. To determine an initial funding level, total decommissioning costs are spread over all facilities to derive a "per turbine" amount. Decommissioning is subject to regular, ongoing Board oversight. Cost estimates are to be reviewed every five years and, as necessary, recalculated to ensure adequate available funds to meet decommissioning financial obligations at that point in time. *Id.*

County and Townships argue that using a per-turbine amount may understate the actual cost to decommission that turbine. County and Townships Merit Brief at 9-10. The County and Townships misunderstand the certificate condition. The per-turbine amount is neither intended to reflect the actual cost of decommissioning nor is it a ceiling or limit on what will be spent for such activities. The actual cost to decommission a turbine will be determined when it is permanently taken offline, a decision that likely will not occur for 20 or perhaps 25 years or more. The rationale for calculating a "per-turbine" amount is simply to derive an initial funding level that, again, will be subject to review and regular update to ensure availability of adequate resources. This will allow the fund to grow in the early operational years of the wind farm, when any decommissioning obligations are unlikely, and will further permit cost recalculations a based on changing and then-current circumstances.

Appellant's preference for a shorter plan review interval (two-three years)[12] and to require a greater "front-loading" of funds into the decommissioning account should be rejected to avoid unnecessary and prohibitive up-front costs that could skew the economics of the project and thwart its construction.

Again, decommissioning is an important issue to the Board, and it approved a comprehensive condition to address it. The differences between the County and the Board arise largely from a mistaken understanding of how Condition 52(g) is intended to be implemented. The Board has approved a decommissioning condition that is practical and sufficiently durable to allow for refinement as future information becomes known. It is lawful because it strikes an appropriate balance between public and private interests to promote important state energy goals.

CONCLUSION

These parties have been here before. The earlier companion project, "Buckeye I," was fully and fairly litigated before the Board. This Court affirmed the Board, finding that it acted in accordance with all pertinent statutes and regulations. *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶1.

This same is true of this application. The record evidence is extensive, and sufficient to support a wide range of outcomes, outcomes that pit private property interests against

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12 By ordering a five-year review interval in Condition 52, the Board followed its own precedent. *See, e.g. 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 (Opinion, Order, and Certificate at 34, 74) (Jan. 23, 2012), App. at 30, 31; *Id.* (Joint Stipulation and Recommendation at 15-16) (Sep. 28, 2011), App. at 34-35.

important state policies, and often against one another. The Board is charged with balancing these competing goals, and did so properly in this case. The record supports its decision, and its actions. Based on the foregoing, the Board respectfully submits that the Court affirm its decision.

Respectfully submitted,

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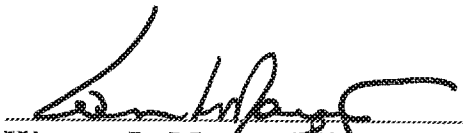

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PROOF OF SERVICE

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 24th day of March, 2014.

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4903.082 Right of discovery.

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.

4906.10 Basis for decision granting or denying certificate.

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and rules adopted under sections 1501.33 , 1501.34 , and 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code. An applicant may withdraw an application if the board grants a certificate on terms, conditions, or modifications other than those proposed by the applicant in the application. The period of initial operation under a certificate shall expire two years after the date on which electric power is first generated by the facility. During the period of initial operation, the facility shall be subject to the enforcement and monitoring powers of the director of environmental protection under Chapters 3704., 3734., and 6111. of the Revised Code and to the emergency provisions under those chapters. If a major utility facility constructed in accordance with the terms and conditions of its certificate is unable to operate in compliance with all applicable requirements of state laws, rules, and standards pertaining to air pollution, the facility may apply to the director of environmental protection for a conditional operating permit under division (G) of section 3704.03 of the Revised Code and the rules adopted thereunder. The operation of a major utility facility in compliance with a conditional operating permit is not in violation of its certificate. After the expiration of the period of initial operation of a major utility facility, the facility shall be under the jurisdiction of the environmental protection agency and shall comply with all laws, rules, and standards pertaining to air pollution, water pollution, and solid and hazardous waste disposal.

The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

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

(2) The nature of the probable environmental impact;

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

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

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

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

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

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

(B) If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon that modification, provided that the municipal corporations and counties, and persons residing therein, affected by the modification shall have been given reasonable notice thereof.

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

4906.20 Certificate required to construct certain wind farms.

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

(B) The board shall adopt rules governing the certificating of economically significant wind farms under this section. Initial rules shall be adopted within one hundred twenty days after June 24, 2008.

(1) The rules shall provide for an application process for certificating economically significant wind farms that is identical to the extent practicable to the process applicable to certificating major utility facilities under sections 4906.06, 4906.07, 4906.08, 4906.09, 4906.10, 4906.11, and 4906.12 of the Revised Code and shall prescribe a reasonable schedule of application filing fees structured in the manner of the schedule of filing fees required for major utility facilities.

(2) Additionally, the rules shall prescribe reasonable regulations regarding any wind turbines and associated facilities of an economically significant wind farm, including, but not limited to, their location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement and including erosion control, aesthetics, recreational land use, wildlife protection, interconnection with power lines and with regional transmission organizations, independent transmission system operators, or similar organizations, ice throw, sound and noise levels, blade shear, shadow flicker, decommissioning, and necessary cooperation for site visits and enforcement investigations. The rules also shall prescribe a minimum setback for a wind turbine of an economically significant wind farm. That minimum shall be equal to a horizontal distance, from the turbine's base to the property line of the wind farm property, equal to one and one-tenth times the total height of the turbine structure as measured from its base to the tip of its highest blade and be at least one thousand one hundred twenty-five 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. For any existing certificates and amendments thereto, and existing certification applications that have been found by the chairperson to be in compliance with division (A) of section 4906.06 of the Revised Code before the effective date of the amendment of this section by H.B. 59 of the 130th general assembly, the distance shall be seven hundred fifty feet instead of one thousand one hundred twenty-five feet. The setback shall apply in all cases except those in which all owners of property adjacent to the wind farm property waive application of the setback to that property pursuant to a procedure the board shall establish by rule and except in which, in a particular case, the board determines that a setback greater than the minimum is necessary.

4901-1-34 Reopening of proceedings.

(A) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.

(B) A motion to reopen a proceeding shall specifically set forth the purpose of the requested reopening. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.

4906-7-07 Discovery.

(A) Scope of discovery.

(1) The purpose of this rule is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in board proceedings.

(2) Except as otherwise provided in paragraph (A)(7) of this rule, any party to a board proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions and requests for admission. The frequency of using these discovery methods is not limited unless the board orders otherwise under paragraph (H) of this rule.

(3) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discovery from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the board, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(4) Discovery responses which are complete when made need not be supplemented with subsequently acquired information unless:

(a) The response fully identified each expert witness expected to testify at the hearing and stated the subject matter upon which each expert was expected to testify.

(b) The responding party later learned that the response was incorrect or otherwise materially deficient.

(c) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.

(d) An order of the board or agreement of the parties provides for the supplementation of responses.

(e) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.

(5) The supplementation of responses required under paragraph (A)(4) of this rule and requests for supplementation of responses submitted pursuant to paragraph (A)(4)(e) of this rule shall be provided within five business days of discovery of the new information.

(6) Nothing in this rule precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.

(7) A discovery request under this rule may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the board in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

(8) For purposes of this rule, the term "party" includes any person who has filed a notice or petition to intervene which is pending at the time a discovery request or motion is to be served or filed.

(9) The staff shall be deemed a "party" under this rule for purposes of conducting discovery, but no party shall conduct discovery against the staff.

(10) Discovery may not be used to harass or delay existing procedural schedules.

(B) Time period for discovery.

(1) Discovery may begin immediately after an application is filed or a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(2) The board or the administrative law judge may shorten or extend the time period for discovery upon their own motion or upon motion of any party for good cause shown.

(C) Filing and service of discovery requests and responses.

Except as otherwise provided in paragraphs (H) and (I) of this rule and unless otherwise ordered for good cause shown, discovery requests shall be served upon the party from whom discovery is sought and filed with the board. Upon a showing of good cause, the board or the administrative law judge may determine that the responding party may recover the reasonable cost of providing copies from the party making the request. For purposes of this rule the term "response" includes written responses or objections to interrogatories, requests for the production of documents or tangible things, requests for permission to enter upon land or other property, and requests for admission.

(D) Interrogatories.

(1) Any party may serve upon any other party written interrogatories, to be answered by the party served. If the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the

interrogatories and all other parties within twenty days after the service thereof, or within such shorter or longer time as the board or the administrative law judge may allow. The party submitting the interrogatories may move for an order under paragraph (I) of this rule with respect to any objection or other failure to answer an interrogatory.

(2) Subject to the scope of discovery set forth in paragraph (A) of this rule, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion, but the board or the administrative law judge may direct that such interrogatory need not be answered until certain designated discovery has been completed, or until some other designated time. The answers to interrogatories may be used to the extent permitted by the rules of evidence, but such answers are not conclusive and may be rebutted or explained by other evidence.

(3) Where the answer to an interrogatory may be derived or ascertained from public documents on file in this state, or from documents which the party served with the interrogatory has furnished to the party submitting the interrogatory within the preceding twelve months, it is a sufficient answer to such interrogatory to specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained.

(4) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, and the burden of deriving the answer is substantially the same for the party submitting the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party submitting the interrogatory a reasonable opportunity to examine, audit, or inspect such records.

(E) Depositions.

(1) Any party to a board proceeding may take the testimony of any other party or person, other than a member of the board staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in paragraph (A) of this rule. The attendance of witnesses and production of documents may be compelled by subpoena as provided in rule 4906-7-08 of the Administrative Code.

(2) Any party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the board. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification. If a subpoena duces tecum is to be served upon the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice.

(3) If any party shows that he or she was unable with the exercise of due diligence to obtain counsel to represent him or her at the taking of a deposition, the deposition may not be used against such party.

(4) The board or the administrative law judge may, upon motion, order that a deposition be recorded by other than stenographic means, in which case the order shall designate the manner of recording the deposition, and may include provisions to assure that the recorded testimony will be accurate and trustworthy. If such an order is made, any party may arrange to have a stenographic transcription made at his or her own expense.

(5) A party may, in the notice and in a subpoena, name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(6) Depositions may be taken before any person authorized to administer oaths under the laws of the jurisdiction in which the deposition is taken, or before any person appointed by the board or the administrative law judge. Unless all of the parties expressly agree otherwise, no deposition shall be taken before any person who is a relative, employee, or attorney of any party, or a relative or employee of such attorney.

(7) The person before whom the deposition is to be taken shall put the witness on oath or affirmation, and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. Examination and cross-examination may proceed as permitted in board hearings. The testimony shall be recorded stenographically or by any other means ordered under paragraph (E)(4) of this rule. If requested by any of the parties, the testimony shall be transcribed at the expense of the party making the request.

(8) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope upon the party taking the deposition, who shall transmit them to the officer, who in turn shall propound them to the witness and record the answers verbatim.

(9) At any time during the taking of a deposition, the board or the administrative law judge may, upon motion of any party or the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party, order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of taking the deposition as provided in paragraph (H) of this rule. Upon demand of the objecting party or deponent, the taking of the depositions shall be suspended for the time necessary to make a motion for such an order.

(10) If and when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are expressly waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness unless the signing is expressly waived by the parties or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within ten days after its submission to him or her, the officer shall sign it and state on the record the fact of the waiver or the illness or absence of the witness, or the fact of the refusal to sign together with the reason, if any, given for such refusal. The deposition may then be used as fully as though signed, unless the administrative law judge upon motion to suppress, holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(11) The officer shall certify on the deposition that the witness was duly sworn by him or her and that the deposition is a true record of the testimony given by the witness. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(12) Documents and things produced for inspection during the examination of the witness shall, upon request of any party, be marked for identification and annexed to the deposition, except that:

(a) The person producing the materials may substitute copies to be marked for identification, if all parties are afforded a fair opportunity to verify the copies by comparison with the originals.

(b) If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to deposition.

(13) Depositions may be used in board hearings to the same extent permitted in civil actions in courts of record. Unless otherwise ordered for good cause shown, any depositions to be used as evidence must be filed with the board at least three days prior to the commencement of the hearing.

(14) The notice to a party deponent may be accompanied by a request made in compliance with paragraph (F) of this rule for the production of documents or tangible things at the taking of the deposition.

(F) Production of documents and things, entry upon land or other property.

(1) Subject to the scope of discovery set forth in paragraph (A) of this rule, any party may serve upon any other party a written request to:

(a) Produce and permit the party making the request, or someone acting on his or her behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts,

photographs, or data compilations, which are in the possession, custody, or control of the party upon whom the request is served.

(b) Produce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.

(c) Permit entry upon designated land or other property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) The request shall set forth the items to be inspected either by individual item or by category, and shall describe each category with reasonable particularity. The request shall also specify a reasonable time, place, and manner for conducting the inspection and performing the related acts.

(3) The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow. The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under paragraph (I) of this rule with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested.

(4) Where a request calls for the production of a public document on file in this state, or a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve months, it is a sufficient response to such request to specify the location of the document or the circumstances under which the document was furnished to the party submitting the request.

(G) Request for admission.

(1) Any party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any specific matter within the scope of discovery set forth in paragraph (A) of this rule, including the genuineness of any documents described in the request. Copies of any such documents shall be served with the request unless they are or have been otherwise furnished for inspection or copying.

(2) Each matter for which an admission is requested shall be separately set forth. The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his or her attorney. If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her

answer or deny only part of the matter of which an admission is requested, the party shall specify that portion which is true and qualify or deny the remainder. An answering party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny that matter or set forth the reasons why an admission or denial cannot be made.

(3) Any party who has requested an admission may move for an order under paragraph (I) of this rule with respect to any answer or objection. Unless it appears that an objection is justified, the board or the administrative law judge shall order that an answer be served. If an answer fails to comply with the requirements of this rule, the board or the administrative law judge may:

(a) Order that the matter be admitted for purposes of the pending proceeding.

(b) Order that an amended answer be served.

(c) Determine that final disposition of the matter should be deferred until a prehearing conference or some other designated time prior to the commencement of the hearing.

(4) Unless otherwise ordered by the board or the administrative law judge, any matter admitted under this rule is conclusively established against the party making the admission, but such admission may be rebutted by evidence offered by any other party. An admission under this rule is an admission for the purposes of the pending proceeding only and may not be used for any other purposes.

(H) Motions for protective orders.

(1) Upon motion of any party or person from whom discovery is sought, the board or the administrative law judge may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(a) Discovery not be had.

(b) Discovery may be had only on specified terms and conditions.

(c) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(d) Certain matters not be inquired into.

(e) The scope of discovery be limited to certain matters.

(f) Discovery be conducted with no one present except persons designated by the board or the administrative law judge.

(g) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

(h) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(2) No motion for a protective order shall be filed under this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order shall be accompanied by:

(a) A memorandum in support, setting forth the specific basis of the motion and citations to any authorities relied upon.

(b) Copies of any specific discovery request which are the subject of the request for a protective order.

(c) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

(3) If a request for a protective order is denied in whole or in part, the board or the administrative law judge may require that the party or person seeking the order provide or permit discovery on such terms and conditions as are just.

(4) Upon motion of any party or person filing a document with the board's docketing division relative to a case before the board, the board or the administrative law judge assigned to the case may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where it is determined that both of the following criteria are met: The information is deemed by the board or administrative law judge assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph.

(a) All documents submitted pursuant to paragraph (H) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(b) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the chief of the docketing division, or

the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "Confidential," "Proprietary", or "Trade Secret".

(c) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

(5) Pending a ruling on a motion filed in accordance with paragraph (H) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered or released pursuant to this rule. The board and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "Confidential", "Proprietary", "Trade Secret", or with any other such marking, will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (H) of this rule.

(6) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (E)(4) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion and shall include a detailed discussion of the need for continued protection from disclosure.

(I) Motions to compel discovery.

(1) Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery, with respect to:

(a) Any failure of a party to answer an interrogatory served under paragraph (D) of this rule.

(b) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under paragraph (F) of this rule.

(c) Any failure of a deponent to appear or to answer a question propounded under paragraph (E) of this rule.

(d) Any other failure to answer or respond to a discovery request made under paragraphs (D) to (G) of this rule.

(2) For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer.

(3) No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by:

(a) A memorandum in support, setting forth:

(i) The specific basis of the motion, and citations of any authorities relied upon.

(ii) A brief explanation of how the information sought is relevant to the pending proceeding.

(iii) Responses to any objections raised by the party or person from whom discovery is sought.

(b) Copies of any specific discovery requests which are the subject of the motion to compel, and copies of any responses or objections thereto.

(c) An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.

(4) The board or the administrative law judge may grant or deny the motion in whole or in part. If the motion is denied in whole or in part, the board or the administrative law judge may issue such protective order as would be appropriate under paragraph (H) of this rule.

(5) Any order of the administrative law judge granting a motion to compel discovery in whole or in part may be appealed to the board in accordance with rule 4906-7-15 of the Administrative Code. If no application for review is filed within the time limit set forth in that rule, the order of the administrative law judge becomes the order of the board.

(6) If any party or person disobeys an order of the board compelling discovery, the board may:

(a) Seek appropriate judicial relief against the disobedient person or party under section 4903.04 of the Revised Code.

(b) Prohibit the disobedient party from further participation in the pending proceeding.

(c) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing evidence or conducting cross-examination on designated matters.

(d) Dismiss the pending proceeding if such proceeding was initiated by an application or petition, unless such a dismissal would unjustly prejudice any other party.

(e) Take such other action as the board considers appropriate.

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.

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Fremont Energy Center LLC for a Certificate of Environmental Compatibility and Public Need for a Merchant, Combined Cycle, 704-Megawatt Power Plant in Sandusky County, Ohio.	)	Case No. 00-1527-EL-BGN

OPINION, ORDER AND CERTIFICATE

The Ohio Power Siting Board (Board), coming now to consider the above-entitled matter; having appointed its administrative law judge to conduct public hearings; having reviewed the evidence presented at the hearings held in this matter; having reviewed the proposed stipulation, and being otherwise fully advised in the premises, hereby waives the necessity for an administrative law judge's report and issues its opinion, order and certificate in this case as required by Section 4906.10, Revised Code.

APPEARANCES:

Bricker & Eckler, by Sally W. Bloomfield and Amy S. Bartemes, 100 South Third Street, Columbus, Ohio 43215, on behalf of Fremont Energy Center, LLC.

Betty D. Montgomery, Ohio Attorney General, by Steven Nourse and Kimberly A. Danosi, Assistant Attorneys General, Public Utilities Section, 9th Floor, 180 East Broad Street, Columbus, Ohio 43215, and by Margaret A. Malone and Brian T. Waltz, Assistant Attorneys General, Environmental Enforcement Section, State Office Tower, 25th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, on behalf of staff of the Ohio Power Siting Board.

OPINION:

I. Summary of the Proceedings

All proceedings before the Board are conducted according to the provisions of Chapter 4906, Revised Code, and Chapter 4906, Ohio Administrative Code (O.A.C.).

On August 21, 2000, Fremont Energy Center LLC (Fremont or applicant) filed a motion for waivers of certain filing requirements under Rule 4906-1-03, O.A.C., including a waiver of the requirement to file an application two years prior to commencement of construction under Section 4906.06(A)(6), Revised Code. On September 29, 2000, Fremont filed its application for a certificate of environmental compatibility and public need to construct a 704-megawatt (MW) electric generating station located in Sandusky Township, Sandusky County, Ohio (Applicant Ex. 1). The proposed project is a "major utility facility" as defined in Section 4906.01(B)(1), Revised Code. Fremont's waiver request was granted in part by entry dated December 12, 2000.

On December 22, 2000, the Board notified Fremont that, pursuant to Rule 4906-1-14, O.A.C., the application had been found to be complete. Fremont served copies of the

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(20) Prior to operation, the applicant shall submit to the staff a signed interconnection agreement with ATSI. If the applicant enters into an agreement with any other transmission entity addressing transmission system modifications associated with the project, it shall provide a copy to the staff.

(21) The applicant shall provide to staff the date on which construction was completed, as it becomes known.

(22) The applicant shall maintain sound levels resulting from the operation of the facility at or below 50 decibels A scale at the nearest noise sensitive receptor.

(23) For nonfirm capacity, the applicant, or its designated operator, will seek and contract for transmission service through the Open Access Same-Time Information System (OASIS), as specified in FERC Orders 888, 889, and any subsequent OASIS-related orders or through an successor OASIS system.

(24) The applicant shall provide to staff the date on which the facility began commercial operation as it becomes known.

(25) The certificate shall become invalid if the applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.

VI. Conclusion

Staff and Fremont agree that the record is sufficient for the Board to issue a certificate for the proposed facility (Jt. Ex. 1, at 7). Although not binding upon the Board, stipulations are given careful scrutiny and consideration, particularly where no party is objecting to the stipulation. We have reviewed the record in this proceeding and we conclude that the stipulation is reasonable and should be adopted. Based upon all of the above, we are approving the application in this case and granting a certificate of environmental compatibility and public need for construction, operation, and maintenance of the proposed generating station at the preferred site (subject to the conditions set forth in the stipulation).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) Fremont is a "person" under Section 4906.01(A), Revised Code.

(2) The proposed facility is a "major utility facility" as defined in Section 4906.01(B)(1), Revised Code.

(3) On August 21, 2000, Fremont filed a motion for waivers of certain filing requirements under Section 4906.06(A), Revised Code, and Rules 4906-1-13 and 4906-5-04(B), O.A.C.

Joseph C. Robertson, Board Member
and Interim Director of the Ohio
Department of Development

Samuel W. Speck, Board Member
and Director of the Ohio Department
of Natural Resources

Nick Baird, M.D., Board Member
and Director of the Ohio Department
of Health

Christopher Jones, Board Member and
Director of the Ohio Environmental
Protection Agency

Fred L. Dailey, Board Member and
Director of the Ohio Department
of Agriculture

Stephen A. Sebo, Board
Member and Public Member

SEF;geb

Entered in the Journal
MAY 21 2001
A True Copy
Gary E. Vigorito
Secretary

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of American Municipal Power-Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio.	))))))	Case No. 06-1358-EL-BGN

OPINION, ORDER AND CERIFICATE

The Ohio Power Siting Board coming now to consider the above-entitled matter; having appointed administrative law judges to conduct the hearings; having reviewed the exhibits introduced into evidence in this matter; and being otherwise fully advised, hereby issues its Opinion, Order and Certificate in this case as required by Section 4906.10, Revised Code.

APPEARANCES:

Chester Wilcox & Saxbe LLP, by John W. Bentine, Stephen C. Fitch, April R. Bott, Nathaniel S. Orosz, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio, 43215-4213, on of behalf American Municipal Power-Ohio, Inc.

Marc Dann, Attorney General of the State of Ohio, by Duane W. Luckey, Chief, Public Utilities Section, by William L. Wright and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215 and by Margaret A. Malone and Christina E. Grasseschi, Assistant Attorneys General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, on behalf of the staff of the Ohio Power Siting Board.

Shannon Fisk, Aaron Colangelo, and Anjali Jaiswal, 101 North Wacker Drive, Suite 609, Chicago, Illinois 60606, on behalf of the Natural Resources Defense Council.

Trent Dougherty, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of the Ohio Environmental Council.

Sanjay Narayan, 85 Second Street, Second Floor, San Francisco, California 94105, on behalf of the Sierra Club.

Elisa Young, 48360 Carmel Road, Racine, Ohio 45771, *pro se*.

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Technician TM Date Processed 3/3/2008

(33) Two cemeteries are located within a one-mile radius. A small family cemetery is located approximately 4,000 feet northwest of the facility and the Letart Falls Cemetery is located approximately 2,000 feet south of the facility. The Applicant has agreed to leave current vegetative screening in place at the family cemetery and to provide a substantial amount of additional screening for the Letart Falls Cemetery.

(34) The Applicant intends to permanently close a portion of East Letart Road (T-95) and Hill Road (T-96). Additionally, some local roads may require substantial restoration following the construction process. The Applicant will be required to coordinate these efforts with the Meigs County Engineer and the Ohio Department of Transportation.

(35) The only commercial land uses in proximity to the plant are greenhouse buildings and a gravel pit. Both of these commercial uses are compatible with the proposed generating facility and they may remain in operation after construction.

(36) The construction and operation of the plant is not expected to have any significant negative impact on institutional facilities such as schools or churches, as schools are not in close proximity to the proposed plant and the Applicant will limit construction activities on Sunday.

(37) The Applicant has completed a noise study of potential impacts expected from construction and operation of the facility. Operational noise is expected to be below 55 dBA at the fence line, which is within generally accepted federal and state standards for sensitive land uses such as nearby residential facilities. Therefore, additional noise mitigation should not be required for normal plant operation. Construction noise levels will be temporary in nature but higher than during plant operation. Pile driving would be the most extreme noise producing activity during construction, at approximately 72 dBA at the nearest sensitive receptor. To help mitigate negative effects of construction noises, the Applicant intends to limit general construction activity to daylight hours.

ORDERED, That a copy of this Opinion, Order, and Certificate be served upon each party of record and any other interested persons.

THE OHIO POWER SITING BOARD

Alan R. Schriber, Chairman of the
Public Utilities Commission of Ohio

Lee Fisher, Board Member
and Director of the Ohio Department
of Development

Sean Logan, Board Member
and Director of the Ohio Department
of Natural Resources

Alvin Jackson M.D., Board Member
and Director of the Ohio Department
of Health

Christopher Korleski, Board Member and
Director of the Ohio
Environmental Protection Agency

Robert Boggs, Board Member and
Director of the Ohio Department
of Agriculture

ABSTAIN
Andrew M. Boatright, P.E., Board
Member and Public Member

GAP/KBict

Entered in the Journal
MAR 03 2008

Renee J. Jenkins
Secretary

BEFORE THE POWER SITING BOARD OF OHIO

In the Matter of the Application of Black Fork Wind Energy, LLC for a Certificate to Install Numerous Electricity Generating Wind Turbines in Crawford and Richland Counties, Ohio	))))	Case No. 10-2865-EL-BGN

JOINT STIPULATION AND RECOMMENDATION

I. INTRODUCTION

Applicant Black Fork Wind Energy, LLC ("Black Fork" or "Applicant), the Ohio Farm Bureau Federation and the Staff of the Ohio Power Siting Board ("OPSB Staff"), at times collectively referred to as the "Parties," submit this Joint Stipulation and Recommendation ("Stipulation") for adoption by the Ohio Power Siting Board (the "Board"). This Stipulation is intended by the Parties to resolve all matters pertinent to the certification and construction of a wind farm comprised of up to 91 wind turbines with a nameplate capacity between 1.6 and 3.0 MW each, with the aggregate capacity not to exceed 200 MW, and other associated facilities located in Auburn, Jackson, Jefferson, Sandusky and Vernon Townships in Crawford County and Plymouth, Sandusky and Sharon Townships in Richland County (hereinafter referred to as the "Facility"). The Facility is more fully described in Black Fork's application as deemed complete by the Board in this proceeding.

The Staff Report was issued on August 31, 2011. A local public hearing was held at the Shelby Senior High School, 109 West Smiley Avenue, Shelby, Ohio 44875 at 6:00 pm on September 15, 2011, and the evidentiary hearing commenced on September 19, 2011, at the offices of the Public Utilities Commission of Ohio in Columbus. The Ohio Farm Bureau Federation was granted intervention by Entry of May 3, 2011. The Board of Crawford County Commissioners; the Board of Richland County Commissioners; the Richland County Engineer;

unless otherwise mutually agreed upon by the facility owner and/or facility operator and the landowner. All physical material pertaining to the facility and associated equipment shall be removed to a depth of at least thirty-six inches beneath the soil surface and transported off site. The disturbed area shall be restored to the same physical condition that existed before erection of the facility. Damaged field tile systems shall be repaired to the satisfaction of the property owner.

(e) That during decommissioning, all recyclable materials, salvaged and non-salvaged, shall be recycled to the furthest extent practicable. All other non-recyclable waste materials shall be disposed of in accordance with state and federal law.

(f) That the facility owner and/or facility operator shall not remove any improvements made to the electrical infrastructure if doing so would disrupt the electric grid, unless otherwise approved by the applicable regional transmission organization and interconnection utility.

(g) That subject to approval by OPSB Staff, and seven days prior to the pre-construction 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. Said estimate shall include: (1) an identification and analysis of the activities necessary to implement the most recent approved decommissioning plan including, but not limited to, physical construction and demolition costs assuming good industry practice and based on ODOT's *Procedure for Budget Estimating and RS Means* material and labor cost indices or any other publication or guidelines approved by OPSB Staff; (2) the cost to perform each of the activities; (3) an amount to cover contingency costs, not to exceed 10 percent of the above calculated reclamation cost. Said estimate will be converted to a per-turbine basis (the "Decommissioning Costs"), calculated as the total cost of decommissioning of all facilities as estimated by the Professional Engineer divided by the number of turbines in the most recent facility engineering drawings. This estimate shall be conducted every five years by the facility owner and/or facility operator.

(h) 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. For purposes of this condition, a turbine is considered to be under construction at the commencement of excavation for the turbine foundation. The form of financial assurance or surety bond shall be a financial instrument mutually agreed upon by OPSB Staff and the Applicant, the facility owner, and/or the facility operator. The financial assurance shall ensure the faithful performance of all requirements and reclamation conditions of the most recently filed and approved decommissioning and reclamation plan. At least thirty

(30) days prior to the pre-construction conference, the Applicant, the facility owner, and/or the facility operator shall provide an estimated timeline for the posting of decommissioning funds based on the construction schedule for each turbine. 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.

(i) That the decommissioning funds, surety bond, or financial assurance shall be released by the holder of the funds, bond, or financial assurance when the facility owner and/or facility operator has demonstrated, and the OPSB Staff concurs, that decommissioning has been satisfactorily completed, or upon written approval of the Board, in order to implement the decommissioning plan.

(67) That at least thirty (30) days before the pre-construction conference, the Applicant shall submit to OPSB Staff, for review and acceptance, the following documents:

(a) One set of detailed engineering drawings of the final project design, including all turbine locations, collection lines, access roads, the crane route, permanent meteorological towers, substations, construction staging areas, and any other associated facilities and access points, so that OPSB Staff can determine that the final project design is in compliance with the terms of the certificate. The final project layout shall be provided in hard copy and as geographically-referenced electronic data. The final plan shall include both temporary and permanent access routes, as well as the measures to be used for restoring the area around all temporary sections, and a description of any long-term stabilization required along permanent access routes. The plan shall consider the location of streams, wetlands, wooded areas, and sensitive plant species as identified by the ODNR Division of Natural Areas and Preserves, and explain how impacts to all sensitive resources will be avoided or minimized during construction, operation, and maintenance

(b) A stream and/or wetland crossing plan including details on specific streams and/or ditches to be crossed, either by construction vehicles and/or facility components (e.g., access roads, electric collection lines), as well as specific discussion of proposed crossing methodology for each stream crossing and post-construction site restoration. The stream crossing plan shall be based on final plans for the access roads and electric collection system.

(c) A detailed frac-out contingency plan for stream and wetland crossings that are expected to be completed via HDD. Such contingency plan may be incorporated within the required stream and/or wetland crossing plan.

(d) A tree clearing plan describing how trees and shrubs around turbines, along access routes, in electric collection line corridors, at construction staging areas, and in

The undersigned hereby stipulate, agree and represent that they are authorized to enter into this Joint Stipulation and Recommendation on this 28th day of September, 2011. Furthermore, the parties expressly agree that this Joint Stipulation and Recommendation may be amended and/or supplemented in a writing executed by the Parties.

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Attorneys for the Ohio Power Siting Board Staff

BEFORE

THE OHIO POWER SITING BOARD

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. 10-2865-EL-BGN

OPINION, ORDER, AND CERTIFICATE

The Ohio Power Siting Board (Board), coming now to consider the above-entitled matter, having appointed administrative law judges to conduct the hearings, having reviewed the exhibits and testimony introduced into evidence in this matter, and being otherwise fully advised, hereby issues its Opinion, Order, and Certificate in this case as required by Chapter 4906, Revised Code.

APPEARANCES:

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff, Stephen M. Howard, and Michael J. Settineri, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, on behalf of the applicant, Black Fork Wind Energy, LLC.

Mike DeWine, Ohio Attorney General, by John J. Jones, Assistant Section Chief, and Stephen A. Reilly and Devin D. Parram, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, and Christina E. Grasseschi, Summer J. Koladin Plantz, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, on behalf of the Board's Staff.

Chad A. Endsley, 280 North High Street, P.O. Box 18238, on behalf of the Ohio Farm Bureau Federation.

Benesch, Friedlander, Coplan, & Aronoff, LLP, by Orla Collier III, 41 South High Street, 26th Floor, Columbus, Ohio 43215, on behalf of the Board of Crawford County Commissioners, the Board of Richland County Commissioners, the Richland County Engineer, the Plymouth Township Trustees, the Sharon Township Trustees, and the Sandusky Township Trustees.

John Warrington, Loren Gledhill, Carol Gledhill, Mary Studer, Alan Price, Catherine Price, Nick Rietschlin, Margaret Rietschlin, Bradley Bauer, Debra Bauer, Grover Reynolds, Brett Heffner, Gary Biglin, and Karel Davis, pro se.

proposed facility include the conditions specified in the section of the Staff Report. (Staff Ex. 2 at 51.)

H. Water Conservation Practice - Section 4906.10(A)(8), Revised Code

As Staff notes, pursuant to Section 4906.10(A)(8), Revised Code, the proposed facility must incorporate maximum feasible water conservation practices, considering available technology and the nature and economics of the various alternatives. Staff states that it has reviewed the information pertaining to the consumptive use of water for the construction and operation of the proposed facility. According to Staff, wind-powered electric generating facilities do not utilize water in the process of electricity production; therefore, water consumption associated with the proposed electric generation equipment does not warrant specific conservation efforts. A potable water supply would be provided to the O&M building for project and personal needs of the several employees using the facility, but Staff believes the amount of water consumed for these purposes would be minimal. (Staff Ex. 2 at 52.)

Based on its review, the Staff recommends that the Board find that the proposed facility would incorporate maximum feasible water conservation practices, and, therefore, it complies with the requirements specified in Section 4906.10(A)(8), Revised Code. (Staff Ex. 2 at 52.)

VI. STIPULATION'S RECOMMENDED CONDITIONS ON THE CERTIFICATE

As stated previously, the parties to the Stipulation recommend that the Board issue the certificate requested by applicant, subject to certain conditions, as spelled out in the Stipulation. The following is a summary of the conditions agreed to by the stipulating parties and is not intended to replace or supersede the Stipulation. The stipulating parties agree that:

(1) The facility shall be installed at applicant's proposed site presented in the March 10, 2011, application, as modified or clarified by applicant's supplemental filings and by recommendations in the Staff Report. Acceptable turbine types shall be limited to the Vestas V100, the General Electric 1.6-100, or the Siemens SWT 2.3-101 models.

(2) The applicant shall utilize the equipment and construction practices described in the application, as modified or clarified in supplemental filings, replies to data requests, and recommendations in the Staff Report, as modified by the Stipulation.

ORDER:

It is, therefore,

ORDERED, That the Stipulation, as amended, be approved and adopted. It is, further,

ORDERED, That a certificate be issued to Black Fork pursuant to Chapter 4906, Revised Code, for the construction, operation, and maintenance of the wind-powered electric generation facility, subject to the conditions set forth in the Stipulation, as amended. It is, further,

ORDERED, That the certificate contain the conditions set forth in the Stipulation, as amended. It is, further,

ORDERED, That Black Fork take all necessary steps to carry out the terms of the Stipulation, as amended and this Order. It is, further,

ORDERED, That a copy of this Opinion, Order, and Certificate be served upon each party of record and any other interested person.

THE OHIO POWER SITING BOARD

Todd A. Snitchler, Chairman
Public Utilities Commission of Ohio

Christiane Schmenk, Board Member and Director of the Ohio Department of Development

James Zehringer, Board Member and Director of the Ohio Department of Natural Resources

Theodore Wymyslo, Board Member and Director of the Ohio Department of Health

Scott Nally, Board Member and Director of the Ohio Environmental Protection Agency

Tony Forshey, DVM, Board Member and Interim Director of the Ohio Department of Agriculture

Board Member and Public Member

SEF/sc

Entered in the Journal
JAN 23 2012

Betty McCauley
Secretary

BEFORE THE POWER SITING BOARD OF OHIO

In the Matter of the Application of Black Fork Wind Energy, LLC for a Certificate to Install Numerous Electricity Generating Wind Turbines in Crawford and Richland Counties, Ohio	))))	Case No. 10-2865-EL-BGN

JOINT STIPULATION AND RECOMMENDATION

I. INTRODUCTION

Applicant Black Fork Wind Energy, LLC ("Black Fork" or "Applicant), the Ohio Farm Bureau Federation and the Staff of the Ohio Power Siting Board ("OPSB Staff"), at times collectively referred to as the "Parties," submit this Joint Stipulation and Recommendation ("Stipulation") for adoption by the Ohio Power Siting Board (the "Board"). This Stipulation is intended by the Parties to resolve all matters pertinent to the certification and construction of a wind farm comprised of up to 91 wind turbines with a nameplate capacity between 1.6 and 3.0 MW each, with the aggregate capacity not to exceed 200 MW, and other associated facilities located in Auburn, Jackson, Jefferson, Sandusky and Vernon Townships in Crawford County and Plymouth, Sandusky and Sharon Townships in Richland County (hereinafter referred to as the "Facility"). The Facility is more fully described in Black Fork's application as deemed complete by the Board in this proceeding.

The Staff Report was issued on August 31, 2011. A local public hearing was held at the Shelby Senior High School, 109 West Smiley Avenue, Shelby, Ohio 44875 at 6:00 pm on September 15, 2011, and the evidentiary hearing commenced on September 19, 2011, at the offices of the Public Utilities Commission of Ohio in Columbus. The Ohio Farm Bureau Federation was granted intervention by Entry of May 3, 2011. The Board of Crawford County Commissioners; the Board of Richland County Commissioners; the Richland County Engineer;

unless otherwise mutually agreed upon by the facility owner and/or facility operator and the landowner. All physical material pertaining to the facility and associated equipment shall be removed to a depth of at least thirty-six inches beneath the soil surface and transported off site. The disturbed area shall be restored to the same physical condition that existed before erection of the facility. Damaged field tile systems shall be repaired to the satisfaction of the property owner.

(e) That during decommissioning, all recyclable materials, salvaged and non-salvaged, shall be recycled to the furthest extent practicable. All other non-recyclable waste materials shall be disposed of in accordance with state and federal law.

(f) That the facility owner and/or facility operator shall not remove any improvements made to the electrical infrastructure if doing so would disrupt the electric grid, unless otherwise approved by the applicable regional transmission organization and interconnection utility.

(g) That subject to approval by OPSB Staff, and seven days prior to the pre-construction 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. Said estimate shall include: (1) an identification and analysis of the activities necessary to implement the most recent approved decommissioning plan including, but not limited to, physical construction and demolition costs assuming good industry practice and based on ODOT's *Procedure for Budget Estimating and RS Means* material and labor cost indices or any other publication or guidelines approved by OPSB Staff; (2) the cost to perform each of the activities; (3) an amount to cover contingency costs, not to exceed 10 percent of the above calculated reclamation cost. Said estimate will be converted to a per-turbine basis (the "Decommissioning Costs"), calculated as the total cost of decommissioning of all facilities as estimated by the Professional Engineer divided by the number of turbines in the most recent facility engineering drawings. This estimate shall be conducted every five years by the facility owner and/or facility operator.

(h) 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. For purposes of this condition, a turbine is considered to be under construction at the commencement of excavation for the turbine foundation. The form of financial assurance or surety bond shall be a financial instrument mutually agreed upon by OPSB Staff and the Applicant, the facility owner, and/or the facility operator. The financial assurance shall ensure the faithful performance of all requirements and reclamation conditions of the most recently filed and approved decommissioning and reclamation plan. At least thirty

(30) days prior to the pre-construction conference, the Applicant, the facility owner, and/or the facility operator shall provide an estimated timeline for the posting of decommissioning funds based on the construction schedule for each turbine. 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.

(i) That the decommissioning funds, surety bond, or financial assurance shall be released by the holder of the funds, bond, or financial assurance when the facility owner and/or facility operator has demonstrated, and the OPSB Staff concurs, that decommissioning has been satisfactorily completed, or upon written approval of the Board, in order to implement the decommissioning plan.

(67) That at least thirty (30) days before the pre-construction conference, the Applicant shall submit to OPSB Staff, for review and acceptance, the following documents:

(a) One set of detailed engineering drawings of the final project design, including all turbine locations, collection lines, access roads, the crane route, permanent meteorological towers, substations, construction staging areas, and any other associated facilities and access points, so that OPSB Staff can determine that the final project design is in compliance with the terms of the certificate. The final project layout shall be provided in hard copy and as geographically-referenced electronic data. The final plan shall include both temporary and permanent access routes, as well as the measures to be used for restoring the area around all temporary sections, and a description of any long-term stabilization required along permanent access routes. The plan shall consider the location of streams, wetlands, wooded areas, and sensitive plant species as identified by the ODNR Division of Natural Areas and Preserves, and explain how impacts to all sensitive resources will be avoided or minimized during construction, operation, and maintenance

(b) A stream and/or wetland crossing plan including details on specific streams and/or ditches to be crossed, either by construction vehicles and/or facility components (e.g., access roads, electric collection lines), as well as specific discussion of proposed crossing methodology for each stream crossing and post-construction site restoration. The stream crossing plan shall be based on final plans for the access roads and electric collection system.

(c) A detailed frac-out contingency plan for stream and wetland crossings that are expected to be completed via HDD. Such contingency plan may be incorporated within the required stream and/or wetland crossing plan.

(d) A tree clearing plan describing how trees and shrubs around turbines, along access routes, in electric collection line corridors, at construction staging areas, and in

The undersigned hereby stipulate, agree and represent that they are authorized to enter into this Joint Stipulation and Recommendation on this 28th day of September, 2011. Furthermore, the parties expressly agree that this Joint Stipulation and Recommendation may be amended and/or supplemented in a writing executed by the Parties.

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