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BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of Black Fork Wind Energy, LLC for a Certificate to Install Numerous Electricity Generating Wind Turbines in Crawford and Richland Counties, Ohio	)))))	**Case No. 10-2865-EL-BGN**

MEMORANDUM CONTRA OF BLACK FORK WIND ENERGY, LLC TO THE APPLICATIONS FOR REHEARING OF GARY BIGLIN, ALAN PRICE AND CATHERINE PRICE

February 27, 2012

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I. INTRODUCTION

Pursuant to Rule 4906-7-17(E) of the Ohio Administrative Code, Black Fork Wind Energy, LLC (the "Applicant") submits this memorandum contra to the February 17, 2012 applications for rehearing of intervenor Gary J. Biglin, intervenor Alan K. Price, and intervenor Catherine A. Price. Each of these three intervenors filed individual applications for rehearing from the January 23, 2012 Opinion, Order and Certificate (the "Certificate") in this case granting the Applicant's application to construct up to 91 wind turbines in Crawford and Richland Counties, Ohio (the "Project"). The Applicant submits that the Ohio Power Siting Board's Certificate addressed all of the issues, was reasonable and lawful and was based on the record before it. The Applicant respectfully requests that the Ohio Power Siting Board (the "Board") deny each of these applications for rehearing.

II. ARGUMENT

As an initial argument, Alan Price and Catherine Price failed, in many instances, to provide clear grounds for rehearing although Section 4903.10 of the Revised Code requires an applicant for rehearing to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." The Applicant requests that the Board not

consider any portion of the applications for rehearing that do not clearly set forth the ground for rehearing as required by Rule 4906-7-17(D) and Section 4903.10(B) of the Revised Code. Without waiving the foregoing argument, the Applicant will address each of the statements by and/or grounds raised by the intervenors in this memorandum contra.

A. Application for Rehearing of Intervener Gary J. Biglin

1. The Board acted lawfully and reasonably in approving the turbine setbacks proposed for the Project.

In his first ground for rehearing, Mr. Biglin argues that the Board's failure to require the Applicant to maintain an adequate turbine setback distance from non-participating property lines and public roadways violated Section 4906.10(A)(2), (3) and (6), Revised Code. (Memorandum in Support, p. 1.) He argues that safe setback distances should be based only from property lines and the public roadways so that Ohio property owners can enjoy their property.

Rule 4906-17-08(C)(1)(c) of the Ohio Administrative Code sets forth the setback requirements that the Board has established. This rule provides in pertinent part:

> (c) Describe proposed locations for wind turbine structures in relation to property lines and habitable residential structures, consistent with no less than the following minimum requirements:
>
> > (i) The distance from a wind turbine base to the property line of the wind farm property shall be at least one and one-tenth times the total height of the turbine structure as measured from its tower's base (excluding the subsurface foundation) to the top of its highest blade.
> >
> > (ii) The wind turbine shall be at least seven hundred fifty feet in horizontal distance from the tip of the turbine's nearest blade at ninety degrees to the exterior of the nearest habitable residential structure, if any, located on adjacent property at the time of the certification application.

At page 18 of the Staff Report of Investigation, the Staff made the following observation

regarding the Project's setback requirements:

> (5) Based on the largest turbine model, the statutory minimum setbacks equate to 543 feet from a non-participating property line and 914 feet from residences on non-participating property. In establishing minimum property line setbacks of 963 feet and resident setbacks of 1,250 feet the Applicant has designed the wind farm to exceed all statutory requirements.

Staff's observations were based on information presented in the Applicant's application that turbine locations from parcel setbacks and habitable residential structures exceeded the regulatory requirements. (Applicant Ex. 1, p. 118.)

At pages 58-59 of the Certificate, the Board noted Mr. Biglin's concerns regarding setbacks but also noted the testimony of Staff witness Pawley that the setbacks followed the Ohio Revised Code. (Certificate, p. 58.) It also noted the testimony of Dale Arnold, Director of Energy, Utility and Local Government Policy for the Ohio Farm Bureau Federation. (Certificate, p. 58.) Mr. Arnold testified that the setback requirements for this project are the minimum setback created by State law and House Bill 562, as well as the rules promulgated by the Board, given the current technology. (Certificate, p. 58; Tr. 326.) Mr. Arnold felt that the current setback requirements create no disincentive to property owners because they do not preclude a property owner who signs a lease from subdividing his property or selling it to new landowners. (Certificate, p. 58, Tr. 301-302.)

Other witnesses testified in support of the Project's turbine setbacks. Jay Haley, a professional engineer, testified at length regarding shadow flicker and the low risk of ice throw. (Tr. at 373-374, 387-388; Applicant Ex. 15.) Mr. Haley testified that the probability of an incident of ice throw was less than once in 100,000 years. (Tr. 374.) He also testified that he was not aware of any incidence of an ice strike despite his extensive research and experience in that area. (Tr. 380.) Mr. Haley also testified at length regarding the use of icing sensors and

how that equipment further reduces the risk of ice throw. (Tr. 402). Dr. Diane Mundt also testified in support of the Project's setbacks. (Applicant Ex. 20.)

As to Mr. Biglin's claims that people should be able to develop their property now or in the future, this Board has held that " ... nothing in Chapter 4906, Revised Code, prohibits adjacent landowners from developing their property regardless of the presence of wind turbines on adjacent property." (In re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Opinion, Order and Certificate, March 22, 2010 at p. 40.) The Board has also held that " ... Chapter 4906, Revised Code, and Rule 4906-17-08, O.A.C., which also provides for wind farm setbacks, does not prohibit the construction of residences within the proposed setback, after a wind farm has already been constructed." (Id.)

Simply put, Mr. Biglin's argument that turbine setbacks should only be from property lines is best left to the General Assembly. Current state law recognizes minimum property line and habitable residence setbacks for wind turbines, setbacks this Board has adopted through its rules. The Board found in the Certificate that the Stipulation's conditions addressing the requisite setback complied with the rule mandates and that no evidence was presented on the record which would lead the Board to believe that additional measures should be taken at this time. Accordingly, given the evidence in the record, the Board acted lawfully and reasonably in approving the Stipulation as presented. Mr. Biglin's first ground for rehearing must be denied.

2. The Project's setbacks from property lines and occupied residences are adequate and protect property owners and users of public roadways.

Mr. Biglin second ground for rehearing is that the turbine setbacks established under the Certificate are inadequate as to non-participating property owners and persons using public roadways. (Memorandum in Support, p. 2-4.) To the contrary, the evidence in the record

establishes that the turbine setbacks for this Project are more than adequate to protect the health and safety of the public.

Mr. Biglin first claims that the Board has allowed wind turbines to be sited within 500 feet from property lines and public roadways. (Memorandum in Support, p.2.) Mr. Biglin provides no evidentiary support for this claim or his claim that Turbine 58 is within 500 feet of two roadways. Moreover, Mr. Biglin ignores the testimony of a professional engineer, Mr. Jay Haley, regarding the low risk of ice throw in regards to public roadways and the difference in risk between buildings and moving vehicles. (Tr. 378-375.) Mr. Haley also testified that he was not aware of any incident of ice throw. (Tr. 380.)

Although Mr. Haley was not aware of any ice throw incident ever occurring, Mr. Biglin argues at pages 2 and 3 of his brief that the only way to ensure 100% safety is to impose the GE setback formula referenced in the Staff report (Staff Ex. 2, p. 37) to property lines and roadways. The Board addressed this argument in its decision, finding that the risk of ice throw was adequately addressed in the Stipulation. In reaching its conclusion, the Board properly considered the expert testimony of Mr. Haley regarding the probability of ice throw being less than once in 100,000 years and that he was not aware of any incidence of an ice strike despite his extensive research and experience in that area. (Certificate, p.57; Tr. at 373-374, 387-388.) The Board also considered Mr. Haley's testimony regarding the use of icing sensors and how that equipment further reduces the risk of ice throw. (Certificate, p. 57; Tr. 400-402.)

Mr. Haley also testified that the GE setback formula referenced in Condition 45 and at page 37 of the Staff Report originated from a publication by Seifert, Westerhellweg, and Kroning (2003), Risk Analysis of ice throw from wind turbines. Mr. Haley testified that he had " ... reviewed that publication, and it is clear from the publication that the setback formula is a simple

*empirical equation that is meant to be a rough guideline for initial siting efforts. *** The risk of* ice throw on this project does not warrant the application of the Seifert setback formula, which even the authors admit is a 'rough guess.'" (Applicant Ex. 16, A.7.) Even Mr. Biglin admitted that the GE setback formula was of limited application, agreeing on cross-examination that GE only recommended application of the setback if an ice detector is not used on the turbine. (Tr. 754; Company Ex. 1, Appendix E at 8.4.1, p. 50/68.)

The Board's decision to reject Mr. Biglin's use of the GE setback formula is also supported by the Board's finding that no evidence was presented in the record that warranted additional measures beyond the minimum setbacks prescribed under the Board's rules. (Certificate at pp. 58-59.) As noted above, Chapter 4906-17 of the Board's rules applies the property line and residential setbacks of Section 4906.20 of the Revised Code to wind farms. The Project was found to comply with these minimum setbacks, in fact exceeding the minimum setbacks with a self-imposed setback of 563 feet from non-participating property lines and 1,250 feet from non-participating residences. (Applicant Ex. 1, p. 118.) This fact coupled with the testimony of the Applicant's witnesses fully supports the Board's decision to not adopt Mr. Biglin's setback formula.

Mr. Biglin's last argument on the setback issue is that the Certificate deprives property owners "of their Constitutional Rights to the protection of private property (U.S. Const. XIV Amend; Ohio Const. Sec 19 Art.I) and to procedural due process (U.S. Const. XIV Amend; Ohio Const. Sec. 16, Art. I)." (Memorandum in Support, p. 4.) The Board rejected a similar argument made in the Buckeye Wind proceeding in 2010. (In re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Opinion, Order and Certificate at pp. 36-40 and Entry on Rehearing, July 15, 2010, pp. 34-35.) The Board, in that proceeding, found that nothing prohibited adjoining landowners from

developing their properties or constructing residences after a wind farm has been constructed. (Id., p. 40).

The Board's decision in the Buckeye Wind proceeding was fully supported by Ohio case law. First, it is well established in Ohio that a government entity like the Board should not take action on a requested permit or zoning ordinance based solely upon possible future plans, where no action has been taken on such plans. See e.g. Henle v. City of Euclid, 97 Ohio App. 258 (Cuyahoga Cty. 1954) (city's plan for future highway was insufficient to preclude grant of permit to re-zone property so that a filling station could be constructed); State ex rel. Sun Oil Co. v. City of Euclid, 164 Ohio St. 265 (1955) (upholding Henle); Krieger v. City of Cleveland, 143 N.E. 142 (Cuyahoga Cty. 1957) (in proceeding by landowner to declare zoning ordinance unconstitutional, court refused to look at future uses of land, explaining, "It may be that in the near future the industrial development of the city of Cleveland will require ... a change in zoning, but for this court to say, from the facts shown now to exist, that the present zoning is not the best ... and that the zoning must be changed, would be unwarranted and illegal intrusion upon the functions of the legislative body of the city."). This case law supports the Board's approval of the Certificate regardless of any future development of landowner properties.

Second, Ohio case law holds that established setbacks do not constitute unconstitutional takings if enacted as a result of a proper exercise of the police power and are reasonably necessary for the "preservation of the public health, safety and morals." See Andres v. City of Perrysburg, 47 Ohio App. 3d 51, 54 (Wood Cty. 1988), citing Pritz v. Messer, 112 Ohio St. 628 (1925) ("[l]aws enacted in the proper exercise of the police power ... reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private

property.'"). Setbacks were established by the General Assembly to safeguard the public from any potential harm, including, noise, shadow flicker, blade throw or ice throw, which may result from construction of the wind turbines. Such action is within the police power to protect the public health, safety and morals, and therefore, does not constitute an unconstitutional taking of private property.

Mr. Biglin's constitutional arguments have no merit and this ground for rehearing must be rejected.

3. The Board did not improperly delegate authority to the Administrative Law Judges.

In his third ground for rehearing, Mr. Biglin argues that the Board relied upon the Administrative Law Judges to reach a final decision which was merely rubber stamped by the Board. (Memorandum in Support, pp. 4-5.) He also argues that the Board must meet its statutory obligation to carefully weigh the issues and evidence and to reach an independent determination whether the Project should be constructed as proposed. (Id.)

A similar argument regarding the delegation by the Board to the drafting of the Order by the Administrative Law Judge ("ALJ") was raised in re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Entry on Rehearing, July 15, 2010 at pp. 36-37 where the Board held:

> (90) In considering this issue, the Board is mindful of the recent decision of the Supreme Court of Ohio ("court") In re the Application of Am. Transm. Sys., Inc. (May 4, 2010), 2010-Ohio 1841, wherein the court found that an Order, signed by the Board, demonstrates that the Order was considered by the Board. Moreover, the court concluded that drafting an Order and deciding an Order are not the same, and nothing in the Revised Code prohibits the Board from delegating the drafting of an Order to an ALJ. In addition, the court relied on a long-standing presumption of regularity, wherein, in the absence of evidence to the contrary, a public board is presumed to have properly performed its duties. Accordingly, UNU's request for rehearing on the grounds that the Board improperly delegated its duties to the ALJs should be denied.

As both the Board and the Supreme Court of Ohio have previously rejected this argument, the Board should deny Mr. Biglin's ground for rehearing for the same reasons.

4. The Administrative Law Judges did not apply a procedure towards the citizen intervenors that was either misleading or prejudicial.

In his fourth ground for rehearing, Mr. Biglin offers four criticisms of the procedural process. (Memorandum in Support, pp. 5-6.) First, he complains that there was a compressed schedule from the time the citizen intervenors were acknowledged and the dates for the public hearing and the adjudicatory hearing. He argues that other project cases have had a window of about two weeks between the hearings. Mr. Biglin, however, ignores the fact that the public hearing in this proceeding took place on September 15, 2011 and that the evidentiary hearing did not begin until October 11, 2011. This was a window of about four weeks between hearings. Mr. Biglin's criticism must be rejected.

Secondly, Mr. Biglin complains that he did not receive a copy of the application until October 11, 2011. However, a review of Mr. Biglin's testimony filed on September 19, 2011 indicates that he had access to the application as he made specific references to it. (See September 19, 2011 Testimony of Gary J. Biglin at pp. 2, 3 and 4.) Moreover, the Applicant was under no legal obligation to serve Mr. Biglin with a copy of the application considering Mr. Biglin intervened well after the date that the Applicant filed and served copies of the complete application. Even if Mr. Biglin did not have access to the application (which he clearly did), he makes no showing of prejudice. The application was also available on-line on the Board's website within days of the March 10, 2011 filing date.

Mr. Biglin's third criticism is that the Administrative Law Judges referred to a settlement conference as a settlement meeting and at other times as a stipulation meeting during a

September 9, 2011 prehearing conference. Mr. Biglin claims this was very confusing even though any confusion on Mr. Biglin's part should have been resolved through the September 12, 2011 Entry setting a date for the settlement conference. Moreover, Mr. Biglin fails to explain how any confusion on his part as to a subsequent settlement conference affected his ability to participate in the evidentiary hearing. Indeed, Mr. Biglin fully participated in the evidentiary hearing, presenting testimony and cross-examining witnesses. Mr. Biglin's third criticism has no basis.

Mr. Biglin's last criticism is that Mr. John Pawley was the only Staff witness made available for cross-examination. As an initial point, Staff, the Applicant and intervenors were free to choose who will testify on their behalf. In this situation, Mr. Pawley was the manager of the Staff investigation and preparation of the Staff Report and testified in support of the September 28, 2011 Joint Stipulation and Recommendation. There is nothing unreasonable or unlawful about having a single witness support the position of the Staff. Clearly the Board did not commit error when the Staff chose Mr. Pawley to testify in support of the Joint Stipulation and Recommendation. This ground must be denied.

B. Application for Rehearing of Intervenor Alan K. Price

1. The ethical issues raised by Mr. Price with respect to wind farm lease agreements are not within the jurisdiction of the Board.

In his first ground for rehearing, Mr. Price alleges that township and county employees that have signed leases with Black Fork Wind Energy or Element Power should be replaced before their offices were asked to work on a road agreement. (Memorandum in Support, p. 1.) Additionally, Mr. Price alleges that he does not believe it was ethical for the Applicant to tell lease signers who had questions about their lease to go to Attorney Jim Prye. (Id.) Mr. Price

alleges that Mr. Prye admitted that the company paid him for such work and that the company was already paying Mr. and Mrs. Price for using their title company for work. (Id.)

The Board does not have jurisdiction over ethical issues; it has jurisdiction over the siting of certain major utility facilities. Further, no legal grounds were provided that any of the alleged conduct was illegal. This ground must be rejected.

2. The Board properly addressed issues relating to road use agreements.

In his second ground for rehearing, Mr. Price claims that the Applicant, PUCO and Ohio Power Siting Board are "doing their best to bully" county officials into signing agreements that they do not have enough time or resources to fully investigate. (Memorandum in Support, p. 2.) At pages 67-68 of Certificate, the Board noted that Conditions 47, 48 and 49 of the Stipulation (*Joint Exhibit 1*) address the subject of transportation concerns and road agreements. The Board pointed out that while it understood that the non-stipulating parties had concerns pertaining to the process, the fact of the matter is that the Applicant must work with the counties in arriving at a road use agreement prior to construction and that no additional conditions were required regarding transportation and road use. (Certificate, pp. 67-68.) Mr. Price also ignores the fact that both Crawford County and Richland County participated in the evidentiary hearing to present their respective interests. Mr. Price's claim that county officials are being "bullied" has no basis in law or fact. His second ground for rehearing must be denied.

3. Prior to commencement of construction, the Applicant, the facility owner, and/or the facility operator is required to provide a statement from the holder of the financial assurance demonstrating that adequate funds had been posted for the scheduled construction.

In his third ground for rehearing, Mr. Price argues that the Applicant is allowed to build a wind farm without having to post any kind of bond the date construction starts. (Memorandum in Support, p. 2.) This is simply incorrect. Condition 66(h) of the Stipulation as summarized at

pages 48-49 of the Certificate clearly imposes a bonding obligation on the Applicant prior to each turbine's construction.

4. Ample evidence exists to support the Board's analysis and conclusion on turbine operational noise.

Mr. Price claims that the background noise study for the Project was flawed. (Memorandum in Support, p. 2.) He claims that four of eight monitors were located near heavy traffic and that two monitors were not in the Project area. (Id.) Mr. Price does not cite to any evidence that the monitors were placed in areas of high traffic or that the monitoring sites were not adequate to provide a valid sampling of background noise levels. Moreover, Mr. Kenneth Kaliski, a noise expert testifying on behalf of the Applicant, stated that in his opinion, the *monitoring sites used were satisfactory to provide a sampling of noise levels in the project area.* (Tr. 449.) He also testified at length regarding the location of the monitors used for his background noise study (Tr. 446-449), noting that the results of one monitor were not considered when determining the average nighttime sound level as that site recorded a very high LEQ level. (Tr. 417.) Mr. Kaliski's testimony supports the Board's analysis and conclusions.

5. The Board properly found that there is no credible support for the determination that there are negative health consequences associated with living near wind turbines.

In his fifth ground for rehearing, Mr. Price criticizes the testimony of Dr. Mundt. (Memorandum in Support, p. 5.) He indicates that he did not believe that she was testifying in her field of study and that she had read other persons literature about other types of blades with various speeds. (Id.) Mr. Price misses the point and value of Dr. Mundt's testimony.

Dr. Mundt is an epidemiologist who testified on behalf of the Applicant. (Applicant Ex. 20, Direct Testimony of Dr. Diane Mundt.) Epidemiology is the field of public health that studies the incidence, prevalence, and distribution of disease -- as well as risk factors that are

associated with disease -- in human populations. (Id., A.6). Epidemiologists use standard scientific methods to identify and interpret statistical correlations between disease occurrence and disease risk factors and other associated factors. Epidemiological evidence is key to determining the causal relationship, if any, between various risk factors and the occurrence of disease. (Id.)

Her testimony was that she had based her analysis on a critical review and emphasis of the available epidemiological literature, as well as her professional training and experience in applying epidemiological concepts and methods to diverse human health issues. (Applicant Ex. 20, A.8.) The key point of Dr. Mundt's testimony, as recognized by the Board, was her statement that, based on her review of the relevant published peer-reviewed scientific literature, she found no consistent or well-substantiated causal connection between residential proximity to industrial wind turbines and health effects. (Id., pp. 6-12.)

Mr. Price also ignores the practical value of Dr. Mundt's testimony. Specifically, Dr. Mundt testified that part of her opinion was based on her own personal observation as an individual who lives near a commercial size wind turbine. (Tr. 467-468.) Dr. Mundt's testimony supports the Board's finding that there is no credible support for a determination that there are negative health consequences associated with living near wind turbines. Mr. Price's critique of Dr. Mundt's testimony has no basis.

6. The Applicant followed the Board's rules on serving the application on applicable libraries.

In his sixth ground for rehearing, Mr. Price complains that the application was not available to him until the first day of the hearing. (Memorandum in Support, p. 2.) He also claimed that the Crestline Public Library should have received it earlier. Mr. Price's assertion that the application was not available to him until the first day of the evidentiary hearing is not

true. A copy of the application was available in five libraries as well as on the Board's website. (Applicant Ex. 2, June 17, 2011 Certificate of Service.) Mr. Price also makes no showing of how his alleged inability to access the application affected his ability to participate in the evidentiary hearing.

With respect to the Crestline Library, the Board's rules did not require the Applicant to serve a copy of the Application on the Crestline Public Library. Rule 4906-5-06 of the Ohio Administrative Code indicates that the Applicant shall place either a copy of the accepted, complete application or a notice of the availability of such application in the main public library of each political subdivision as referenced in Division B of 4906.06 of the Revised Code. Section 4906.06(B), Revised Code requires that the Applicant serve a copy of the application on the chief executive officer of each municipal corporation and county and the head of each public agency charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

No part of the facility is proposed to be within the Village of Crestline, Ohio. Copies of the application were placed in other libraries, for example in Bucyrus, the county seat of Crawford County, and in Mansfield, the county seat of Richland County. (See Applicant Ex. 2, June 17, 2011 Certificate of Service.) The Applicant followed the Board's rules with respect to service of the application on libraries and it is clear that Mr. Price could have accessed the application prior to the evidentiary hearing. This ground must be rejected.

7. The Board properly clarified that all conditions of the Stipulation apply to any entity that, at the time of each of these phases in the life of the project, is the entity ultimately responsible for the construction, operation, maintenance, or decommissioning of the project.

In his seventh ground for rehearing, Mr. Price sought an explanation for the difference between Applicant, owner and operator. (Memorandum in Support, p. 7.) The Board did in fact

provide an explanation and clarification on the difference between the terms "Applicant, owner and operator." At page 70 of the Opinion, Order and Certificate, the Board stated:

> Lastly, we would note that, during the hearing, concerns were raised regarding who the Applicant is and what is the Applicant's relationship to other corporate entities. We further note that, most often, the conditions of the Stipulation apply, on their face, to "the applicant." However, several conditions of the Stipulation, e.g., Conditions 48 and 66 make reference to and, on their face, appear to impose certain obligations on, in some instances, "the facility owner and/or operator" and on, in other instances, "the applicant, the facility owner and/or facility operator." We clarify that all conditions of the Stipulation that we are approving in this order apply to any entity that, at the time of each of these phases in the life of the project, is the entity ultimately responsible for the construction, operation, maintenance, or decommissioning of the project.

Given the Board's explanation quoted above, this ground for rehearing should be denied.

8. The Board had ample evidence to approve the application.

In his eighth ground for rehearing, Mr. Price (without any citations) claims that questions were unanswered by Staff, the Applicant and the Applicant's witnesses. (Memorandum in Support, p. 3.) However, the Administrative Law Judges, the Staff and the Intervenors had the right to ask questions of witnesses during the hearing. Mr. Price also cross examined multiple witnesses and had ample opportunity to ask questions. That is one of the purposes of a hearing. The Applicant disagrees with Mr. Price's assertion that there were a lot of questions "unanswered or answered that they would get back to us with the answer." The Board's Certificate and the transcript of the hearing disclose a great deal of information and testimony provided in response to questions. As ample information existed in the record to allow the Board to issue the Certificate, Mr. Price's last ground for rehearing should be rejected.

C. Application for Rehearing of Intervenor Catherine A. Price

As indicated above in the introduction to the Argument section of this brief, Mrs. Price's application for rehearing fails to set forth the specific grounds on which she considers the Board's Certificate to be unreasonable or unlawful. Section 4903.10 of the Revised Code requires an applicant for rehearing to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Mrs. Price memorandum in support makes no reference to the Board's Certificate, instead appearing to critique the application in this proceeding or witnesses' testimony. To the extent the Board does consider parts or all of Mrs. Price's application for rehearing, the Applicant responds as follows.

1. The application indicated that turbines ranging from 1.6 MW up to 3.0 MW were under consideration.

In her first ground for rehearing, Mrs. Price states that the application "used Vestas V100 rated 1.8 MW, General Electric 1.6 MW, and Siemens 1.2 MW. (Memorandum in Support, p. 1.) Yet 3.0 MW is mentioned in the testimony of the applicant and in letters from the applicant's legal counsel." Mrs. Price provides no citation for this claim. Moreover, Mrs. Price's statements are incorrect. Pages 3 and 9 of the application indicated that the Applicant has considered a variety of wind turbine generator models, ranging in generation capacity from 1.6 MW to 3.0 MW. (Applicant Ex. 1.) This ground should be rejected.

2. The application's study on historic properties was complete.

In her second ground for rehearing, Mrs. Price alleges that the study on historic properties was incomplete because her residence was not included and allegedly was built in 1836. (Memorandum in Support, p. 2.) Mrs. Price's criticism that a study was incomplete should not be leveled at the Board or the Applicant. Rule 4906-17-08(D) required the Applicant to indicate any registered landmarks of historic, religious, archaeological, scenic, natural or other cultural

significance within five miles of the proposed facility that are recognized by being registered with or identified as eligible for registration by the National Registry of Natural Landmarks, the Ohio historical society, or the Ohio department of natural resources. The Applicant did consult those registries. (Applicant Ex. 1, pp. 133-134.) If a registry is incomplete, it does not mean that either the Board or the Applicant did not fulfill their duties. The Board does not have jurisdiction over the completeness of historic registries; it can only require the Applicant to consult with such registries. Moreover, Mrs. Price did not present any evidence at hearing that her residence qualified for registration or how the Project would affect the cultural significance of her residence. This ground must be rejected.

3. The Board's analysis of the status of road use agreements is reasonable and lawful.

In her third ground for rehearing, Mrs. Price alleges that the road agreement was not yet completed, that without a road agreement in place the Project would not happen, that Applicant's witness Mawhorr testified that the road at the end of Mrs. Price's drive would have to be changed, that Richland County Engineer Beck testified that roads should be built up before construction so they are safe, and that it was a violation of her rights not to have safe roads which her "tax dollars have been used for." (Memorandum in Support, p. 1.)

The approved conditions of the Stipulation do not support Mrs. Price's implication that roads will not be safe as a result of the Project. At pages 67-68 of the Certificate, the Board noted that Conditions 47, 48 and 49 of the Stipulation address the subject of transportation concerns and road agreements. These conditions require the Applicant to develop route plans, make improvements outlined in the route plan, repair damage to bridges and roads caused by construction activity and obtain all required county and township transportation permits.

Conditions 72 through 78 of the Amendment to the Joint Stipulation and Recommendation (Joint Ex. 2) provide further protection of roads and bridges.

The Board pointed out that while it understood that the non-stipulating parties had concerns pertaining to the process, the fact of the matter is that the Applicant must work with the counties in arriving at a road use agreement prior to construction and that no additional conditions were required regarding transportation and road use. (Certificate, pp. 67-68.) Moreover, there is no legal requirement that road use agreements be negotiated prior to the issuance of a certificate of a major utility facility. Accordingly, this ground for rehearing must be denied.

4. The Applicant's well study was based on the Ohio Department of Natural Resources, Division of Water Well Law Database.

In her fourth ground for rehearing, Mrs. Price argues that the well study in the application was not complete because multiple wells were allegedly not included, including three on her property. No citation to the record was provided to support Mrs. Price's allegations.

Courtney Dohoney, environmental scientist at Ecology and Environment, testified that she prepared the diagram that was part of the response to the Staff Data Request dated August 5 and August 11. (Tr. 270.) She indicated that the diagram depicted private water wells was based on information from the Ohio Department of Natural Resources, Division of Water Well Law Database. (Tr. 271.) She stated under cross-examination that she believed that all wells that are drilled in the state are to be included in this database and that if the water well was not registered, she was not aware of it. (Tr. 273.) She stated that everything that was on the Ohio Department of Natural Resources, Division of Water Well Law Database, was transferred to her map. (Tr. 274.)

Ms. Dohoney also testified that she did not believe the Project would have an adverse impact on groundwater resources. (Applicant Ex. 13, A.12.) She testified that:

> The foundation for each turbine will only be approximately 8 feet deep with a 40 foot radius spreadfooter design making the foundation above the water table at nearly all the reported wells within 1,300 feet of a turbine. Further, because of the distance between each turbine and the nearest water well (at least 435 feet), it is not expected that construction activities related to excavation or dewatering will negatively impact water wells. As described in the Application, CTL Thompson, Inc, the geotechnical engineering firm who conducted a preliminary geotechnical investigation at the site, determined that impacts to groundwater resources are expected to be localized (100-200 feet) near the turbine foundation. If areas of shallow groundwater exist in the vicinity of the turbines, they will be identified during site-specific detailed foundation engineering investigation performed in conjunction with the foundation design process and addressed in the design plans.

Ms. Dohoney's testimony supports the Board's decision to issue the Certificate regardless of any claim by Mrs. Price that her wells were not considered. This ground for rehearing should be rejected.

5. There is no issue in this case regarding television and cell phone reception.

In her fifth ground for rehearing, Mrs. Price alleges that there was no telephone or cell phone study done and that the mitigation process was incomplete. (Memorandum in Support, p. 1.) She alleges that no baseline television and signal strength study was done and that the Applicant did not state what compensation would be offered for loss of signal. (Id.).

This ground for rehearing should be rejected. First, Mr. Stoner testified that in his experience wind turbines do not cause telephone and cell phone degradation. (Tr. 106.) At pp. 25-26 of the Staff Report, the Staff made the following observations:

> (31) Television stations most likely to produce off-air coverage to Crawford and Richland counties are those at a distance of 40 miles or less. Specific impacts to TV reception could include noise generation at low channels at the very high frequency (VHF)

> ranges within one-half mile of turbines, and reduce picture quality. Signal loss could occur after construction and the Applicant proposed to mitigate accordingly. However, the transition to digital signal has reduced the likelihood of these effects occurring.
>
> (32) The Applicant states that the facility will not impact radio, television and other communications services in the project area, and that the facility has been sited to avoid known tower structures in the project area.

Further, the Board addressed this issue at page 45 of the Certificate by adopting Conditions 57 and 58 of the Stipulation. The Board summarized those conditions as follows:

> (57) The applicant must meet all Federal Communications Commission and other federal agency requirements to construct an object that may affect communications, and, subject to Staff approval, mitigate any effects or degradation caused by wind turbine operation. For any residence that is shown to experience a degradation of TV and cell phone reception due to the facility operation, the Applicant shall provide, at its own expense, cable or direct broadcast satellite TV service and/or cell phone service.
>
> (58) At least thirty days prior to the pre-construction conference, the Applicant shall complete a baseline TV reception and signal strength study and provide the results to Staff for review and acceptance.

Conditions 57 and 58 address Mrs. Price's concern with respect to television and cell phone reception. This ground for rehearing should be rejected.

6. The Certificate requires the posting of decommissioning funds prior to turbine construction.

In her sixth ground for rehearing, Mrs. Price alleges that the Applicant did not want to ensure funding for decommissioning and she argued that funds must be in place from the time the turbines are built. (Memorandum in Support, p. 1.) She questions what would happen if a tornado came through and damaged the turbines beyond repair and she also questions whether funds would be available to repair, replace or remove turbines and fix roads again. She also questioned whether the Applicant, owner or operator was responsible for these funds and what

would happen if the Applicant, owner or operator were to file bankruptcy before providing decommissioning funds.

Mrs. Price's ground for rehearing has been addressed by the Board at pages 48-49 of the Certificate as the Board adopted Condition 66(h) of the Stipulation. That condition requires the posting of decommissioning funds, a surety bond or financial assurance before the scheduled construction of each turbine. Mrs. Price's ground for rehearing should be denied.

7. The Board's analysis and conclusion that no additional Conditions beyond those set forth in the Stipulation should be imposed with respect to noise has ample evidentiary support.

In her seventh ground for rehearing, Mrs. Price summarizes various parts of testimony from Kenneth Kaliski but presents no clear grounds for rehearing. (Memorandum in Support, pp. 1-2.) Mrs. Price appears to critique the placement of the background sound monitors used by Mr. Kaliski in his studies. However, Mr. Kaliski testified at length regarding the location of the monitors used for his background noise study, noting that the results of one monitor were not included as it had a very high LEQ level. (Tr. 417.) He also testified that in his opinion, the monitoring sites used were satisfactory to provide a sampling of noise levels in the project area. (Tr. 449.)

Mrs. Price also writes that construction equipment was present near monitor H during the measuring period, but does not cite to any evidence in the record to support this claim. (Memorandum in Support, p. 2.) Instead, she lists dates that construction took place, information that is not in the record and accordingly should not be considered by the Board when ruling on her application for rehearing.

Mrs. Price's summary of Mr. Kaliski's testimony is also deficient. For example, she ignores Mr. Kaliski's testimony that issues that increase turbine sound levels such as blade wear

or gearbox deterioration also affect the power output of turbines, and that those issues would be addressed via normal maintenance of turbines. (Tr. 424.) Mr. Kaliski was also correct that the Applicant must provide a final sound study prior to construction pursuant to Condition 51 of the Stipulation. (Tr. 426; Certificate at p. 44.)

Contrary to any critique by Mrs. Price, the evidence in the record fully supports the Board's analysis and conclusions regarding turbine operational noise. Accordingly, the Board should not grant rehearing as to any part of Mrs. Price's statements in part 7 of her memorandum in support.

8. The Board's Opinion, Order and Certificate addresses issues with respect to turbine maintenance.

In her eighth ground for rehearing, Mrs. Price alleges that Courtney Dohoney testified that the manufacturer of the turbines will maintain the turbines. (Memorandum in Support, p. 2.) Mrs. Price questions whether the turbine manufacturer will answer to anyone if large parts must be trucked in for repairs. In posing the question, Mrs. Price ignores the conditions in the Stipulation and the Amendment to the Stipulation requiring the Applicant to follow local county heavy load rules as well as comply with all local permitting requirements. (See Conditions 49 and 72-78 of the Amendment to the Stipulation and p. 43 and pp. 50-52 of the Certificate.) This ground for rehearing should be rejected.

9. The Board reasonably and lawfully relied upon the testimony of Dr. Diane Mundt in finding that there was no credible support for a determination that there are negative health consequences associated with living near wind turbines.

In her ninth ground for rehearing, Mrs. Price lists several criticisms of Dr. Diane Mundt's testimony. (Memorandum in Support, p. 2.) Mrs. Price claimed that wind turbines were not Dr. Mundt's field of study, that she only reviewed literature written by other people, that because there was only limited literature on shadow flicker and health outcomes that she had to rely on

other literature, that she had never seen or treated patients, that she was brought in to testify only to add more confusion, and that the literature that Dr. Mundt referred to should have been entered into evidence.

Dr. Diane Mundt, an epidemiologist, testified on behalf of the Applicant. Epidemiology is the field of public health that studies the incidents, prevalence, and distribution of disease -- as well as risk factors that are associated with disease -- in human populations. (Applicant Ex. 20, A.6.) Epidemiologists use standard scientific methods to identify and interpret statistical correlations between disease occurrence and disease risk factors and other associated factors. Epidemiological evidence is key to determining the causal relationship, if any, between various risk factors and the occurrence of disease. (Id.)

Her testimony was that she had based her analysis on a critical review and emphasis of the available epidemiological literature, as well as her professional training and experience in applying epidemiological concepts and methods to diverse human health issues. (Applicant Ex. 20, A.8.) The key point of Dr. Mundt's testimony, as recognized by the Board, was her statement that, based on her review of the relevant published peer-reviewed scientific literature, she found no consistent or well-substantiated causal connection between residential proximity to industrial wind turbines and health effects. (Id., pp. 6-12.) She also testified that she resided near a commercial wind turbine, further bolstering her testimony. (Tr. 468.)

The Board found Dr. Mundt's testimony convincing and held that there was no credible support for a determination that there are negative health consequences associated with living near wind turbines. Mrs. Price does not cite any evidence to the contrary in her application for rehearing. Accordingly, this ground for rehearing must be rejected.

10. The Board properly found that the Applicant followed the Board's rules with respect to service of the application on public libraries.

In her tenth ground for rehearing, Mrs. Price alleges that the application should have been served upon the Crestline Public Library. (Memorandum in Support, p.3.) With respect to the Crestline Library, the Board's rules do not require that the Crestline Public Library receive a copy. Rule 4906-5-06 of the Ohio Administrative Code indicates that the Applicant shall place either a copy of the accepted, complete application or a notice of the availability of such application in the main public library of each political subdivision as referenced in Division B of 4906.06 of the Revised Code. Section 4906.06(B), Revised Code requires that the Applicant serve a copy of the application on the chief executive officer of each municipal corporation and county and the head of each public agency charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

No part of the facility is proposed to be within the Village of Crestline, Ohio. Copies of the application were placed in other libraries, for example in Bucyrus, the county seat of Crawford County, and in Mansfield, the county seat of Richland County. (See Applicant Ex. 2, June 17, 2011 Certificate of Service.) The Applicant followed the Board's rules with respect to service of the application on libraries. This ground must be rejected.

11. The Board properly clarified that all conditions of the Stipulation apply to any entity that, at the time of each of these phases in the life of the project, is the entity ultimately responsible for the construction, operation, maintenance, or decommissioning of the project.

In her eleventh ground for rehearing, Mrs. Price states that the use of the three terms "Applicant, Owner and Operator" were never clearly defined and their responsibilities were not explained. (Memorandum in Support, p. 3.)

The Board did in fact provide an explanation and clarification on the difference between the terms "Applicant, Owner and Operator." At page 70 of the Opinion, Order and Certificate, the Board stated:

> Lastly, we would note that, during the hearing, concerns were raised regarding who the Applicant is and what is the Applicant's relationship to other corporate entities. We further note that, most often, the conditions of the Stipulation apply, on their face, to "the applicant." However, several conditions of the Stipulation, e.g., Conditions 48 and 66 make reference to and, on their face, appear to impose certain obligations on, in some instances, "the facility owner and/or operator" and on, in other instances, "the applicant, the facility owner and/or facility operator." We clarify that all conditions of the Stipulation that we are approving in this order apply to any entity that, at the time of each of these phases in the life of the project, is the entity ultimately responsible for the construction, operation, maintenance, or decommissioning of the project.

Given the Board's explanation quoted above, this ground for rehearing should be denied.

12. Questions were answered so as the Board had ample evidence to approve the application.

Mrs. Price claims that she left the hearing with more questions than answers. (Memorandum in Support, p. 3.) She claims, with no reference to the record, that many questions asked by the Administrative Law Judges, Staff, Richland County and the other intervenors were not answered. The Administrative Law Judges, the Staff and the intervenors, however, had the right to ask questions of witnesses during the hearing. Mrs. Price cross examined multiple witnesses and had ample opportunity to ask questions. That is one of the purposes of a hearing. The Applicant disagrees with Mrs. Price's assertion that there were a lot of questions unanswered. The Board's Certificate discloses a great deal of information and testimony provided in response to questions. As ample information existed in the record to allow the Board to issue the Certificate, Mrs. Price's last ground for rehearing should be rejected.

III. CONCLUSION

For the foregoing reasons, the Board should deny or strike each of the grounds for rehearing raised by Intervenors Mr. Biglin, Mr. Price and Mrs. Price.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via U.S. Mail, postage prepaid, upon the following persons this 27th day of February, 2012:

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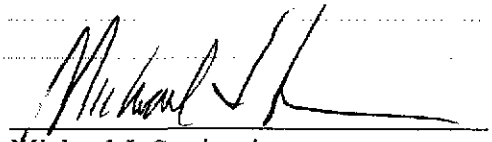

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