

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
REPUBLIC WIND, LLC FOR A
CERTIFICATE TO SITE WIND-POWERED
ELECTRIC GENERATION FACILITIES IN
SENECA AND SANDUSKY COUNTIES,
OHIO.

CASE NO. 17-2295-EL-BGN

ORDER ON REHEARING

Entered in the Journal on March 17, 2022

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the applications for rehearing filed on July 26, 2021, and affirms the determinations made in the June 24, 2021 Opinion, Order, and Certificate in this matter.

II. PROCEDURAL HISTORY

{¶ 2} 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.

{¶ 3} Republic Wind, LLC (Republic or Applicant) is a corporation and person under R.C. 4906.01(A).

{¶ 4} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Board.

{¶ 5} The proposed electric generation facility is a major utility facility, as defined in R.C. 4906.01(B).

{¶ 6} Pursuant to the Entry of August 21, 2018, the Administrative Law Judge (ALJ) granted the motions to intervene filed by Duane and Deb Hay; Gary and Dawn Hoepf; David Hoover; Jeffrey A. Hoover; Greg and Laura Jess; Mike and Tiffany Kessler; Kevin and Jennifer Oney; Doug and Jennifer Myers; Tom and Lori Scheele; and Chris and Danielle Zeman (collectively, "Initial Local Residents"); the Ohio Farm Bureau Federation; and

individually for the Board of Trustees for Adams, Pleasant, Reed, Scipio, and York townships.

{¶ 7} By Entry of February 15, 2019, the ALJ granted the joint motion to intervene of Joseph and Diane Anderson; Denise Bell; Aaron and Carrie Boes; Richard and Linda Bollenbacher; Robert and Mary Chappell; Thomas and Kathleen Fries; Leslie and Dennis Hackenburg; Jeffrey and DeeAnne Hamilton; Allen and Mary Hasselbach; Ethan and Crystal Hoepf; Jason and Michelle Hoepf; Taylor Hoepf; Kenneth and Debra Hossler; Leonard and Beverly Kubitz; Gary and Michelle Miller; Steven and Kelley Miller; Kim Mitchell; Charles and Linda Morsher; Patricia Motry; Steven and Linda Mulligan; Linda Niederkohr; Nicholas and Michelle Reiter; Elaine Schultz; James and Victoria Seliga; Eugene and JoAnn Smith; James and Elaine Steinmetz; Herman and Patricia Studer; Christine Vogt; Mark Weber and Cindra Riley; Charles and Rhonda Weyer; and Ann Wright (collectively, “Additional Local Residents”). With the exception of pro se intervenors, Dennis Hackenburg and Mike and Tiffany Kessler, “Initial Local Residents” and “Additional Local Residents” granted intervention shall be subsequently referred to as “Local Residents.” Additionally, the Ohio Environmental Council and Environmental Defense Fund (EDF) were granted intervention pursuant to the Entry of February 15, 2019. On October 16, 2020, EDF filed a notice of withdrawal from this proceeding. Further, the Board of County Commissioners of Seneca County and the Seneca County Park District were each granted intervention pursuant to the Entry of February 15, 2019. Seneca County, Seneca County Park District, Adams Township, Reed Township, and Scipio Township shall be subsequently referred to as “Local Government Entities.”

{¶ 8} By Opinion, Order, and Certificate dated June 24, 2021, (Order) the Board denied the request of Republic for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of a wind-powered electric generation facility in Adams, Pleasant, Reed, Scipio, and Thompson townships in Seneca County and in York Township in Sandusky County, Ohio (Project or Facility). Specifically, with respect to its analysis of R.C. 4906.10(A)(6) regarding whether the Project will serve the

public interest, convenience, and necessity, the Board found that the Project will not serve the public interest, convenience, and necessity when balancing the projected benefits against the magnitude of potential negative impacts on the local community. (Order at 28.) Additionally, the Board stated that it could not find that any predicted economic or environmental benefits will outweigh the potentially catastrophic damage that would result from the contamination of community private wells and water supplies. Therefore, the Board determined that, at this time, it could not find that the proposed facility would serve the public interest, convenience, and necessity. (Order at 32.)

{¶ 9} With respect to its analysis of R.C. 4906.10(A)(3) regarding whether the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, the Board found that Republic had failed to demonstrate that the Project satisfies this requirement. Specifically, the Board determined that Republic should be prohibited from moving forward with the Project based on the concerns raised by the objecting intervenors in this proceeding as karst is significantly present in the project area and cannot be properly addressed through the adoption of conditions for the proposed project. In particular, the Board focused on the adverse impact of the Project on groundwater and the ultimate impact on private wells and drinking water which could have a major impact on the public health and wellbeing of residents in the project area. The Board emphasized that “there is a high likelihood of harm with no reliable remedy and that the identified concerns are too significant in nature to wait until the conducting of post-certificate studies.” The Board noted that no other conditions were proposed for consideration regarding the remedying of these concerns (Order at 41-43, 44.)

{¶ 10} R.C. 4906.12 provides that R.C. 4903.02 to 4903.10 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 11} 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 circumstance set forth in R.C. 4903.10. R.C. 4903.10 states that any party to 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. R.C. 4903.10(B) also requires that applications for rehearing be in writing and must set forth specifically the ground or grounds on which the party seeking rehearing considers an order unreasonable or unlawful.

{¶ 12} On July 26, 2021, Republic and Local Residents each filed an application for rehearing relative to the Board's June 24, 2021 Order.

{¶ 13} On August 5, 2021, Republic and Local Residents each filed a memorandum contra to their respective applications for rehearing. Additionally, on August 5, 2021, Local Government Entities filed a memorandum contra Republic's application for rehearing.

{¶ 14} By Entry issued August 20, 2021, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the ALJ granted the applications for rehearing for the limited purpose of affording the Board additional time to consider the issues and arguments raised in the applications for rehearing.

III. DISCUSSION

A. Republic's Application for Rehearing

1. FIRST ASSIGNMENT OF ERROR

{¶ 15} In the first assignment of error, Republic asserts that the Order is unreasonable and unlawful because it requires Republic to submit fully detailed geotechnical information before a certificate is granted. Republic submits that such error unlawfully amends Ohio Adm.Code 4906-4-09(A)(2)(b)(i) and denies Republic due process by changing its applicable burden of proof post-hearing. According to Republic, inasmuch as the Board is an agency as defined by R.C. 119.01, Ohio Adm.Code 4906-4-09(A)(2)(b)(i) cannot be amended without

notice, hearing, and review by the Joint Committee on Agency Rule Review as required by R.C. Chapter 119. Republic also argues that the revised rule was not final filed with the Ohio Secretary of State or the Director of the Legislative Service Commission as required by R.C. 119.03(C). (Republic Application for Rehearing at 9-10, 14-15.)

{¶ 16} In support of its position, Republic contends that the information elicited under Ohio Adm.Code serves as the basis upon which the Board determines whether the applicants have met their burden of proving that a project satisfies the criteria contained in R.C. 4906.10(A)(1)-(8) and that applicants rely on these rules in compiling the information to be submitted in their applications and testimony in order to meet their required burden of proof. (Republic Application for Rehearing at 10-11.) Republic states that Ohio Adm.Code 4906-4-09(A)(2)(b)(i) requires that fully detailed geotechnical evaluations must be submitted as post-certification reports sixty days before the pre-construction conference is conducted, pursuant to Ohio Adm.Code 4906-3-14. Therefore, Republic opines that it was not required to introduce the information on the record at the hearing and its failure to do so cannot serve as a basis to deny the application. (Republic Application for Rehearing at 10.) Instead, Republic argues that in compliance with the general requirements of Ohio Adm.Code 4906-4-08(A)(5)(c), it introduced into the record the required maps and the geotechnical report that described the suitability of the site for the proposed project (Republic Application for Rehearing at 12). Republic notes that consistent with Ohio Adm.Code 4906-4-09(A)(2)(b)(i), it committed to perform the detailed post-certification evaluation of geological features, including karst formations, and to submit to Staff the final design details from a registered engineer that demonstrates that the Facility can be safely constructed at the location (Republic Application for Rehearing at 12, 20 citing App. Ex. 1C at 81; App. Ex. 1C, Ex. F at 8; App. Ex. 47 at 5). According to Republic, the very purpose of Ohio Adm.Code 4906-4-09(A)(2)(b) is to allow for the submittal of post-certificate studies (Republic Application for Rehearing at 21).

{¶ 17} Local Residents state that the Board correctly concluded that the Project does not represent the minimum adverse impact under R.C. 4906.10(A)(3) or serve the public

interest, convenience, and necessity under R.C. 4906.10(A)(6). Specifically, Local Residents opine that the Board was correct in determining that Republic failed to prove that its plans to install turbines in the karst plain would not damage the karst formations and cause flooding, the polluting of groundwater, or the blocking of the flow of groundwater to wells thereby threatening water supplies. Local Residents emphasize that the uninterrupted supply of clean groundwater is essential to residents around the project area and that the presence of karst will cause detriment to private wells and suitable drinking water. (Local Residents Memorandum Contra at 2, 3, 9 citing Local Residents Ex. 24 at 15-16; Tr. IV at 849.) Local Residents point out, and Republic, itself, recognizes, that the majority of residents in the vicinity of the project area rely on private wells for their potable water (Local Residents Memorandum Contra at 3 citing Local Residents Ex. 24 at 16, Amd. Applic. at 73).

{¶ 18} Local Residents note that some of the groundwater utilized by the area's residents can be found at depths as shallow as eight feet from the ground surface. Local Residents identify that Source Water Protection Areas (SWPAs) for three public water systems are located in the project area. According to Local Residents, the purpose of these SWPAs is to protect the drinking water resources from contamination. Local Residents believe that this purpose will be threatened by Republic's plan to place turbines in these SWPAs, including 21 in the Capital Aluminum and Glass SWPA. Additionally, Local Residents highlight that the majority of the Project boundary lies in the Bellevue-Castalia Karst Plain, which is characterized by rock knobs and sinkholes with water groundwater flowing at a rate of 3,500 to 8,600 feet per day through the karst openings. Citing its list of issues filed on September 5, 2019, Local Residents highlight that it identified a number of concerns regarding karst and the proposed placement of turbines. Local Residents contend that despite the known karst hydrological concerns, Republic failed to perform any field work and hydrological studies and, instead, elected to wait until it submitted a geotechnical report following certification. (Local Residents Memorandum Contra at 3-5 citing Amd. Applic., Ex. F at 4, 5.)

{¶ 19} According to Local Residents, despite knowing the concerns regarding the Project's impact on issues related to water, Republic offered no expert testimony regarding hydrology but, instead, offered a geotechnical engineer, Shawn McGee, whose focus is on engineering tasks designed to provide stable foundations in the construction of structures. Local Residents submit that witness McGee did not have the hydrogeology expertise that was offered by Local Residents' witness Sasowsky, a geoscientist with a focus on geologic, hydrologic, and soil consulting with research experience in the project area. (Local Residents Memorandum Contra at 6-8 citing Republic Ex. 27 at 2, Tr. IV at 839, Local Resident Ex. 24 at 1-2, 5-7.)

{¶ 20} While recognizing that the geotechnical report pursuant to Ohio Adm.Code 4906-4-09(A)(2)(b)(i) is to be provided post-certification, Local Residents submit that the Republic has provided no precertification information on water impacts required under the precertification obligations set forth in Ohio Adm.Code 4906-4-08(A)(4)(a) or 4906-4-08(A)(5) in order to determine if the criteria of R.C. 4906.10(A) have been met prior to certification. According to Local Residents, while the Board does not need to enforce all of the data requirements of Adm.Code 4906-4-09(A)(2)(b)(i) prior to certification, it must have the hydrogeological data set forth in Ohio Adm.Code 4906-4-08(A)(4)(a) and 4906-4-08(A)(5) in order to determine compliance with R.C. 4906.10(A)(2), (A)(3), and (A)(6). (Local Residents' Memorandum Contra at 14, 17.)

{¶ 21} Specifically, Local Residents believe that Ohio Adm.Code 4906-4-08(4)(a) requires information on water impacts and a demonstration by the Applicant through the offering of some pretesting in order to determine the Project's potential harm to the community's water supply. Despite this obligation, Local Residents note that Republic performed no pre-certification boring testing. (Local Residents Memorandum Contra at 9-14 citing Amd. Applic. at 81-82; Tr. II at 313, 824.) Instead, Local Residents believe that Republic limited its focus on the structural turbine concerns associated with constructing in karst formations (Local Residents Memorandum Contra at 10). With respect to Ohio Adm.Code 4906-4-08(A)(5), Local Residents state that Republic did not provide the

geological features of the proposed site as required by the subsection in order to determine whether karst features at turbine sites may threaten groundwater supplies and whether the geology will safely support the turbines. According to Local Residents, this information can only be provided through the conducting of soil borings. (Local Residents Memorandum Contra at 11.)

{¶ 22} In regard to Republic's reliance on determinations reached by Staff, Local Residents submit that Republic has failed to differentiate between the hydrogeological and geotechnical issues raised by the Project. In particular, Local Residents believe that Staff only opined that there are no particular geological features that exist which would adversely affect the Project construction and did not address hydrogeological threats. Local Residents also dismiss Republic's arguments that the Staff's completeness letter signifies that there are no hydrogeological concerns. (Local Residents Memorandum Contra at 15-16 citing Staff Report at 26; Tr. VII at 1414.) Local Residents posit that based on its discovery, Local Residents' list of disputed issues, and the public comments filed in the docket, Republic was aware that hydrogeological threats from the construction in karst was a central issue in this case that needed to be addressed at the time of hearing (Local Residents' Memorandum Contra at 17).

{¶ 23} In support of its hydrogeological concerns, Local Residents focus on Republic's acknowledgement that approximately 50 percent of the project area is located in the Bellevue-Castalia Karst Plain. Local Residents assert that in actuality at least 70 percent and possibly 100 percent of the project area is located in karst or potential karst. (Local Residents Memorandum Contra at 18 citing Amd. Applic. at 77; Tr. IV at 823; Tr. VI at 1207-1209.) According to Local Residents, the presence of karst impacts the water cycle due to dissolving of the bedrock, which results in large pathways for water to flow at rapid speeds, including at proposed turbine sites. Referencing the Hull Report attached to Republic's amended application, Local Residents state that the turbine foundations are likely to extend into the underground water table. Local Residents note that the recommended dewatering remedy in the Hull Report would actually affect groundwater supplies by pumping the

water out of the aquifer rather than allowing the water to travel to nearby wells. (Local Residents Memorandum Contra at 19.)

{¶ 24} Local Residents dismiss Republic's claim that essential groundwater resources will be protected from damage because the setback in Ohio Adm.Code 4906-4-08(C)(2)(b) will keep any damage 1,371 feet away from neighboring homes. Rather, Local Residents respond that the record reflects that groundwater travels much faster in karst than in non-karst geology and that severing an underground channel at a turbine site could cut off the water supply at a neighboring water well in four to nine hours, while allowing contaminants to enter into karst openings at a turbine site that could also contaminate the well in four to nine hours. (Local Residents Memorandum Contra at 20-21 citing Amd. Applic. F at 4.) According to Local Residents, the groundwater flows rapidly throughout the bedrock in the area whether or not the karst is noticeable on the land surfaces (Local Residents Memorandum Contra at 22 citing Local Residents Ex. 24 at 7, 9; Tr. VI at 1204-1205).

{¶ 25} Responding to Republic's rehearing assertions, Local Residents state its witness Sasowsky did not speculate about the potential adverse effects of turbine construction in karst but, instead, demonstrated that such construction could cut off or pollute a water supply similar to what had been experienced in the geographic area during the 1960s (Local Residents Memorandum Contra 21-22 citing Tr. VI at 1190-1199; Local Residents Ex. 24 at 14.). Specifically, Local Residents represent that the bedrock is at a shallow depth and as a result of the presence of sinkholes, contaminants drawn into the bedrock from the turbine construction could reach a neighboring well in a short period of time, destroying important water sources. Local Residents also note that karst openings can develop under wind turbines and cause their collapse. (Local Residents Memorandum Contra at 23 citing Local Residents Ex. 24 at 13; Amd. Applic., Ex. J at 2-4.) Despite these concerns, Local Residents argue that Republic failed to address the concerns regarding the threat to groundwater (Local Residents Memorandum Contra at 23).

{¶ 26} Specific to Republic's proposed structural remedy of grouting, Local Residents respond that such an approach will block the natural drainage of surface water into cavities, which may result in surface collapses elsewhere due to the fact that the grout will force the opening of new pathways for surface water movement into the groundwater system that may convey contaminants into the water supply. Given Republic's failure to look for karst features at turbine sites, Local Residents believe that the Board properly found that Republic failed to meet its burden of proof that the Project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) or serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6). (Local Memorandum Contra at 24, 26, 27 citing Local Residents Ex. 24 at 21.)

{¶ 27} Local Residents contend that the quick pathways in these karst areas that connect surface water to groundwater can pollute the water supply since the rapid flow of water does not allow for the filtering and cleaning of surface water before it can reach groundwater as is the case in non-karst areas and this water can be unhealthy for human consumption (Local Residents Memorandum Contra 25 citing Local Residents Ex. 24 at 21). Local Residents also point out that turbine construction and the use of grouting can limit water recharge to an underlying aquifer. Therefore, Local Residents believe that it is important to understand the source of water for each individual well. (Local Residents Memorandum Contra at 30 citing Local Residents Ex. 24 at 16.) Despite this concern, Local Residents argue that Republic has done nothing to investigate the potential threat to the community water supplies and, therefore, the Project does not represent the minimum adverse environmental impact under R.C. 4906.10(A)(3) or serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) (Local Residents Memorandum Contra at 30).

{¶ 28} Local Residents also believe that the Project may increase flooding hazards in the project area because there are few streams available to remove stormwater from the land surface (Local Residents Memorandum Contra at 27 citing Local Residents Ex. 24 at 13). Additionally, as noted above, Local Residents also believe that flooding can occur if sink

holes are plugged with sediment or are filled with grout and no precautions are identified to prevent this threat (Local Residents Memorandum Contra at 27-28 citing Local Residents Ex. 24 at 21).

{¶ 29} Local Government Entities reject Republic's position that karst issues will be dealt with as they arise through mitigation measures. Local Government Entities contend that a majority of the area is in karst and reference the Staff's determination that karst areas must be avoided. Local Government Entities state that constructing a wind turbine project in a karst area creates a danger to the entire area including land failures, disrupted water sources, contaminated water, and flooding. (Local Government Entities Memorandum Contra at 2 citing Local Residents Ex. 24 at 12.) In response to Republic's argument that the Board changed the applicable rules for consideration of proposed wind projects, Local Government Entities submit that this argument is wholly without merit and that a review of the decision demonstrates compliance with the applicable procedural and substantive rules (Local Government Entities Memorandum Contra at 2-3).

{¶ 30} With respect to Republic's first assignment of error that the Order is unreasonable and unlawful because it requires Republic to submit fully detailed geotechnical information before a certificate is granted, the Board finds that the application for rehearing is denied. In reaching this determination, the Board recognizes that based on the record, there is a significant presence of karst in the project area. This determination is supported by both Republic's estimation that approximately 50 percent of the project area is located in the Bellevue-Castalia Karst Plain and Local Residents' estimation that in actuality at least 70 percent and possibly 100 percent of the project area is located in karst or potential karst (Local Residents Memorandum Contra at 18 citing Amd. Applic. at 77; Tr. IV at 823; Tr. VI at 1207-1209). In either case, the level of karst presence is significant enough to raise a level of concern regarding the attending problems related to the potential harm to the community's water supply (Order at 30-32, 42-43). The Board notes that despite this high level of karst presence and the related concerns regarding the adverse impact to the water supply, Republic failed to present evidence directly refuting these concerns and

instead deferred addressing these issues until post-certificate boring testing (Republic Application for Rehearing at 18 citing Tr. IV at 824).

{¶ 31} While the Board agrees with Republic that pursuant to Ohio Adm.Code 4906-4-09(A)(2)(b), fully detailed geotechnical exploration and evaluation is not required until 60 days prior to the preconstruction conference, Republic was obligated to directly address this concern at the time of hearing in order for the Board to be able to assess (a) whether the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other considerations, and (b) whether the facility will serve the public interest, convenience, and necessity. In support of this determination, the Board references Ohio Adm.Code 4906-4-08(A)(4) that requires that at the time of application, an applicant shall provide information regarding water impacts, including an evaluation of the impact to public and private water supplies due to the construction and operation of the proposed facility. The Board also agrees with Local Residents that the issue of the proposed Project's impact on the public water supply was identified as a concern by intervenors prior to the adjudicatory hearing in this proceeding. Additionally, as noted by Local Residents, although Republic witness McGee focused on the issue of the structural stability of turbine construction in karst, Republic failed to provide any witnesses to address the concern of the adverse impact of the proposed Project on public and private water supplies. Pre-certification record testimony regarding this issue is integral to the Board's consideration in light of the concerns raised relative to the effectiveness of the proposed remedies such as dewatering and grouting. (Order at 34-35, 42-43.)

2. SECOND ASSIGNMENT OF ERROR

{¶ 32} In regard to its second assignment of error, Republic argues that the Board's decision is unlawful, unreasonable, and against the manifest weight of the evidence because it failed to make findings of fact, based upon evidence of record, that support the Board's decision, in violation of R.C. 4903.09. According to Republic, the speculative concerns noted

by the Board cannot constitute the factual findings required by R.C. 4903.09. (Republic Application for Rehearing at 15; 27.)

{¶ 33} Specific to R.C. 4906.10(A)(3), Republic asserts that the Board violated this statutory section by failing to make findings based on probative evidence regarding whether the Facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. Republic avers that in exercising its authority relative to R.C. 4906.10(A)(3), the Board should not require the elimination of all environmental impacts when certificating major utility facilities. Instead, Republic believes that the Board is only required to determine if the potential environmental impacts of the proposed project have been minimized based on an assessment of the technological and economic limitations of remedying potential impacts. Republic believes that this analysis requires careful consideration of the probative evidence submitted regarding the actual impacts that may occur from the project and the potential remedies for these impacts. In this case, Republic asserts that the Board failed to give any weight to the probative evidence submitted by Republic in its geotechnical report performed by Hull & Associates, LLC (App. Ex. 1C, Ex. F) regarding potential geotechnical impacts and remedies and, instead, improperly imposed an absolute prohibition on construction of any and all of the proposed turbines based on the testimony of Local Residents' witness Sasowsky. (Application for Rehearing at 16.)

{¶ 34} In particular, Republic avers that there is no probative evidence in the record to support the Board's claim that there is a high likelihood of harm from karst formations. Instead, referencing the Hull Report, Republic contends that the Project will not restrict or have an adverse effect on groundwater SWPAs and will have limited impacts on private wells. (Republic Initial Br. at 17 citing App. Ex. 1C, Ex. F at 8.) In support of its position, Republic states that witness Sasowsky acknowledged that he did not know the specific geotechnical details of the presence of karst at the actual turbine locations and did not understand the actual construction methods to be used at the turbine locations (Republic Application for Rehearing at 15-18 citing Tr. VI at 1197-1199). Republic also argues that

while witness Sasowsky stated that between 70 and 100 percent of the project area is occupied by karst or potential karst, this is just an estimate (Republic Application for Rehearing at 18 citing Tr. VI at 1208). Republic notes that it will perform geotechnical borings at the exact turbine locations to determine the subsurface conditions and share the information with Staff (Republic Application for Rehearing at 18 citing Tr. IV at 824).

{¶ 35} Republic asserts that it is impossible for the Board to credibly claim that there is a high likelihood of harm due to impacts from karst formations if site-specific geotechnical surveys have yet to be performed (Republic Initial Br. at 17). Republic also rejects the Board's claim that "its concerns are too significant to wait for post-certificate studies." Republic notes that it would not be able to start any construction until it submits fully detailed geotechnical studies for each turbine site location and submit a final design from a registered engineer that demonstrates that the Facility can be safely constructed at the location. (Republic Application for Rehearing at 21.) According to Republic, its position is supported by Staff witness Collins (Republic Application for Rehearing at 12 citing Tr. VII at 1414). Applicant also points out that during review of the application, Staff never indicated that Republic's application was incomplete or that fully detailed geotechnical information needed to be submitted prior to certification approval. Instead, Republic notes that Staff recommended that Republic comply with the post-certification requirements contained in Ohio Adm.Code 4906-4-09, which includes the submission of fully detailed geotechnical evaluations (Republic Application for Rehearing at 13 citing Staff Ex. 1 at 61).

{¶ 36} As further support of its position, Republic references the Board's determination in Case No. 18-1607-EL-BGN, *In re Firelands Wind, LLC*, Case No. 18-1607-EL-BGN, Opinion and Order (June 24, 2021) (*Firelands Decision*) and numerous prior wind cases (e.g., *In re Heartland Wind*, Case No. 09-1066-EL-BGN, Opinion and Order at 29, Condition 30; *In re Paulding Wind Farm*, Case No. 09-980-EL-BGN, Opinion and Order at 28, Condition 24; *In re Paulding Wind Farm*, Case No. 10-369-EL-BGN, Opinion and Order at 29, Condition 27; *In re Hog Creek*, Case No. 09-277-EL-BGN, Opinion and Order at 19, Condition 12; *In re Hog Creek*, Case No. 10-654-EL-BGN, Opinion and Order at 28, Condition 29; *In re Greenwich*

Windpark, Case No. 13-990-EL-BGN, Opinion and Order at 32, Condition 30) that the imposition of post-certificate conditions is an appropriate method of addressing potential impacts of karst formations. Therefore, Republic avers that the Board is incorrect in its determination that there is no remedy for its concerns regarding potential impacts to karst formations and local water supplies. (Republic Application for Rehearing at 19-22.)

{¶ 37} Specific to the *Firelands Decision*, Republic believes that there are glaring inconsistencies between the Order in that case and the one in the Republic proceeding. Republic highlights that the Board specifically adopted conditions whereby Firelands will be allowed to submit post-certificate studies regarding a detailed geotechnical analysis in accordance with Ohio Adm.Code 4906-4-09(A)(2)(b) and to submit 30 days prior to the preconstruction conference, detailed engineering drawings that account for karst topography. According to Republic, in the *Firelands Decision*, the Board also determined that grouting is a method that could be used to minimize the potential impact on karst formations subject to Staff approval. Republic opines that the *Firelands Decision* is more consistent with precedent because it allows for the submittal of detailed post-certificate rather than completely denying the application based solely on preliminary investigations. (Republic Application for Rehearing at 22-23.)

{¶ 38} According to Republic, the Board's determination that the Project will not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) is unlawful and unreasonable, and against the manifest weight of the evidence. Republic specifically focuses on the Board's reliance on the public and local government opposition due to concerns related to local parks, roads, bridges, and local water supplies. (Republic Application for Rehearing at 23-24.) Republic opines that the Board should have given little weight to written comments submitted in the public docket due to the fact that the comments are not subject to cross-examination or given under oath and, therefore, do not serve as substantial, reliable, or probative evidence that supports the Board's finding that the Project will not serve the public interest, convenience, and necessity. In particular, Republic points to the Board's reliance on resolutions filed in the docket by the Board of

Thompson Township (posted on May 14, 2020) and Seneca County Commissioners (posted on March 22 and 25, 2021). Specific to the Seneca County resolution, Republic notes that it was filed by Seneca County, a party to the proceeding, after the record had been closed. Republic submits that the issues related to the resolution should have been addressed by Seneca County during the hearing. (Republic Application for Rehearing at 24-25.)

{¶ 39} Republic disputes the contention of Seneca County that it had the unilateral authority to void the Road Use Maintenance Agreement (RUMA) that had been entered into by the Applicant and Seneca County. Further, Republic contends that the absence of such an agreement does not result in the conclusion that the Project is not in the public interest, convenience, and necessity since there is no requirement that a RUMA be in place and R.C. 5727.75 would still require Republic to repair and restore any damage to roads, bridges, and culverts along with the required posting of a bond. Republic asserts that the record provides sufficient support that transportation-related concerns will be properly addressed. Notwithstanding Seneca County's filing regarding the rescission of the RUMA, Republic notes that an updated RUMA has now been signed by the Applicant and Seneca County. (Application for Rehearing at 25-26 citing Staff Report at 34-35; Application at 40-46.)

{¶ 40} Republic disputes the Board's determination that the vast majority of docket comments opposed the Project. In support of its position, Republic relies on its witness Carr's testimony reflecting that as of October 15, 2019, 450 individuals had submitted written comments in the public docket reflecting approximately 250 individuals in support of the Project and approximately 200 individuals opposed to the Project. (Republic Application for Rehearing at 27 citing App. Ex. 13 at 9.) Additionally, Republic contends that the Board failed to give any weight to testimony at the local hearing that supported the Project (Republic Application for Rehearing at 29 citing App. Ex. 13 at 13). Rather, Republic submits that the Board relied largely on one-sided local opposition for its conclusion that the Project is not in public interest, convenience, and necessity. Therefore, Republic asserts that the Board's conclusion that the Project is not in the public interest, convenience, and

necessity was unreasonable, unlawful, and overwhelmingly against the manifest weight of the evidence. (Republic Application for Rehearing at 31.)

{¶ 41} Republic considers much of the testimony in opposition to the Project to be speculative concerns and fears of laypersons, none of whom are experts in the fields of geology or hydrology. Republic asserts that such concerns do not represent or outweigh what it considers to be the probative and reliable evidence that the Project will serve the public interest, convenience, and necessity. Responding to the Board's statement that it would have been prudent for the Applicant and Staff to have visited the Bowen Nature Preserve in order to best assess the potential impacts of the Project, Republic contends that an actual visit was not required. Additionally, Republic argues that the Board entirely ignored the actual reliable and probative evidence that showed the visual impacts to all parks, including Bowen Nature Preserve, as reflected by the Visual Impact Assessment, which Republic believes complied with Ohio Adm.Code 4906-4-08(D)(4). (Republic Application for Rehearing at 27-29 citing App. Ex. 1C, Ex. AA.)

{¶ 42} Republic believes that the Board's decision is almost entirely based on whether the Project is popular with local governments. Republic submits that such a holding is contrary to the Board's decision in *In re Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion and Order, (Nov. 11, 2019) (*Duke Decision*), in which the Board approved Duke's application despite the fact that the vast majority of commentators opposed the project in that case. Additionally, Republic states that the Board ignored the Staff's conclusion that the Project will serve the public interest, convenience, and necessity. (Republic Application for Rehearing at 30 citing Staff Report at 56.) Based on the record, Republic contends that the Project will benefit the local economy and landowners (Republic Application for Rehearing at 30-31 citing Tr. I at 16, 126; App. Ex. 16 at 3; App. Ex. 28 at 2-3). Republic also contends that the emergency first responders will not be adversely affected (Republic Application for Rehearing at 31 citing Staff Ex. 1 at 40-41; App. Ex. 13 at 15; App. Ex. 24; Tr. II at 694, 705). Finally, Republic states that the Project will provide significant benefits to local farmers (Republic Application for Rehearing at 31 citing App. Ex. 32 at 2-3).

{¶ 43} Local Residents assert that Republic's second assignment of error substantially duplicates its first assignment of error. To that extent, Local Residents incorporate its responses to the first assignment of error and vice versa (Local Residents Memorandum Contra at 32). Local Residents contend that the Board's Order is supported by the Findings of Fact based on the evidence in the record demonstrating that the Project does not comply with the criteria of R.C. 4906.10(A)(2), (3), and (6). In particular, Local Residents assert that Republic purposefully deprived the Board of evidence at the time of hearing that was necessary for the Board to determine whether the Project complies with the criteria of R.C. 4906.10(A). In support of its position, Local Residents point to Republic's acknowledgement that the Board did not have the site-specific geotechnical information necessary to determine if the presence of karst will result in a high likelihood of harm and whether the Facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3).

{¶ 44} Local Residents agree with the Board's finding that there was enough evidence to conclude that the Project does not present the minimum adverse environmental impact as required under R.C. 4906.10(A)(3). In applying this statutory section, Local Residents do not believe that the Board is required to grant a certificate even if the project is the least harmful of several harmful alternatives. Specifically, Local Residents opine that the Board can consider that siting a wind facility in a karst area does not represent the minimum adverse impact when the project could have been sited in a non-karst area. Additionally, Local Residents insist that Republic was obligated to provide the Board with enough information to determine if the Facility represents the minimum adverse environmental impact at the time of certification. In support of its position, Local Residents reference the requirement in R.C. 4906.10(A)(3) regarding the consideration of the nature and economics of various alternatives and point out the overlap of this requirement with that set forth in R.C. 4906.04(A) and Ohio Adm.Code 4906-4-04(A)(4) as to the reasons why the proposed location is best suited for the facility and a description of the alternative locations that were

considered and the siting criteria used to select the chosen location. Additionally, Local Residents submit that Republic's own acknowledgement that the Board cannot determine the effect of turbine construction without the investigation and report on geological characteristics of turbine sites demonstrates that the Applicant has not satisfied its burden under R.C. 4906.10(A)(2). Local Residents also agree with the Board's determination that there was enough evidence to conclude that the Project will not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). (Local Residents Memorandum Contra at 33-35.)

{¶ 45} Based on its findings of fact set forth in the Order, Local Residents assert that the Board has complied with R.C. 4903.09 to provide findings of fact supporting its decision (Local Residents Memorandum Contra at 35 citing Order at ¶¶91-100, 127-132).

{¶ 46} In support of its position relative to Republic's second assignment of error, Local Residents identify that there is widespread existence of karst in the project area and that there is a danger that turbine construction could block groundwater recharges from filling, collapse karst openings, or allow for contaminants to seep into karst formations resulting in the pollution of the area's water supplies. Local Residents contend that inasmuch as the dissolution of rock is ongoing, the absence of karst features does not preclude their development later. Therefore, Local Residents assert that the use of soil borings to look for karst hazards such as sinkholes below the surface will not resolve whether such hazards exist or will develop in the future. Local Residents also opine that the prevalence of karst throughout the project area makes the likelihood of Republic grouting the karst cavities at the turbine sites a virtual certainty. (Local Residents Memorandum contra at 38 citing Local Residents Ex. 24 at 10, 20.) In response to Republic's assertion that it submitted the most reliable information about karst and groundwater through its submitted geotechnical report, Local Residents indicate that Republic improperly relies on the existence of a setback to support its contention that the construction of turbines in karst will not affect the well water supply. (Local Residents Memorandum Contra at 39 citing Amd. App., Ex. F at 4, 8.) Local Residents also reiterate that Republic has

submitted no hydrogeological information to support its belief that the turbine sites will not harm underground water supplies (Local Residents Memorandum Contra at 39).

{¶ 47} In response to Republic's argument that the Board should allow Republic to submit its geotechnical report under Ohio Adm.Code 4906-4-09(A)(2)(b)(i) because the Board let other companies do the same in other certificate cases, Local Residents reiterates its argument that the data to be provided in the geotechnical report to be submitted pursuant to Ohio Adm.Code 4906-4-09(A)(2)(b)(i) will not contain the necessary hydrogeological data required under Ohio Adm.Code 4906-4-08(A)(4)(a) and 4906-4-08(A)(5). Local Residents opine that the Board's decision is not inconsistent with other Board cases because the Board did not require Republic to produce a geotechnical report under Ohio Adm.Code 4906-4-09(A)(2)(b)(i) prior to the decision. (Local Residents Memorandum Contra at 40.) Second, Local Residents argue that R.C. 4903.09 does not allow the Board to rely on facts in the decisions of other cases because the statute requires the Board to base its decision solely on the record in this case. In support of its position, Local Residents note that the cases relied upon by Republic may not have involved the prevalent karst issues present in this case. (Local Residents' Memorandum Contra at 40-41.)

{¶ 48} Local Residents conclude that the Board correctly stated that the record describes no acceptable remedy to prevent groundwater damage from siting turbines in the karst area. In support of its position, Local Residents reiterate their contention that grouting is an unacceptable remedy for providing turbines with foundational stability in karst. In response to Republic's reference to the Board's handling of grouting in the *Firelands Decision*, Local Residents assert that the decision is not precedent in this case since it is not based on the record in this case. According to Local Residents, the only proposed condition to address the karst problem was grouting, but this remedy will affect groundwater and the turbines stability. Local Residents point out that the resolution of this issue must be addressed by the Board, and not Staff, pre-certification because it is directly related to the determination of whether the Project satisfies the R.C. 4906.10(A) criteria.

{¶ 49} Local Residents state that the Board correctly determined that the Project does not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) due to the stated concerns regarding karst and water supplies. Local Residents point out that widespread opposition to the Project is one of the factors that the Board may consider in deciding that it is not in the public's best interest, convenience, and necessity. Local Residents reference that Republic, itself, dedicated specific testimony on the public comments provided in this case. (Local Residents' Memorandum Contra at 45 citing App. Ex. 13 at 9-15.) Local Residents reject Republic's assertion that the Board based its decision on a popularity contest. Local Residents reject Republic's claim that the Board should rely on the *Duke Decision* in order to disregard the public opposition to the Project. Specifically, Local Residents recognize that each case is based on its own facts and the *Duke Decision* is not in the record of this case and the relevance of the *Duke Decision* facts to this case was not tested at the time of hearing. Rather, Local Residents aver that the Board based its decision on the local opposition as well as the karst-related threats to underground water supplies, road and bridge damage, and visual impacts to public parks (Local Residents Memorandum Contra at 45 citing Order at ¶¶93-98). Local Residents also focus on the Project's visual impacts relative to local parks in violation of Ohio Adm.Code 4906-4-08(B)(1)(a)(iii) and the adverse impacts on birds, eagles, bats, shadow flicker, noise, blade shear, and aviation (Local Residents Memorandum Contra at 46).

{¶ 50} In response to Republic's contention that the Board should not afford much weight to the unsworn, nonexpert, public comments, Local Residents state that while the Board summarized many of these concerns, none of the unsworn public comments were mentioned or utilized in the Board's findings of fact in support of the Board's decision. With respect to Republic's claim of public support for the Project, Local Residents allege that Republic wrote form letters, enticed individuals to sign them, and sent the letters to the Board on their behalf. (Local Residents Memorandum Contra at 47 citing Tr. II at 299-304.) In response to Republic's contention that the Board ignored the economic benefits of the Project, Local Residents respond that the Board considered these benefits but noted that any

projected benefits must be balanced against the magnitude of potential negative impacts on the local community. Local Residents posit that making money off a project is not in the public interest if the community loses its water supply in the meantime. (Local Residents Memorandum Contra at 49.)

{¶ 51} In response to Republic's position that the Board should have adopted the recommendation in the Staff Report that the Project complies with R.C. 4906.10(A)(6), Local Residents consider the Staff Report to be just a recommendation. Additionally, Local Residents point out that the Staff Report was prepared prior to the parties' vetting of evidence in the evidentiary hearing. (Local Residents Memorandum Contra at 49.)

{¶ 52} Local Government Entities reject Republic's contention that the Board's decision was not supported by the findings of fact based on evidence in the record. Rather, they assert that it was the failings of Republic to provide evidence that its Project met the applicable standards. (Local Government Entities Memorandum Contra at 3.)

{¶ 53} With respect to Republic's second assignment of error that the Order is unlawful, unreasonable, against the manifest weight of the evidence, and in violation of R.C. 4903.09 because it failed to make findings of fact, based upon evidence of record that support the Board's decision, the Board finds that the application for rehearing is denied. In reaching this determination, the Board responds that pursuant to its Order, it is not requiring the elimination of all environmental impacts when certifying major utility facilities. Rather, the Board's focus was centered on ensuring that the proposed Project does not result in a permanent adverse impact on the surrounding water supply. The Board also pointed out that remedies such as grouting are not a viable option. (Order at 42, 43.)

{¶ 54} As discussed above, the probative evidence set forth in the record demonstrates the concerns that the construction of turbines in areas of significant karst will have an adverse impact on the surrounding water supply. Although, the Staff Report recommended a determination that the application complied with R.C. 4906.10(A)(6), this recommendation was prior to the development of the full record in this case which reflected

the significant presence of karst in the project area. The Board also notes that Staff recommended that there be no wind turbine construction in areas in which karst is found to be present. (Staff Ex. 1 at 26; Tr. VII at 1416-1417.) In regard to Republic's citation to various prior Board decisions relative to reliance on post-certificate conditions as an appropriate method of addressing potential impacts, the Board distinguishes the current case inasmuch as the cited cases did not involve project areas that were situated in significant areas of karst. Due to the significant levels of karst and the overriding health-related concerns surrounding the impact of the Project on water supplies in this case, it is imperative that these issues and the efficacy of any potential remedy be addressed prior to the issuance of a certificate.

{¶ 55} Although Republic contends that the Board's Order is inconsistent with its determination in the *Firelands Decision*, the Board concludes that such assertion is incorrect. Rather, similar to this case, the Board in the *Firelands Decision* found that proposed turbine locations situated in identified areas of karst that are at moderate or above levels cannot be remedied through the use of grouting and should not proceed. Additionally, unlike the current case, the Board found that for the Firelands' project area, much of it lies outside of areas where karst is expected to be encountered at a moderate to high level (*Firelands Decision* at 35). In response to Republic's argument that it is sufficient for the Board to allow for the submission of its geotechnical report post-certificate but pre-construction under Ohio Adm.Code 4906-4-09(A)(2)(b)(i) because the Board allowed for such submissions in prior cases, the Board finds that the cited cases are distinguishable because they did not involve project areas with karst levels that were as high as that in this case. Additionally, the Board highlights that the referenced geotechnical report does not address the same concerns as the hydrogeological issues encompassed in Ohio Adm.Code 4906-4-08 that are discussed above.

{¶ 56} In response to Republic's concerns regarding the Board's reliance on the public comments and local public hearing testimony in this proceeding, the Board finds that these factors were just two of a number of components that were considered as part of the Board's decision in this case. In response to Republic's contention that the Board's decision is almost

entirely based on whether the Project is popular with local governments, the Board references its discussion in the fourth assignment of error.

3. THIRD ASSIGNMENT OF ERROR

{¶ 57} In its third assignment of error, Republic asserts that the Order is unreasonable, unlawful, and constitutes an abuse of discretion because the Board refused to make findings as to whether Republic had satisfied each criterion in R.C. 4906.10(A). Specifically, Republic disputes the Board's determination that if it finds that an applicant has failed its burden as to one or two of the criteria set forth in R.C. 4906.10(A)(1)-(8), the Board need not address the remaining criteria. Rather, Republic insists that the Board must make a determination as to each criterion and can only approve the application if each criterion is satisfied. (Republic Application for Rehearing at 32.)

{¶ 58} In support of its position, Republic references the language in R.C. 1.47 which provides that "[i]n enacting a statute, it is presumed that ... [a] just and reasonable result is intended." Republic believes that the Board's interpretation of not ruling on all of the criterion of R.C. 4906.10(A) in the Order is unjust and unreasonable when considering its prejudicial effect on Republic's appellate rights. Republic contends that by the Board piecemealing its decision relative to the R.C. 4906.10(A) criterion, any potential relief for Republic will be delayed through numerous Orders and rehearings. Republic submits that such a result is arbitrary, capricious, wholly lacks justification, and is a clear abuse of discretion. Republic believes that such a process will ultimately jeopardize the feasibility of the Project. Further, Republic believes that the Board did not sufficiently explain the reason for why it chose to issue a piecemeal order despite the fact a full and complete record was developed in this matter. (Republic Application for Rehearing at 32-34.)

{¶ 59} Local Residents state that for judicial efficiency, the Board should find that other issues raised by the intervening parties preclude the issuance of a certificate under R.C. 4906.10(A)(3) and (6). Referencing the language of R.C. 4906.10(A), Local Residents submit that the Board is only required to rule on all eight criteria when it grants a certificate.

Since the Board found that Republic failed to satisfy R.C. 4906.10(A)(3) and 4906.10(A)(6), Local Residents contend that the Board is not required to rule on all eight criteria. Local Residents opine that the Board's decision not to rule on eight criteria does not violate any of Republic's constitutional rights. (Local Residents Memorandum Contra at 53.)

{¶ 60} Local Government Entities submit that once a determination has been made that an applicant has failed to meet any of the criteria of R.C. 4906.10(A), no additional analysis is needed. In support of their position, Local Government Entities reference the Ohio Supreme Court's determination that the Board shall have the ability to use its discretion in determining all procedural issues. (Local Government Entities Memorandum Contra at 3 citing *In re Application of Am. Transm. Sys. Inc.*, 2010 Ohio 1841.) According to Local Government Entities, Republic has failed to set forth any argument as to how the Board abused its discretion in determining procedural issues (Local Government Entities Memorandum Contra at 3).

{¶ 61} The Board finds that Republic's third assignment of error set forth in its application for rehearing is denied. In reaching this determination, the Board rejects Republic's contention that the Order is unreasonable, unlawful, and constitutes an abuse of discretion because the Board refused to make findings as to whether Republic had satisfied each criterion in R.C. 4906.10(A). In reaching this determination the Board relies on the statutory language of R.C. 4906.10(A) that the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it finds and determines that all of the factors set forth in R.C. 4906.10(A)(1)-(8) have been met. Therefore, although there is an affirmative obligation for the Board to render a determination on each of the R.C. 4906.10(A)(1)-(8) criteria for the purpose of approving an application, no such requirement exists relative to the denial of an application. Rather, based on the statute, an application is considered denied upon the Board determining that one of the criteria has not been satisfied. Therefore, based on our determinations stated in the Order, the Board acted within its delegated authority.

4. FOURTH ASSIGNMENT OF ERROR

{¶ 62} In its fourth assignment of error, Republic asserts that the Order is unlawful and unreasonable because the Board deferred to the opinion and opposition of local governments in denying the application in violation of R.C. 4906.13(B). In support of its position, Republic submits that pursuant to R.C. 4906.13(B), “[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction and operation of a major utility facility*** authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” Additionally, Republic argues that the Board’s “authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself. (Republic Application for Rehearing at 35 citing *In re Application of Am. Transm. Sys., Inc.*, 2010-Ohio-1841, ¶21, 125 Ohio St. 3d 333, 337.) Therefore, Republic avers that the Board, and not local governments, is the final arbiter regarding the construction of a major utility facilities.

{¶ 63} Specific to its argument that the Board improperly delegated its authority to local governments, Republic contends that the Board was clearly swayed by the number of local governments that opposed the Project and that the decision was not based on facts but, instead, purely on local opposition. However, Republic considers the local government opposition to be nothing more than opposition based on speculative concerns. Republic reiterates its contention that the Board fails to cite to any reliable or probative evidence regarding potential impacts that cannot be mitigated (i.e., the visual impact concerns raised by the Seneca County Park District and the concerns regarding Seneca County’s RUMA). Citing the Board’s prior decisions in *In re Duke Energy Ohio*, *In re Buckeye Wind LLC*, Case No. 08-666-EL-BGN, and *In re Champaign Wind, LLC*, Case No. 12-160-EL-BGN, Republic contends that if the Board could base its decision on the opposition of local governments, it would have denied certificates in these prior cases. (Republic Application for Rehearing at 35-37.)

{¶ 64} Upon a review of the Board's Order, Republic opines that the Board based its decision on the local government and local opposition to the Project and that it appears as though the Board is attempting to apply Ohio Substitute Senate Bill 52 (SB 52) in this case in order to provide more power to local governments. Republic posits that the Board cannot apply SB 52 to Republic's project inasmuch as Ohio Constit. Article II, Section 28 explicitly prohibits the General Assembly from passing laws with a retroactive effect. (Republic Application for Rehearing at 37.)

{¶ 65} Local Residents respond that while the Board found the local governmental opposition to the Project to be persuasive, the Board did not transfer to local government officials its authority to act on Republic's application for a certificate. Local Residents also recognize that the Board's Order is not based solely on the opposition of local officials and the public but, instead, attributed the appropriate amount of weight to the public input factor while also finding that karst and other problems contribute to the decision to deny the certificate. While recognizing the restrictions set forth in R.C. 4906.13(C), Local Residents contend that the Board can still consider the local government input in the context of it making its decision relative to compliance with R.C. 4906.10(A) and that there are no rules quantifying an objective percentage of local opposition necessary to deny a project. Local Residents note that the Board also considered other factors in its denial based on expert testimony related to karst and groundwater problems. Therefore, Local Residents believe that the decision in this case is distinguishable from other cases in which the Board issued certificates over local government opposition. (Local Residents Memorandum Contra at 50-51.)

{¶ 66} Finally, Local Residents reject any claim that the Board is getting a jumpstart on implementing SB 52. Rather, Local Residents aver that the law, and not the Board, establishes the guidelines by which local support or opposition will affect a project (Local Residents Memorandum Contra at 51.)

{¶ 67} Local Government Entities contend that Republic failed to present any evidence that its agents, representatives, or consultants visited the Bowen Nature Preserve or provided any analysis of how the Project would impact it. In support of its position, Local Government Entities state that the Visual Impact Study did not comply with Ohio Adm.Code 4906-4-08(D) due to the fact that the only park within the boundary of the Project was not evaluated. Local Government Entities assert that at an absolute minimum, Republic should have been able to answer the question of visibility of turbines from the local park in the project area. Additionally, Local Residents note that while Republic witness Robinson referenced the impact on two other nature preserves, his direct testimony did not mention the Bowen Nature Preserve. According to Local Government Entities, Ohio Adm.Code 4906-4-08(D)(4)(b), (c), (d), (e), and (f) require that the actual parks in the project area must at least be considered as part of the application process and that analysis be performed as to the impact of a proposed project on such parks. (Local Government Entities Memorandum Contra at 3-7 citing Tr. VII at 1409, 1446, 1452; Tr. III at 537, 540; Republic Ex. 21 at 10.)

{¶ 68} The Board finds that Republic's fourth assignment of error set forth in its application for rehearing is denied. In reaching this determination, the Board rejects Republic's contention that the Board deferred to the opinion and opposition of local governments in denying the application in violation of R.C. 4906.13(B). Specifically, the Board recognizes that as entities granted intervention, Local Government Entities, just as any other party, were lawfully entitled to raise its arguments regarding the application filed in this proceeding and the compliance with the factors set forth in R.C. 4906.10(A). Local Government Entities and the other parties in this proceeding presented evidence with respect to the compliance analysis. The entire record in this case was fully analyzed by the Board, resulting in the Order issued on June 24, 2021. As part of this analysis, the Board considered the evidence presented by Local Government Entities and all other parties. The Board highlights that there were no governmental entities participating as a party in this case who stated their support for the Project. Based on its review of the record, the Board exercised its statutory authority for the purpose of issuing its Order. The Board notes that

SB 52 took effect subsequent to the Board's Order and was not applicable in any manner relative to the decision-making process in this proceeding.

5. ALTERNATIVE GROUNDS

{¶ 69} Alternatively, Republic requests that the Board grant rehearing for the limited purpose of submitting in the record the fully detailed geotechnical information called for in Ohio Adm.Code 4906-4-09(A)(2)(b)(i) (Republic Application for Rehearing at 8, 39).

{¶ 70} Local Residents respond that Republic is not entitled to a do-over. As discussed above, Local Residents also emphasize that it is the hydrogeologic information, and not the geotechnical information, that should have been provided in the record pursuant to Ohio Adm.Code 4906-4-08(A)(4)(a) and 4906-4-08(A)(5). Additionally, Local Residents argue that the Board has no authority to grant rehearing to admit such information. In support of its position, Local Residents reference R.C. 4903.10 and the restriction on considering any evidence that, with reasonable diligence, could have been offered at the original hearing. Further, Local Residents submit that Republic should not be allowed to omit from its application the information required by the Board's rules, choose not to fill those gaps at hearing, and then request another hearing in order to introduce evidence that should have initially been provided. (Local Residents Memorandum Contra at 31-32.)

{¶ 71} The Board finds that Republic's request to be granted rehearing for the limited purpose of submitting in the record the fully detailed geotechnical information called for in Ohio Adm.Code 4906-4-09(A)(2)(b)(i) should be denied. In reaching this determination, the Board finds that, consistent with the rulings set forth above, Republic failed to meet its burden of proof relative to R.C. 4906.10(A)(3) and (6). As noted by Local Residents, pursuant to R.C. 4903.10(B), rehearing should not be granted for the purpose of considering information that with reasonable diligence could have been offered in the original hearing. Based on the determinations set forth in the Order related to the intervenors' concerns associated with the significant presence of karst in the project area and its impact on the

surrounding water supply, the Board finds that Republic should have presented evidence that was responsive to the intervenors' concerns at the hearing in this matter.

6. OTHER ISSUES

{¶ 72} On August 18, 2022, Republic filed a Supplemental Memorandum Contra Local Residents' application for rehearing and a request for a waiver. In support of its filing, Republic submits that Local Residents attached and incorporated their prior briefs into their application for rehearing and, therefore, effectively reargued the positions advanced in the Reply Brief filed on January 13, 2020. According to Republic, one of those positions was the suggestion that Republic did not have widespread public support for the Project. Included with the Supplemental Memorandum Contra filing are Attachments A and B (maps that allegedly demonstrate where commenters reside in proximity to the project boundary) and Attachment C (an Excel spreadsheet that allegedly lists the public commenters, their addresses, whether they oppose or support the Project, and their proximity to the project boundary). Republic references the direct testimony of Republic witness Carr for the purpose of clarifying the record relative to the issue of local opposition to the Project. (App. Ex. 13 at 9.)

{¶ 73} In support of the need for its Supplemental Memorandum Contra, Republic argues that the post-hearing briefing schedule in this case did not permit it to respond to the assertions that Local Residents made in their reply brief regarding the lack of widespread support of the Project. Additionally, Republic contends that the administrative rule requiring that responses to applications for rehearing be filed within 10 days did not provide Republic with adequate time to prepare a full response in its memorandum contra Local Residents' application for rehearing. Therefore, Republic requests that the Board waive the 10-day limit set forth in Ohio Adm.Code 4906-2-32(B) for the filing of its memoranda contra Local Residents' Application for Rehearing. Republic believes that its Supplemental Memorandum Contra is necessary in order to provide the Board with a full and accurate count of the public commentators supporting and opposing the Project. Republic insists that Local Residents are not prejudiced by the acceptance of the Supplemental Memorandum

Contra as being timely filed inasmuch as the memorandum contra an application for rehearing is the final pleading before the Board renders its rehearing determination and no further responsive pleadings are permitted.

{¶ 74} On August 20, 2021, Local Residents filed a memorandum contra Republic's supplemental memorandum and a motion to strike. Local Residents assert that Republic's filing was a transparent attempt to file a new argument and evidence almost a month after the 30-day statutory deadline for the filing of an application for rehearing. Additionally, Local Residents state they did not raise the issue of local opposition in their application for rehearing. Therefore, Local Residents believe that Republic is raising a new argument that should have been included in Republic's application for rehearing. According to Local Residents, had Republic properly raised its argument in the context of an application for rehearing, Local Residents would have had the opportunity to properly respond. Further, Local Residents contend that exhibits attached to the Supplemental Memorandum Contra are inaccurate, not part of the record and have not been subject cross-examination to evaluate their accuracy. (Local Residents Memorandum Contra at 1-11.)

{¶ 75} On September 7, 2021, Republic filed a memorandum contra Local Residents' motion to strike. Republic responds that Local Residents willingly opened the door regarding this issue by incorporating its post-hearing briefs into its application for rehearing. Therefore, Republic states that it has every right to counter Local Residents' inaccurate statements with information contained in the record. Additionally, Republic disputes Local Residents claim that Republic's summary of public comments and maps are inaccurate. As part of its filing, Republic included a corrected project area map in attempt to reflect the location of commenters in this case. (Memorandum Contra at 1-4.)

{¶ 76} On September 14, 2020, Local Residents filed a reply memorandum in support of its motion to strike.

{¶ 77} Based on a review of the stated arguments, Local Residents motion to strike is granted. In reaching this determination, the Board finds that Republic's Supplemental

Memorandum Contra is an untimely attempt to respond to prior arguments raised in this proceeding and determinations made by the Board in its Order regarding the level of local opposition to the Project. Any disputes relative to the Board's determination on this issue should have been raised in the context of Republic's application for rehearing filed on July 26, 2021, and not in its August 18, 2021 Supplemental Memorandum Contra. Additionally, the Board agrees with Local Residents that exhibits attached to Republic's Supplemental Memorandum Contra are not currently part of the record and have not been subject cross-examination to evaluate their accuracy.

B. Local Residents' Application for Rehearing

{¶ 78} In its sole assignment of error, Local Residents submit that the Order is unlawful and unreasonable because the Board did not decide many of the grounds raised by the Local Residents as the basis for denying the certificate. Local Residents therefore request that the Board add these additional grounds to the Order as further reasons for denying the certificate. Attached to the application for rehearing are the Local Residents' post-hearing brief, post-hearing reply brief, supplemental post-hearing brief, and supplemental post-hearing reply brief, which Local Residents assert outline further grounds for the Board's denial. Local Residents note, however, that they understand that the Board may not wish to opine on further issues already decided in the Order, but that Local Residents are filing its application for rehearing as a precaution to ensure they are able to request that the Ohio Supreme Court remand the case to the Board with instructions to decide these issues if the Court reverses the Board's denial of the certificate. (Local Residents Application for Rehearing at 2.)

{¶ 79} Republic rejects the contention that Local Residents have provided any basis for denying issuance of a certificate, as it discussed extensively in its post-hearing briefs which are attached to its memorandum contra Local Residents' application for rehearing. While Republic disagrees with the reasoning presented by Local Residents, it does agree that the Board is obligated to make findings under all criteria listed in R.C. 4906.10(A)(1)-(8). (Republic Memorandum Contra at 1-2.)

{¶ 80} The Board finds that Local Residents' assignment of error set forth in their application for rehearing is denied. As stated in the Order, any evidence not specifically addressed therein was nevertheless weighed and considered by the Board in reaching its final determination (Order at ¶61). The Board affirms the reasoning set forth in the Order for the denial, as well as the evidence cited in support of finding that Republic did not satisfy the statutory requirements of R.C. 4906.10(A)(3) and (A)(6)) and finds no need to supplement its original decision with additional grounds for denial. To the extent that Local Residents are requesting determinations be made as to additional R.C. 4906.10(A) criteria, the Board reiterates the reasoning outlined in denying Republic's third assignment of error. As stated above, an application is considered denied upon the Board determining that one of the statutory criteria has not been satisfied and there is no affirmative obligation for the Board to issue a determination as to each criterion if an application is denied.

C. Board Conclusion

{¶ 81} In summary, the Board has reviewed and considered all claims and arguments contained in the application and based on the foregoing, finds that Republic and Local Residents applications for rehearing are without merit. The Board finds that Republic and Local Residents have raised no new arguments or brought to our attention any error demonstrating that our prior consideration of this matter was inadequate, against the manifest weight of the evidence, or otherwise unlawful and unreasonable. Accordingly, as to each of the claimed errors, we affirm the determination made in our June 24, 2021 Opinion, Order, and Certificate.

IV. ORDER

{¶ 82} It is, therefore,

{¶ 83} ORDERED, That the applications for rehearing filed by Republic and Local Residents be denied. It is, further,

{¶ 84} ORDERED, That Local Residents' motion to strike be granted. It is, further,

{¶ 85} ORDERED, That, to the extent not specifically addressed herein, all other arguments raised in the applications for rehearing be denied. It is, further,

{¶ 86} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

Brittney Colvin, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Bruce T. Vanderhoff, M.D., Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

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in

Case No(s). 17-2295-EL-BGN

Summary: Opinion & Order on Rehearing denying the applications for rehearing filed on July 26, 2021, and affirming the determinations made in the June 24, 2021 Opinion, Order, and Certificate in this matter. electronically filed by Ms. Mary E. Fischer on behalf of Ohio Power Siting Board