

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of for an)
Amendment of a Certificate of Environmental) Case No. 12-1669-EL-BGA
Compatibility and Public Need for the Rolling)
Hills Generating Station, in Vinton County, Ohio)

**MOTION FOR A WAIVER OF OHIO REVISED CODE 4906.06 (C)
AND OHIO ADMINISTRATIVE CODE RULE 4906-5-08 (C)(1)
REGARDING PUBLICATION REQUIREMENTS**

Rolling Hills Generating, LLC (“Rolling Hills” or “Applicant”), respectfully moves the Ohio Power Siting Board (“Board”) or its Administrative Law Judge (“ALJ”) for a waiver of one of the publication requirements set forth in Ohio Revised Code Section (“R.C.”) 4906.06 (C) and Ohio Administrative Code (“OAC”) Rule 4906-5-08 (C)(1) pertaining to the time within which publication is to be made after an application is filed for the reasons set forth in the memorandum in support below.

MEMORANDUM IN SUPPORT

Rolling Hills filed its Application for an Amendment (“Amendment”) in the above referenced matter on June 1, 2012. Its representatives then proceeded to arrange for publication in accordance with R.C. 4906.06 (C). That section as well as OAC Rule 4906-5-08 (C)(1) essentially states that within fifteen days from the date from filing and application, an applicant shall give public notice to persons residing in those areas where the facility is located. Division (D) of R.C. 4906.06 states:

Inadvertent failure of service on, or notice to, any of the persons identified in divisions (B) or (C) of this section may be cured pursuant to orders of the board designed to afford them adequate notice to enable them to participate effectively in the proceeding.

...

OAC Rule 4906-5-08 (D) which pertains to, and complements, R.C. 4906.06 (D) states:

Inability or inadvertent failure to notify the persons described in this rule shall not constitute failure to give public notice, provided substantial compliance with these requirements is met.

In this case, newspaper publication was made in three counties, Vinton, Meigs and Gallia. The newspapers of general circulation in Meigs and Gallia counties are daily papers; the one in Vinton County is a weekly newspaper published on Wednesdays. Personnel in counsel's office communicated by telephone and e-mail with each of the newspapers to assure that the notices were timely made. In the case of the Vinton County newspaper, the newspaper indicated that in order to make the date within the 15 days, the publication would have to reach the newspaper by Friday, June 8th no later than 2:00 p.m. The requisite notice was sent by electronic mail by 1:24 PM on June 8th. No automatic e-mail notice was received indicating that the e-mail did not go through. Less than 2 hours later, when a call was made to the person in charge of legal notices at the Vinton County newspaper, she stated that the notice had not been received and that it was impossible to include the notice in the paper that would be published on June 13th. Thus, the Vinton County notice was published on June 22, 2012, five days after the fifteenth day of the Amendment's filing.

Rolling Hills Generating Station is located in Wilkesville Township in Vinton County. When asked about its subscribers in Wilkesville Township or the Village of Wilkesville, the Vinton County newspaper representative replied that there were no subscribers in those areas.

On the other hand, representatives from both the Meigs County and the Gallia County

newspapers stated that their newspapers served Vinton County and specifically the Wilkesville area. Thus, those persons closest to Rolling Hills Generating Station were given newspaper notice by those two newspapers, while if the notice had been timely filed by the Vinton County newspaper, it would not have been available to those persons because that newspaper does not have subscribers in the area.

Division (D) of R.C. 4906.06 states essentially that inadvertent failure to serve notice can be cured by an order of the Board. Paragraph (D) of OAC Rule 4906-5-08 states that inability or inadvertent failure to notify the persons referenced in the rule shall not constitute failure to give notice, if substantial compliance with the requirements has been met. Applicant has met the requirements of both the statute and the rule.

Firstly, the circumstances of this publication certainly constitute inadvertence. Applicant had every indication that the legal notice would be published timely. The notice was submitted to the weekly newspaper on time but for whatever reason, despite the lack of an automatic notice stating that the e-mail did not arrive at the proper destination, the newspaper personnel stated that it had not been received and apparently could not (or would not) extend the deadline by an hour and a half for a legal publication that was to appear five days later. Applicant's representatives performed their activities timely and diligently. The failure to publish timely by the Applicant was unintentional, the essence of inadvertence as that term is used in R.C. 4906.06 (D) and OAC Rule 4906-5-08 (D). Furthermore, the attempt to publish the notice timely was caused by events beyond the control of Applicant and thus constitutes Applicant's inability to make the timely notice as contemplated by OAC Rule 4906-5-09 (D).

Additionally, the people in the areas closest to Rolling Hills Generating Station received timely notice from the other two newspapers, which had subscribers in the area. As noted above,

even had the Vinton County newspaper published the notice on time, residents in the immediate vicinity would not have seen it.

Finally, the publication in 20 rather than 15 days has not been a factor in anyone's ability to participate effectively in this case. To date, more than a month after the publications by all three newspapers, no one has intervened. Therefore, there is no party who has been affected adversely by the late publication. Because the publication in Vinton County was made as soon as possible after the required publication date, there is no need to the Board to provide for another "cure" under the statute. In fact, another publication more than a month after the publication date in Vinton County would be less efficacious in complying with the statutory and rule requirements than the 5-day later publication already accomplished by the Applicant.

Furthermore, the fact that the people in the Wilkesville area received notice from two neighboring county newspapers while at the same time they also would have potentially received notice in the Vinton county newspaper (if any of them were subscribers) only five days after the required time frame, constitutes substantial compliance in accordance with OAC Rule 4906-5-08 (D). In the only Board case to consider the provisions of what is now Paragraph (D) of the rule, *In he Matter of the Hanna-Shalersville 138 kV Transmission Line Project*, Case No. 00-99-EL-BTS, Entry of September 9, 2000, based solely on an investigation of the non service by the applicant, the administrative law judge ruled that the failure to serve certain property owners cited in the rule was caused by inadvertence. In that case, because the applicant failed to serve a letter upon a substantial number of persons entitled to direct service of the public hearing, in order to correct the inadvertence, the administrative law judge directed that, applicant publish a new newspaper notice rather than serving a letter on the affected persons. In this case, no persons who were not served with the Amendment were entitled to a letter concerning the

Amendment who did not receive one. Moreover, applicant caused the public notice in Vinton County to be published as soon as possible after the required date so the only cure that could be effected has already been completed. Thus, it is reasonable and just for the Board to grant this waiver by finding substantial compliance and that no further action is necessary.

WHEREFORE, Rolling Hills, LLC requests the Board or its Administrative Law Judge to find, in accordance with R.C. 4906.06 (D) and OAC Rule 4906-5-08 (D) that the publication made for this Amendment complies with R.C. 40906.06 (C) and OAC Rule 4906-5-08(C)(1).

Respectfully submitted on behalf of
ROLLING HILLS GENERATING, LLC



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Summary: Motion FOR A WAIVER OF OHIO REVISED CODE 4906.06 (C) AND OHIO ADMINISTRATIVE CODE RULE 4906-5-08 (C)(1) REGARDING PUBLICATION REQUIREMENTS electronically filed by Teresa Orahood on behalf of Rolling Hills Generating, L.L.C.