

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Power Siting Board's )  
Adoption of Chapter 4906-17 of the Ohio )  
Administrative Code and the Amendment )  
of Certain Rules in Chapters 4906-1, 4906-5 ) Case No. 08-1024-EL-ORD  
and Rule 4906-7-17 of the Ohio )  
Administrative Code to Implement )  
Certification Requirements for Electric )  
Generating Wind Facilities. )

ENTRY ON REHEARING

The Ohio Power Siting Board finds:

- (1) On June 24, 2008, the governor of the state of Ohio signed Amended Substitute House Bill No. 562 (HB 562), which, among many things, directed the Ohio Power Siting Board (Board) to adopt certification rules for the construction, operation, and maintenance of electric generating wind facilities.
- (2) On September 15, 2008, the Board issued for comments and reply comments its Staff's proposal to adopt rules to implement certification requirements for electric generating wind facilities in Chapter 4906-17, Ohio Administrative Code (O.A.C.), and, in order to accommodate the adoption of Chapter 4906-17, O.A.C., to amend certain rules in Chapters 4906-1 and 4906-5 and Rule 4906-7-17, O.A.C. Comments were due by September 29, 2008, and reply comments were due by October 7, 2008.
- (3) Comments and/or reply comments to the proposed rules were filed by numerous interested stakeholders. After evaluating Staff's proposal, the comments and reply comments, the Board issued its order adopting rules for the construction, operation, and maintenance of wind-powered electric generation facilities on October 28, 2008 (order).
- (4) Pursuant to Sections 4903.10 and 4906.12, Revised Code, any party who has entered an appearance in a Board proceeding may apply for rehearing with respect to any matters decided.

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business  
Technician \_\_\_\_\_ Date Processed JAN 26 2009

Any application for rehearing must be filed within 30 days of the issuance of the Board's decision.

- (5) Applications for rehearing were filed by Union Neighbors United (UNU) and Buckeye Wind, LLC, (Buckeye) on November 26, 2008, and November 28, 2008, respectively. On December 8, 2008, UNU filed a memorandum contra Buckeye's application for rehearing.
- (6) Rule 4906-7-17, O.A.C., provides that the Administrative Law Judge may issue an entry granting rehearing for the limited purpose of affording the Board more time to consider the issues raised in an application for rehearing. Pursuant to Rule 4906-7-17, O.A.C., on December 17, 2008, the Administrative Law Judge issued an entry granting UNU's and Buckeye's applications for rehearing for the purpose of affording the Board additional time to consider the issues raised.

#### UNU's Application

- (7) In its application for rehearing, UNU requests that the Board reconsider the adoption of minimum noise standards and measurement protocols as a part of Rule 4906-17-08, O.A.C., as proposed in its initial comments. UNU asserts that the Board's refusal to implement minimum noise standards and measurement protocols and the intent to evaluate the noise levels on a case-by-case basis in light of the composition of the area surrounding the proposed facility is unlawful and unreasonable to the extent that any decision by the Board would be arbitrary, in violation of Article I, Section 16, of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). Further, UNU asserts that it is unreasonable not to adopt minimum noise standards and measurement protocols as there is no rational basis to conclude in one proceeding that a given noise level is appropriate with regard to one adjacent residential property and then conclude in another proceeding that a different noise level is appropriate. UNU requests that the Board grant rehearing in order that additional evidence may be developed to support appropriate regulatory criteria for noise measurement and mitigation.

- (8) The Board thoroughly considered the comments and reply comments of UNU and other commenters, regarding the adoption of noise standards as a part of the wind-powered electric generation siting process. We note, as UNU's comments acknowledge, that the level of sound generated by wind turbines depends on a number of factors such as the design characteristics of the wind turbine, distance to the source, sound blocks, obstructions and terrain, sound absorption of the propagation medium between the source and the location of sound measurement, acoustic characteristics of the ground surface, frequency composition of the sound waves, and weather conditions such as wind speed, direction, temperature, humidity, and precipitation. We believe that an appropriate practice for dealing with potential noise impacts of a wind turbine is to maintain a minimum distance between the nearest turbine and a residence. Taking that approach, Section 4906.20, Revised Code, requires a minimum setback from the turbine to the nearest, habitable, residential structure, and the Board has reflected that approach in the rules adopted.
- (9) Further, the Board notes that, as with all major utility facilities, including other electric generation facilities, the Board will evaluate all wind-powered electric generation facilities and render its decision on such facilities pursuant to the criteria in Section 4906.10, Revised Code, as well as pursuant to Section 4906.20, Revised Code, that is specifically applicable to wind farms. Our review will, therefore, include the noise level expected as a result of the construction, operation and maintenance of such facilities. The Board will revise paragraph (C) of Rule 4906-17-01, O.A.C., to clarify that certification applications for wind farms will be approved or modified and approved pursuant to the criteria in Section 4906.10, Revised Code. Accordingly, the Board grants UNU's application for rehearing to the extent set forth herein.

Buckeye's Application

- (10) Buckeye requests that the Board reconsider the adoption of Rule 4906-17-08(C)(1)(c)(iii), O.A.C. As adopted by the Board, Rule 4906-17-08(C)(1)(c)(iii), O.A.C., states:

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.

- (11) Buckeye argues that Rule 4906-17-08(C)(1)(c)(iii), O.A.C., is unreasonable and unlawful and requests that it be revised. Buckeye believes that, as adopted, the rule could be interpreted as requiring the consent of every owner of property surrounding the property on which the turbine is proposed to be located. Buckeye notes that Section 4906.20(B)(2), Revised Code, states that:

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 . . . .

- (12) According to Buckeye, adopted Rule 4906-17-08(C)(1)(c)(iii), O.A.C., does not accurately reflect the intent of Section 4906.20(B)(2), Revised Code. Buckeye believes that the reference in the adopted rule to "owners of property adjacent to the turbine" is intended to mean the property within the minimum setback and, therefore, immediately adjacent to the turbine. Buckeye is concerned that adopted Rule 4906-17-08(C)(1)(c)(iii), O.A.C., could be interpreted as requiring the consent of every owner of property surrounding the property on which the turbine is proposed to be located. Pursuant to such interpretation of the adopted rule, Buckeye contends that a property owner beyond the minimum setback, on the opposite side of the property on which the turbine is proposed to be located, could block the installation of a turbine even if the property owners within the minimum setback consent to the proposed location of the turbine. Thus, Buckeye reasons that Rule 4906-17-08(C)(1)(c)(iii), O.A.C., as adopted by the Board, is contrary to the intent and language of Section 4906.20(B)(2), Revised Code, and is, therefore, unreasonable and unlawful. Accordingly, Buckeye recommends that Rule 4906-17-08(C)(1)(c)(iii), O.A.C., as adopted by the Board, be amended as follows:

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

- (13) On December 8, 2008, UNU filed a memorandum contra Buckeye's application for rehearing of Rule 4906-17-08(C)(1)(c)(iii), O.A.C. UNU argues that it is a well-established principle that, where the language of a statute is clear and unambiguous, the statute must be enforced as written, neither adding to nor subtracting from the statute. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 4 (2008); Section 1.49, Revised Code. UNU posits that, if the statute is unambiguous, there is no need to interpret the statute; it must simply be applied. *Howard* at 4, citing *State v. Hairston*, 101 Ohio St.3d 308 (2004). According to UNU, Section 4906.20(B)(2), Revised Code, is unambiguous and adopted Rule 4906-17-08(C)(1)(c)(iii), O.A.C., is consistent with Section 4906.20(B)(2), Revised Code, as the statute does not state that the waiver requirement is limited only to those landowners within the minimum setback. Further, UNU contends that the revision to Rule 4906-17-08(C)(1)(c)(iii), O.A.C., as proposed by Buckeye, based on Buckeye's suggestion of legislative intent, is inappropriate given the clear and unambiguous language of Section 4906.20(B)(2), Revised Code, regarding minimum setback waivers. UNU argues that the statute is not ambiguous, as the term "adjacent" has a simple and clear meaning; near or close (to something); adjoining, touching at some point or along a line; contiguous. Webster's New World College Dictionary (Fourth Edition 1999). Therefore, UNU contends that the statute is clear and there is no need to resort to consideration of legislative intent or other means of statutory interpretation. Furthermore, UNU points out that, even if legislative intent were an appropriate consideration in this instance, the legislative history of HB 562 is silent on the subject of minimum setback waivers. Accordingly, UNU request that Buckeye's application for rehearing be denied.
- (14) The Board finds that Section 4906.20(B)(2), Revised Code, is clear and unambiguous as to who must agree to the waiver of the minimum setback. To that end we agree with UNU that it is a well-settled principle of statutory construction that, where

the statute is clear and unambiguous, statutory interpretation is not necessary and the statute must be applied giving effect to the words used. In re Collier, 85 Ohio App.3d 232, 236-237 (1993). Further, where the statute is clear and unambiguous, the agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute. Id. Accordingly, the Board finds it unnecessary and inappropriate to revise Rule 4906-17-08(C)(1)(c)(iii), O.A.C., as proposed by Buckeye.

- (15) After further review of the rules adopted by the Board in the order, the Board finds that Appendix A to Rule 4906-1-01, O.A.C., and Rule 4906-1-03, O.A.C., should be amended. In this proceeding, the Board amended the definitions in Rule 4906-1-01, O.A.C., to accommodate the adoption of a certification process for wind-powered electric generation facilities. Although there were no amendments to the appendices to Rule 4906-1-01, O.A.C., in relation to this proceeding, as part of the review, the Board Staff determined that Appendix A, which sets forth the application requirements matrix for electric power transmission lines, had inadvertently misstated the minimum line requirements. Accordingly, the Board, *sua sponte*, adopts the following revisions to Rule 4906-1-01, O.A.C., Appendix A:

(1)(b) Line(s) three hundred kV and above, and greater than ~~01~~ 1 mile but not greater than .2 miles in length.

...

(e) Line(s) one hundred twenty-five kV and above, but less than three hundred kV, and greater than ~~02~~ 0.2 miles in length but not greater than two miles in length.

- (16) Also, after further review of the rules adopted by the Board in the order, the Board finds that Rule 4906-1-03, O.A.C., should be amended. Adopted Rule 4906-1-03, O.A.C., fails to clearly indicate that a motion and supporting memorandum must be filed to request the waiver of any requirement, standard or rule. Accordingly, the Board, *sua sponte*, revises Rule 4906-1-03, O.A.C., to state:

The board or administrative law judge may, for good cause shown, as supported by a motion and supporting memorandum, waive any requirement, standard, or rule set forth in Chapters 4906-1 to 4906-17 of the Administrative Code, except where precluded by statute.

It is, therefore,

ORDERED, That UNU's application for rehearing be granted to the extent set forth herein. It is, further,

ORDERED, That Buckeye's application for rehearing be denied. It is, further,

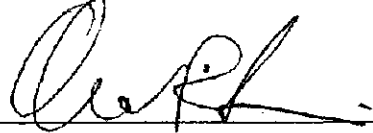
ORDERED, That Rules 4906-1-01, 4906-1-03 and 4906-17-01, O.A.C., be revised as attached to this entry on rehearing. It is, further,

ORDERED, That all the rules in Chapter 4906-17, O.A.C., and all other rules amended in Chapters 4906-1, 4906-5 and 4906-7, O.A.C., and adopted by the Board on October 28, 2008, or revised herein, be filed with the Joint Committee on Agency Rule Review, the Legislative Services Commission, and the Secretary of State, in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the five-year review date for Chapter 4906-17, be established as September 30, 2013. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all commenters and all interested persons of record.

## THE OHIO POWER SITING BOARD



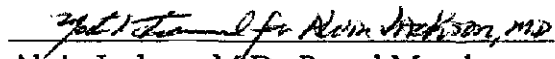
Alan R. Schriber, Chairman of the  
Public Utilities Commission of Ohio



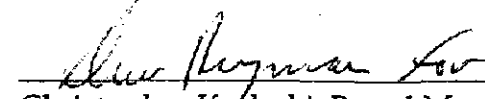
Lee Fisher, Board Member  
and Director of the Ohio Department  
of Development



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



Lorry Yale Wagner, Board Member and  
Public Member

GNS/vrm

Entered in the Journal

JAN 26 2009



Renee J. Jenkins  
Secretary



**APPENDIX A**  
**APPLICATION REQUIREMENT MATRIX**  
**FOR ELECTRIC POWER TRANSMISSION LINES**

Description of the Proposed Electric Power Transmission Line and Associated Facilities	Certificate Application (BTX, BTA, or BSB) Required	Letter of Notification Application (BLN) Required	Construction Notice Application (BNR) Required
	4906-15-01 through 4906-15-07	4906-11-01	4906-11-02
(1) Rerouting or extension or new construction of single or multiple circuit electric power transmission line(s) as follows:			
(a) Line(s) three hundred kilovolts (kV) and above, and not greater than 0.1 mile in length.			X
(b) Line(s) three hundred kV and above, and greater than 0.1 mile but not greater than one mile in length.		X	
(c) Line(s) three hundred kV and above, and greater than one mile in length.	X		
(d) Line(s) one hundred twenty-five kV and above, but less than three hundred kV, and not greater than 0.2 miles in length.			X
(e) Line(s) one hundred twenty-five kV and above, but less than three hundred kV, and greater than 0.2 miles in length but not greater than two miles in length.		X	
(f) Line(s) one hundred twenty-five kV and above, but less than three hundred kV, and greater than two miles in length.	X		
(2) Adding additional circuits on existing structures designed for multiple circuit use.			
(a) No new permanent access roads or structure replacement, and no widened right-of-way required.			X
(b) New permanent access roads or structure replacement or widened right-of-way required.		X	
(3) Replacing conductors on existing structures with larger or bundled conductors.			X

(4) Replacing electric power transmission line structure(s) with a different type of structure(s) or adding structure(s) within an existing electric power transmission line and:			
(a) Two miles or less of new right-of-way required.		X	
(b) More than two miles of new right-of-way required.	X		
(5) Rebuilding existing electric power transmission line(s) for operation at a higher voltage, for a distance of:			
(a) Two miles or less.		X	
(b) More than two miles.	X		
(6) Upgrading existing line(s) less than one hundred twenty-five kV to a voltage of one hundred twenty-five kV or greater, for a distance of:			
(a) Two miles or less.		X	
(b) More than two miles.	X		
(7) Constructing a new electric power transmission substation (except pole-mounted switching stations).	X		
(8) Constructing additions to existing electric power transmission substations where:			
(a) There is a twenty percent or less expansion of the fenced area.			X
(b) There is a greater than twenty percent expansion of the fenced area.		X	
(9) Replacement or relocation of an electric power transmission line and associated facilities where the project is required by publicly funded entities and is located on or adjacent to right-of-way or land owned by the public entity requiring the project.			X

**\*\*\* DRAFT – NOT FOR FILING \*\*\***

4906-17-01

Applicability and definitions.

(A) This chapter details the application filing requirements for all wind-powered electric generation facilities consisting of wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of five megawatts or more.

(B) As used in this chapter:

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

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

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

**\*\*\* DRAFT – NOT FOR FILING \*\*\***

4906-1-03      **Waiver of rules.**

~~Where good cause appears, the~~The board or the administrative law judge may permit  
~~departure from, for good cause shown, as supported by a motion and supporting~~  
~~memorandum, waive any requirement, standard, or rule set forth in Chapters 4906-1 to~~  
~~4906-15 4906-17~~ of the Administrative Code, except where precluded by statute.