

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting)
Board's Review of Chapters 4906-1, 4906-5,)
4906-7, 4906-9, 4906-11, 4906-13, 4906-15,) Case No. 12-1981-GE-BRO
and 4906-17 of the Ohio Administrative)
Code.)

SECOND ENTRY ON REHEARING

The Ohio Power Siting Board (Board), in considering the application for rehearing filed by Union Neighbors United, Inc., Robert and Diane McConnell, and Julia Johnson, denies the application for rehearing of the Board's November 12, 2015 Second Finding and Order adopting Ohio Adm.Code 4906-4-08 and directing Staff to meet with all interested stakeholders in the near future to develop potential solutions to the remaining concerns raised in the comments. Accordingly, the Board finds:

- (1) Pursuant to R.C. 106.03 and 111.15, all state agencies are required to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules.
- (2) In summary, R.C. 106.03(A) requires that the Board determine whether the rules: should be continued without amendment, be amended, or be rescinded; need amendment or rescission to give more flexibility at the local level or to eliminate unnecessary paperwork; incorporate a text or other material by reference; duplicate, overlap, or conflict with other rules; have an adverse impact on businesses; and contain words or phrases having meanings that, in contemporary usage, are understood as being derogatory or offensive.
- (3) In addition, on January 10, 2011, the governor of the state of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative," which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among other things, the Board must: review its rules to determine the impact that a rule has on small businesses; attempt to

balance the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative, unintended consequences, or unnecessarily impede business growth.

History of the Proceedings

- (4) On July 5, 2012, the Board initiated its five-year review of the rules contained in Ohio Adm.Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 in this docket.
- (5) On February 18, 2014, the Board issued a Finding and Order (First Order) in which it adopted a number of revisions to the current administrative rules, including a reorganization of the rules in order to provide a better structure for the rules and to make it easier to follow the process and requirements for different types of cases. In the First Order, the Board concluded that Ohio Adm.Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 should be rescinded and replaced by new Ohio Adm.Code Chapters 4906-1 through 4906-7, subject to the provisions of R.C. 111.15.
- (6) By Entry on Rehearing issued May 15, 2014, the Board granted, in part, and denied, in part, the applications for rehearing filed by two commenters.
- (7) On September 15, 2014, House Bill 483 (H.B. 483) became effective, thus, amending R.C. 4906.20 and 4906.201, regarding the setback requirements for applications to construct wind-powered electric generation facilities that come before the Board.
- (8) While the Board moved forward, in accordance with the provisions of R.C. 111.15, and filed the vast majority of the rules with the Joint Committee on Agency Rule Review (JCARR), in light of the new law contained in R.C. 4906.20 and 4906.201, the Board did not file new Ohio Adm.Code 4906-4-08, which contained a consolidation of the rules found in Ohio Adm.Code 4906-13-04, 4906-13-07, 4906-17-

05, and 4906-17-08. In addition, Ohio Adm.Code 4906-13-04, 4906-13-07, 4906-17-05, and 4906-17-08 were not filed with JCARR. The rules not filed with JCARR address the health and safety, land use, and ecological information required in applications filed before the Board, including the provision regarding the statutory setback requirements for wind-powered electric generation facilities.

- (9) By Entry issued November 24, 2014, the Board requested comments on Staff's proposed revision to Ohio Adm.Code 4906-4-08, which revised the setback requirements for applications to construct wind-powered electric generation facilities in light of the amendments to R.C. 4906.20 and 4906.201 made in H.B. 483. In the November 24, 2014 Entry, the Board noted that, until JCARR reviewed Ohio Adm.Code 4906-4-08 and it became effective, Ohio Adm.Code 4906-13-04, 4906-13-07, 4906-17-05, and 4906-17-08 should remain in effect.
- (10) In response to the November 24, 2014 Entry, comments were filed by multiple parties including, in part, Union Neighbors United (UNU) joined by Robert and Diane McConnell and Julia Johnson in individual capacities (jointly referred to as UNU), Greenwich Neighbors United, and EverPower Wind Holdings Inc. Reply comments were filed by UNU, American Wind Energy Association, and Greenwich Windpark LLC.
- (11) On November 12, 2015, the Board issued a Second Finding and Order (Second Order) in this proceeding. In the Second Order, the Board found that revisions to Ohio Adm.Code 4906-4-08(C)(2)(b) should be filed with JCARR, the Legislative Service Commission, and the Secretary of State, in order to ensure the most current statutory setback requirement is reflected in the rules as soon as possible. However, the Board found that further discussion was necessary on the topics raised in the comments regarding Ohio Adm.Code 4906-4-08 as they relate to wind-powered electric generation facilities. Consequently, the Board directed that Staff commence discussions with all interested stakeholders in January 2016 in order to obtain more information on stakeholders' proposals and concerns and to develop potential solutions. The Board further

found that, upon conclusion of the discussions, but no later than June 1, 2016, the Board should initiate a rulemaking docket in order to formally consider Staff's proposed revisions to Ohio Adm.Code 4906-4-08 resulting from the stakeholder deliberations.

Application for Rehearing

- (12) R.C. 4906.12 states, in relevant part, that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23, apply to a proceeding or order of the Board as if the Board were the Public Utilities Commission of Ohio (Commission).
- (13) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (14) Further, Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing within 30 days after the issuance of a Board order in the manner, form, and under the circumstances set forth in R.C. 4903.10.
- (15) Ohio Adm.Code 4906-2-32(E) provides that the administrative law judge (ALJ) may issue an order granting rehearing for the limited purpose of affording the Board more time to consider the issues raised in an application for rehearing.
- (16) Thereafter, on December 11, 2015, UNU filed an application for rehearing asserting that the Second Order is unlawful and unreasonable.
- (17) On December 28, 2015, pursuant to Ohio Adm.Code 4906-2-32(E), the administrative law judge granted the application for rehearing for the limited purpose of affording the Board additional time to consider the issues raised in the application for rehearing.

UNU's Assignments of Error

- (18) In its application for rehearing, UNU asserts that the Second Order is unlawful and unreasonable on the basis that: (1) it promulgates Ohio Adm.Code 4906-4-08 in its entirety despite the Board's acknowledgement that there is insufficient information in the docket to support issuance of the rule; (2) the Board erroneously concluded that comments concerning safety hazards associated with the potential for turbine blade throw or ice throw are beyond the scope of the Board's authority; and, (3) neither Ohio Adm.Code 4906-4-08 nor the other rules promulgated in this proceeding set forth reasonable regulation of subjects mandated by R.C. 4906.20(B)(2), specifically reconstruction or enlargement of wind turbines, protection of recreational lands or wildlife, interconnection, decommissioning, cooperation for site visits and enforcement investigations, and enforceable standards for protection of the public from ice throw, wind turbine noise, blade shear, or shadow flicker.
- (19) Regarding the first argument in its application for rehearing, UNU asserts that the Board found that numerous stakeholder comments and concerns raised regarding Ohio Adm.Code 4906-4-08 warranted additional consideration by the Board, and that this docket lacked sufficient information to make necessary revisions to the rule. UNU asserts that it welcomes the opportunity to participate in the stakeholder rules process planned for January 2016, but asserts that there is no certainty that process will result in revisions to the proposed rule. Consequently, UNU asserts that, in order to avoid waiving its appeal rights, it has no alternative but to seek rehearing, and requests that the Board defer the rule's adoption until it can fully consider the comments, concerns, and information to be developed in the stakeholder process.

The Board finds that UNU has raised no new arguments on this subject on rehearing and that the Board fully addressed this argument in the Second Order. As acknowledged by UNU, the Board found in the Second Order that numerous stakeholder comments and concerns warranted additional consideration and the docket lacked

sufficient information; consequently, the Board ordered Staff to commence discussions with interested stakeholders in January 2016 in order to obtain more information and develop potential solutions. Nevertheless, the Board found that Ohio Adm.Code 4906-4-08 should be filed with JCARR in order that the most current statutory setback requirement be reflected in the rules as soon as possible. (Second Order at 5-11.) UNU raises no new arguments on this subject on which the Board finds rehearing should be granted; consequently, the Board denies UNU's application for rehearing on these grounds.

- (20) In support of its second argument on rehearing, UNU contends that the Board erroneously concluded that comments filed concerning safety hazards associated with the potential for blade shear or ice throw were beyond the scope of the Board's authority. UNU argues that, in Finding (16) of the Second Order, the Board wrongfully denied its arguments regarding setbacks when it found that that they appeared to be concentrated on the minimum setback requirement established by the General Assembly in H.B. 483, which the Board found was beyond the scope of the Board's purview. UNU claims that its recommended setbacks are within the Board's rulemaking authority because R.C. 4906.20(B)(2) requires the Board to enact reasonable regulations relating to ice throw and blade shear; and because the setbacks referenced by the Board in Finding (16) are *minimum* setbacks, and the Board is free to find that a greater setback may be warranted.

The Board finds that UNU has raised no new arguments on this subject on rehearing and that the Board fully addressed this argument in the Second Order. As the Board stated in the Second Order, we reiterate that we are required by statute to consider applications for the construction of wind-powered electric generation facilities in Ohio in accordance with applicable statutes, including the specific minimum setback requirement established by H.B. 483. Additionally, as discussed in the Second Order, the specific comments the Board addressed in Finding (16) appeared to be concentrated on the minimum setback requirement established by the General Assembly, which is

beyond the scope of the Board's purview. (Second Order at 4-5.) Further, we note that the Board went on to find that the stakeholder process to be convened in January 2016 should address comments filed on issues including, among other things, ice throw, manufacturer-recommended setbacks, and setback waivers (Second Order at 6-11). Thus, the Board has established a process to better enable the Board to enact reasonable regulations regarding ice throw and setback issues, among other things. For these reasons, the Board finds that UNU's application for rehearing on these grounds should be denied.

- (21) Regarding its third assignment of error, UNU claims that R.C. 4906.20(B)(2) requires the Board to enact reasonable rules, and that neither Ohio Adm.Code 4906-4-08 nor the remainder of the Board's rules establish enforceable standards for the protection of the public from ice throw, turbine noise, blade shear, or shadow flicker.

The Board finds that UNU has raised no new arguments on this subject on rehearing and that the Board fully addressed this argument in the Second Order. Initially, as discussed previously, the Board notes its finding that numerous stakeholder comments and concerns warranted additional consideration and the docket lacked sufficient information, and its directive that Staff commence discussions with interested stakeholders to obtain more information and develop potential solutions. Additionally, in order that the most current minimum setback established by the General Assembly be restated in the rule as soon as possible, the Board found that Ohio Adm.Code 4906-4-08 should be filed with JCARR. (Second Order at 5-11.) As the Board has established a process to better enable the Board to enact reasonable regulations pursuant to R.C. 4906.20(B)(2), and UNU raises no new arguments on this subject, the Board denies UNU's application for rehearing on these grounds.

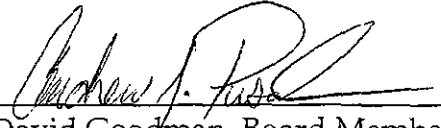
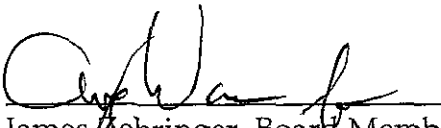
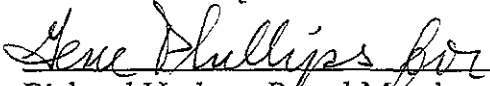


It is, therefore,

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

ORDERED, That notice of this Second Entry on Rehearing be sent to the electric-energy and gas-pipeline industry service lists. It is, further,


ORDERED, That a copy of this Second Entry on Rehearing be served upon all commenters and all interested persons of record.

THE OHIO POWER SITING BOARD


Andre T. Porter, Chairman
Public Utilities Commission of Ohio
David Goodman, Board Member
and Director of the Ohio
Development Services Agency
James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources
Richard Hodges, Board Member
and Director of the Ohio
Department of Health
Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency
David Daniels, Board Member
and Director of the Ohio
Department of Agriculture
Jeffrey J. Lechak, Board Member
and Public Member

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Entered in the Journal **JAN 14 2018**


Barcy F. McNeal
Secretary