

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Firelands Wind,)
LLC for a Certificate of Environmental)
Compatibility and Public Need to Construct a) Case No: 18-1607-EL-BGN
Wind-Powered Electric Generation Facility in)
Huron and Erie Counties, Ohio.)

**FIRELANDS WIND’S
MEMORANDUM CONTRA TO PETITION TO INTERVENE BY
RESIDENTS IN SENECA, HURON, AND ERIE COUNTIES**

I. INTRODUCTION

On January 31, 2019, as supplemented, Firelands Wind, LLC (“Applicant”) filed an application with the Ohio Power Siting Board (“Board”) for a Certificate of Environmental Compatibility and Public Need to Construct a Wind-Powered Electric Generation Facility in Huron and Erie Counties, Ohio (“Application”).

At this time, pursuant to Ohio Administrative Code (“OAC”) Rule 4906-2-27(B)(1), the Applicant submits this memorandum contra to the May 17, 2019 Petition to Intervene (“Petition to Intervene”) filed on behalf of various residents in Seneca, Huron, and Erie Counties, Ohio. The Applicant does not object to the Petition to Intervene for some of the residents named in the Petition to Intervene, due to the fact that those residents’ properties are either in the Project area or abut the Project area. However, for the reasons stated herein, the Applicant does object to the intervention of the following 21 residents: Chris and Amy Bauer; Tom and Vicki Smythe; Jane and Mark Motley; Scott and Heather Eisenhauer; Krista Beck; Jesse Roeder; Terry and Bertha Eisenhauer; Dan and Renee Schoen; Gerard and Denise Wensink; Kevin and Beth Wagner; John Wagner; and Jim and Catherine Limbird (“Petitioners”).

The Applicant believes in public participation and has worked to inform the public of the Project and answer all questions about the Project from its very inception. However, even given the Applicant's strong commitment to public involvement, upon review of the Petitioners' motion, it is not possible for the Applicant to support intervention in this matter by these 21 individuals. As further set forth herein, the Applicant opposes the Petition to Intervene for good reason. Petitioners claim an interest in this case based on the fact that they: a) are residents of Seneca, Huron, or Erie Counties; b) pay property taxes; c) consume electricity; d) will be subjected to excessive noise and shadow flicker, as well as a different view of the landscape; e) watch the birds, bats, and bald eagles that will be harmed; and f) will experience a diminution in the value of their homes.

Moreover, the Petitioners falsely state that none of the Petitioners are "participating property owners' with regard to the Project, *i.e.*, none have entered into leases for the project and none have entered into agreements waiving the statutory setbacks with regard to their property." When, in fact, Chris and Amy Bauer are "participating property owners" as they reside on property that is obligated under a contract with the Applicant that runs with the land, and said contract was properly filed with the Huron County Recorder's office.

Even a liberal interpretation of the standing doctrine leads to denial of these 21 Petitioners' request to intervene. First, Petitioners' statement that they live in Seneca, Huron, or Erie Counties, pay taxes, and consume electricity does not provide a sufficient nexus to the Project to establish standing. These arguments do not show the particularized interest required to support a motion for intervention.

Second, the Petitioners state that their interests in the proceeding relate to possible effects of noise and shadow flicker from the turbines. However, as stated in the Petition to Intervene, 19

of the 21 Petitioners are merely “in close proximity to the Project area.”¹ The properties of Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird are not within the Project area and do not abut the Project area. Rather, as shown on Attachment A, their residences are between 2,339 to 9,969 feet (0.4 to 1.9 miles) away from the nearest turbine. Therefore, even assuming the arguments regarding the effects of noise, shadow flicker, and diminution of property values and viewshed set forth by these 19 Petitioners in their motion were true (which the Applicant asserts they are not), none of these Petitioners are in close enough proximity to any turbine or any of the Project facilities to support their request for intervention in this matter on those grounds.

Third, the Petitioners assert the application fails to establish that the Project “represents the minimum adverse environmental impact.” In support of this proposition, Petitioners reference alleged flaws in the Applicant’s bird and bat risk studies, failing to mention that the Board is charged with investigating the Project and issuing ecological and environmental assessments, with considerable review and input from the Ohio Department of Natural Resources (“ODNR”) (a member of the Board), in consultation with the United States Fish and Wildlife Service.

Regardless of how these 19 Petitioners frame their arguments, their stated “interests” do not rise to a level that warrants intervention in this proceeding, given their lack of relationship to the Project, and the statutory obligations of the Board. As such, the request by Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird should be denied for lack of good cause.

¹ The Petition to Intervene states that Chris and Amy Bauer have a residence and property within the footprint of the Project area; however, they are obligated under a contract with the Applicant.

With regard to Chris and Amy Bauer, their request to intervene should be denied as they are estopped from entering into the Petition to Intervene because they are under a contractual obligation that precedes and supersedes their request for intervention.

II. ARGUMENT

A. Legal Standard

Under both Section 4906.08(A)(3) of the Ohio Revised Code (“RC”), and OAC Rule 4906-2-12(B), the Board or Administrative Law Judge (“ALJ”) assigned to the case may grant petitions to intervene only upon a showing of “good cause.” In determining “good cause” and whether to allow intervention, the Board / ALJ may consider the following factors:

1. The nature and extent of the person’s interest.
2. The extent to which the person’s interest is represented by existing parties.
3. The person’s potential contribution to a just and expeditious resolution of the issues involved in the proceeding.
4. Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.

The Ohio Supreme Court has held that “intervention ought to be liberally allowed so that positions of all persons with a real and substantial interest in the proceedings can be considered.” *Ohio Consumers’ Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853 (*emphasis added*). However, merely filing a petition to intervene in an administrative proceeding does not guarantee intervention. See *e.g. Senior Citizens Coalition v. Pub. Util. Comm. of Ohio*, 69 Ohio St.2d 625, 627 (1982) (upholding Public Utilities Commission of Ohio’s decision to limit a party’s intervention).

B. Intervention is Not Warranted

Petitioners lack the “good cause” required to intervene. Their stated interests are indirect, generic, and outside the scope of the Application. Allowing intervention for these Petitioners would unjustly complicate and delay the proceeding. As such, their request should be denied.

1. Chris and Amy Bauer are under contractual obligation that prohibits their participation in the Petition to Intervene

The Petition to Intervene falsely states that none of the Petitioners have obligations under leases or agreements. However, the property owned by Chris and Amy Bauer, 6551 Young Road, Bellevue, Ohio, is under a contractual obligation that runs with the land.

In 2014, the owner of the land located at 6551 Young Road, Bellevue, Ohio entered into a lease agreement with the Applicant, which, among other requirements, obligates Chris and Amy Bauer to “participate in the project” and “provide evidence of [the Owners] consent to the placement of Wind Facilities on the Wind Facilities Property” if the need arises. (Attachment B at 2-3). As further stated in the agreement, the contract “shall run with the land and shall be binding upon and inure to the benefit of and be enforceable by Owner and Grantee, and their respective successors and assigns.” (Attachment B at 4-5).

In accordance with the Board’s rules, this agreement was recorded with the Huron County Recorder’s office in 2014 (*See* Attachment B, Huron County Recorder, Instr. 201410140005819). Chris and Amy Bauer purchased the land that is cited as their basis for intervention in this matter in 2016, well after 2014 when the agreement was executed. Thus, when they purchased the property in 2016, a proper title search would have revealed that the property was obligated under the contract entered into in 2014 by a previous owner of the property.

Therefore, Petitioners Chris and Amy Bauer are estopped from joining in the Petition to Intervene because their property is bound by a properly recorded lease with the Applicant, pursuant to RC Section 5301.25. A purchaser of land is bound by an encumbrance upon that land “if he has constructive or actual notice of the encumbrance.” *Collins v. Carpenter*, 2002-Ohio-5173, ¶ 19 (Ohio Ct. App. 2002). RC Section 317.08 identifies leases as an encumbrance recorded in county records. Furthermore, the proper recording of an encumbrance serves as constructive notice of the

encumbrance whether or not the purchaser has reviewed the recording. *Id.*; *In re Williams*, 395 B.R. 33, 44–45 (Bankr. S.D. Ohio 2008).

With regard to the Bauer’s property, pursuant to the properly recorded lease, they are bound by the obligations of the lease, through either actual or, in the least, constructive notice of the existence of that lease agreement. Thus, their notice of the lease binds them to the obligations of the lease and prevents them from being a party to the Petition to Intervene. For these reasons, Petitioners Chris and Amy Bauer are estopped from intervening and their request should be denied.

2. The nature and extent of the remaining 19 Petitioners’ interests are neither real nor substantial

Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird, assert they should be granted intervention because they: live in Seneca, Huron, or Erie Counties; pay taxes; consume electricity; could be subjected to additional noise or shadow flicker from the turbines, as well as a different view from their homes; and could lose value on their properties. However, none of these “interests” are of a real and substantial nature to warrant intervention. Indeed, none of Petitioners would be impacted by the wind turbines, as the closet turbine will be located a substantial distance from their properties. Specifically, the closet turbine to the properties of these 19 Petitioners would be: Jim and Catherine Limbird close to two miles; Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, and Dan and Renee Schoen greater than a mile; Tom and Vicki Smythe, Gerard and Denise Wensink, Jane and Mark Motley, John Wagner, and Scott and Heather Eisenhauer close to one mile; and Kevin and Beth Wagner close to a half mile. (*See* Attachment A). These 19 Petitioners’ properties are not within the Project area and they do not abut the Project area. Given

this distance, these 19 Petitioners will never be affected by wind turbine shadow flicker or sound, or any other wind farm externality.

Petitioners correctly state that the Board has granted petitions to intervene filed by property owners whose property would be affected by a proposed project. (Petition at 15). Yet each of the cases Petitioners cite to support their intervention involves owners of property within or along the route of the facility. *See, e.g., In re Application of American Transm. Systems, Inc.*, Case No. 12-1636-EL-BTX, Entry (May 21, 2014) at 1-2 (granting intervention to an owner of property along the possible alternate route of a proposed transmission line); *In re Application of Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Entry (Aug. 2, 2012) at 3-6 (granting intervention to property owners who own real estate and reside within the footprint of a wind farm); *In re Application of Buckeye Wind LLC*, Case No. 13-360-EL-BGA, Entry (Nov. 21, 2013) at 5-6 (granting motion of proposed intervenors who claimed the wind project would have an impact on their residences).

Simply alleging close proximity to the Project area is not sufficient to substantiate “good cause” for intervention in this case. *See, e.g., In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Entry (Apr. 23, 2019) at 5 (denying intervention to individuals that submitted generic arguments alleging close proximity to the project area). These 19 Petitioners in this case do not have a direct interest in this case. Therefore, in accordance with the Board’s precedent, these particular residents should be denied intervention. *See, e.g., Id.*, Entry (Aug. 21, 2018) at 7 (denying intervention to individuals that reside outside of the project area and do not have property that abuts the project area, noting that their interests may be raised during the local public hearing.); *In re Application of Icebreaker Windpower, Inc.*, Case No. 16-1871-EL-BGN, Entry (May 23, 2018) at 5-6 (denying intervention because the residents failed to assert a sufficiently direct interest

in the outcome of the case, noting that their interests would be more appropriately addressed at the local hearing).

Any issues related to landowner property rights and other public safety concerns, which these 19 Petitioners cite as justification for their intervention, simply do not exist for them due to the location of their property outside of the Project area. Further, as the Board has previously explained, “it is not enough for a person seeking to intervene in a proceeding . . . to merely state that he or she resides in a county wherein the project under consideration is proposed to be sited.” *See In re Application of Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (Mar. 2, 2010) (*emphasis added*).

In addition, the fact that Petitioners are Ohio energy consumers who also pay taxes does not confer a right to intervene. Petitioners’ supposed concerns regarding “funds to subsidize construction of the Project” and “higher than competitively-bid electricity” are irrelevant and have “no true nexus” with the Board’s review of the Application. *See In re Application of Col. S. Power Co., et al.*, Case No. 06-309-EL-BTX, Entry (Nov. 20, 2006) (denying petition to intervene due to alleged rate and reliability issues). Under Petitioners’ erroneous legal argument, anyone in Ohio (and even beyond, given their tax argument) could intervene in Board proceedings.

The Petitioners also allege that the Applicant “cannot even begin to make its required showing of ‘the probable environmental impact’ of its Project . . . on migrating birds, much less show that its siting of the Project ‘represents the minimum adverse environmental impact.’” (Petition at 12). However, as the Board is well aware, one of the purposes of this proceeding is to ensure that any potential adverse environmental impacts resulting from the proposed Project are minimized. However, it is evident Petitioners’ environmental interests are indirect and tangential to their Petition and should not be viewed as valid particularized environmental “interests.”

To be clear, the Ohio General Assembly tasked the Board with adopting “rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites, and projected needs for electric power.” RC Section 4906.03(C). The Applicant may commence construction only upon the Board’s issuance of a “certificate of environmental compatibility and public need.” RC Section 4906.01(D). The Board itself is comprised of directors from a variety of state agencies established to protect the public, the environment, and wildlife, including the Ohio Environmental Protection Agency, the Ohio Department of Health, and ODNR. RC Section 4906.02(A). These agencies and the Board retain environmental experts who are tasked with the statutory duty to investigate electric generation projects and issue reports addressing environmental and wildlife concerns. That Petitioners might someday disagree with the expert opinion of these agencies is not in and of itself a valid justification to intervene. Hence, the environmental/wildlife concerns mentioned by Petitioners do not in any way support their request to intervene. Any such concerns will undoubtedly be addressed by the Board in accordance with its mandate from the General Assembly.

The Petitioners also cite concerns with regard to the noise and shadow flicker. However, they fail to acknowledge that the Board has strict requirements with regard to these issues, which are set forth in OAC Rule 4906-4-09. They further neglect to note that the Applicant has committed to comply with the Board’s directives regarding construction and operational sound limits, as well as shadow flicker restrictions. (Application at 238-240). Thus, the Petitioners assertions regarding these factors do not support a showing of “good cause” for intervention in this matter.

In sum, these 19 Petitioners’ stated interests in the proceeding as “taxpayers” and “residents” of Seneca, Erie, or Huron Counties who question the value of renewable energy

generally do not warrant intervention in this case, as the proposed Project will be located at least half a mile or more away from their property. Therefore, these 19 Petitioners have failed to show that they have an interest that relates to or will be impacted by the specific issues at stake in the Application proceeding. To the extent Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhower, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhower, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird, and other residents that reside outside of the Project area have opinions regarding the Project, they can voice their opinion at the local public hearing that will be scheduled in the future.

3. Relevant Interests will be Adequately Represented and Investigated

Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhower, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhower, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird have no real, substantial, direct, or relevant interest in this proceeding, so their Petition should be denied outright. *See In re Application of Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (Mar. 2, 2010) at ¶ 13 (denying intervention for lack of individual interests). But insofar as these 19 Petitioners claim an interest in the degradation of the environment and its wildlife, the remaining residents listed in the Petition to Intervene, whose property is within the Project area or abuts the Project area, adequately represent such interests. Moreover, as previously explained, the Board's staff will adequately address and investigate Petitioners' concerns regarding the environment and wildlife, as well as the noise, shadow flicker, and viewshed topics. *See e.g. Fairview General Hosp. v. Fletcher*, 69 Ohio App.3d 827, 835 (10th Dist. App. 1990) (denying intervention because state agencies already adequately represented economic and health care interests).

4. Petitioners will not Contribute to a Just and Expeditious Resolution of the Proceeding

The involvement of Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhower, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhower, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird in this proceeding is unnecessary and will not contribute to a just and expeditious resolution of the issues. As previously explained, these 19 Petitioners raised issues that will be addressed by the Board, and have claimed interests that will be represented in the case. Allowing Petitioners to intervene simply because they are taxpaying residents that live in close proximity to where the Project is located would be neither just nor expedient, and is wholly unsupported by precedent. If these were valid interests, then every one of the millions of taxpaying Ohioans could intervene in this proceeding, which would clearly be an impractical and nonsensical result.

5. Granting Petitioners' Intervention will Unduly Delay the Proceedings and Cause Unjust Prejudice to the Applicant

Participation by Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhower, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhower, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird in this proceeding will cause unnecessary delay and prejudice to the Applicant. In the Petition to Intervene, the Petitioners reveal their overwhelming negative personal views on the Project, none of which deal with their stated interests of protecting the environment and surrounding community. Petitioners claim that the Project is “offensive and invasive” and would be a “blight” on Seneca, Huron, and Erie Counties. It is evident that the driving force behind Petitioners’ attempted intervention is their ideological opposition to wind energy generally—and not some pretend impact to their property and lives. Thus, this proceeding is not the appropriate

forum for the Petitioners' arguments and to allow them to intervene would unjustly prejudice the Applicant.

Petitioners acknowledged bias against wind power is not something that can be adjudicated by the Board. For example, the allegation that "[t]he cost of electricity generated by the proposed Project will be higher than competitively-bid electricity, notwithstanding ..." cannot be addressed in this case. (Petition at 16). By raising these immaterial political arguments, Petitioners make clear their motion really serves to stall, delay, and/or simply kill the Project on grounds unrelated to those under which they claim to have an interest. Granting this attempted intervention based merely on political hostility would undoubtedly result in unjust delay and prejudice to the Applicant through unnecessary litigation, including discovery and any appeals from the Board's ruling.

Moreover, allowing the 19 Petitioners who do not live in the Project area to intervene in this case will result in irrelevant, duplicative evidence, which will only serve to delay this proceeding.

III. CONCLUSION

In sum, the Petition to Intervene in this proceeding, with regard to the 21 Petitioners set forth in this Memorandum Contra should be denied for a lack of "good cause," based on the following:

1. **Contractual obligation estops intervention by two Petitioners**: Chris and Amy Bauer are under a contractual obligation pursuant to a properly recorded lease and, thus, are estopped from intervening.
2. **No real or substantial interest**: Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird do not live in or abut the Project Area and, therefore, have no substantial, direct, or personal interest in the proceeding.

3. **Interests represented by other parties:** Insofar as Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird claim an interest in environmental/wildlife issues, those interests will be adequately represented by the Board and those Petitioners whose properties are within the Project area or abut the Project area.
4. **No contribution to just and expeditious resolution:** Tom and Vicki Smythe, Jane and Mark Motley, Scott and Heather Eisenhauer, Krista Beck, Jesse Roeder, Terry and Bertha Eisenhauer, Dan and Renee Schoen, Gerard and Denise Wensink, Kevin and Beth Wagner, John Wagner, and Jim and Catherine Limbird will not contribute to a just and expeditious resolution of the issues—the Board could not expeditiously resolve any issues if it permitted every single taxpaying resident with a political ax to grind to intervene in this proceeding.
5. **Will unduly delay and unjustly prejudice:** Given Petitioners' political agenda to oppose renewable energy generally, their participation in the proceeding will merely cause undue delay to the proceeding and unjust prejudice to the Applicant.

Respectfully Submitted,

/s/ Christine M.T. Pirik

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Attorneys for Firelands Wind, LLC

June 3, 2019

CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 3rd day of June, 2019.

/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

Counsel:

werner.margard@ohioattorneygeneral.gov

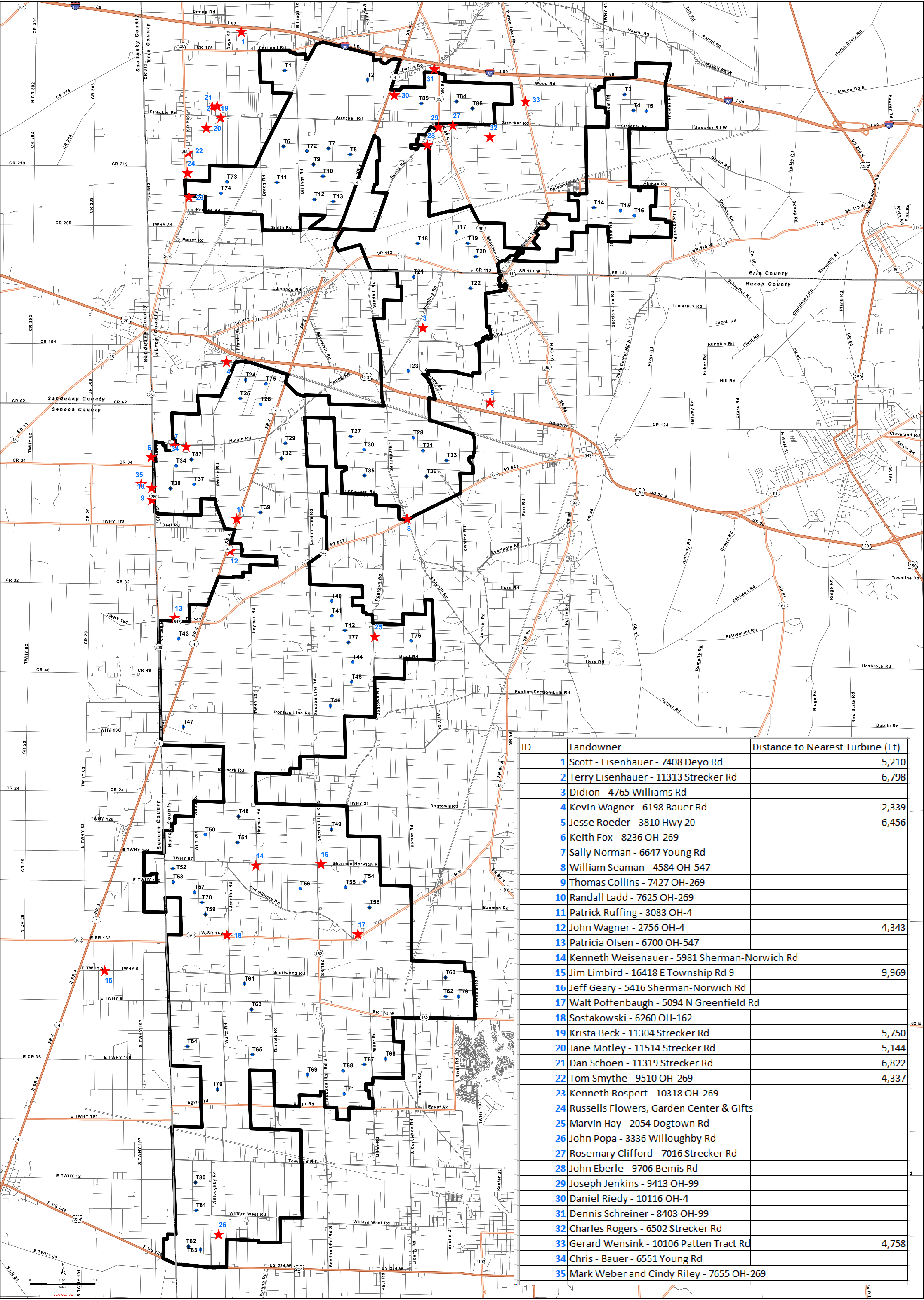
jstock@beneschlaw.com

mgurbach@beneschlaw.com

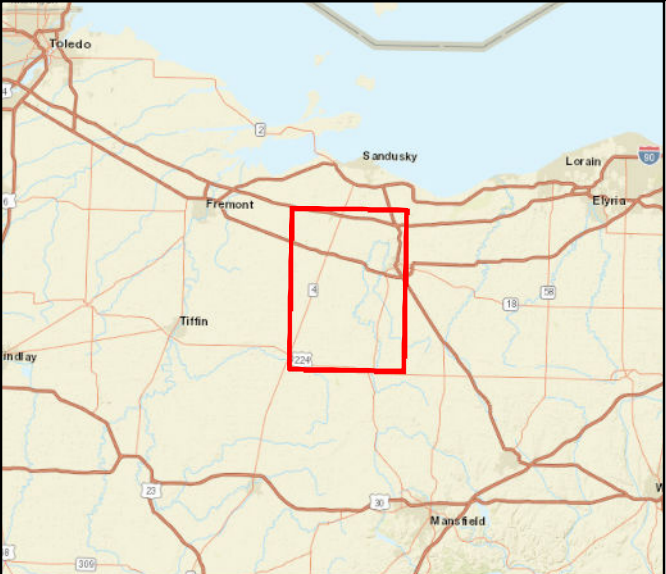
Administrative Law Judges:

jay.agranoff@puco.ohio.gov

COLUMBUS 59714-18 116038v2



ID	Landowner	Distance to Nearest Turbine (Ft)
1	Scott - Eisenhower - 7408 Deyo Rd	5,210
2	Terry Eisenhower - 11313 Strecker Rd	6,798
3	Didion - 4765 Williams Rd	
4	Kevin Wagner - 6198 Bauer Rd	2,339
5	Jesse Roeder - 3810 Hwy 20	6,456
6	Keith Fox - 8236 OH-269	
7	Sally Norman - 6647 Young Rd	
8	William Seaman - 4584 OH-547	
9	Thomas Collins - 7427 OH-269	
10	Randall Ladd - 7625 OH-269	
11	Patrick Ruffing - 3083 OH-4	
12	John Wagner - 2756 OH-4	4,343
13	Patricia Olsen - 6700 OH-547	
14	Kenneth Weisenauer - 5981 Sherman-Norwich Rd	
15	Jim Limbird - 16418 E Township Rd 9	9,969
16	Jeff Geary - 5416 Sherman-Norwich Rd	
17	Walt Poffenbaugh - 5094 N Greenfield Rd	
18	Sostakowski - 6260 OH-162	
19	Krista Beck - 11304 Strecker Rd	5,750
20	Jane Motley - 11514 Strecker Rd	5,144
21	Dan Schoen - 11319 Strecker Rd	6,822
22	Tom Smythe - 9510 OH-269	4,337
23	Kenneth Rospert - 10318 OH-269	
24	Russells Flowers, Garden Center & Gifts	
25	Marvin Hay - 2054 Dogtown Rd	
26	John Popa - 3336 Willoughby Rd	
27	Rosemary Clifford - 7016 Strecker Rd	
28	John Eberle - 9706 Bemis Rd	
29	Joseph Jenkins - 9413 OH-99	
30	Daniel Riedy - 10116 OH-4	
31	Dennis Schreiner - 8403 OH-99	
32	Charles Rogers - 6502 Strecker Rd	
33	Gerard Wensink - 10106 Patten Tract Rd	4,758
34	Chris - Bauer - 6551 Young Rd	
35	Mark Weber and Cindy Riley - 7655 OH-269	



Emerson Creek Petitioner Residence

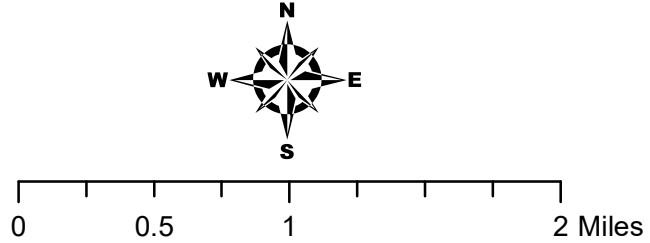
- Proposed Turbine (87)
- ★

Petitioner Residence
- ▭

County Boundary
- ▭

Project Boundary
- ▭

Parcel Boundary




 Instr: 201410140005819 10/14/2014
 Pages: 6 F: \$60.00 11:32 AM
 Jan M. Tkach T20140006460
 Huron County Recorder DISP: MAIL

E ☒ PU _____
 IP _____ PR _____ AN _____

THIS INSTRUMENT DRAFTED BY AND
WHEN RECORDED RETURN TO:

Apex Clean Energy, Inc.
 Attn: Jeanine Wolanski
 244 East High Street
 Charlottesville, VA 22902

WIND EASEMENT AND
WIND FARM PARTICIPATION AND SUPPORT AGREEMENT

This Wind Easement and Wind Farm Participation and Support Agreement (the “**Agreement**”), is dated and effective as of June 16th, 2014 (“**Effective Date**”), by and between Tree Pump, LLC, an Ohio limited liability company (“**Owner**”), and Firelands Wind, LLC, a Delaware limited liability company (“**Grantee**”).

RECITALS:

A. Owner is the owner of (i) that certain real property located in Huron County, Ohio, more particularly described on **Exhibit A** attached hereto and made a part hereof (the “**Participation Property**”) and (ii) the remainder of the real property described in Recital E below as the premises covered by the Lease (as defined below);

B. Owner recently acquired all of the real property described in Recital A from James R. Bright, Successor Co-Trustee, and Mary Katherine Rickenbaugh, Co-Trustee of the Charlotte S. Dillon Trust u/a dated June 12, 1985 (the “**Prior Owner**”);

C. Prior Owner and Lyme Wind Farm, LLC, a Delaware limited liability company (“**Lyme**”) are the parties to that certain Wind Energy Land Lease and Easement Agreement dated November 26, 2011 (“**Lease Effective Date**”), a memorandum of which was recorded on December 20, 2011 in the Huron County, Ohio Recorder’s office at Volume 659, Page 251, as amended by that First Amendment of Wind Energy Land Lease and Easement Agreement, dated November 26, 2011 (the lease, as amended, the “**Lease**”); Grantee is the assignee or otherwise has acquired all of the rights and obligations of Lyme under the Lease;

D. Grantee has acquired, or will acquire, certain easements and other related rights covering real property (“**Wind Facilities Property**”) located adjacent to and/or in the vicinity of the Participation Property for purposes of the construction, installation, maintenance, use and operation of wind energy

conversion turbines (“**Wind Turbines**”), electrical distribution and transmission facilities and related roads and facilities (collectively, with the Wind Turbines, the “**Wind Facilities**”);

E. The premises covered by the Lease (the “**Lease Premises**”) are a part of the Wind Facilities Property and currently comprise approximately 223 total acres, of which the Participation Property represents approximately 5.7 acres and is improved with a large residence, a barn and other farming-related outbuildings;

F. Owner is seeking to sell the Participation Property, and to facilitate such sale Owner has requested Grantee to release the Participation Property from the Lease, which release Grantee is willing to grant, subject to the provisions of this Agreement, because the existing improvements on and other features of the Participation Property make it inappropriate for placement thereon of Wind Facilities;

G. To the extent described herein, Owner agrees to participate in the wind farm project being developed by Grantee on the Wind Facilities Property in Huron County, Ohio (the “**Wind Farm**”).

H. The Wind Farm may be constructed and put into operation in one or more phases (each, a “**Phase**”) that are distinguishable from the remainder of the Wind Farm, as determined by Grantee in its reasonable discretion.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

1. **Release from Lease; Grant of Rights.** Pursuant to Sections 2.2(d)(i) and/or 2.2(d)(iii) of the Lease, Grantee hereby releases the Participation Property from the Lease. Notwithstanding such release, Owner hereby grants to Grantee a non-obstruction easement on the Participation Property whereby Owner shall not, and shall not grant any third parties any right which would, interfere with or obstruct the wind speed or wind direction over the Wind Facilities Property and/or the Participation Property, whether by planting trees or constructing buildings or other structures on the Participation Property which at any time during the Term (as defined below), reach a height of greater than fifty (50) feet, which trees or structures would, in Grantee’s sole judgment, cause a meaningful decrease in the output or efficiency of the Wind Facilities in the Wind Farm. Trees, structures and improvements located on the Participation Property as of the date of this Agreement (or any replacement of any of them following a casualty (and disease in the case of a tree)) shall be allowed to remain and Grantee may not require their removal. Owner also grants to Grantee an easement to generate audio, visual, and electrical effects, as well as shadow flicker, radio interference, and/or other effects on the Participation Property attributable to the operation of Wind Facilities; provided, however, that the provisions of Section 1.1(d) of the Lease, relating to Wind Turbines not being constructed closer than 1,000 feet from any residence on the Lease Premises, shall remain applicable as if the Participation Property remained part of the Lease Premises. For the avoidance of doubt, and consistent with the release of the Participation Property from the Lease, nothing in this Section 1 shall be construed to provide Grantee with any right to enter the Participation Property or construct Wind Facilities on the Participation Property.

2. **Term of Agreement.** This Agreement shall be for an initial term (“**Initial Term**”) commencing on the Effective Date and continuing until thirty (30) years after the Lease Effective Date. Unless earlier terminated, Grantee may elect to extend the Initial Term for three (3) additional 10-year terms upon written notice to Owner at least ninety (90) days’ prior to the expiration of the Initial Term or

each extended term as the case may be. The Initial Term plus the additional extended term(s) is called the "Term."

3. **Termination.** If Grantee fails to commence the generation of energy using Wind Facilities on the Wind Facilities Property prior to the tenth (10th) anniversary of the Lease Effective Date, this Agreement shall automatically terminate. Either party shall have the right to terminate this Agreement in whole or in part, at any time, upon written consent of the other party. Upon termination of the Agreement, Grantee shall record a Notice of Termination with the Huron County Recorder's Office.

4. **Consideration.** As consideration for this Agreement, Grantee shall make payments to Owner during the Term as set forth in the Fee Schedule attached hereto ("Fee Schedule"). The Fee Schedule shall be omitted from the recorded Agreement as provided in Section 11 below. Any payments made under this Agreement are in addition to any payments to be made to Owner under the Lease.

5. **Authority.** Owner hereby represents and warrants to Grantee that it owns the Participation Property in fee simple, and is fully authorized and empowered to grant the rights and benefits to Grantee contained in this Agreement. There are no liens, encumbrances, leases, mortgages, deeds of trust, mineral or oil and gas rights, options, rights of refusal, preferential rights to purchase or lease, or other interests in (or exceptions to) Owner's fee title ownership of the Participation Property which are not recorded in the public records of Huron County, Ohio. Grantee hereby represents and warrants that it is the owner of all of the rights and obligations of Lyme as the Developer under the Lease, and is fully authorized and empowered to grant the release of the Participation Property from the Lease and the other rights and benefits to Owner contained in this Agreement.

6. **Assignment.** Grantee shall have the right at any time, without need for Owner's consent, to assign or convey all or any portion of this Agreement to an assignee or assignees, on an exclusive or non-exclusive basis, or to mortgage or collaterally assign all or any part of its interest in the Agreement and its rights under the Agreement to any entity ("**Lender**") without the consent of Owner. Any Lender will have no obligations under this Agreement until such time as it exercises its rights to acquire Grantee's interest subject to the lien of Lender's mortgage by foreclosure or otherwise or assumes the obligations of Grantee under this Agreement. So long as any mortgage with a Lender remains in effect, this Agreement shall not be modified, and Owner shall not accept a surrender of the rights granted under this Agreement or a termination or release of this Agreement, without the prior consent of all Lenders.

7. **Reasonable Assistance.** Owner agrees to promptly provide evidence of its consent to the placement of Wind Facilities on the Wind Facilities Property if such evidence is shown by Grantee to be necessary to fully carry out this Agreement. Owner agrees to and shall execute such estoppel certificates (certifying as to such matters as Grantee may reasonably request) and/or consents to assignment and/or non-disturbance agreements as Grantee or any Lender may reasonably request from time to time.

8. **Indemnification.** Grantee shall protect, hold harmless and indemnify Owner against any liability for damage to or destruction of Owner's or a third-party's personal property located on the Participation Property and/or the Wind Facilities Property to the extent such damage is caused by Grantee's operations or activities on the Wind Facilities Property, except to the extent such damage arises out of the negligent or intentionally wrongful acts or omissions of Owner, its tenants, invitees or permittees, or any violation or alleged violation of applicable laws or regulations by Owner, its tenants, invitees or permittees.

9. **Events of Default.** Each of the following shall constitute an event of default, which shall permit the non-defaulting party, at its discretion, to terminate this Agreement and/or pursue such other remedies as are available to it at law or in equity:

- (a) any failure by Grantee to pay any amount owed pursuant to the attached Fee Schedule if the failure to pay continues for thirty (30) days after receipt of written notice from Owner; and
- (b) any other material breach of this Agreement by either party which continues for thirty (30) days after written notice of default from the non-defaulting party or, if the cure will take longer than thirty (30) days, the length of time necessary to effect such cure so long as the defaulting party commences to cure within the thirty (30) day period and continuously and diligently pursues the cure to completion.

Owner, upon providing Grantee any notice of default under this Agreement, shall at the same time provide a copy of such notice to each Lender whose address has been previously provided to Owner for this purpose. Owner shall accept any performance by or at the instigation of any such Lender as if the same had been done by Grantee (but no Lender shall have any obligation to remedy or cause the remedy of any default).

10. **Notice.** All notices, requests, demands, waivers, approvals, consents and other communications required or permitted by this Agreement (“**Notices**”) shall be given in writing by personal delivery (confirmed by courier delivery service), first class U.S. mail, postage prepaid, return receipt requested, certified, or recognized overnight courier, addressed as follows:

If to Owner:

Tree Pump, LLC
5 Portofino Drive, No. 1807
Pensacola Beach, FL 32561
Attn: Kay Rickenbaugh
Phone: 615-210-6545

If to Grantee:

Firelands Wind, LLC
c/o Apex Clean Energy, Inc.
244 East High Street
Charlottesville, VA 22902
Phone: 434-220-7595

Each Lender shall provide written notice to Owner of its address for purposes of Section 9 and this Section 10. Any party may change its address for purposes of this paragraph by giving Notice of such change to the other parties in the manner provided in this paragraph. Any Notice provided for herein shall become effective only upon actual receipt by the party to whom it is given, unless such Notice is only mailed by certified mail, return receipt requested, in which case it shall be deemed to be received five (5) business days after the date it is mailed.

11. **Recording.** Owner and Grantee agree that this Agreement (without the Fee Schedule) shall be recorded in the Real Property Records of Huron County, Ohio. Grantee shall pay all fees associated with the recording of the Agreement.

12. **Legal Fees.** In the event of any controversy, claim or dispute arising out of or relating to this Agreement or the enforcement or breach hereof, the prevailing party shall be entitled to recover from the losing party the prevailing party’s reasonable costs, expenses and attorneys’ fees (including but not limited to those incurred at trial, on appeal and on petition for review).

13. **Binding Effect; Governing Law.** All the terms, conditions, covenants and other provisions contained in this Agreement, including the benefits and burdens, shall run with the land and

shall be binding upon and shall inure to the benefit of and be enforceable by Owner and Grantee, and their respective successors and assigns. The provisions hereof shall be governed by and construed in accordance with the laws of the State of Ohio, excluding the choice of law provisions thereof.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties have signed this Agreement on the date set forth below by the respective signatures of Owner and Grantee, effective as of the Effective Date.

Owner:

Tree Pump, LLC

By: Mary Katherine Rickenbaugh
Mary Katherine Rickenbaugh, a Member

PROVINCE
STATE OF ONTARIO
PROVINCE
COUNTY OF ONTARIO

The foregoing instrument was acknowledged before me this 12th day of June, 2014 by Mary Katherine Rickenbaugh, who is known or presented satisfactory evidence of her identity to me, who executed it on behalf of Tree Pump, LLC.

[Signature]
Notary Public - ONTARIO

Grantee:

Firelands Wind, LLC

By: Apex Clean Energy Holdings, LLC, its sole member



Jeanine G. Wolanski
NOTARY PUBLIC
Commonwealth of Virginia
Reg. # 7066537
My Commission Expires
September 30, 2014

By: M. Goodwin
Name: Mark W. Goodwin
Title: President
Date: 6/18/14

STATE OF Virginia

CITY/COUNTY OF Charlottesville

The foregoing instrument was acknowledged before me this 18th day of June, 2014 by Mark W. Goodwin as the President for Apex Clean Energy Holdings, LLC, a Delaware limited liability company, the sole member of Firelands Wind, LLC, a Delaware limited liability company, on behalf of the company.

[Signature]
Notary Public

EXHIBIT A

Legal Description of Participation Property

Situated in Great Lot 9 & 10 of Section 4, Lyme Township, T-4-N, R-24-W, Huron County, Ohio, and further being described as follows:

- 1) COMMENCING at a found railroad spike marking the centerline intersection of State Route 269 (60' R/W) with the centerline of Young Road (60' R/W);
- 2) thence, S 82° 17' 12" E, along the centerline of said Young Road, passing at a distance of 1804.05 feet, a found railroad spike marking the centerline of Young Road, a total distance of 2,799.15 feet, to a set P.K. nail marking the centerline of said Young Road, and the POINT OF BEGINNING;
- 3) thence S 82° 17' 12" E, a distance of 165.20 feet, continuing along the centerline of said Young Road, to a set P.K. nail marking a point of intersection of the centerline of said Young Road;
- 4) thence, S 89° 21' 08" E, a distance of 217.99 feet, along the centerline of said Young Road, to a set P.K. nail marking the centerline of said Young Road;
- 5) thence, S 02° 32' 22" W, passing at 30.02 feet, a set 5/8" iron bar marking the southerly right-of-way line of said Young Road, a total distance of 650.46 feet, to a set 5/8" iron bar;
- 6) thence, N 87° 27' 38" W, a distance of 382.40 feet, to a set 5/8" iron bar;
- 7) thence, N 02° 32' 22" E, passing at a distance of 628.05 feet, a set 5/8" iron bar marking the southerly right-of-way line of said Young Road and the southerly line of Great Lot 10, a total distance of 658.17 feet, to the POINT OF BEGINNING.

Containing in all, 5.6932 acres of land, more or less, subject to all legal highways, easements and restrictions of record.

0.1504 acres of land (6,551 square feet) lying within the right-of-way of Great Lot 9 of said Young Road, and 0.1134 acres of land (4,939 square feet) lies within the right-of-way of Great Lot 10 of said Young Road.

The bearings are for angular measurement only. The North arrow is assumed.

Prior reference: Instrument 201403110001220, recorded on March 11, 2014.

This legal description is based upon an actual field survey performed for William R. Dillon, by James Dale Barnes, P.S. 8411, of Barnes Surveying in December/January, 2014.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/3/2019 4:25:22 PM

in

Case No(s). 18-1607-EL-BGN

Summary: Memorandum Contra to Petition to Intervene by Residents in Seneca, Huron, and Erie Counties electronically filed by Christine M.T. Pirik on behalf of Firelands Wind, LLC