

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Seneca)
Wind, LLC for a Certificate of Environmental)
Compatibility and Public Need for a Wind-) Case No. 18-488-EL-BGN
Powered Electric Generating Facility in)
Seneca County, Ohio.)

**MOTION TO CONTINUE THE ADJUDICATORY HEARING AND REQUEST FOR
EXPEDITED TREATMENT**

Pursuant to Ohio Administrative Code (“OAC”) Rule 4906-2-27(A) and (C), Seneca Wind, LLC (“Seneca Wind” or “Applicant”) hereby requests that the Ohio Power Siting Board (“OPSB” or “Board”), continue the adjudicatory hearing scheduled to begin on August 26, 2019 and suspend the accompanying procedural schedule.

The Federal Aviation Administration (“FAA”) issued Determinations of No Hazard (“DNH”) for Seneca Wind’s turbine locations on July 5, 2019. The period for submission of petitions for review of the DNHs was through August 4, 2019, and the DNHs were scheduled to become final on August 14, 2019.

After the DNHs were issued, Seneca Wind learned that its aviation consultant inadvertently misidentified a nearby municipality as “Bloomfield” instead of “Bloomville” when submitting project information and the aeronautical study to FAA for review. The FAA subsequently missed this error when issuing notices for public comment prior to the issuance of the DNHs. Seneca Wind immediately brought these errors to the FAA’s attention. On August 3, 2019, FAA informed Seneca Wind that the issued DNHs were to be terminated and refiled immediately. To ensure that opportunity for public comment was not adversely affected, FAA terminated the existing DNHs in order for the notice and public comment period to be reopened.

The termination of the DNHs is solely to correct a potential public notice error. The underlying aeronautical study and technical analysis is unaffected. Seneca Wind fully expects that all DNHs will be reissued by the FAA.

Seneca Wind submits this motion to allow for additional time for this process to be completed. It is in the public's and all parties' interest to allow the FAA to resolve a potential notice issue. In the event that the continuance is not granted, Seneca Wind will likely exercise its right to withdraw its application to the OPSB and resubmit it when the DNHs are reissued. Granting the continuance will promote administrative efficiency and the preservation of all parties' resources by avoiding a restart of the entire OPSB certificate application process.

A memorandum in support of this motion is attached. Seneca Wind contacted counsel for the other parties in this proceeding regarding this motion. Counsel for the Board of Education of the Seneca East Local School District, the Black Swamp Bird Observatory, and the Ohio Farm Bureau Federation do not oppose this motion or expedited treatment. Staff indicated that it takes no position on this motion or expedited treatment. Steve Shuff indicated that he opposes this motion and expedited treatment. Seneca Wind had not heard from counsel for other parties by the time this motion was filed.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On July 16, 2018, and as amended on July 20, 2018, and as modified thereafter, Seneca Wind filed an application with the Board for a certificate of environmental compatibility and public need to construct a wind-powered electric generating facility in Seneca County, Ohio. The Staff Report of Investigation was issued on July 3, 2019 and the local public hearing was held on July 23, 2019. Under the current procedural schedule, the adjudicatory hearing is scheduled to commence on August 26, 2019, with Seneca Wind's prefiled testimony due on August 6 and the Staff and intervenor testimony due on August 13, 2019.¹

On July 5, 2019, the FAA issued DNHs for all of Seneca Wind's proposed turbine locations. The issued DNHs for each turbine above 500 ft. concluded that "the aeronautical study revealed that the structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace or operation of air navigation facilities."² The

¹ Due to the timing of this request for continuance of the public hearing and the due date for Seneca Wind's prefiled testimony, Seneca Wind will file its prefiled testimony as scheduled on August 6, subject to supplementation if this motion is granted and subject to withdraw if it is not.

² See, e.g., *Determination of No Hazard to Air Navigation for Turbine 11*, at p.1, issued on July 5, 2019 and filed with the Ohio Power Siting Board on July 10, 2019.

issued DNHs only required the turbines to follow certain lighting and marking standards.³ The DNHs were based on analysis of the specific coordinates and heights of the proposed turbines.⁴

The DNHs were provided to the OPSB Staff and the Ohio Department of Transportation (“ODOT”) Office of Aviation. The deadline for interested parties to submit petitions for discretionary review was August 4, 2019, with the DNHs otherwise becoming final on August 14, 2019.

After the DNHs were issued, Seneca Wind learned that its aviation consultant inadvertently misidentified a nearby municipality as “Bloomfield” instead of “Bloomville” when submitting project information and the aeronautical study to FAA for review. The FAA subsequently missed this error when issuing notices for public comment prior to the issuance of the DNHs. Seneca Wind immediately brought these errors to the FAA’s attention.

On August 3, 2019, FAA informed Seneca Wind that the issued DNHs were to be terminated and refiled immediately. The purpose of the termination is entirely procedural to allow for additional notice and comment to be conducted. Prior to issuing the DNHs, the FAA conducts a circularization process to solicit input from the public. In part, the public notice identifies nearby municipalities to the project. To Seneca Wind’s knowledge, except for the misidentification of one municipality, no other aspect of FAA’s analysis or public notice was affected. However, to ensure that public notice was not adversely affected, the FAA terminated the issued DNHs in order for the notice and public comment period to be reopened.

Because no other aspect of the FAA’s technical analysis supporting the issuance of the DNHs is affected, Seneca Wind fully expects that all DNHs will be reissued. FAA

³ *Id.*

⁴ *Id.* at p.2.

representatives have communicated to Seneca Wind that the locations will be reviewed again in accordance to their processes and a 37 day public comment period will be conducted.

II. ARGUMENT

A. **FAA’s decision to terminate the DNHs is solely a precautionary step to remedy an inadvertent public notice error and is not the result of any issue with the underlying technical analysis of the aeronautical study and specific turbine locations.**

The DNHs issued on July 5, 2019 were based on the FAA’s technical analysis of the aeronautical study and specific coordinates of each turbine. The FAA examines extensive studies for proposed wind turbine locations prior to issuing a DNH. Along with submitting an aeronautical study, the proposed project must submit individual turbine latitude and longitude in degrees, minutes, and seconds, site elevation, height above ground level, overall height above mean sea level, and turbine marking and lighting data. In addition to this data, FAA identifies and evaluates potential impacts to all nearby airports (including the Seneca County Airport),⁵ air rescue, and military training routes.

FAA’s technical analysis of each turbine location concluded that the proposed turbines “would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace or operation of air navigation facilities.”⁶ In reaching this conclusion, FAA made a number of specific findings, including:

- The turbines will have no significant adverse effect on aircraft arrival, departure, and en route procedures.⁷
- No impact on any planned public-use airports and aeronautical facilities.⁸

⁵ *Id.* at p. 4, expressly referencing Seneca County Airport.

⁶ See, e.g., *Determination of No Hazard to Air Navigation for Turbine 11*, at p.1, issued on July 5, 2019 and filed with the Ohio Power Siting Board on July 10, 2019.

⁷ *Id.* at p. 10

⁸ *Id.*

- The United States Department of Defense determined that the project would not create a substantial adverse effect on their operations at this time.⁹
- No cumulative impact resulting from the turbines when combined with the impact of other existing or proposed structures.¹⁰
- The proposed turbines do not create a substantial adverse impact to nearby radar operations.¹¹

Although these findings by the FAA indicate that project does not pose a hazard to airspace, the notices misidentified the municipality of “Bloomville” as “Bloomfield.” By terminating the issued DNH and reopening the notice and comment process, FAA is taking a precautionary step to ensure that no interested parties missed the opportunity to comment as a result of the inadvertent misidentification of the municipality. The termination is not due to any mistake in the technical data, descriptions, or turbine location data that the FAA used to make the above-mentioned determinations.

B. A continuance of the adjudicatory hearing is reasonable, serves the public interest, and promotes administrative efficiency.

As the Board is aware, this is not Seneca Wind’s first request for a delay in the hearing schedule relating to the status of the FAA DNHs. In two previous instances, Seneca Wind received postponements of the procedural schedules to await FAA notices.¹² These requests were needed due to the extra time needed to coordinate with the U.S. Department of Defense to ensure no significant impacts to Military Training Routes and delays caused by the U.S. federal government shut-down from the end of 2018 into early 2019 (the longest on record).

More recently, Seneca Wind requested a delay of the Staff Report until the issuance of the FAA DNHs. This request was denied by Entry dated July 3, 2019 and the Staff Report was

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Entries of February 1, 2019 and April 4, 2019.

issued the same day. As discussed above, the FAA DNHs were issued on July 5, 2019. On July 8, 2019, the Administrative Law Judge issued a new procedural schedule, with the local public hearing scheduled for July 23, 2019. On July 12, 2019, Seneca Wind filed a motion to partially modify the procedural schedule to delay the local public hearing to allow Staff to amend the Staff Report regarding its navigable airspace analysis. This request was denied by Entry dated July 16, 2019. In denying the request, the Entry noted that “the purpose of the local public hearing is to afford members of the public, who are not parties to this case, an opportunity to offer testimony regarding the proposed project, and the ALJ cannot find that Seneca Wind has presented good cause to suspend the local public hearing for the third time in this case.”¹³

In this instance, good cause exists to grant this request for a continuance. The local public hearing has already been held and so the public will not have to wait any longer as a result of this request. A continuance of the adjudicatory hearing will only affect intervening parties, represented by experienced counsel. Every counsel understands that delays in trials or hearings are sometimes inevitable. Continuances of adjudicatory hearings are commonplace at the OPSB and Public Utilities Commission of Ohio. Indeed, even if this continuance is granted, it is highly unlikely that this case will be nearly as prolonged as the ongoing Duke Energy Central Corridor

¹³ Entry at 4.

Gas Pipeline Extension Project¹⁴ or the Icebreaker Wind Facility¹⁵ cases pending before the Board. No intervening party will be prejudiced by a continuance, as the continuance does not seek to alter any of the parties' right to participate in the adjudicatory hearing.

Granting the request for continuance will serve the public interest. The FAA has completed thorough technical analysis of the proposed project and issued DNHs indicating that the project "would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace or operation of air navigation facilities."¹⁶ The termination of the DNHs and reopening of the notice and comment period prior to issuing new DNHs will ensure that no interested parties missed an opportunity to comment. For the Board to accommodate this additional notice and comment process before making a decision in this proceeding does nothing except ensure transparency, public awareness, and a clear factual basis for the Board's eventual decision, especially on such a material matter as impacts to navigable airspace.

Moreover, granting the request for continuance is reasonable. The delays related to the FAA DNHs throughout this case have been frustrating for Seneca Wind, as it is anxious to commence operations of its proposed facility as soon as possible. However, every indication to

¹⁴ Case No. 16-0253-GA-BTX. The application was first filed in September 2016, followed by an Amended Application in January 2017. An Entry in April 2017 initially scheduled the adjudicatory hearing for July 2017. In May 2017, the first Staff Report was issued, and in June 2017, motions to continue the adjudicatory hearing were granted. A subsequent motion by Duke Energy to suspend the procedural schedule indefinitely was granted in August 2017. Duke's motion for reestablishment of the procedural was filed in April 2018, a Staff review and recommendation was issued in June 2018, and an entry establishing a procedural schedule was filed in December 2018. An Amended Staff Report was filed in March 2019 and the adjudicatory hearing was held in April 2019, followed by briefing in May 2019.

¹⁵ Case No. 16-1871-EL-BGN. The Application was filed in February 2017, and a motion to suspend the procedural schedule was filed in October 2017. The procedural schedule was reestablished in April 2018. The Staff Report was filed in July 2018. A motion to extend the procedural schedule was granted in July 2018. In August 2018 a motion to extend time to file a stipulation was extended. In September 2019, testimony was filed and Staff's opposed motion to extend the filing deadline was granted. The adjudicatory hearing was held at the end of September 2018 and October 2018. In November 2018 a motion to extend the procedural schedule was granted, followed by another in December 2018, and others in January 2019, February 2019, March 2019, April 2019, and May 2019. In June 2019, a procedural schedule was established, followed by testimony in July 2019.

¹⁶ See, e.g., *Determination of No Hazard to Air Navigation for Turbine 11*, at p.1, issued on July 5, 2019 and filed with the Ohio Power Siting Board on July 10, 2019.

date has demonstrated that the project does not create a hazard to navigable airspace. For example, although it caused a delay, after receiving notice from the U.S. Department of Defense about potential concerns to Military Training Routes, Seneca Wind successfully addressed those concerns.¹⁷ There is nothing to suggest that the FAA will not re-issue the DNHs. Indeed, the DNHs that were issued expressly found that the project does not create a hazard to navigable airspace. It is entirely reasonable to wait for the FAA to complete the notice and comment period and reissue the DNHs.

Finally, granting the continuance will promote administrative efficiency and judicial economy. The DNHs originally issued to the project showed no hazard to navigable airspace, and Seneca Wind fully expects the DNHs to be reissued after FAA completes the corrected notice and comment period. A continuance will allow the Board to make its decision based on concrete approval or denial by the FAA. However, Seneca Wind does not intend to proceed with its pending OPSB application without a final decision from the FAA. Seneca Wind expects to receive reissued FAA DNHs that will clear the path for a fully viable project. If this motion for continuance is not granted, Seneca Wind will likely withdraw its pending application and file a new application after the FAA DNH process is complete. This would restart the entire OPSB process for this project at significant expense for Seneca Wind, the Board and potentially the intervening parties. Granting the continuance will preserve the resources, investigation, analysis, and hearing preparation of all parties.

Seneca Wind contacted the other parties in this proceeding regarding this motion. Counsel for the Board of Education of the Seneca East Local School District, the Black Swamp Bird Observatory, and the Ohio Farm Bureau Federation do not oppose this motion or expedited

¹⁷ See July 3, 2019 Staff Report of Investigation at pg. 52 discussing a June 11, 2019 correspondence from DOD. This June 11, 2019 correspondence indicated DOD does not oppose the project.

treatment. Staff indicated that it takes no position on this motion or expedited treatment. Steve Shuff indicated that he opposes this motion and expedited treatment. Seneca Wind had not heard from counsel for other parties by the time this motion was filed.

III. CONCLUSION

Seneca Wind respectfully requests that the OPSB grant this motion for continuance on an expedited basis.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion was served upon the following parties listed below by electronic mail, this 6th day of August 2019.



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Summary: Motion of Seneca Wind, LLC to Continue The Adjudicatory Hearing and Request For Expedited Treatment and Memorandum in Support electronically filed by Teresa Orahood on behalf of Devin D. Parram