

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p><b>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 )</b></p>	<p><b>Case No. 2013-1874</b></p> <p><b>On Appeal from the Ohio Power ) Siting Board, ) Case No. 12-160-EL-BGN</b></p>
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**REPLY BRIEF OF APPELLANTS CHAMPAIGN COUNTY  
AND GOSHEN, UNION AND URBANA TOWNSHIPS**

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## REPLY ARGUMENT

The Order of May 28, 2013 and the Order on Rehearing of September 30, 2013 (collectively also referred to as “Orders”) are unlawful and unreasonable in the following respects:

### **First Proposition of Law:**

**The Ohio Power Siting Board erred in failing to require Applicant to post financial assurance for decommissioning the Project in an amount sufficient to cover the total decommissioning costs. There was no evidence presented at hearing nor any rationale presented to demonstrate that the Board’s decision to allow Applicant to provide financial assurance on a per turbine basis would adequately cover the costs of decommissioning. As such, the Ohio Power Siting Board’s Orders are unsupported by the record and, therefore, unreasonable and unlawful.**

Upon such Application and hearing, R.C. 4906.10(A) requires the OPSB to make certain findings to grant a Certificate, among them “[T]hat the facility will serve the public interest, convenience, and necessity.” *R.C. 4906.10(A)(6)*. The County and Townships take the position that the public interest has not been served regarding the OPSB’s Orders as they pertain to financial assurance.

In order to comply with serving the public interest, convenience and necessity, it is imperative that the OPSB provide for adequate financial assurance for the Project. *OAC §4906-17-08* It appears, however, that the OPSB does not believe that the decommissioning bond amount’s purpose is to cover actual decommissioning costs. Appellee’s Merit Brief, p. 46. No evidence was presented that showed that dividing the total decommissioning costs into an amount per turbine would be sufficient to cover actual decommissioning costs. Appellee OPSB even states in its brief that “[t]he 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.” Appellee’s Merit Brief, p. 46.

Clearly, Appellee OPSB believes that the per turbine amount will not cover decommissioning and inconceivably believes that there is or will be another source of funds available to pay for the remaining costs of decommissioning, whenever that may occur. Hopefully, it will not be on the backs of the public taxpayers.

The OPSB has indicated that requiring the total decommissioning bond or financial assurance for the entire project would be prohibitive and could possibly thwart the construction of the project. Appellee's Merit Brief, p. 47. Such an argument can be made for any cost to Applicant. However, if the public is not protected, then the OPSB is required to make findings for conditions to the Certificate to do so. *R.C. §4906.10(A)*.

Further, although there was evidence presented herein that a decommissioning bond of \$5,000.00 per turbine was wholly insufficient, Applicant still continues to assert that such a nominal sum is adequate as it was ordered in the first wind project before the OPSB. Intervenor Appellee Applicant's Merit Brief, pp. 33-36. Even the Staff of the OPSB disagreed with Applicant's assertion.

Because the public interest is not served as to this issue, the granting of the Certificate was unreasonable and unlawful. Therefore, The Orders should be reversed as to this issue or remanded to the OPSB for further hearing.

## **SECOND PROPOSITION OF LAW:**

**The Ohio Power Siting Board erred in failing to include as a condition the requirement that setbacks from the turbines to non-participating landowners' property lines conform to the manufacturer's setback recommendation if in excess of the minimum setback provided by rule. Therefore, the Orders are unreasonable and unlawful.**

The Applicant has proposed that the setbacks for the Project be the minimum standard allowed by rule, being 541 feet to a non-participating landowners' property line and 919 feet from the non-participating residence. (Exhibit 1, Application, pp. 83-84).

To show that such minimum setbacks are a potential hazard to nearby occupied structures, the County and Townships highlighted a "setback" found in Exhibit R-Turbine Safety Manuals (See Exhibit 1, Application) as an example of a greater setback recommended by the manufacturer. The turbine safety manual for the Gamesa model (one of the turbines proposed) sets forth that, in the event of a fire near the turbine, the area must be cleared and cordoned off in a radius of 400 meters (1,300 feet) from the turbine. (Exhibit 1, Application, Exhibit R, p. 42 of 44 of the Gamesa safety manual) Clearly, the area required by the subject safety manual to be cleared and cordoned off in the event of a fire near the turbine is greater than the setback proposed by Applicant and approved by Appellee OPSB. As a result, an occupied residence could be located well within the area to be cleared and cordoned off.

Appellee OPSB now states that Gamesa's recommendation in excess of the minimum setback is "only when the turbine is on fire or spinning uncontrollably". Appellee's Merit Brief, p. 42. The County and Townships would concur with the purpose of the recommendation of the turbine manufacturer. However, the OPSB then, inexplicably, argues that the turbines do not normally operate while on fire or spinning uncontrollably. Appellee's Merit Brief, p. 42. Further, Appellee OPSB argues that the turbine manufacturer's recommendations are for temporary removal of persons (apparently for safety reasons). Appellee's Merit Brief, p. 42. However, the OPSB unreasonably concludes that the recommendation should not be applied to residences,

which are structures occupied by such persons. Appellee's Merit Brief, p. 42 (emphasis applied by the undersigned).

The OBSB's Staff recommended a minimum setback unless the GE model was selected and then a setback of 991 feet to occupied structures and heavily traveled roads would be required and the OPSB concurred. Order of May 28, 2013, p. 36. It appears that, although Appellee OPSB is cognizant of the larger setbacks set forth in the turbine manufacturers' safety manuals, it only is swayed by the safety manual requiring the smallest setback.

As set forth by the County and Townships previously, if the OPSB would require as a condition that Applicant obtain, in writing, the chosen manufacturer's statement that the recommended setback was within the minimum setback according to rule, then there should be no issue with liability if there is a manufacturing defect resulting in loss or damage. If the chosen manufacturer states a greater recommended setback than the minimum allowed by rule, then the greater setback should be required by the OPSB.

At this time, as Applicant has not indicated what model of turbine it will use in this Project, the County and Townships are not necessarily stating that the setbacks set forth in the Gamesa safety manual or RePower safety manual is the setback that should be utilized, but it is certainly uncontroverted evidence of a recommended setback greater than the minimum setback **for safety purposes**. Certainly, the OPSB should not discount Gamesa's recommended setback, even though it considers it temporary, in order to adhere to a lesser setback, even as the legislature is increasing such minimum setback in future projects. As the setback pursuant to OAC §4906-17-8(C)(1)(c) is a minimum standard, the OPSB should be considering the purpose for the manufacturers'

recommended setbacks, which apparently are to prevent probable injury or damage from the turbine at least within such radius during an emergency. It is surprising, then, that the OPSB would still allow a smaller setback to occupied non-participating structures when, in essence, a manufacturer has indicated that such setback is within an unsafe radius of the turbine. This is of particular note as the OPSB has also required Applicant to also comply with the requirements of the safety manual of the manufacturer in Condition 37 of its Order of May 28, 2013.

Therefore, the Orders should be reversed or remanded to the OPSB for further hearing to require that the minimum setback should be the manufacturer recommended setback, whether it be for temporary clearance or otherwise, or the minimum setback allowed by rule, whichever is greater. Additionally, prior to construction, Applicant should be required to obtain, in writing, the chosen manufacturer's statement of its recommended setback, if not already set forth in the manufacturer's safety manual.

Because the public interest is not served as to this issue, the granting of the Certificate was unreasonable and unlawful.

### **THIRD PROPOSITION OF LAW:**

**The OPSB erred in failing to conduct its proceedings in a manner that afforded the parties "due process" in its hearings as the Appellants County and Townships had no meaningful ability to cross-examine "experts" regarding parts of the Application, and, therefore, the Orders are unreasonable and unlawful.**

During the adjudicatory hearing, the Applicant used a corporate executive, Michael Speerschnider, to "sponsor" the Application. Through the sponsor's testimony, the Applicant sought to establish the foundational basis for the admissibility of the Application. Upon this sponsor's testimony, the Application, Exhibit 1, was immediately admitted into evidence after the sponsor's testimony over the objection of multiple

intervenors. (Tr. II, p. 419, line 22 to p. 424, line 22. Although there is some disagreement of the involvement of Mr. Speerschnider in the creation of Exhibit 1, there is no dispute that he could not answer specifics about some of the subject set forth in the exhibits. (See Tr. 1, p. 168, line 1 to p. 170, line 2)

Clearly, Mr. Speerschnider admitted that he was not able to answer questions posed upon cross-examination regarding many of the exhibits attached to the Application. Therefore, the Application, marked as Exhibit 1, was improperly admitted over the objections of the intervenors at the conclusion of Mr. Speerschnider's testimony.

Additionally, Applicant's witness, Hugh Crowell, clearly did not have the requisite expertise to answer even the simplest of questions regarding the transportation study nor was he present at the time the information was gathered for said study (See Tr. VI, p. 1601, line 1 to p. 1602, line 6) and there is little dispute regarding his ability to testify to such study. The OPSB abused its discretion in concluding that Mr. Crowell was qualified to testify due to his position as there was nothing in the record which supported that he could testify as an expert as to the transportation study. In fact, Mr. Crowell could not answer most of the questions regarding the transportation study asked upon cross-examination. (Tr. VI, p. 1611, line 13 to p. 1618, line 9). He was not an engineer. (Tr. VI, p. 1598, lines 22-23.) He even indicated at one point that he did not consider himself an expert in the subject area. (Tr. VI, p. 1601, lines 6-10.) Again, as Mr. Crowell was unable to answer many of the questions posed upon cross-examination, did not participate in collecting the data or creating of the study and did not meet the criteria of Evid.R. 702 to qualify as an expert regarding the transportation study of Exhibit E to the

Application, that exhibit should have been stricken upon motion to strike by the intervenors, but was not. (Tr. VI, p. 1629, line 1 to p. 1630, line 18).

The record reflects that Mr. Speerschnider was not a qualified expert as to the entire Application and that Mr. Crowell was not a qualified expert as to the transportation study set forth in Exhibit E thereto as the record reflects their inability to aid the trier of fact for the exhibits they were “sponsoring”.

Although the OPSB states in its Order on Rehearing that, in essence, County and Township should have deposed “Crowell and Speerschnider to determine whether either of the witnesses was familiar with the [County and Townships’] areas of concern within the application” or could have called other witnesses (See Order on Rehearing, p. 5), that would not obviate Applicant’s burden to call a witness who was qualified to testify on the subjects set forth in the exhibits he is “sponsoring”. Further, this Court has previously held that, even though the rules of evidence are relaxed in administrative proceedings, this does not mean that testimony of witnesses should be accepted as expert opinion when they did not have the scientific expertise to form appropriate opinions. See *Simon v. Lake Geauga Printing Co.*, (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468.

The County and Townships certainly understand that the hearsay rule is relaxed in administrative proceedings and that administrative boards are permitted some leeway in admitting hearsay consistent with due process. *Haley v. Ohio St. Dental Bd.*, 7 Ohio App.3d 1 (2nd Dist. 1982).

One of the due process requirements for a fair hearing recognized by this Court was the opportunity to confront and cross-examine witnesses, even before an administrative tribunal. See *Ohio Assn. of Pub. School Emp., AFSCME, AFL-CIO v.*

*Lakewood City School Dist. Bd. of Edn. (1994), 68 Ohio St.3d 175, 624 N.E.2d 1043.* Appellee OPSB, however, argues that the County and Townships are precluded from claiming a denial of the right of cross-examination as the County and Townships did not take advantage of the opportunity to subpoena witnesses per this Court's prior finding in *In re Application of Black Fork Wind Energy, LLC, 2013-Ohio-5478*. Appellee's Merit Brief at p. 15. The case cited by Appellee OPSB is not on point as the County and Townships are not stating that they were unable to subpoena witnesses. The argument of Appellee OPSB highlights the contention of the County and Townships that the Application was admitted, over objection, through testimony a sponsor who was not qualified to testify and who could not answer many questions regarding parts of the Application being sponsored. The OPSB appears to shift the burden of proof to the intervenors instead of acknowledging the lack of foundation and expertise of the "sponsor" witness in admitting the Application into evidence.

There is no evidence in the record supporting the board's assertion that Mr. Speerschneider directed and supervised third-party consultants and managed the production of the application. But even if the statement was accurate, it would not change the fact that many of the reports attached to the Application are hearsay, because they were not Mr. Speerschneider's statement. Although he testified that the application and its exhibits were "true and accurate to the best of [his] knowledge and belief" (Speerschneider Direct, Champaign Wind Ex. 5, p. 4), that limited assertion is meaningless in the absence of any record evidence demonstrating his knowledge of the specialized subject matter of the technical studies and reports appended to the application. For example, there is no such evidence that he is qualified to testify as to

the Camiros report. Mr. Speerschneider's educational background and experience is in physics, environmental studies, and engineering. (Id., p.2.) He is not an economist and was not qualified at hearing as an expert in the Camiros report.

Further, while Appellee OPSB was liberal in admitting hearsay offered by Applicant, it applied a more stringent standard with respect to all of the intervenors' witnesses. For example, the board would not permit William Palmer -- an undisputed expert on safety issues -- to base his opinions on a database of wind turbine accidents, reasoning that the database was hearsay. (Tr. VI, p. 1360, lines 1-4, p. 1361, lines 20-21). It disallowed the admission of documents attached to the direct testimony of UNU expert witnesses because, under the "learned treatise" exception to the hearsay rule, the witnesses could refer the documents in their testimony but the documents were not admissible as evidence. (E.g., Tr. V, pp.1107, 1019). Therefore, the hearsay rule did not apply for purposes of "sponsoring" or otherwise supporting the application as evidence, yet the hearsay rule applied with full force to evidence offered by the intervenors.

Although the Board relies on "long-standing practice" in relaxing the hearsay rule with regard to the admission of the application, it is highly prejudicial to do so while applying the rule with full force to intervenors. This arbitrary double standard was an abuse of discretion and contributed to a hearing that was fundamentally unfair and lacked due process.

As the intervening Boards had no meaningful ability to cross-examine the "sponsors" regarding parts of the Application, due process for a fair hearing has been denied and, therefore, the Order is unreasonable and unlawful as to this issue and the OPSB should set this matter for re-hearing to resolve the improper admission of the

Exhibit 1, the Application, or parts thereof, based upon the objections of the County and Townships set forth in the record.

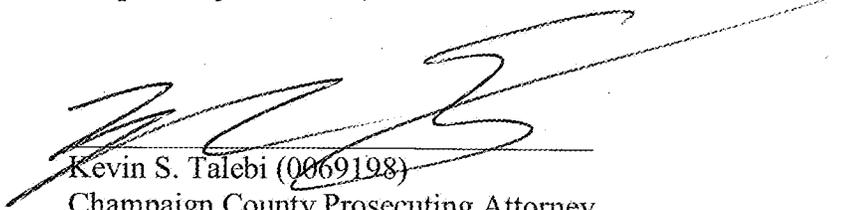
### CONCLUSION

Appellee OPSB asserted in its brief that “[w]ere it left to the appellants, no wind farm project would ever be built in Ohio”. Appellee OPSB’s Merit Brief, p. 2. That unfounded assertion and the attitude behind it certainly explains Appellee OPSB’s continued reluctance to admit the validity of the County and Townships’ positions regarding decommissioning amounts and setbacks, as well as other issues which would protect the local public. Many of the issues raised by the County and Townships in the hearing process of the first wind project in Ohio were rejected at the time by the OPSB. Some of those issues, such as decommissioning bonds and local input on road use (through agreements between the Applicant and the local entities) are now standard conditions in more recent approved projects. This reflects that, although the OPSB indicate otherwise, the area of wind development is not well-established and every effort should be made to ensure the public is protected over what the OPSB considers precedence from prior wind projects. The County and Townships request that the issues set forth herein be addressed as set forth herein in order to protect Champaign County and specifically for the “public interest, convenience and necessity” to be served in granting of the Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County.

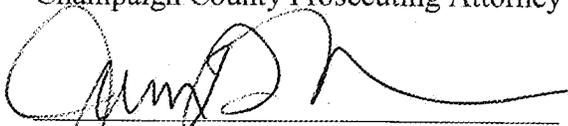
Accordingly, Appellants County and Townships submit that the Orders of May 28, 2013 and September 30, 2013 are unlawful and unreasonable and should be reversed.

This Honorable Court should remand such Orders to the Ohio Power Siting Board with instructions to correct the errors identified herein.

Respectfully submitted,



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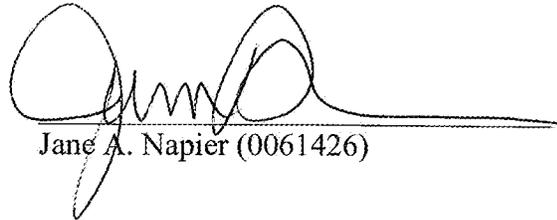
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