

FILE

IN THE SUPREME COURT OF OHIO

17-1375

In the Matter of the Application of 6011  
Greenwich Windpark, LLC Regarding its  
Certificate of Environmental Compatability  
and Public Need Issued in Case No.  
13-990-EL-BGN

Supreme Court Case No. 2017-\_\_\_\_\_

Appeal from the Ohio Power Siting Board,  
a Division of the Public Utilities  
Commission of Ohio

Ohio Power Siting Board  
Case No. 15-1921-EL-BGA

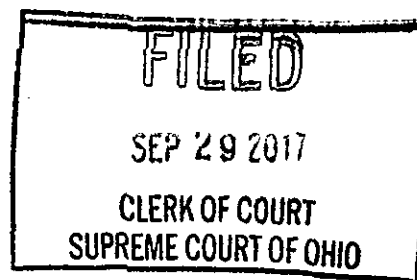
Greenwich Neighbors United,

Appellant,

v.

Ohio Power Siting Board,

Appellee.



NOTICE OF APPEAL OF APPELLANT  
GREENWICH NEIGHBORS UNITED

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**NOTICE OF APPEAL OF APPELLANT  
GREENWICH NEIGHBORS UNITED**

Appellant, Greenwich Neighbors United (“GNU” or “Appellant”), hereby gives its notice of appeal, pursuant to R.C. 4903.11, R.C. 4903.13, R.C. 4906.12, S.Ct.Prac.R. 10.03(A), and Ohio Adm. Code 4906-2-33, to the Supreme Court of Ohio and Appellee, the Ohio Power Siting Board (“Board”), a Division of the Public Utilities Commission of Ohio (“Commission”), from the Board’s Order on Certificate dated May 19, 2016 (“Amendment Order”) (Attachment A), Entry on Rehearing dated July 12, 2016 (“First Entry on Rehearing”) (Attachment B) and Second Entry on Rehearing dated August 17, 2017 (“Second Entry on Rehearing”) (Attachment C) in Case No. 15-1921-EL-BGA. Among other things, the Amendment Order granted 6011 Greenwich Windpark, LLC (“Windpark”) an amended certificate to construct a large electricity-producing wind farm and associated facilities.

GNU timely intervened in the proceeding below and timely submitted comments and objections to the Board. These comments and objections were significantly ignored by the Board in its Amendment Order issued May 19, 2016. GNU then timely submitted an Application for Rehearing (Attachment D) to the Board demonstrating the unlawful and unreasonable errors contained in the Amendment Order. In the First Entry on Rehearing issued July 12, 2016, the Board granted rehearing to further consider the issues raised by GNU. In the Second Entry on Rehearing issued August 17, 2017, the Board rejected each of GNU’s assignments of error.

GNU hereby timely submits its Notice of Appeal to the Court and alleges that the Board committed the following errors in the proceeding below:

1. The Board acted unreasonably and unlawfully by not subjecting Windpark’s November 16, 2015 Application to the minimum setback requirements that

became effective September 15, 2014 (R.C. 4906.20 and R.C. 4906.201) despite the General Assembly specifically directing the Board to apply such setback requirements to applications to amend a certificate. Without authority to do so, the Board “interpreted” the most-recently-enacted minimum setback requirements as though the General Assembly gave the Board authority to permit Windpark to evade such setback requirements when the Board determines that an amendment does not involve a substantial change in the location of a turbine or result in a material increase in an environmental impact. The General Assembly gave the Board no such discretion. In addition, and if the General Assembly had given the Board such discretion, the Board acted unlawfully by adopting and applying a standard having uniform application without first promulgating the standard as a rule.<sup>1</sup>

2. The Amendment Order is unreasonable and unlawful because it authorizes an amendment to a certificate that was illegally issued by the Board in Case No. 13-990-EL-BGN and because the Board deprived GNU of an opportunity to contest the Application based on such original and continuing illegality. In Case No. 13-990-EL-BGN, the Board authorized a certificate despite the uncontested fact that Windpark’s proposal comprehensively violated the minimum setback requirements in effect at that time. The Board’s actions in Case No. 13-990-EL-BGN violated its statutory duty to ensure that the proposed facility represents the minimum adverse environmental impact and that the facility will serve the public interest, convenience, and necessity (R.C. 4906.10). Since the

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<sup>1</sup> This proposition of law was raised as GNU assignment of error 4. Attachment D at 16-19.

Board lacks authority to authorize a certificate that fails to satisfy the requirements of R.C. 4906.10, the certificate authorized in Case No. 13-990-EL-BGN is void and may not be amended.<sup>2</sup>

3. The Amendment Order is unreasonable, unlawful and capriciously vague to the extent it might be read to permit Windpark to evade minimum setback requirements by securing a waiver from any less than all owners of property adjacent to the wind farm property (in circumstances where Windpark previously identified all such owners) and without the Board first satisfying its duty to establish, by rule, the procedure by which any such lawful setback waiver must be acquired from all such property owners.<sup>3</sup>
4. The Board acted unreasonably or unlawfully when it issued the Amendment Order without requiring public notice of the Application as supplemented and modified by Windpark on March 22, 2016, without requiring a public information meeting, without holding a local public hearing, without holding an evidentiary hearing, without taking evidence, without addressing comments and objections, without holding Windpark accountable for satisfying its burden of proof, without allowing GNU to present its own evidence and to challenge the claims and assertions made by Windpark in its Application or in the Staff Report of Investigation ("Staff Report"), without setting forth the reasons required by R.C. 4906.11 and without making or reporting the findings of fact and conclusions of law required by R.C. 4906.10(A), R.C. 4906.11 and R.C. 4906.12. Failure to do

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<sup>2</sup> This proposition of law was raised as GNU assignment of error 6. Attachment D at 21-22.

<sup>3</sup> This proposition of law was raised as GNU assignment of error 1. Attachment D at 6-7.

any one of these things renders the Amendment Order unreasonable or unlawful. They were done in combination.<sup>4</sup>

5. The Board's Amendment Order is unlawful and unreasonable because it violated the Board's rules to the extent that it limited the scope of GNU's intervention, failed to provide GNU with the due process guaranteed by the Ohio and U.S. Constitutions, and violated R.C. 4903.09 by substantially failing to respond to GNU's comments and objections.<sup>5</sup>
6. The Amendment Order is unreasonable and unlawful because it states (at page 4) that the Board has promulgated the rules that the General Assembly required the Board to adopt to establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements.<sup>6</sup>

Because the Application to Amend the Certificate, the Staff Report, and the Amendment Order all rely on the record from the original certificate case, Case No. 13-990-EL-BGN, GNU is also filing a motion simultaneously with this Notice of Appeal that requests the Court to order the Board to provide the Court with the record from both the original certificate case as well as the proceeding below.

WHEREFORE, GNU respectfully submits that the Board's Amendment Order and Second Entry on Rehearing are unlawful and unreasonable for the reasons asserted by GNU and asks that the Court reverse and remand the Amendment Order and Second Entry on Rehearing with instructions to the Board that require compliance with the Court's findings. In this regard, GNU asks the Court to find:

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<sup>4</sup> This proposition of law was raised as GNU assignment of error 2. Attachment D at 8-11.

<sup>5</sup> This proposition of law was raised as GNU assignment of error 3. Attachment D at 11-16.

<sup>6</sup> This proposition of law was raised as GNU assignment of error 5. Attachment D at 19-21.

1. The Board, is precluded, as a matter of law, from authorizing a certificate or amended certificate for an economically significant wind farm and associated facilities that comprehensively violates the statutory minimum setbacks unless the applicant affirmatively demonstrates that all owners of property adjacent to the wind farm property have properly waived application of the statutory minimum setbacks pursuant to a procedure the Board established by rule;
2. Windpark's Application to Amend the Certificate filed on November 16, 2015 triggered mandatory compliance with the enhanced statutory minimum setbacks established by Am. Sub. H.B. 483 which became effective September 15, 2014;
3. The claims and assertions of Windpark and the Board's Staff in the proceeding below triggered the Board's obligation under R.C. 4906.07(B) to hold a hearing in the same manner as a hearing is held on an original certificate application;
4. That GNU is entitled to due process and that the Board's summary disposition of contested issues of law and fact through reliance on unauthenticated, unproven, and unreliable claims by Windpark and the Board's Staff violated GNU's due process rights; and
5. The Board's actions in the proceeding below violated its statutory duty to ensure that the proposed wind farm represents the minimum adverse environmental impact and that the proposed wind farm serves the public interest, convenience, and necessity.

GNU further requests that the Court provide any additional relief that the Court believes GNU is entitled to as a matter of law or equity.

Respectfully submitted,

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## THE OHIO POWER SITING BOARD

In the Matter of the Application of 6011 )  
 Greenwich Windpark, LLC Regarding )  
 its Certificate of Environmental ) Case No. 15-1921-EL-BGA  
 Compatibility and Public Need Issued )  
 in Case No. 13-990-EL-BGN. )

ORDER ON CERTIFICATE

The Ohio Power Siting Board, in considering the above-entitled matter and having determined that a public hearing is not necessary, grants the application filed by 6011 Greenwich Windpark, LLC to add three new turbine models to the list of turbine models that are suitable for the wind-powered electric generation facility in Huron County, Ohio.

OPINION:I. Procedural History of this Case

All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

On August 25, 2014, the Board granted the application of 6011 Greenwich Windpark, LLC (Applicant or Greenwich) for a certificate to construct a wind-powered electric generation facility in Huron County, Ohio. *In re 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN (*Greenwich Certification Case*), Opinion, Order, and Certificate (Aug. 25, 2014). The Board granted Greenwich's application pursuant to a Stipulation filed by the Applicant, the Ohio Farm Bureau Federation (Farm Federation), and Staff, subject to certain conditions set forth in the stipulation. Greenwich was approved to construct a major facility in the form of a wind-powered electric generation facility with up to 25 wind turbines and 60 megawatt (MW) capacity. The generation facility would be built on 4,650 acres of leased land, involving 26 landowners in Greenwich Township, Huron County, Ohio. Further, the facility was proposed to be constructed using the Nordex N117 turbine model. *Greenwich Certification Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 5.

On November 16, 2015, Greenwich filed the application in this case to amend its certificate issued by the Board in the *Greenwich Certification Case*. Greenwich's application proposed to add three new turbine models for potential operation with the project.



Thereafter, on December 1, 2015, Greenwich filed a supplement to its application in this case containing a clarification. Subsequently, on March 22, 2016, Greenwich filed an additional supplement to its application in this case. The supplement filed by Greenwich on March 22, 2016, replaced one of the proposed turbine models with a different model. Accordingly, pursuant to its application and the supplements filed thereafter, Greenwich proposes to add the Gamesa G114 turbine, the GE 2.5-120 turbine, and the GE 2.3-116 turbine as turbine models suitable for the project.

On November 17, 2015, Greenwich filed proof of service of the application in this case. Greenwich published notice of its application in the Norwalk Reflector on November 20, 2015, and in the Greenwich Enterprise Review on November 24, 2015. Both newspapers are of general circulation in Huron County, Ohio. Greenwich then filed proof of publication with the Board on December 3, 2015. However, by Entry issued on February 25, 2016, the Administrative Law Judge determined that Greenwich should republish notice of its application in this case, in accordance with R.C. 4906.06 and Ohio Adm.Code 4906-3-09. Accordingly, Greenwich republished notice of its application in the Norwalk Reflector on March 1, 2016, and in the Greenwich Enterprise Review on March 8, 2016. On April 22, 2016, Staff filed its report of investigation evaluating the application in this case.

## II. Motions to Intervene

On November 25, 2015, Greenwich Neighbors United (GNU) filed a motion to intervene, in accordance with Ohio Adm.Code 4906-7-04(B). GNU states that it represents owners of real property located adjacent to the property which has been or will be leased by Greenwich for the project. Accordingly, GNU states that it has a direct, real, and substantial interest in the issues and matters involved in this proceeding. GNU asserts that its participation will not unduly prolong or delay this proceeding and that it will significantly contribute to the full development and equitable resolution of the issues. Therefore, GNU requests that the Board grant its motion to intervene.

Thereafter, on November 30, 2015, the Farm Federation filed a motion to intervene, in accordance with Ohio Adm.Code 4906-7-04(B). Farm Federation states that it represents agricultural interests at the state and local levels, with over 190,000 member families belonging to the organization statewide and over 1,200 families in the Huron County Farm Bureau. Farm Federation notes that it was a party of record in the *Greenwich Certification Case* and fully understands and appreciates the rules and regulations governing the Board's evaluation process. Farm Federation asserts that due to its unique interest in this matter, as well as its experience with energy development issues, good cause exists to grant its motion to intervene in this proceeding.

On December 4, 2015, Greenwich filed a response to the motions to intervene. Greenwich asserts that it does not oppose the motions to intervene, but requests that intervenors not be permitted to challenge issues beyond the scope of the amendment application. Greenwich notes that in similar cases, the Board has granted motions to intervene to the extent they address a request to add new turbine models but denied the motions to the extent they request intervention for the purpose of addressing irrelevant matter outside the qualification and scope of the proceeding. *In re Black Fork Wind*, Case No. 10-2865-EL-BGN, (*Black Fork Wind*) Order on Certificate (Aug. 27, 2015) at 2.

In accordance with Ohio Adm.Code 4906-7-04, the Board finds that the motions to intervene filed by GNU and Farm Federation are reasonable to the extent they address Greenwich's request to add new turbine models to the list of suitable turbine models for the project. With this qualification, the Board finds that their motions to intervene should be granted. However, consistent with the Board's decision in the *Black Fork Wind* case, the motions to intervene are denied to the extent the movants request intervention to address irrelevant matters other than the amendment application or that are outside the scope of this proceeding.

### III. Summary of Ohio Revised Code and Ohio Administrative Code

Greenwich is a corporation and a person under R.C. 4906.01(A) and is certificated to construct, operate, and maintain a major utility facility, in the form of a wind-powered electric generation facility, under R.C. 4906.10 in accordance with the Board's Order in the *Greenwich Certification Case*.

Pursuant to R.C. 4906.10, the Board's authority applies to major utility facilities and provides that such facilities must be certified by the Board prior to the commencement of construction. In accordance with R.C. Chapter 4906, the Board promulgated rules, which are set forth in Ohio Adm.Code Chapters 4906-5 and 4906-17, prescribing regulations regarding applications for wind-powered electric generation facilities.

R.C. 4906.06(E) provides that an application for an amendment of a certificate shall be in such form and contain such information as the Board prescribes. R.C. 4906.07 requires that, when considering an application for amendment of a certificate, the Board shall hold a hearing "\* \* \* [i]f the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility \* \* \*."

Under R.C. 4906.06(E), an applicant is required to provide notice of its application as required by R.C. 4906.06(B) and (C). These sections require an applicant to file proof of service of the application to all public officials in the area where the facility is located

and, within 15 days after the date of the filing of the application, give public notice of the application by publishing a summary of the application in newspapers of general circulation in the area.

R.C. 4906.20 prohibits any person from commencing to construct an economically significant wind farm in this state without first having obtained a certificate from the Board and directs the Board to adopt rules governing the certificating of economically significant wind farms. Pursuant to R.C. 4906.13, an economically significant wind farm includes 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 or more megawatts but less than fifty megawatts. The Board has promulgated the required rules as Ohio Adm.Code 4906. These rules shall provide for an application process and establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements.

R.C. 4906.201 applies the minimum setback requirements of R.C. 4906.20 to electric generating plant that consists of wind turbines and associated facilities with an aggregate capacity of fifty megawatts or more. Both R.C. 4906.20 and 4906.201 address amendments of existing certificates for wind farms which trigger the application of enhanced setback requirements.

As discussed above, R.C. 4906.06(E), 4906.20, and 4906.201 all address amendments to certificates. R.C. 4906.06(E) applies generally to the amendment of a certificate held by a major utility facility including an electric generating plant and associated facilities designed for or capable of operation at a capacity of fifty megawatts or more, an electric transmission line and associated facilities of one hundred twenty-five kilovolts or more, and a gas pipeline greater than five hundred feet in length and its associated facilities that is more than nine inches in outside diameter and is designed for transporting gas at a maximum allowable operating pressure in excess of one hundred twenty-five pounds per square inch. R.C. 4906.20 and 4906.201, on the other hand, specifically apply to wind turbines. The Board interprets the amendment addressed in R.C. 4906.20 and 4906.201 to apply specifically in those instances where an amendment results in a substantial change in the location of a turbine or an amendment results in a material increase in an environmental impact caused by a turbine that is not already addressed by conditions placed on the certificate.

#### IV. Description of Application and Staff's Investigation

Through its application in this case, Greenwich proposes to add the Gamesa G114 turbine, the GE 2.5-120 turbine, and the GE 2.3-116 turbine as turbine models suitable for the project. According to the Applicant, since the *Greenwich Certification Case*, turbine technology has advanced for use in low wind-speed areas and the three proposed

turbines all provide an increase in energy production for the project using the approved physical locations (Application at 1). Greenwich explains that the current conditions in the certificate approved in the *Greenwich Certification Case* would be satisfied through the use of the new models. With any of the proposed turbine models, the turbine locations will remain in the exact same location and the total capacity of the facility will not exceed 60 MW as permitted in the certificate (Application at 5). Accordingly, the project site area and turbine site locations provided in the application in the *Greenwich Certification Case* will not change as a result of this case. Additionally, Greenwich notes that the certificate allows the construction of up to 25 turbines. However, depending on the capacity of the final turbine model selected, Greenwich may only need to utilize 24 of the certificated turbine locations. (Application at 13.)

Staff reviewed Greenwich's application to amend its certificate, as well as the supplements to the application, and filed its Staff Report on April 22, 2016. In its report, Staff notes that the turbine locations and other project facility components would not change as a result of the application in this case (Staff Report at 1). Staff's review focused on the three new turbine models and whether adding them to the previously approved turbine model for the project would impact any of the stipulated conditions or result in a material increase in environmental impact as compared to the original project. Staff asserts that the turbine approved in the *Greenwich Certification Case*, as well as the turbines proposed in this case, are in compliance with the applicable setback requirements. Staff notes that the originally approved project included 16 turbine sites that were within the minimum setback from the property line of the project property, as well as one turbine site that was within the minimum setback from the exterior of the nearest habitable residential structure. In the *Greenwich Certification Case*, the Board required executed waivers of the minimum setback for each of these turbine sites. The same turbine sites that originally required a waiver of the setback requirement continue to require a waiver. However, when applying the original setback, Staff determined that the increased turbine height will not require additional waivers for the remaining turbine sites, since the remaining turbine sites were sited far enough from the wind farm property line and the exteriors of the nearest habitable residential structures to comply with the setback. Further, this would apply even when the setback distance is calculated using the height of the tallest proposed turbine. Accordingly, Staff determined that the addition of the three proposed turbine models will not create the need for any additional stipulated conditions or result in a material increase in environmental impact when compared to the original project. (Staff Report at 2-3).

Staff also evaluated the safety manuals of the proposed turbine models and determined that the conditions of the original certificate in the *Greenwich Certification Case* adequately address safety considerations.

Additionally, Staff considered the turbine noise impacts of the previously certificated and proposed turbine models. Staff notes that Greenwich committed to adhere to a noise condition in the *Greenwich Certification Case*. Specifically, Condition 15 of the Order states:

"The facility shall be operated so that the facility noise contribution does not exceed the project area ambient nighttime LEQ (46 dBA) by five dBA result at the exterior of any currently existing nonparticipating sensitive receptor. During daytime operation, from 7:00 a.m. to 10:00 p.m., the facility may operate at the greater of: the project area ambient nighttime LEQ (46 dBA) plus five dBA; or the validly measured ambient LEQ plus five dBA at the location of the sensitive receptor. After commencement of commercial operation, the Applicant shall conduct further review of the impact and possible mitigation of all facility-related noise complaints through its complaint resolution process."

Staff reviewed the impact of the previously certificated and proposed turbine models on nonparticipant receptors for impacts ranging between 46 dBA and 51 dBA. Staff determined that the turbine models did not impact any nonparticipating receptors above 46 dBA, apart from the Gamesa G114 turbine, which was modeled to have an impact on one nonparticipating receptor above 46 dBA but less than 51 dBA. Staff found that the addition of the three proposed turbine models would not create the need for any additional stipulated conditions or result in a material increase in environmental impact when compared to the previously certificated turbine model. (Staff Report at 3.)

Further, Staff considered the potential impact of shadow flicker. Staff asserts that the conditions of the original certificate in the *Greenwich Certification Case* should be updated. Specifically, Condition 16 provides:

"The facility shall be operated so that the turbine shadow flicker does not exceed 30 hours per year for any nonparticipating sensitive receptor. Applicant shall confirm with Staff that the minimization measure or mitigation has been completed for the two receptors that the model and site specific analysis showed to be in excess of 30 hours per year of shadow flicker. The analysis shall show how modeled shadow flicker impacts have been reduced to 30 or fewer hours per year for each such receptor. \* \* \*"

Staff noted that Greenwich modeled the shadow flicker impact of the previously certificated turbine model and the three proposed turbine models. The previously

certificated Nordex N117 turbine model was projected to impact two nonparticipating receptors with shadow flicker in excess of 30 hours per year. The proposed Gamesa G114 and the GE 2.3-116 turbine models are each projected to impact five nonparticipating receptors with shadow flicker in excess of 30 hours per year, while the proposed GE 2.5-120 turbine model is projected to impact six nonparticipating receptors with shadow flicker in excess of 30 hours per year. Accordingly, Staff recommends that Condition 16 from the original certificate in the *Greenwich Certification Case* be updated to apply to any nonparticipating receptors forecasted to exceed 30 hours of shadow flicker per year. Further, Staff notes that Greenwich has committed to adhere to the original shadow flicker condition for any turbine forecasted to create in excess of 30 hours per year of shadow flicker at a nonparticipating receptor within the study area. With regard to the potential impact of shadow flicker from the three proposed turbine models, Staff determined that upon application of Condition 16 in the *Greenwich Certification Case* to all applicable receptors, the addition of the three proposed turbine models does not result in a material increase in environmental impact when compared to the original project. (Staff Report at 4.)

Additionally, Staff evaluated the potential for ice throw and blade shear for the proposed turbine models as compared to the previously certificated turbine model. Staff determined that studies regarding the probability of ice throw for the proposed turbine models yielded similar probabilities as the original project. Further, Staff determined that there are negligible potential impacts due to blade shear for either the previously certificated or proposed turbine models. Accordingly, regarding ice throw and blade shear, Staff determined that the addition of the proposed turbine models does not create the need for any additional stipulated conditions and does not result in a material increase in environmental impact when compared to the original project. (Staff Report at 5.)

Staff also noted that in the time since the original certificate was issued, Kinder Morgan has proposed a pipeline for the area. According to Staff, Kinder Morgan estimates that construction will begin in November 2016 and the pipeline will be placed in service in January 2018. Staff notes that, at this time, the distance of the pipeline to the base of any turbine is proposed to be 1.1 times the total turbine height, which is 548 feet for the tallest turbine model. Staff avers that Greenwich has continued to keep in contact with Kinder Morgan as the projects have progressed. Staff asserts that Conditions 9, 10, 18, and 31 of the original certificate in the *Greenwich Certification Case* adequately address pipeline protection issues. (Staff Report at 5.)

Staff determined that if any of the three proposed turbine models are selected, the original conditions of the certificate, including the clarification with regard to Condition 16 regarding shadow flicker, adequately ensure that adverse environmental impacts will continue to be minimized for this project. Staff recommends that the Board approve the

application related to the three proposed wind turbine models, provided that Greenwich apply Condition 16 to all receptors that the model and site specific analysis showed to be in excess of 30 hours per year of shadow flicker, and the certificate continue to include the 53 conditions contained in the Board's Order in the *Greenwich Certification Case*. (Staff Report at 5-6.)

## V. Conclusion

Initially, we note that in our Order in the *Greenwich Certification Case*, after thoroughly considering all of the evidence of record, including the testimony provided at the local public hearing and the evidence presented at the evidentiary hearing, we determined that the Stipulation between the stipulating parties satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest and necessity, and does not violate any important regulatory principle or practice. Therefore, the Board approved the Stipulation.

The Stipulation in the *Greenwich Certification Case* established 53 conditions, some of which substantively pertain to the facility itself and others that were more procedural in nature. In its application for a certificate in the *Greenwich Certification Case*, Greenwich proposed to use the Nordex N117 turbine model. The application in this case would add three new turbine models to the list of acceptable models to be used for the project; the Gamesa G114 turbine, the GE 2.5-120 turbine, and the GE 2.3-116 turbine. The Board finds that Greenwich properly filed this case for our review and consideration in accordance with R.C. Chapter 4906.06(E), thereby providing for the necessary notice and due process afforded to applications regarding certificates issued by the Board. The Board's review of this application is concentrated solely on Greenwich's request to add three new turbine models to the list of possible models to be used in this project and what effect, if any, such request might have on our previous consideration of the statutory requirements set forth in R.C. Chapter 4906 and, in particular, R.C. 4906.10, as well as the conditions established in the *Greenwich Certification Case*.

The Board finds that, as attested to in the application before us, and verified in the Staff Report, there is no material increase in any environmental impact of the facility and no substantial change in any portion of the facility's location, including the location of the individual turbines, from what was originally approved by the Board in the *Greenwich Certification Case*. Therefore, the Board finds that a hearing pursuant to R.C. 4906.07(B) is not necessary under the circumstances presented in this case. Moreover, the addition of three new turbine models does not affect our conclusion from the *Greenwich Certification Case* that the project satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice.

This application merely permits Greenwich to upgrade the list of possible turbine models in order to take advantage of the latest technological advancements in this field of study. Some of the intervenors raise issues regarding possible variances from the conditions established in the *Greenwich Certification Case*. However, all of those issues were thoroughly reviewed in our Order approving the Stipulation in the *Greenwich Certification Case*, and, as verified in the Staff Report, none of the requirements established in the certificate will be changed or violated with the technological advancements proposed in this application. Therefore, after review of the conditions delineated in the *Greenwich Certification Case*, we conclude that such conditions adequately address and apply to the addition of the three new turbine models.

Greenwich was required to file this application for the Board's review and consideration. As part of our examination, the Board considers the facts in each case to determine whether the proposal affects the turbines such that the enhanced setback provisions in R.C. 4906.201, which became effective on September 15, 2014, should be triggered. Upon our deliberation of the specific request proposed by Greenwich in this application, as well as the recommendations set forth in the Staff Report, the Board finds that, based on the facts of this case, including the fact that this application does not relocate any turbines or provide any new or additional material environmental impacts beyond the previously approved turbine model, this application does not constitute an amendment that triggers the enhanced setbacks under R.C. 4906.201(B)(2). Therefore, the Board concludes that the conditions required by our Order in the *Greenwich Certification Case*, including the setback requirements that adhere to the provisions in R.C. 4906.20(B)(2), continue to apply to the turbines for this project. Further, the Board finds that Staff's recommendation should be adopted and that Condition 16 regarding shadow flicker should be updated to apply to any nonparticipating receptors forecasted to exceed 30 hours of shadow flicker per year.

Accordingly, the Board finds that, pursuant to R.C. Chapter 4906, based on the record in this proceeding, Greenwich's application should be approved, subject to the conditions set forth in this Order and in the *Greenwich Certification Case*.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Greenwich is a corporation and a person under R.C. 4906.01(A).
- (2) Greenwich's electric generation facility is a major utility facility under R.C. 4906.01(B)(1).



- (3) On November 16, 2015, Greenwich filed an application in this proceeding regarding the certificate issued in the *Greenwich Certification Case*.
- (4) Thereafter, on March 23, 2016, Greenwich filed a supplemental application regarding the certificate issued in the *Greenwich Certification Case*.
- (5) The proposed application would add the Gamesa G114 turbine, the GE 2.5-120 turbine, and the GE 2.3-116 turbine as turbine models suitable for the project.
- (6) On November 17, 2015, Greenwich filed proof of service of the application in this case. Public notice of the proposed application was published in Huron County, Ohio and filed with the Board on December 3, 2015, and on March 14 and March 16, 2016.
- (7) On November 25, 2015, and November 30, 2015, GNU and Farm Federation filed motions to intervene.
- (8) On April 22, 2016, Staff filed a report evaluating the application.
- (9) The proposed changes to the certificated facility do not result in a substantial change in the location of the facility or any material increase in any social or environmental impact. Therefore, pursuant to R.C. 4906.07, an evidentiary hearing is not necessary.
- (10) Based on the record, and in accordance with R.C. Chapter 4906, the application regarding the certificate of environmental compatibility and public need for Greenwich's electric generation facility, issued in the *Greenwich Certification Case*, should be approved, subject to the conditions set forth in the *Greenwich Certification Case*.

ORDER:

It is, therefore,

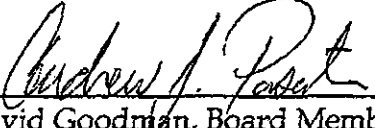
ORDERED, That Greenwich's application be approved, subject to the terms of this Order and the conditions set forth in the *Greenwich Certification Case*. It is, further,


ORDERED, That the motions to intervene filed by GNU and Farm Federation be granted, to the extent set forth herein, and denied, to the extent the movants request intervention for the purpose of addressing matters outside of this scope of this case. It is, further,

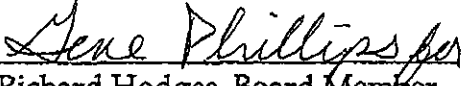
ORDERED, That a copy of this Order on Certificate be served upon all parties and interested persons of record.


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

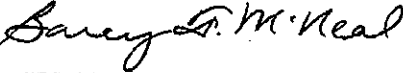
  
Craig Butler, Board Member  
and Director of the Ohio  
Environmental Protection Agency

  
David Daniels, Board Member  
and Director of the Ohio  
Department of Agriculture

  
Jeffrey J. Lechak, Board Member  
and Public Member

BAM/sc

Entered in the Journal **MAY 19 2016**

  
Barcy F. McNeal  
Secretary

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of 6011 )  
Greenwich Windpark, LLC Regarding its )  
Certificate of Environmental Compatibility ) Case No. 15-1921-EL-BGA  
and Public Need Issued in Case No. 13-990- )  
EL-BGN. )

ENTRY ON REHEARING

The administrative law judge finds:

- (1) By Order on Certificate (Order) issued May 19, 2016, the Ohio Power Siting Board (Board) granted the application filed by 6011 Greenwich Windpark, LLC (Greenwich) seeking to add three new turbine models to the list of turbine models that are suitable for its wind-powered electric generation facility in Huron County, Ohio.
- (2) R.C. 4906.12 states, in relevant part, that R.C. 4903.02 to 4903.16 and 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).
- (3) 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 matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (4) 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.
- (5) 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.

- (6) On June 20, 2016, Greenwich Neighbors United (GNU), an entity previously granted intervention in this matter, filed an application for rehearing of the Board's May 19, 2016 Order.
- (7) On June 30, 2016, Greenwich filed a memorandum contra GNU's rehearing application filed on June 20, 2016.
- (8) Pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the ALJ finds that to the extent that GNU's application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in the June 20, 2016 application for rehearing.

It is, therefore,

ORDERED, That GNU's application for rehearing filed on June 20, 2016, be granted as discussed in Finding (8). It is, further,

ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/ Jeffrey R. Jones

By: Jeffrey R. Jones  
Administrative Law Judge

sef/vrm

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**7/12/2016 11:11:43 AM**

**in**

**Case No(s). 15-1921-EL-BGA**

Summary: Administrative Law Judge Entry granting additional time to consider the issues raised in the June 20, 2016 application for rehearing; electronically filed by Vesta R Miller on behalf of Jeffrey R. Jones, Administrative Law Judge, Ohio Power Siting Board

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF  
6011 GREENWICH WINDPARK, LLC  
REGARDING ITS CERTIFICATE OF  
ENVIRONMENTAL COMPATIBILITY AND  
PUBLIC NEED ISSUED IN CASE NO. 13-990-  
EL-BGN.

CASE NO. 15-1921-EL-BGA

SECOND ENTRY ON REHEARING

Entered in the Journal on August 17, 2017

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by Greenwich Neighbors United.

II. PROCEDURAL HISTORY

{¶ 2} 6011 Greenwich Windpark, LLC (Greenwich) is a person as defined in R.C. 4906.01.

{¶ 3} R.C. 4906.04 provides that no person shall commence to construct a major utility facility in the state without first having obtained a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 4} On August 25, 2014, the Board adopted a Joint Stipulation and Recommendation authorizing Greenwich to build a 60 megawatt (MW) major utility facility with up to 25 wind turbines on 4,650 acres of leased land in Greenwich Township, Huron County, Ohio in *In re 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN, Opinion, Order, and Certificate (Aug. 25, 2014) (*Greenwich Certificate Case*).

{¶ 5} On May 19, 2016, the Board authorized Greenwich to add three new turbine models to the list of turbine models suitable for installation at the wind-powered electric generation facility in Greenwich Township, Huron County, Ohio in *In re Greenwich Windpark, LLC Regarding the Certificate Issued in Case No. 13-990-EL-BGN*, Case No. 15-1921-EL-BGA,

Order on Certificate (May 19, 2016) (15-1921 Order). The Order on Certificate also granted the motions to intervene in Case No. 15-1921-EL-BGA filed by Greenwich Neighbors United (GNU) and Ohio Farm Bureau Federation (OFBF) to the limited extent that movants seek to address Greenwich's request to add new turbine models to the list of suitable turbine models for the project. The Board clarified, however, that the motions to intervene were denied to the extent the movants request intervention to address irrelevant matters other than the specific application in this case or any other matter that is outside the scope of this proceeding.

{¶ 6} On June 20, 2016, GNU filed an application for rehearing.

{¶ 7} R.C. 4903.10, which is made applicable to Board proceedings by R.C. 4906.12, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On July 12, 2016, the administrative law judge (ALJ) found, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), that to the extent GNU's application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in GNU's application for rehearing.

### III. DISCUSSION

#### A. *GNU First Assignment of Error - Minimum Setback Waiver Requirements*

{¶ 9} GNU's first assignment of error is that the 15-1921 Order is unreasonable, unlawful, and capriciously vague to the extent it might be read to permit Greenwich to evade minimum setback requirements by securing a waiver from any less than all owners of property adjacent to the wind farm property and without the Board first satisfying its duty to establish, by rule, the procedure by which any such setback waiver must be acquired from all such property owners.

{¶ 10} In its memorandum contra, Greenwich claims that GNU is merely attempting to use the current application seeking to add turbine models as a pretense to re-litigate the Board's ruling on setback waivers adopted in the *Greenwich Certificate Case*. This issue is beyond the scope of this proceeding and was already fully addressed in the *Greenwich Certificate Case* Greenwich maintains. Additionally, Greenwich asserts that GNU's argument that the project's waivers are invalid because the Board has not issued a rule establishing a setback waiver procedure ignores prior Board rulings and the Board's rules.

{¶ 11} The Board denies GNU's first assignment of error. The issue regarding from whom waivers must be secured to the minimum property line and residential setbacks for the turbine locations sited in the *Greenwich Certificate Case* is beyond the scope of this proceeding. The issue was already fully addressed in the *Greenwich Certificate Case*. *Greenwich Certificate Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 13, 19; *Greenwich Certificate Case*, First Entry on Rehearing (Aug. 27, 2015) at 14-15; *Greenwich Certificate Case*, Second Entry on Rehearing (Nov. 12, 2015) at 3-4.

{¶ 12} Likewise, GNU's argument that the project's waivers are invalid because the Board has not issued a rule establishing a setback waiver procedure is beyond the scope of this proceeding. In 2009, the Board adopted rules under R.C. 4906.20, which included a rule on setback waivers, governing the certificating of economically significant and major utility wind farm facilities. The rules, including Ohio Adm. Code 4906-17-08,<sup>1</sup> were applied when the issue of setback waivers was addressed by the Board in the *Greenwich Certificate Case*. GNU's argument is untimely now because the review of the turbine locations for setback compliance – to include the issue of setback waivers as governed by the Board's rules – has already been adjudicated in the *Greenwich Certificate Case*. Furthermore, the Board has already stated that R.C. 4906.20 does not grant to the Board or the administrative law judge the authority to waive the minimum setback requirement. *Greenwich Certificate Case*, Entry on Rehearing (Aug. 27,

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<sup>1</sup> Ohio Adm. Code 4906-17-08 was subsequently replaced by Ohio Adm. Code 4906-4-08 effective June 26, 2016.



2015) at 14. Rather, under R.C. 4906.20, property owners waive setback requirements not the Board.

**B. GNU Second Assignment of Error – Failure to hold a hearing and to make the required evidentiary findings**

{¶ 13} GNU next argues that the Board erred when it issued the 15-1921 Order without holding a public and evidentiary hearing, without taking evidence or addressing comments and objections, and without making or reporting the findings of fact and conclusions of law setting forth the reasons prompting the decisions arrived at. GNU submits that the addition of the three turbine models in this case introduces changes that cannot be reasonably and lawfully held to have no material increase in any environmental impact and no substantial change in any portion of the facility and thus, under R.C. 4906.07, the Board was required to hold a hearing in this matter.

{¶ 14} The Board finds that GNU's second assignment of error should be denied. The Board's 15-1921 Order thoroughly examined the hearing requirements set forth in R.C. 4906.07 and specifically found that, as attested to in the application, and as verified in the Staff Report, there was no material increase in any environmental impact of the facility and no substantial change in any portion of the facility's location, including the location of the individual turbines from what was originally approved by the Board in the *Greenwich Certificate Case*. 15-1921 Order, Order on Certificate (May 19, 2016) at 8. Moreover, as the Board noted, the addition of the three new turbine models did not affect the Board's conclusion from the *Greenwich Certificate Case* that the project satisfies the criteria set forth in R.C. Chapter 4906, promoted the public interest, and did not violate any important regulatory principle or practice. 15-1921 Order, Order on Certificate (May 19, 2016) at 8.

{¶ 15} Similarly, the assertion that the Board ignored GNU's comments and objections is without merit as demonstrated by the record in this matter. For example, GNU's comments and objections regarding Greenwich's newspaper notice containing an improper intervention time frame was addressed by the Board in an Entry issued February 25, 2016, directing Greenwich to publish additional newspaper notice. GNU's comments and objections also

discussed a concern regarding a potential pipeline proposed to be built in the project area. This issue was subsequently investigated by the Staff and addressed in the 15-1921 Order. 15-1921 Order, Order on Certificate (May 19, 2016) at 7. Additionally, the Staff addressed and the Board discussed in the 15-1921 Order issues raised by GNU involving safety manuals, noise, and shadow flicker of the proposed turbine models. 15-1921 Order, Order on Certificate (May 19, 2016) at 5-7. Finally, a significant portion of GNU's comments and objections addressed the application of setbacks and the use of waivers. As previously discussed, the waivers issue is beyond the scope of this proceeding because it was previously addressed in the *Greenwich Certification Case* and is not the subject of Greenwich's application in this case. 15-1921 Order, Order on Certificate (May 19, 2016) at 9. GNU cannot use this case to attempt to re-litigate issues properly reviewed in the original *Greenwich Certification Case*.

{¶ 16} GNU's final argument under this assignment of error posits that the Board erred by not conducting a hearing, creating a transcript, and issuing findings of fact supporting the decision rendered. As noted above, in its May 19, 2016 Order, the Board specifically discussed why a hearing was not required as set forth in R.C. 4906.07(B). 15-1921 Order at 8. Similarly, the Board set forth specific findings of fact supporting our decision in this matter at pages 9-10. For all the foregoing reasons, GNU's second assignment of error is denied.

**C. GNU Third Assignment of Error - Limitations on intervention**

{¶ 17} GNU's third assignment of error asserts that the Board unreasonably and unlawfully limited the scope of GNU's intervention, failed to provide GNU with due process guaranteed by the Ohio and U.S. Constitutions, and violated R.C. 4903.09 by failing to respond to GNU's comments and objections.

{¶ 18} GNU's third assignment of error is denied. The Board did not improperly limit GNU's intervention to specific issues, but was merely advising the parties to remain within the scope of this proceeding. In doing so, the Board followed its precedent established in *In re Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (*Black Fork Wind*), Order on Certificate (Aug. 27, 2015) at 3. In fact it would have been unreasonable, unlawful, and prejudicial to the

applicant to have re-litigated issues that had been decided previously in the *Greenwich Certification Case*. Therefore, the Board did not limit GNU's participation, and GNU was free to raise, as it did, a variety of issues within the scope of this proceeding.

{¶ 19} GNU also argues that it has a constitutionally guaranteed right to due process and that the Board entirely ignored the comments and objections that GNU did file. As a creature of statute, the Board does not render decisions on constitutional matters; such decisions are left to a court of appropriate jurisdiction to review. Nonetheless, GNU's assertion that the Board ignored the comments and the objections of GNU is erroneous. As discussed in more detail in paragraph 15 above, the Board did address GNU's concerns regarding newspaper publication, a pipeline proposed to be built in the project area, the safety manual of the proposed turbines, the impacts of the proposed turbine models to the noise and shadow flicker thresholds established in the *Greenwich Certification Case*, and the issue of setback waivers. Thus, the Board did consider and address the concerns raised by GNU in the 15-1921 Order. Any argument to the contrary is incorrect.

**D. GNU Fourth Assignment of Error - Interpretation of R.C. 4906.20 and R.C. 4906.201**

{¶ 20} In its fourth assignment of error, GNU asserts that the Board acted unreasonably and unlawfully by not subjecting Greenwich's application in this case to the most recently enacted minimum setback requirements despite the General Assembly specifically directing the Board to apply such setback requirements to applications to amend a certificate. Without authority to do so, GNU argues, the Board interpreted the current minimum setback requirements as though the General Assembly gave the Board the authority to permit Greenwich to evade such requirements when the Board determines that an amendment does not involve a substantial change in the location of a turbine or result in a material increase in an environmental impact. GNU submits that the General Assembly gave the Board no such discretion. Finally, GNU argues that the Board acted unlawfully by adopting and applying a standard having uniform application without first promulgating the standard as a rule.

{¶ 21} GNU's fourth assignment of error is denied. R.C. 4906.20 and 4906.201 both address the certificating of wind farms. Initially, R.C. 4906.20 provides that the Board "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\*\*\* (emphasis added)." Subsequently, R.C. 4906.20 and R.C. 4906.201 set forth an enhanced setback in cases of an "amendment to an existing certificate." As both of these statutes are silent as to the definition of an "amendment to an existing certificate" that would trigger the enhanced setbacks, the Board has used its discretion and expertise to determine what qualifies, just as it must create parameters around the concepts of "change" and "alteration." Here, the Board reasonably determined the new turbine models comply with the criteria in R.C. 4906.10 and are adequately covered by the existing conditions of the certificate in the *Greenwich Certification Case*. In other words, the impacts of the proposed turbine model changes in this case do not require a change to the existing certificate. Such an interpretation is consistent with R.C. 4906.20(B)(2)(b)(ii).<sup>2</sup> The original certificate conditions will adequately mitigate the impact of the new turbine models; and, therefore, the addition of new turbine models does not constitute an "amendment to an existing certificate" as contemplated by R.C. 4906.20 and R.C. 4906.201. Thus, application of the enhanced setbacks is not warranted. Not every proposed change to a major utility facility requires an amendment to an existing certificate. Where the existing certificate conditions are adequate to address/mitigate any impacts of the proposed modification, such as new turbine models, the Board can approve the change without amending the existing certificate.

{¶ 22} The Board relied upon its expertise in applying an interpretation of "[a]ny amendment made to an existing certificate" under R.C. 4906.20(B)(2)(b)(ii) that recognizes the practicality of wind farm siting, while still adhering to the law. The Board and the staff of its member agencies provide a broad spectrum of expertise in subjects such as engineering,

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<sup>2</sup> R.C. 4906.20(B)(2)(b)(ii) provides in relevant part, "the amendments to this section by the act [H.B. 483] shall not be construed to limit or abridge any rights or remedies in equity or under the common law."

environment, agriculture, natural resources, land use planning, and geology. These areas of expertise are necessary to review applications before the Board. It would be wholly impractical for every modification to a wind farm project, no matter how insignificant or technical, to constitute an amendment to the certificate. Certificated wind farm projects can take years for the project to actually commence construction for a variety of reasons. These include delays in financing due to appeals of certificate decisions, finalizing property agreements with landowners, and many other reasons. During that period, between initial certification and actual construction, circumstances can and often do evolve. Such evolution could be very minor in nature, such as a change in the wind farm developer's corporate name. Such evolution could also be dramatic in nature, such as the movement of turbine locations. One form of evolution that the Board sees with frequency involves updates of wind turbine models or software that could serve to make wind turbines more efficient and in many circumstances, less obtrusive to surrounding property owners. Again, the Board declines to interpret "amendment to an existing certificate" to include project changes that are adequately addressed by existing certificate conditions and, thus, do not require an amendment to the original certificate.

{¶ 23} Moreover, applying the enhanced setbacks to every type of change that occurs to a project could prove detrimental to the originally certificated project due to a myriad of reasons, including cost of reconfiguring turbine locations and associated facilities. This could result in a previously certificated wind farm project, wherein significant investment has been made over a span of years, to be irreparably impeded. As such, the Board must be very thoughtful about how these projects evolve over a span of years when considering, on a case-by-case basis, whether a proposed change constitutes an "amendment to an existing certificate," thereby evoking the enhanced setbacks.

{¶ 24} The Board further declines to adopt an interpretation that would impute intent from the statute that would serve to eliminate existing wind farm projects from commerce for minor modifications to an application that often dates back many years. If this was in fact the intent, such intent could have been explicitly stated. To the contrary, the law does not affix a

definition to “amendment” within a statute that also cites “change” and “alteration.” Thus, the Board must utilize its expertise of the siting process to interpret these words in a manner that recognizes the practicality of siting commercial wind farms while also adhering to the words of the statute.

{¶ 25} Here, we noted that the application merely requested to upgrade the list of possible turbine models in order to take advantage of technological advancements, and that none of the requirements in the existing certificate would be changed or violated in approving the application. Thus, neighboring landowners would not experience adverse effects that have not already been contemplated and mitigated under the existing certificate. Finally, the Board finds no reason to depart from its application of precedent in this case *Black Fork Wind*, Case No. 14-1591-EL-BGA, Order on Certificate (Aug. 27, 2015); *In re Trishe Wind Ohio, LLC*, Case No. 16-1687-EL-BGA, Order on Certificate (Mar. 2, 2017). Therefore, GNU’s fourth assignment of error is denied.

***E. GNU’s Fifth Assignment of Error – Failure to Promulgate Rules***

{¶ 26} GNU’s fifth assignment of error argues that the May 19, 2016 Order is unreasonable and unlawful because it states that the Board has failed to promulgate the rules that the General Assembly required the Board to adopt to establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements. GNU further submits that the Board has a long-standing and unfulfilled duty to promulgate a package of rules identifying Ohio’s statewide approach to the location, construction, operation, and use of wind farms. Until and unless the Board promulgates the required rules, according to GNU, the Board has no legal authority to issue certificates or approve amendments to certificates.

{¶ 27} GNU’s fifth assignment of error is denied. An application solely seeking to add new turbine models to the list of turbine models suitable for a wind farm project is not the appropriate procedural vehicle to challenge whether or not the Board has adopted all required rules outlined by the General Assembly in statute. Rather, the proper venue to challenge

whether or not the Board has adopted all required rules outlined by the General Assembly in statute would be in a rulemaking proceeding where notice of that issue and due process is afforded all interested persons. The instant case is not the appropriate proceeding for doing so. In fact, the Board notes that GNU has availed itself of such an opportunity to challenge the sufficiency of the Board rules in a pending rulemaking proceeding, Case No. 16-1109-GE-BRO. A Finding and Order was issued in that rules case on May 4, 2017, and applications for rehearing are currently being considered by the Board. GNU's fifth assignment of error is beyond the scope of this proceeding and is, therefore, denied.

**F. GNU Sixth Assignment of Error - Amendment of a Void Certificate**

{¶ 28} GNU's final assignment of error argues that, for the reasons explained in the applications for rehearing filed by Omega Crop Co., LLC in Case No. 13-990-EL-BGN on September 23, 2014 and September 24, 2015, the Board lacked authority to issue the certificate in Case No. 13-990-EL-BGN and that certificate is, accordingly, void. GNU continues that since the certificate issued in Case No. 13-990-EL-BGN is void, the Board is without authority to amend that certificate.

{¶ 29} Rehearing on GNU's sixth assignment of error is denied. The Board issued a certificate to Greenwich to construct a wind-powered electric generation facility on August 25, 2014, in Case No. 13-990-EL-BGN. GNU's sixth assignment of error is beyond the scope of this proceeding. Accordingly, it is denied.

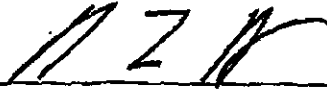
{¶ 30} Any assignment of error not specifically addressed by the Board in this Entry on Rehearing should be considered denied.

{¶ 31} It is, therefore,

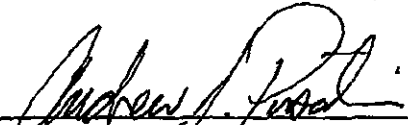
{¶ 32} ORDERED, That the application for rehearing filed by GNU be denied. It is, further,

{¶ 33} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

THE OHIO POWER SITING BOARD



Asim Z. Haque, Chairman  
Public Utilities Commission of Ohio



David Goodman, Board Member  
and Director of the Ohio  
Development Services Agency



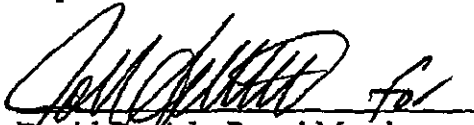
James Zehringer, Board Member  
and Director of the Ohio  
Department of Natural Resources



Lance Himes, 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

JRJ/vrm

Entered in the Journal

AUG 17 2017



Barcy F. McNeal  
Secretary



**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of )  
6011 Greenwich Windpark, LLC for an )  
Amendment to its Certificate to Install ) Case No. 15-1921-EL-BGA  
and Operate a Wind-Powered Electric )  
Generation Facility in Huron County, Ohio. )

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**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT  
OF GREENWICH NEIGHBORS UNITED**

---

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**JUNE 20, 2016**

**ATTORNEYS FOR GREENWICH NEIGHBORS UNITED**

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**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of	)	
6011 Greenwich Windpark, LLC for an	)	
Amendment to its Certificate to Install	)	Case No. 15-1921-EL-BGA
and Operate a Wind-Powered Electric	)	
Generation Facility in Huron County, Ohio.	)	

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**APPLICATION FOR REHEARING**

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On May 19, 2016, the Ohio Power Siting Board ("Board") issued an Order on Certificate ("Order") granting the application filed by Greenwich Windpark, LLC ("Wind Farm") on November 16, 2015 as modified on March 22, 2016. The as-modified November 16, 2015 application ("Application") asked the Board to amend a certificate previously issued by the Board.

Since the Application was modified by the Wind Farm on March 22, 2016, the as-modified Application was submitted to the Board after the date the required public notice of the Application was carried in local newspapers. The Wind Farm's March 22, 2016 change to its Application called for the elimination of one turbine model identified in the November 16, 2015 Application and the insertion of another newly-introduced turbine model. There was no public notice of the Wind Farm's March 22, 2016 change to its Application or the as-modified Application.

In the as-modified Application, the Wind Farm asserted that:

1. The Wind Farm's project (as modified to include the new turbine model types) would continue to substantially violate the lesser

minimum setback requirements that existed when the application in Case No. 13-0990-EL-BGN was filed.

2. The new turbines models are better fitted to low wind speed conditions and that they "... all provide an increase in energy production ...." In other words, the Wind Farm's Application represented that the proposed turbines would operate more frequently than the one turbine model that was the focus of Case No. 13-0990-EL-BGN.<sup>1</sup> "According to the Applicant, ... the three proposed turbines all provide an increase in energy production for the project using the approved physical locations (citation omitted)."<sup>2</sup>
3. The Gamesa G114 and Goldwind GW121 turbine models have a total height greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>3</sup>
4. The Gamesa G114, Goldwind GW121, GE 2.5-120 and GE 2.3-116 turbine models each have a maximum sound power level that is greater than the maximum sound power level of the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>4</sup>
5. The Wind Farm's shadow flicker modeling for the Gamesa G114, GE 2.5-120, GE 2.3-116 and Goldwind GW121 predicted shadow flicker in excess of 30 hours per year affecting more "receptors" than was the case for the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>5</sup>
6. The Goldwind GW121, GE 2.5-120 and GE 2.3-116 turbine models have a rotor diameter greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>6</sup>
7. The GE 2.3-116 turbine model has a hub height and total height measured to the blade tip greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>7</sup>

The as-modified Application did not address or respect the most-recently-enacted minimum setback requirements which came with directions that the Board apply such

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<sup>1</sup> Application at 1. Page 5 of the Application states: "Given the characteristics of the wind at many of the intended turbine locations, these turbines would result in increased productivity for the project."

<sup>2</sup> Order at 4-5 (citing Application at 1).

<sup>3</sup> Application at 1.

<sup>4</sup> Application at 1-2; Request to Supplement Amendment at 1 (March 22, 2016).

<sup>5</sup> Application at 2; Request to Supplement Amendment at 2 (March 22, 2016).

<sup>6</sup> Application at 9; Request to Supplement Amendment at 1 (March 22, 2016).

<sup>7</sup> Request to Supplement Amendment at 1 (March 22, 2016).

minimum setback requirements to applications to amend a certificate (such as the Application). The currently statutory minimum setback requirements became effective well before the Wind Farm filed the Application.

Greenwich Neighbors United ("GNU") moved to intervene on November 25, 2015 and GNU's intervention request was approved, subject to some limitations discussed below.

GNU also filed comments on and objections to the Wind Farm's Application on December 3, 2016 which were supplemented by GNU on December 29, 2015. GNU specifically requested that the Board subject the Application to a full and complete process including public information meetings, a local public hearing and an evidentiary hearing. GNU's comments on and objections to the Wind Farm's Application are not mentioned in or addressed by the Order.

The Board did not hold any hearing.

It took no evidence.

It did not acknowledge or address the public comments submitted to the Board at the Board's invitation.

Rather, the Board skipped ahead and approved the Wind Farm's as-modified Application.

GNU hereby respectfully requests the Board to grant rehearing for the purpose of remedying the unreasonable, arbitrary, capricious and otherwise unlawful Order. The grounds on which GNU claims the Order to be unreasonable and unlawful are as follows:

1. The Order is unreasonable, unlawful and capriciously vague to the extent it might be read to permit the Wind Farm to evade minimum setback requirements by securing a waiver from any less than all owners of property adjacent to the wind farm property (in circumstances where the Wind Farm previously identified all such owners) and without the Board first satisfying its duty to establish, by rule, the procedure by which any such lawful setback waiver must be acquired from all such property owners.
2. The Board acted unreasonably or unlawfully when it issued the Order without requiring public notice of the Application as modified by the Wind Farm on March 22, 2016, without holding a public hearing, without holding an evidentiary hearing, without taking evidence, without addressing comments and objections, without holding the Wind Farm accountable for satisfying its burden of proof, without allowing GNU to present its own evidence and to challenge the claims and assertions made by the Wind Farm in its Application or in the Staff Report of Investigation, without setting forth the reasons required by R.C. 4906.11 and without making or reporting the findings of fact and conclusions of law required by R.C. 4906.10(A), R.C. 4906.11 and R.C. 4906.12. Failure to do any one of these things renders the Order unreasonable or unlawful. They were done in combination.
3. The Board's Order is unlawful and unreasonable because it violated the Board's rules when it limited the scope of GNU's intervention, failed to provide GNU with the due process guaranteed by the Ohio and U.S. Constitutions, and violated R.C. 4903.09 by failing to respond to GNU's Comments and Objections.
4. The Board acted unreasonably and unlawfully by not subjecting the Wind Farm's Application to the most-recently-enacted minimum setback requirements (R.C. 4906.20 and R.C. 4906.201) despite the General Assembly specifically directing the Board to apply such setback requirements to applications to amend a certificate. Without authority to do so, the Board "interpreted" the most-recently-enacted minimum setback requirements as though the General Assembly gave the Board authority to permit the Wind Farm to evade such setback requirements when the Board determines that an amendment does not involve a substantial change in the location of a turbine or result in a material increase in an environmental impact. The General Assembly gave the Board no such

discretion. In addition, the Board acted unlawfully by adopting and applying a standard having uniform application without first promulgating the standard as a rule.

5. The Order is unreasonable and unlawful because it states (at page 4) that the Board has promulgated the rules that the General Assembly required the Board to adopt to establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements.
6. The Order is unreasonable and unlawful because it authorizes an amendment to a certificate that was illegally issued by the Board in Case No. 13-0990-EL-BGN and because the Board deprived GNU of an opportunity to contest the Application based on such original and continuing illegality. The original certificate is void by operation of law. It cannot be amended.

Accordingly, and for the additional reasons set forth in the attached Memorandum in Support incorporated herein, GNU requests that the Board grant rehearing and vacate the Order, hold, as a matter of law, that the Wind Farm cannot commence construction of the proposed wind farm, and provide such other relief as may be warranted.

Respectfully submitted,

/s/ Samuel C. Randazzo

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**ATTORNEYS FOR GREENWICH NEIGHBORS UNITED**

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of	)	
6011 Greenwich Windpark, LLC for an	)	
Amendment to its Certificate to Install	)	Case No. 15-1921-EL-BGA
and Operate a Wind-Powered Electric	)	
Generation Facility in Huron County, Ohio.	)	

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**MEMORANDUM IN SUPPORT**

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**I. ASSIGNMENTS OF ERROR**

1. **The Order is unreasonable, unlawful and capriciously vague to the extent it might be read to permit the Wind Farm to evade minimum setback requirements by securing a waiver from any less than all owners of property adjacent to the wind farm property (in circumstances where the Wind Farm previously identified all such owners) and without the Board first satisfying its duty to establish, by rule, the procedure by which any such lawful setback waiver must be acquired from all such property owners.**

Assuming, for the purposes of argument, that the Board's Order was lawful and reasonable, the Wind Farm's plan to comprehensively violate the minimum setback requirements means that the Wind Farm still cannot construct or operate a wind farm unless and until it secures waivers from all adjoining property owners. In Case No. 13-0990-EL-BGN, the Wind Farm submitted Exhibit 2b<sup>8</sup> which identified the owners of property adjoining the wind farm property. The Wind Farm's Application in this proceeding substantially relies on the information it filed in Case No. 13-0990-EL-BGN. There is nothing in the Application that identifies a different population of owners of

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<sup>8</sup> *In the Matter of the Application of 6011 Greenwich Windpark, LLC for a Certificate to Construct a Wind-Powered Electric Generation Facility in Huron County, Ohio, Case No. 13-0990-EL-BGN, Application, Exhibit 2b, (Feb. 21, 2014).*



property adjoining the wind farm property than the population previously identified by the Wind Farm.

In Case No. 13-0990-EL-BGN and this proceeding, the Board did not acknowledge or address the objections and concerns put forward by the local residents, businesses and public officials provoked by the Wind Farm's proposal to cram 25 wind turbines into a relatively small area where people live, farm, work, travel and recreate. In this context, it is unreasonable for the Board to continue to be vague about the population of property owners that must provide a waiver before the Wind Farm can proceed. The Wind Farm provided a list of these property owners so there is no good reason for the Board to perpetuate or encourage the creation of any mystery about the population of adjoining property owners who must agree to waive the numerous violations of the minimum setback requirements before the Wind Farm can move forward.

GNU urges the Board to clarify its Order and clearly state that: (1) the Wind Farm must secure waivers from the population of adjoining property owners that the Wind Farm previously identified to the Board in the Wind Farm's Exhibit 2b before the Wind Farm can take any further steps towards commencing construction; and, (2) no such waivers shall be valid unless and until they are secured in accordance with the procedure the Board establishes by rule.

With this requested clarification by the Board, GNU believes that the extended controversy that is documented by the filings made in this proceeding and in Case No. 13-0990-EL-BGN will, mercifully, come to an end.

2. The Board acted unreasonably or unlawfully when it issued the Order without requiring public notice of the Application as modified by the Wind Farm on March 22, 2016, without holding a public hearing,<sup>9</sup> without holding an evidentiary hearing, without taking evidence, without addressing comments and objections, without holding the Wind Farm accountable for satisfying its burden of proof, without allowing GNU to present its own evidence and to challenge the claims and assertions made by the Wind Farm in its Application or in the Staff Report of Investigation,<sup>10</sup> without setting forth the reasons required by R.C. 4906.11 and without making or reporting the findings of fact and conclusions of law required by R.C. 4906.10(A), R.C. 4906.11 and R.C. 4906.12.<sup>11</sup> Failure to do any one of these things renders the Order unreasonable or unlawful. They were done in combination.

Most of GNU's second statement of error is self-explanatory and does not require further discussion. Accordingly, GNU's Memorandum in Support will focus on the Board's failure to hold a hearing.

First, it is important to note that R.C. 4906.07 specifies the circumstances when the Board must hold a hearing. If an amendment application introduces the potential for any material increase in any environmental impact of the facility or a substantial change in location of all or a portion of such facility, the Board must hold a hearing on the application. It does not preclude the Board from holding a hearing in other circumstances.

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<sup>9</sup> R.C.4906.07(A) requires the Board to set a public hearing.

<sup>10</sup> The Staff Report of Investigation mostly repeats the claims made by the Wind Farm and does not contain the recommended findings required by R.C. 4906.07(C). The recommended findings which are required to be included in the Staff Report of Investigation must address the findings and determinations which the Board must make to comply with R.C. 4906.10(A). The Order does not include the findings and determinations required by R.C. 4906.10(A).

<sup>11</sup> R.C. 4906.12 states that "Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. Of the Revised Code, in the same manner as if the board were the public utilities commission under such sections." As discussed herein, R.C. 4903.09 deals with contested cases such as this one and calls for the making of a complete record including a transcript, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at based upon such findings of fact.

In the as-modified Application, the Wind Farm asserted that:

- The Wind Farm's proposed facility (as modified to include the new turbine model types) would continue to substantially violate the lesser minimum setback requirements that existed when the application in Case No. 13-0990-EL-BGN was filed and more aggressively violate the most-recently-enacted setback requirements that the General Assembly directed the Board to apply to applications to amend a certificate.
- The new turbines models are better fitted to low wind speed conditions and that they "... all provide an increase in energy production ...." In other words, the Wind Farm's Application represented that the proposed turbines would operate more frequently than the one turbine model that was the focus of Case No. 13-0990-EL-BGN.<sup>12</sup> "According to the Applicant, ... the three proposed turbines all provide an increase in the energy production for the project using the approved physical locations (citation omitted)."<sup>13</sup>
- The Gamesa G114 and Goldwind GW121 turbine models have a total height greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>14</sup>
- The Gamesa G114, Goldwind GW121, GE 2.5-120 and GE 2.3-116 turbine models each have a maximum sound power level that is greater than the maximum sound power level of the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>15</sup>
- The Wind Farm's shadow flicker modeling for the Gamesa G114, GE 2.5-120, GE 2.3-116 and Goldwind GW121 predicted shadow flicker in excess of 30 hours per year affecting more "receptors" than was the case for the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>16</sup>

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<sup>12</sup> Application at 1. Page 5 of the Application states: "Given the characteristics of the wind at many of the intended turbine locations, these turbines would result in increased productivity for the project."

<sup>13</sup> Order at 4-5 (citing Application at 1).

<sup>14</sup> Application at 1.

<sup>15</sup> *Id.* at 1-2; Request to Supplement Amendment at 1 (March 22, 2016).

<sup>16</sup> Application at 2; Request to Supplement Amendment at 2 (March 22, 2016); Staff Report of Investigation at 4 (April 22, 2016). According to the Staff Report of Investigation, the size and operating characteristics of the new turbine models will increase the number of "receptors" subject to excessive shadow flicker by between 250% and 300%.

- The Goldwind GW121, GE 2.5-120 and GE 2.3-116 turbine models have a rotor diameter greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>17</sup>
- The GE 2.3-116 turbine model has a hub height and total height measured to the blade tip greater than the Nordex model which was the focus of Case No. 13-0990-EL-BGN.<sup>18</sup>

The as-modified Application did not address or respect the most-recently-enacted minimum setback requirements which came with directions that the Board apply such minimum setback requirements to applications to amend a certificate (such as the Application). The currently-effective minimum setback requirements became effective well before the Wind Farm filed the Application seeking approval of a certificate amendment.

Based on the Application, it is clear that the Wind Farm wants to now construct and operate a facility hosting even bigger, noisier and more-shadow-flickery machines, all of which will whirl more frequently and for a longer duration. GNU asserts that the Board was required to hold a hearing because the Application introduces changes that must be regarded as resulting in some (some as in "any") material increase in some (some as in "any") environmental impact. Given the fact that the Application proposed changes that increase the safety-affecting and setback-affecting dimensions of the structures, GNU asserts that the Board was required to hold a hearing because the Application proposed a substantial change in the location of a portion of the facility.

Additionally, GNU asserts that the Board was required to hold a hearing because the Application triggered the most-recently-enacted minimum setback requirements in a

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<sup>17</sup> Application at 9; Request to Supplement Amendment at 1 (March 22, 2016).

<sup>18</sup> *Id.* at 1.

context where the Application acknowledged that the Wind Farm would continue to comprehensively violate the prior and lesser minimum setback requirements.

The face of the Application introduces changes that cannot be reasonably and lawfully held to have no material increase in any environmental impact and no substantial change in any portion of the facility.

**3. The Board's Order is unlawful and unreasonable because it violated the Board's rules when it limited the scope of GNU's intervention, failed to provide GNU with the due process guaranteed by the Ohio and U.S. Constitutions, and violated R.C. 4903.09 by failing to respond to GNU's Comments and Objections.**

Even if the Application did not propose changes having any material increase in any environmental impact, it was unreasonable, arbitrary and capricious for the Board to not order a hearing for the purpose of resolving contested issues in accordance with customary procedures.

GNU filed a timely motion to intervene in this matter demonstrating its interest in this proceeding. Although the Board agreed that GNU satisfied the standard for intervention, the Board nonetheless limited the scope of GNU's intervention. Order at 3. That limitation was unlawful and unreasonable.

Intervention in proceedings before the Board is governed by R.C. 4906.08 and Rule 4906-2-12, Ohio Administrative Code ("O.A.C."). R.C. 4906.08 states that a party to a Board proceeding shall include any party who "has petitioned the board for leave to intervene as a party within thirty days after the date of publication of [the required public notice] if that petition has been granted by the board for good cause shown." Rule 4906-2-12, O.A.C., provides that any person may petition the Board for intervention by "[p]reparing a petition for leave to intervene setting forth the grounds for the proposed

intervention and the interest of the petitioner in the proceedings” and filing that within 30 days of the required public notice or by such other deadline established by the Board. The Ohio Supreme Court has held that intervention should be liberally granted under these standards. *Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20; see also *id.* at ¶ 16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995) (intervention requirements are similar to requirements in Civ.R. 24 which “is generally liberally construed in favor of intervention.”).

The Board determined that GNU had met the applicable requirements for intervention, granting, in part, GNU’s motion to intervene.<sup>19</sup> Order on Certificate at 3. However, the Board also appears to have denied, in part, GNU’s intervention, limiting GNU’s participation in this matter “to the extent [GNU] request[s] intervention to address irrelevant matters other than the amendment application or that are outside the scope of the proceeding.” *Id.* In support, the Board cites to its decision in the *Black Fork Wind Case*.<sup>20</sup> *Id.*

In limiting the scope of GNU’s intervention the Board failed to follow its rules. Rule 4906-2-12(D), O.A.C., governs limited intervention in Board proceedings and provides:

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<sup>19</sup> The Board appears to have inadvertently cited to its former rule on intervention, Rule 4906-7-04, O.A.C., which has been rescinded, instead of its current rule on intervention Rule 4906-2-12, O.A.C. Both the former rule and current rule are identical.

<sup>20</sup> The Board defines the *Black Fork Wind* decision as the Order on Certificate issued in Case No 10-2865-EL-BGN on August 27, 2015. There was no such decision issued in that case on that day. It appears that the Board meant to cite to its decision in a companion Black Fork Wind Case, *In the Matter of the Application of Black Fork Wind Energy, LLC Regrading its Certificate of Environmental Compatability and Public Need Issued in Case No. 10-2865-EL-BGN*, Case No. 14-1591-EL-BGA, Order on Certificate (Aug. 27, 2015) (“*Black Fork Wind Case*”).

- (D) Unless otherwise provided by law, the board or the administrative law judge may:
  - (1) Grant limited participation, which permits a person to participate with respect to one or more specific issues, if:
    - (a) The person has no real and substantial interest with respect to the remaining issues.
    - (b) The person's interest with respect to the remaining issues is adequately represented by existing parties.

GNU's right to intervene in this proceeding was not contested. The Board did not find that GNU has no real and substantial interest as to any matter at issue in this proceeding. It did not find that GNU's interests are adequately represented by another party. The pleadings would not support such findings in any event. Without making the requisite findings, the Board nonetheless went on to limit the scope of GNU's intervention.

The *Black Fork Wind Case* lends no support to the imposition of a limitation on the scope of GNU's intervention because that decision suffers from the same legal defects just discussed. See *Black Fork Wind Case*, Order on Certificate at 2-3 (Aug. 27, 2015).

Furthermore, because GNU has a property interest that is affected by the construction of the Wind Farm under the amended certificate, that property interest may not be affected unless or until GNU has had an opportunity to exercise due process rights afforded by the Ohio and United States Constitutions. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1978).

As the United States Supreme Court phrased the issue, "[t]he point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate

procedures.” *Id.* at 541. State law that creates a property interest is sufficient to require due process under the Fourteenth Amendment. *Id.* at 538 (*quoting Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972) (“Property interests, of course, are not created by the [U.S.] Constitution, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....’”).

“[O]nce it is determined that the Due Process Clause applies” the “essential principle” of the clause requires that “a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Id.* at 541-542 (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). “[T]he root requirement’ of the Due Process Clause [] being ‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.’” *Id.* (emphasis in original) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

The Ohio Constitution similarly guarantees due process be provided before a property right is deprived. Ohio Constitution Article 1, § 1; see *State ex rel. Sunset Estate Props., LLC v. Vill. of Lodi*, 142 Ohio St.3d 351, 355 (2015).

GNU has property interests under the Ohio Revised Code and Ohio Constitution.<sup>21</sup> For example, R.C. 4906.20 and 4906.201 set forth statutory protections to the property rights of owners of property adjacent to a proposed wind farm by

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<sup>21</sup> The Ohio Supreme Court has broadly defined “property” under an application of the Due Process requirements:

...this court recognized that the definition of “property” includes the unrestricted possession, use, enjoyment, and disposal of lands or chattels. And “[a]nything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.” *Id.* at 388, citing *Spann v. Dallas*, 111 Tex. 350, 235 S.W. 513 (1921), and *O’Connor v. Moscow*, 69 Idaho 37, 202 P.2d 401 (1949).

*State ex rel. Sunset Estate Props., LLC v. Vill. of Lodi*, 142 Ohio St.3d 351 (2015).



requiring that the Board adopt reasonable regulations on such matters as “ice throw, sound and noise levels, blade shear, [and] shadow flicker” and requiring the Board to adopt rules establishing minimum setbacks in accordance with the statutorily prescribed formula. R.C. 4906.20 vests a further explicit property interest in adjacent landowners by giving them control over the extent to which the enjoyment of their property may be encroached by wind farm developers seeking relief from Ohio's minimum setback requirements. R.C. 4906.20(B)(2)(c). GNU represents the interests of owners of property adjoining the Wind Farm property and no one has contested this fact.

Article 1, § 1 of the Ohio Constitution also sets forth certain inalienable rights that are vested in every Ohioan including the inalienable rights to “acquiring, possessing, and protecting property.”

Because GNU has a constitutionally guaranteed right to due process, the Board must provide GNU an opportunity to be heard. The Board accepted the claims and assertions contained in the Wind Farm's as-modified Application and the Staff Report of Investigation but did not provide any opportunity for GNU to be heard and to challenge the claims and assertions advanced by the Wind Farm and the Board's Staff in the Staff Report of Investigation. Moreover, the Board entirely ignored the Comments and Objections that GNU did file with the Board.

The Board also violated R.C. 4903.09 when it failed to respond to GNU's Comments and Objections. R.C. 4903.09 provides that in contested cases the Board must issue a written decision including findings of fact and setting forth the reasons prompting the decisions arrived at, based upon said finding of fact.<sup>22</sup> As the Ohio

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<sup>22</sup> As already explained, R.C. 4903.09 applies to Board proceedings pursuant to R.C. 4906.12.

Supreme Court has further explained, this statute requires that contrary arguments must be addressed. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 30. Failure to initially address these issues, which are again presented to the Board in this Application for Rehearing, is reversible error. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 70-71.

Thus, The Board acted unlawfully and unreasonably by limiting the scope of GNU's intervention, denying GNU the opportunity to be heard, failing to hold a hearing and failing to respond to GNU's Comments and Objections in its Order.

4. **The Board acted unreasonably and unlawfully by not subjecting the Wind Farm's Application to the most-recently-enacted minimum setback requirements (R.C. 4906.20 and R.C. 4906.201)<sup>23</sup> despite the General Assembly specifically directing the Board to apply such setback requirements to applications to amend a certificate. Without authority to do so, the Board "interpreted" the most-recently-enacted minimum setback requirements as though the General Assembly gave the Board authority to permit the Wind Farm to evade such setback requirements when the Board determines that an amendment does not involve a substantial change in the location of a turbine or result in a material increase in an environmental impact. The General Assembly gave the Board no such discretion. In addition, the Board acted unlawfully by adopting and applying a standard having uniform application without first promulgating the standard as a rule.**

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<sup>23</sup> R.C. 4906.20(B)(2)(b) and 4906.201 specifically require the application of the most-recently-enacted setback requirements to applications to amend a certificate. These statutory sections delegate no discretion to the Board to allow the Wind Farm's amendment Application to evade the current minimum setback requirements. The current minimum setback requirements state that regardless of the minimum distance produced by applying the size-related formula, the minimum setback distance shall be no less than either 1,125 feet or 750 feet from the base of the turbine to the adjoining property line. The choice between a minimum setback floor of 1,125 and 750 feet depends on the timing of the amendment. According to the Staff Report of Investigation, the prior and lesser formula-based minimum setback requirements applied to the bigger turbines identified in the Application yield a minimum setback distance of 548 feet from any adjoining property line. And, 16 of the turbine sites violate the 548 feet minimum setback from the property line. Staff Report of Investigation at 2 (March 22, 2016). The Staff Report of Investigation made no attempt to consider or apply the most-recently-enacted setback requirements which specify a minimum setback distance of no less than 750 feet (more than 200 feet more than identified in the Staff Report of Investigation). Similarly, the Staff Report of Investigation made no attempt to evaluate facility noise, shadow flicker, ice trough risk or other impacts at adjoining property lines. Instead, things like noise and shadow flicker were considered relative to the location of "receptors".

Most of GNU's fourth statement of error is self-explanatory and does not require further discussion. Below, GNU discusses the Board's unlawful adoption and application of a standard having uniform application without first promulgating the standard as a rule. Since the Board failed to follow the required process for adopting the rule dealing with applications for a certificate amendment that trigger the most-recently-enacted setback requirements, the Board acted unlawfully by applying its "interpretation" in this proceeding.

R.C. 111.15 sets forth the procedure that the Board follows for the purpose of adopting rules.<sup>24</sup>

"Rule" is defined in R. C. 111.15(A)(1) as any rule, regulation, bylaw or standard, having a general and uniform operation, adopted by any agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule.

The Board's "interpretation" of a statute subjecting applications to amend a certificate to the most-recently enacted setback requirements produced a "standard" that has "a general and uniform operation" within the meaning of R.C. 111.15(A)(1). It prescribes a legal standard that did not previously exist.

GNU believes that the Board's "interpretation" is unlawful because the law clearly and unambiguously calls for the most-recently-enacted setback requirements to be applied in the case of all applications to amend a certificate.

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<sup>24</sup> The discussion here does not suggest that the Board can properly engage in rulemaking under Chapter 111 rather than Chapter 119. The point here is that the Board must properly engage and complete the rulemaking process before it can apply a rule.

R.C. 4906.20(B)(2)(b) and R.C. 4906.201 specifically require the application of the most-recently-enacted setback requirements to applications to amend a certificate. These statutory sections delegate no discretion to the Board to allow the Wind Farm's amendment Application to evade the current minimum setback requirements.

The current minimum setback requirements state that regardless of the minimum distance produced by applying the size-related formula, the minimum setback distance shall be no less than either 1,125 feet or 750 feet from the tip of the turbine blade to the adjoining property line. The statutory formula can cause the minimum setback requirement from the adjoining property line to be greater but no less.

According to the Staff Report of Investigation, the prior and lesser formula-based minimum setback requirements applied to the bigger turbines identified in the Application yield a minimum setback distance of 548 feet from any adjoining property line. And, 16 of the turbine sites violate the 548 feet minimum setback from the property line. Staff Report of Investigation at 2 (March 22, 2016).

The Staff Report of Investigation, like the Order, made no attempt to consider or apply the most-recently-enacted setback requirements. Based on current law, the absolute minimum setback distance is no less than 750 feet from adjoining property line (greater than 200 feet more than identified in the Staff Report of Investigation).

In any event, the General Assembly gave the Board no opportunity to interpret the statute to cause some amendment applications to trigger the most-recently-enacted setback requirements and others to not do so.

But even if the Board could lawfully resort to "interpretation" in this case, the result **must** first be formally promulgated as a rule pursuant to R.C. Chapter 111 before

the result can be enforced against the public in general or GNU specifically.<sup>25</sup> And in this case, the General Assembly specifically directed the Board to proceed by rulemaking rather than by adjudication. Although “[t]he decision whether to proceed by rule or adjudication generally is for an administrative agency in the first instance,”<sup>26</sup> that discretion does not exist when the Board is subject to a statutory requirement to issue rules to carry out particular actions.<sup>27</sup>

The practical effect of the Board's application of its “interpretation” in this case also works to unlawfully evade the opportunity for a review of the Board's “interpretation” by the Joint Committee on Agency Rule Review.<sup>28</sup>

5. **The Order is unreasonable and unlawful because it states (at page 4) that the Board has promulgated the rules that the General Assembly required the Board to adopt to establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements.**

R.C. 4906.20(B) requires the Board to have a package of rules in place that comprehensively respond to the General Assembly's directives. The Board did not have such a package of rules in place when the Wind Farm filed its Application and that condition remains the same today.

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<sup>25</sup> See, e.g., *Fairfield Cty. Bd. of Commrs. v. Nally*, 143 Ohio St.3d 93, (2015); *Jackson Cty. Environmental Comm't. v. Schregardus*, 95 Ohio App.3d 527, 642 N.E.2d 1142 (10th Dist.1994).

<sup>26</sup> *Duff Truck Line v Pub. Util. Comm'n. of Ohio*, 46 Ohio St.2d 186, 193 (1976). (hereinafter cited as “*Duff*”).

<sup>27</sup> *Wayne County Comm'rs. v. McAvoy*, 1980 WL 353586 at \*3 (10<sup>th</sup> Dist. Ct. App. July 29, 1980) (Ohio EPA could not issue a permit prior to the adoption of rules required by statute; *Duff* distinguished because the PUCO did not, in *Duff*, have a mandatory requirement to make rules and regulations governing motor transportation companies under R.C. 4921.04 and 4921.07). The Board has a wind-specific mandatory requirement to promulgate rules by virtue of R.C. 4906.20 and a more general mandatory requirement to adopt rules by virtue of R.C. 4906.03.

<sup>28</sup> R.C. 121.22, the Open Meetings (or “Sunshine”) Act, requires proposed rules to be deliberated upon and adopted in meetings that are open to the public unless covered by a specific exemption from the open meetings requirement. There was no public “deliberation” process here.

Section 4906.20(A), Revised Code, states that a certificate shall be issued only pursuant to this Section (which contains the rulemaking requirements).<sup>29</sup> R.C. 4906.20(B), states that the minimum setback requirements (which must be included in the rules the Board must promulgate) must be observed unless and until **ALL** owners of property adjacent to the wind farm property waive the application of the setback requirements to the wind farm property.

The Application acknowledged that the prior and lesser minimum setback requirements would continue to be violated in the case of 16 of 25 of the proposed wind turbines<sup>30</sup>. As discussed above, GNU asserts that this comprehensive violation of the minimum setback requirements means that the Wind Farm's proposal to introduce a bigger, noisier and more-shadow-flickery facility will, necessarily, have some material impact on the environment because the Wind Farm's plan invades the space that the General Assembly commanded the Board to protect against invasion by wind farm developers. Under Ohio law, this invasion of the protected space may only occur if all adjoining property owners consent by executing a waiver pursuant to the procedure the Board is supposed to establish by rule.

The Board has held that it cannot waive the minimum setback requirements and that the Wind Farm can only proceed if it secures minimum setback violation waivers from adjoining property owners. But before any such waivers can be secured, the Board must establish by rule, in accordance with R.C. 4906.20(B)(2)(c), the procedure by which any such lawful waiver may be acquired. The Board has no such rule establishing the procedure by which such a waiver must be obtained.

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<sup>29</sup> R.C. 4906.04 states that a certificate may only be issued pursuant to Chapter 4906.

<sup>30</sup> Turbine numbers 1, 3-7, 9-10, 12-15, 17, 21-22 and 25 violate the minimum setback requirements. Order at 13.

R.C. 4906.20(B)(2) also requires the Board to have rules that call for the most-recently-enacted setback requirements to be triggered by an application to amend a certificate. The Board has no such rules. As discussed above, the Board used this proceeding to, in effect, issue a rule (disguised as an "interpretation") regarding the triggering of these setback requirements but it did so without following the requirements that must be followed before the Board can issue and apply a rule.

The Board has a long-standing and unfulfilled duty to promulgate a package of rules identifying Ohio's statewide approach to the location, construction, operation and use of wind farms. It has persistently ignored this duty even though it has repeatedly issued certificates and approved certificate amendments as though it had the authority to do so without first adopting the required rules.

The General Assembly gave the Board no authority to issue certificates or to approve amendments to certificates separate and apart from the requirements contained in rules that the Board is duty-bound to promulgate. Yet the Board has, in practice, unlawfully unhinged its authority to issue certificates and to approve amendments to certificates from the discipline of and accountability to substantive rules that are required but remain missing. Until and unless the Board lawfully promulgates the required rules, it has no legal authority to issue certificates or approve amendments to certificates.<sup>31</sup>

- 6. The Order is unreasonable and unlawful because it authorizes an amendment to a certificate that was illegally issued by the Board in Case No. 13-0990-EL-BGN and because the Board deprived GNU of an opportunity to contest the Application**

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<sup>31</sup> *Wayne County Comm'rs v. McAvoy*, 1980 WL 353586 at \*3 (10<sup>th</sup> Dist. Ct. App. July 29, 1980) (Ohio EPA could not issue a permit prior to the adoption of rules required by statute).

**based on such original and continuing illegality. The original certificate is void by operation of law. It cannot be amended.**

For the reasons explained in the Applications for Rehearing filed by Omega Crop Co., LLC in Case No. 13-0990-EL-BGN on September 23, 2014 and September 24, 2015,<sup>32</sup> the Board lacked authority to issue the certificate issued in Case No. 13-0990-EL-BGN and that certificate is, accordingly, void.<sup>33</sup> Among other things, that certificate was issued without the Board first satisfying the mandatory requirement to promulgate rules.

The Board has only such authority as is expressly conferred by statute. By issuing a certificate without first satisfying the mandatory requirement to promulgate rules, the Board did not act in accordance with its delegated authority.<sup>34</sup>

Since the certificate issued in Case No. 13-0990-EL-BGN is void, the Board is without authority to amend the certificate.

Respectfully submitted,

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<sup>32</sup> These Applications for Rehearing filed by Omega Crop Co., LLC in Case No. 13-0990-EL-BGN on September 23, 2014 and September 24, 2015 are incorporated herein by reference.

<sup>33</sup> A judgment will be deemed void when it is issued by a body which did not have jurisdiction or otherwise lacked authority to act. *State v. Fischer*, 128 Ohio St 3d 92, 2010-Ohio-6238, 942 N.E. 2d 332 ¶ 6.

<sup>34</sup> *Wayne County Comm'rs. v. McAvoy*, 1980 WL 353586 at \*3 (10th Dist. Ct. App. July 29, 1980).



**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Application for Rehearing and Memorandum in Support of Greenwich Neighbors United* has been served via electronic mail upon the following parties of record this 20<sup>th</sup> day of June 2016.

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**ADMINISTRATIVE LAW JUDGE**

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**Case No(s). 15-1921-EL-BGA**

**Summary: App for Rehearing and Memorandum in Support of Greenwich Neighbors United electronically filed by Mr. Samuel C. Randazzo on behalf of Greenwich Neighbors United**

**CERTIFICATE OF FILING**

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(B)(2), Greenwich Neighbors United's Notice of Appeal has been filed with the Docketing Division of the Ohio Power Siting Board, a Division of the Public Utilities Commission of Ohio, and served on the Chairman of the Board by leaving a copy at the office of the Board in Columbus, Ohio, in accordance with Ohio Adm. Code 4906-2-33, on this 29<sup>th</sup> day of September 2017.



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**Matthew R. Pritchard  
Counsel for Appellant  
Greenwich Neighbors United**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Appellant Greenwich Neighbors United* was served upon the parties of record to the proceeding before the Ohio Power Siting Board, a Division of the Public Utilities Commission of Ohio, listed below and pursuant to S.Ct.Prac.R. 3.11(B)(2) and R.C. 4906.12 on this 29th day of September 2017, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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