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BEFORE THE OHIO POWER SITING BOARD

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| 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 |

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**MEMORANDUM CONTRA OF BLACK FORK WIND ENERGY, LLC TO THE APPLICATIONS FOR REHEARING OF MR. BRETT A. HEFFNER AND MR. JOHN WARRINGTON**

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## MEMORANDUM CONTRA OF BLACK FORK WIND ENERGY, LLC

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## I. INTRODUCTION

Pursuant to Rule 4906-7-17(E) of the Ohio Administrative Code ("OAC"), Black Fork Wind Energy, LLC (the "Applicant") submits this memorandum contra to the February 21, 2012 applications for rehearing of intervenor Brett A. Heffner and intervenor John Warrington. Each of these two 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

The Applicant will address each of the grounds raised by each of these two intervenors in this memorandum contra.

### A. Application for Rehearing of Intervenor Brett A. Heffner

As an initial point, the Applicant has filed a motion to strike certain portions of Mr. Heffner's memorandum in support that reference an audio compact disc that was not served on

the Applicant (although Board rule 4906-7-06 requires the service of all pleadings and papers associated with an application for rehearing) and that was not part of the evidentiary record in this proceeding.[1] Subject to the Board's consideration of the motion to strike, the Applicant responds as follows to Mr. Heffner's application for rehearing.

**1. The Board did not err in allowing evidence of a non-unanimous stipulation to be introduced.**

In his first ground for rehearing, Mr. Heffner claims that the focus of the adjudicatory hearing was unreasonably and unlawfully shifted to the stipulation instead of to the application or the Staff Report. (Memorandum in Support, pp. 1-2.) To support this argument, Mr. Heffner implies that his rights in the proceeding were affected by the stipulation, that the public was not made aware of the settlement conference in this proceeding before the public meeting and that significant and material changes were made without the opportunity of public inquiry. (Id. p. 2.) Mr. Heffner also claims that there was widespread misinformation about the terms "settlement," "partial stipulation" and "stipulation." (Id., p. 2.)

Mr. Heffner's claims are without merit. First, Mr. Heffner's rights were not impacted by the Stipulation as the focus of the evidentiary hearing was on both the application and the conditions proposed in the September 28, 2011 Joint Stipulation and Recommendation and the October 5, 2011 Amendment to the Joint Stipulation and Recommendation (collectively, the "Stipulation"). Having the burden of proof, the Applicant submitted into evidence the application, ten pieces of direct testimony and six pieces of additional testimony addressing all aspects of the application and the conditions proposed in the Stipulation. Intervenors, including Mr. Heffner, submitted written testimony and engaged in a robust cross examination of the

[1] See the Applicant's Motion to Strike Portions of the Application for Rehearing Filed by Mr. Brett Heffner and Memorandum Contra to His Request to Enter Recording of 9-9-11 Pre-Hearing Telephone Conference as Part of the Record and attached exhibits including affidavit by counsel.

Applicant's witnesses, Ohio Farm Bureau Federation witness Dale Arnold and Staff witness Pawley. Mr. Heffner has no basis for claiming that the Stipulation was the only focus of the hearing.

Second, Mr. Heffner's claim that no notice was given to the public regarding the settlement conference is without merit. There is no legal requirement that notice be given to the public that parties are engaged in private settlement discussions. Moreover, Mr. Heffner ignores the fact that the Administrative Law Judges issued an entry on the public docket about the settlement conference on September 12, 2011. The entry noted that the evidentiary hearing would be "called and continued" to allow the parties to participate in settlement discussions. Mr. Heffner has no basis for implying that Administrative Law Judge's decision to call and continue the evidentiary hearing to hold a settlement conference was not published.

Third, Mr. Heffner provides no evidentiary support for his claim of "wide spread misinformation" or how any confusion on his part affected his ability to participate in the evidentiary hearing. In fact, the Administrative Law Judge's September 21, 2011 entry resetting the evidentiary hearing date expressly states that it was the parties that requested additional time to continue settlement discussions and requested dates for the filing of a stipulation, if a stipulation was reached, and dates for filing testimony. That entry, which was served on Mr. Heffner, was more than sufficient to alleviate any confusion on Mr. Heffner's part

Mr. Heffner is simply wrong to claim that the focus of the adjudicatory hearing was unreasonably and unlawfully shifted to the Stipulation instead of to the application or the Staff Report. (Memorandum in Support, pp. 1-2.) The Board had ample evidence to support both the application and the Stipulation, both of which were presented into the evidence without objection by Mr. Heffner. The Board's subsequent approval of the Stipulation and grant of the Certificate

to the Applicant was reasonable, lawful and consistent with its rules. Mr. Heffner's first ground for rehearing must be rejected.

**2. The Board and the Administrative Law Judges followed the procedures set forth in the applicable provisions of the Ohio Administrative Code.**

In his second ground for rehearing, Mr. Heffner alleges that it is "unreasonable and unlawful to conduct a procedure called a hearing, preside over it with persons called judges, and practice before them with entities called attorneys and parties and under the rules of procedure include as a general provision the ability for the presiding officers to 'waive any requirement, standards, or rule set forth in this chapter or prescribe different practices or procedures to follow in this case.'" (Application for Rehearing, p. 2.) Mr. Heffner goes on to state that un-transcribed or off the record conversations with the Administrative Law Judges violated the rules and procedures which were laid down in front of all the parties, but were then ignored and countermanded in subsequent process. (Memorandum in Support, p. 2.) Mr. Heffner provided no citations for these claims.

The Applicant submits that the Board and the Administrative Law Judges followed procedural rules and did not violate them. To the extent there were off the record discussions, as there usually are in most hearings, these discussions were held in front of all parties. Moreover, as the record reflects, Mr. Heffner fully participated in the evidentiary hearing by filing testimony, cross examining witnesses and given closing statements. There is simply no basis for Mr. Heffner's second ground for rehearing.

### 3. The Staff Report is part of the record in this case and intervenors had the opportunity to cross-examine all of the Applicant's witnesses as well as Staff witness Pawley.

In his third ground for rehearing, Mr. Heffner alleges that the Certificate is unlawful claiming that the Staff Report and "Staff Opinion" were used extensively in the Board's formation of findings of fact and conclusions of law, but that the Staff Report was not treated as evidence in the adjudicatory hearing and citizen intervenors were not permitted to cross-examine the authors of the Staff Report, nor were intervenors permitted to cross-examine other signatories to the Stipulation. (Application for Rehearing, p. 2.)

It must be remembered that pursuant to Rule 4906-5-05(D)(3) of the OAC, the Staff Report shall become part of the record in a certificate case. Nevertheless, Staff provided the testimony of John Pawley as the team project leader to be cross-examined on both the Staff Report and the Stipulation. Moreover, the burden of proof in certificate cases is on the Applicant, not the Staff. The Applicant made available its witnesses for cross-examination and those witnesses testified both as to the contents of the application and the conditions proposed in the Stipulation. The record is clear that the intervenors were provided the opportunity to cross-examine all of the Applicant's witnesses and the Staff witness. Lastly, while Crawford County may have filed testimony in this case, it elected to not present its witnesses and appropriately, that testimony was not received into evidence. Mr. Heffner's third ground for rehearing must be rejected.

**4. There is no evidence that the Board did not review the evidence nor did the Board improperly delegate authority to the Administrative Law Judges.**

In his fourth ground for rehearing, Mr. Heffner alleges that the Certificate is unreasonable and unlawful as the Board did not review evidence and testimony. (Application for Rehearing, p. 2.)

Mr. Heffner provides no evidence that shows that the Board did not review the evidence of record. Mr. Heffner's argument is similar to the one raised by Mr. Biglin, who felt that the Board improperly delegated authority to the Administrative Law Judges.

The Board rejected a similar argument regarding the delegation by the Board to the drafting of an order by an administrative law judge in re Buckeye Wind LLC, Case No. 08-666-EL-BGN, *Entry on Rehearing, July 15, 2010 at pp. 36-37*:

> (90) In considering this issue, the Board is mindful of the 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.

Considering this authority, Mr. Heffner's fourth ground for rehearing should be rejected.

**5. It is reasonable and lawful for the Administrative Law Judge to schedule time for a settlement conference and to provide all parties more time to prepare for the hearing.**

In his fifth ground for rehearing, Mr. Heffner alleges that the Administrative Law Judge unreasonably and unlawfully made a motion and subsequent expedited ruling without showing good cause. (Application for Rehearing, p. 2.) He claims that at the September 9 pre-hearing teleconference involving all parties, it was wrong to grant a request that the September 19 hearing date be converted into a settlement conference. (Memorandum in Support, p. 5.)

The Administrative Law Judge did not make a motion or issue an expedited ruling pursuant to Rule 4906-7-12(C) of the OAC; he simply ruled upon a request for a procedural matter as permitted under Rule 4906-7-10(A)(7) which governs prehearing conferences. Further, the Attorney Examiner issued an Entry on September 12, 2011 pursuant to Rule 4906-7-10(C) memorializing the request and the grant to convert the September 19 hearing into a settlement conference.

Mr. Heffner has also failed to show any prejudice resulting from the Administrative Law Judge's decision to grant the request to call and continue the evidentiary hearing. Mr. Heffner also failed to take an interlocutory appeal from such an Entry. Mr. Heffner's fifth ground for rehearing should be rejected.

**6. The Administrative Law Judge lawfully converted the September 19 hearing date to a settlement conference by virtue of Rules 4906-7-10 and 4906-7-14 of the Ohio Administrative Code.**

In his sixth ground for rehearing, Mr. Heffner claims that there was an alleged motion made by Assistant Attorney General John Jones to call and continue the September 19 hearing. (Application for Rehearing, p. 3.) Mr. Heffner claims that such a motion was invalid and the subsequent ruling by the Administrative Law Judge was therefore invalid. (Id.) Mr. Heffner

relies on Rule 4906-7-12(A) of the OAC that requires that all motions, unless made at a public hearing or transcribed pre-hearing conference, or otherwise ordered for good cause shown, shall be in writing and shall be accompanied by a memorandum in support. (Memorandum in Support, p. 6.) However, Rule 4906-7-10 of the OAC authorizes an administrative law judge to rule on any procedural matter the administrative law judge considers appropriate. This rule is in accord with Rule 4906-7-14 of the OAC which authorizes the Administrative Law Judge to rule in writing "upon any procedural motion or other procedural matter." (Emphasis added.) Mr. Jones' request was not a motion but a request regarding a procedural matter. Again, Mr. Heffner has cited no prejudice to converting the September 19 hearing to a settlement conference.[2] This ground should be rejected.

**7. The Administrative Law Judge reasonably and lawfully resolved a procedural matter involving converting the September 19 hearing to a settlement conference.**

In his seventh ground for rehearing, Mr. Heffner alleges that the Staff should have filed a motion pursuant to Rule 4906-7-12(C) of the OAC with respect to his request to convert the September 19 hearing to a settlement conference. (Application for Rehearing, p. 3.) Mr. Heffner also complains that the Administrative Law Judge issued a ruling prior to all parties having the opportunity to object to what Mr. Heffner frames as an "expedited ruling." (Id.)

As explained above, the Staff's request to convert the September 19 hearing to a settlement conference was a procedural matter which could be disposed of via a procedural ruling by the Administrative Law Judge pursuant to Rules 4906-7-10 and 4906-7-14 of the OAC. No motion was necessary to rule upon such a procedural matter. Mr. Heffner's seventh ground for rehearing should be rejected.

[2] The settlement conference was not a vain act as the Stipulation resulted in a settlement between Staff, the Applicant, the Ohio Farm Bureau Federation and the Crawford County intervenors. (See Joint Ex. 1 and Joint Ex. 2.)

**8. The request by the Staff was a procedural matter and could be made by the Staff pursuant to Rule 4906-7-14 of the Ohio Administrative Code.**

In his eighth ground for rehearing, Mr. Heffner claims that the Staff is not a party for purposes of pre-hearing telephone conferences and therefore could not have been considered a party to any hearing. (Application for Rehearing, p. 3.)

Mr. Heffner has misinterpreted Rule 4906-7-03 of the OAC. Subsection C provides that except for purposes of rules 4906-7-05, 4906-7-06, paragraph C of 4906-7-07, paragraph I of 4906-7-07, and rules 4906-7-09, 4906-7-11, 4906-7-12, 4906-7-14, 4906-7-15, and 4906-7-16 of the Administrative Code, the Board's staff shall not be considered a party to any proceeding. This means that pursuant to Rule 4906-7-14 of the OAC, the Staff is a party to a proceeding and can make a request for a procedural matter which the Administrative Law Judge has the authority to address. Moreover, nothing in Rule 4906-7-10 precludes Staff counsel from participating in the prehearing conference. Thus, Mr. Jones' request was appropriate. Again, Mr. Heffner has not cited any prejudice. This ground must be rejected.

**9. The filing of the Joint Stipulation and Recommendation on September 28, 2011 did not impose an unreasonable and unlawful burden on the intervenors.**

In his ninth ground for rehearing, Mr. Heffner complains that the hearing on October 11 gave the intervenors less than three days to react to a "completely novel agreement without time to secure witnesses to testify concerning such an agreement." (Application for Rehearing, p. 3.) He complains that all of the intervenors pre-filed testimony became inactive and they had to start from scratch on testimony regarding the Stipulation. (Id.)

Mr. Heffner's statements are not true. First, the intervenors knew as early as September 9 that there was a potential for a settlement agreement because the September 19 hearing was

converted to a settlement conference (a conference that was open to all parties). Further, the Joint Stipulation and Recommendation was filed on September 28 and served via overnight, giving the intervenors seven calendar days to prepare any testimony. (See Joint Ex. 1.)

In fact, as evidenced by the Administrative Law Judges September 21, 2011 entry resetting the hearing date, it was the parties and not the Administrative Law Judge that proposed the dates for the filing of any stipulation and the dates for filing testimony. Mr. Heffner also made no objection at the hearing to the introduction of the Stipulation, stating that "I have nothing to say about it." (Tr. 679.) Mr. Heffner's ninth ground for rehearing must be rejected.

**10. Discussions between the Board's Staff, counsel for the Board's Staff, and the Applicant do not constitute prohibited ex parte discussions.**

In his tenth ground for rehearing, Mr. Heffner alleges that the Board's Staff and counsel for Board's Staff unreasonably and unlawfully conducted numerous ex parte discussions with the company. (Application for Rehearing, p. 3.) He goes on to state that there was no journalized evidence in support, but to just ask any of the citizen intervenors what they observed at the hearing. (Memorandum in Support, p. 9.)

Rule 4906-7-02 of the OAC prohibits a board member or Administrative Law Judge assigned to a case from discussing the merits of the case with any party or intervenor to the proceeding. It does not prohibit discussions between the Staff or Staff's counsel and the Applicant or any other party. This ground must be rejected.

**11. The application was properly deemed complete and was part of the adjudicatory hearing.**

In his eleventh ground for rehearing, Mr. Heffner alleges that the application was unreasonably and unlawfully deemed complete. (Application for Rehearing, p. 3.)

First, the Board has previously held that an intervenor in a Board proceeding lacks standing to oppose the grant or denial of an Applicant's request for waiver from the Board's Detailed Certification Application Filing Requirements. (See In re Buckeye Wind, Case No. 08-666-EL-BGN, Entry, July 31, 2009 at p. 8.) Mr. Heffner's claim, at this late date, that the application was incomplete is akin to objecting to a request for a waiver. In addition, Mr. Heffner was present when the application was marked and introduced into evidence as Company Exhibit 1. (TR. 29, 31, and 205-206.) By failing to object to its admission at the hearing, Mr. Heffner has waived any claim to raise the issue of the "completeness" of the application.

Mr. Heffner goes on to claim that because no specific turbine was chosen, this somehow made the application incomplete because it violated Rule 4906-17-03 of the OAC. (Memorandum in Support, p. 9.) This is not correct. Rule 4906-17-03(A)(1) of the OAC expressly contemplates that a specific model may not be chosen at the time the application is filed:

> (1) For its proposed project area and any alternative project area(s), the Applicant shall submit:
>
> (a) Type(s) of turbines or, if a specific model of turbine has not yet been selected, the potential type(s), estimated number of turbines, estimated net demonstrated capability, annual capacity factor, hours of annual generation, and the project developer to be utilized for construction and operation of the facility, if different than the Applicant.

At page 9 of the application (Applicant Ex. 1), the Applicant stated:

> Currently, the Project is designed to utilize up to 91 Vestas V100 turbines, each with a 1.8 MW nameplate capacity. The total generating capacity for these turbines is 163.8 MW. While the Vestas V100 turbine is the currently preferred turbine model, the Applicant is considering a variety of other turbine models,

> including the General Electric 1.6 XLE and Siemens SWT-2.3-101 models as well as others, ranging from 1.6 MW up to 3.0 MW.

Mr. Heffner's claim is wrong as the Applicant clearly fulfilled the requirement of Rule 4906-17-03(A)(1)(a) of the OAC.

Mr. Heffner goes on to suggest that because sites are movable after the certification, there is no "final version of layout or construction" available in contravention to Rule 4906-17-03 of the OAC. (Memorandum in Support, p. 9.) This is incorrect. Condition 67, as summarized at page 49 of the Certificate, requires one set of detailed engineering drawings of the final project design including all turbine locations at least 30 days prior to the preconstruction conference. Condition 68, summarized at page 50 of the Certificate, requires that any changes made to the project layout after the submission of final engineering drawings are to be provided to Staff and are subject to Staff review and approval prior to construction. As well, Condition 69 of the Stipulation, summarized at page 50 of the Certificate, requires the Applicant to submit as-built drawings to Staff after construction is complete. Contrary to Mr. Heffner's claims, detailed final engineering drawings will be submitted to Staff prior to construction.

Mr. Heffner also claims that the application did not contain a description of the Applicant's public interaction programs as required by Rule 4906-17-08(E)(1) of the OAC. (Memorandum in Support, p. 9.) He cites the Staff Report at page 47. (Id.) Mr. Heffner is incorrect. Rule 4906-17-08(E)(1) requires the Applicant to describe the Applicant's program for public interaction for the siting, construction, and operation of the proposed facility, i.e. public information programs. The Applicant provided such information at pages 138-139 of the application. (Applicant Ex. 1, pp. 138-139.) The application was introduced and admitted into evidence as Company Exhibit 1 without objection from any party, including Mr. Heffner. Mr. Heffner's claim must be rejected.

Finally, Mr. Heffner claims that there was conflicting information from the Administrative Law Judges as to whether the application was part of the adjudicatory hearing or not part of the adjudicatory hearing. (Memorandum in Support, p. 9.) The Administrative Law Judges did not confuse or mislead the intervenors. The Stipulation is the primary focus of the hearing but the Applicant, with the burden of proof, introduced the application and testimony supporting both the application and the Stipulation. Mr. Heffner was present but did not object to the admission into evidence of either the application or the Stipulation. Mr. Heffner's claim must be rejected. (Tr. 205-206; Tr. 679.)

**12. The Administrative Law Judge did not err when he converted the scheduled September 19 adjudicatory hearing to a settlement and stipulation conference in an untranscribed prehearing teleconference over the objection of the various parties.**

In citing an alleged audio of the September 9 prehearing teleconference (which is inadmissible and should not be considered), Mr. Heffner alleges in his twelfth ground for rehearing that the Administrative Law Judge unreasonably and unlawfully converted the adjudicatory hearing scheduled for September 19 to a "settlement and stipulation" conference. (Application for Rehearing, p. 3.)

The Administrative Law Judge did not err. First, converting the scheduled adjudicatory hearing to a settlement conference is a procedural matter which the Administrative Law Judge can rule upon pursuant to Rules 4906-7-14 and 4906-7-10 of the OAC. In fact, he memorialized his decision by Entry of September 12, 2011 pursuant to Rule 4906-7-10(C). Mr. Heffner filed no interlocutory appeal from this Entry. But more importantly, Mr. Heffner fails to show any prejudice from the ruling. In fact, the ruling gave the interveners an opportunity to be at and participate in the settlement conference. Further, continuing the hearing gave the interveners additional time to prepare for the hearing. There is nothing unreasonable or unlawful about the

Administrative Law Judge's decision to call and continue the September 19 evidentiary hearing to allow the parties to hold a settlement conference. This ground must be rejected.

**13. The testimony of Mr. Stoner on the topic of wind energy projects impacting property values was properly admitted into evidence.**

In his thirteenth ground for rehearing, Mr. Heffner claims that the Certificate was unreasonable and unlawful because it improperly allowed Mr. David Stoner to testify as an expert with respect to the potential concern about wind energy projects impacting property values. (Application for Rehearing, pp. 3-4.) Mr. Heffner claims that Mr. Stoner was not an expert in real estate and that the Administrative Law Judges did not research into the actual work histories of the wind industry employees. (Memorandum in Support, pp. 13-14.)

To the contrary, Mr. Stoner has a long history of developing utility facilities, including wind farms. Mr. Stoner testified that he had worked for over 25 years in the electric utility and independent power business, primarily in project development, and including specifically overseeing the development of wind energy projects for the last eight years. (Applicant Ex. 7, p. 1.) He also held the following positions prior to joining Element Power in 2009:

- Senior Vice President – Development with BP Alternative Energy (2006-2009) , overseeing wind project development in the eastern U.S. and nationwide;
- Director – Development with Greenlight Energy (2003-2006), directing wind energy project development nationwide;
- Vice President – Development with Newport Generation (2000-2002, directing natural gas-fired project development nationwide;
- Development Director, then Vice President and Managing Director –Europe for Entergy Power Group (1996-2000), with responsibility for directing gas-fired project

development in the UK and then overseeing all of Entergy's power development activities in Europe;

- Manager, Director, then Vice President – Development with Westmoreland Energy (2000-2006) overseeing coal and gas-fired project development nationwide and internationally; and
- Various positions with PA Power & Light (1983-1999), responsible for permitting and environmental studies of utility facilities.

(Applicant Ex. 7, A.3.) Mr. Stoner also testified that he had a B.S. degree in Environmental Research Management from the Pennsylvania State University and an M.S. degree in Civil Engineering from Lehigh University. (Id.) Given his experience and graduate degree in engineering, Mr. Stoner was more than qualified to testify regarding his opinions on property values.

The Board also noted that Mr. Stoner testified that, based on his experience, the proposed Black Fork facility would likely have no negative impact on property values in the area. (Tr. 36.) Mr. Stoner testified that while clearly the project would positively and directly impact both Black Fork and those who have signed leases, the broader community could also expect to gain in terms of tax revenue and economic development. (Tr. 44.)

After hearing the arguments of both parties (Tr. 68-70), the Administrative Law Judge overruled the objection and permitted testimony on the impact on property values from wind projects by Mr. Stoner. This ruling was correct.

Ohio evidence rule 702 provides in pertinent part:

> A witness may testify as an expert if all of the following apply:

(a) the witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(b) the witnesses qualify as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(c) the witness' testimony is based on reliable scientific, technical or other specialized information.

Mr. Stoner's testimony on the topic of wind energy projects related to matters beyond the knowledge or experience possessed by lay persons and also dispelled a misconception common among lay persons. Mr. Stoner is qualified as an expert by his specialized knowledge in the wind industry, his education and his experience regarding the subject matter of his testimony. (Applicant Ex. 7, A.3.) Mr. Stoner's testimony is based on specialized information that he possesses by reason of his experience with various wind industry projects. Thus, Mr. Stoner was qualified to offer an opinion as an expert on this topic. This ground for rehearing must be denied.

**14. Section 4906-10(A)(1), Revised Code does not require that the Board address the basis of the need for a non-transmission line facility.**

In his fourteenth ground for rehearing, Mr. Heffner claims that the Certificate is unreasonable and unlawful as it does not adequately address the basis of need pursuant to Section 4906.10(A)(1), Revised Code. (Application for Rehearing, p. 4.) Mr. Heffner is incorrect.

Section 4906.10(A)(1), Revised Code provides in relevant part:

> 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 all of the following: (1) The basis of the need for the facility <u>if the facility is an electric transmission line or gas or natural gas transmission line</u>. (Emphasis added.)

The Applicant is proposing to construct and operate a wind powered electric generation facility, not an electric transmission line nor a gas or natural gas transmission line. Given the statutory language, Staff was correct that Section 4906.10(A)(1), Revised Code is not applicable to this electric generating facility project. (Staff Ex. 2 ,p. 17. ) Section 4906.10(A)(1), Revised Code is not applicable and this ground for rehearing must be rejected.

**15. The Board acted in accordance with its governing statutes when issuing the Certificate.**

In his fifteenth ground for rehearing, Mr. Heffner criticizes the legislature for the structure and jurisdiction of the Ohio Power Siting Board. (Application for Rehearing, p. 4.) That argument is best presented to the General Assembly; the Board does not have authority to consider such issues. Mr. Heffner goes on to claim that it is unreasonable and unlawful for the Board to not be bound to the Stipulation, allowing it to make material changes to a certificate without the opportunity of a public hearing. (Id.)

The General Assembly, however, has given the Board express authority and discretion to grant an application "... upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate." (ORC § 4906.10(A), emphasis added.) The Board's ability to impose terms and conditions is very important because the Board evaluates applications for proposed projects, not constructed projects. (See ORC § 4906.04, stating "[n]o person shall commence to construct a major utility facility in this State without first having obtained a certificate for the facility.") There is no legal requirement that the Board must be a party to a stipulation. Indeed, requiring the Board to sign a stipulation is akin to asking a judge to sign a class action settlement agreement even though it is the judge that must approves the settlement. That makes no sense.

Mr. Heffner also argues that the general public did not have an opportunity to comment on the Stipulation at the public hearing. First, there is no legal requirement that the Board hold a public hearing on a stipulation, whether partial or full. Instead, under current law, the Board must hold the public hearing on the application no later than 90 days after the filing of the complete application. (ORC § 4906.07.) In this case the application was deemed filed on June 21, 2011 and the public hearing was set for Thursday, September 15, 2011 (with Sunday, September 18, 2011 being the 90 day limit). As a practical matter, the filing of stipulations after public hearings is a practice that occurs often in proceedings before the Commission and the Board. Arbitrarily delaying public hearings would be extremely disruptive to the general public considering that public notices are issued well in advance of the public hearing date. Moreover, as Mr. Heffner is aware, the general public in this case did have the ability to provide testimony on the proposed Project before the Administrative Law Judges. That is the purpose of the public hearing and the testimony from that hearing was considered by the Board. (Certificate, p. 3.)

Finally, Mr. Heffner argues that non-participating landowners will have no way of mitigating injuries. (Memorandum of Support, p. 16.) The General Assembly, however, has vested the Board with oversight over the construction, operation and maintenance of major utility facilities as approved in a certificate of environmental compatibility and need. (ORC § 4906.98.) In addition to the statutory compliant process, the Certificate provides non-participating landowners the ability to submit complaints and to engage in a complaint resolution process. (Certificate, p. 36.) Mr. Heffner's fifteenth ground for rehearing must be rejected.

**16. Courts of Common Pleas, not the Ohio Power Siting Board, are invested with jurisdiction to restrain and enjoin violations of Sections 1331.01 to 1331.14 of the Revised Code.**

In his sixteenth ground for rehearing, Mr. Heffner alleges that the Certificate is unlawful as it violates the Valentine Anti-Trust Act of 1898, as codified in Ohio Revised Code 1331.

(Application for Rehearing, p. 16.) He claims that his pre-filed testimony of September 15, 2011 at page 8, item 26 indicates that the Valentine Anti-Trust Act of 1898 codified in O.R.C. 1331 will invalidate many contracts, making the project as proposed unworkable. (Id.) He states that landowners should have had access to contracts from competing companies before the project boundaries were drawn. (Id.) He states that there is no evidence that any or all landowners were offered a contract by more than one company for any parcel. (Id.) He states that the unique quality of a public utility cannot be used as justification, as the Applicant maintains that it is not a public utility. Mr. Heffner goes on to quote various portions of Chapter 1331 of the Ohio Revised Code.

The Valentine Act, as codified in Chapter 1331 of the Revised Code, was patterned after the federal Sherman Anti-Trust Act. Although he has quoted various sections contained within Chapter 1331 of the Ohio Revised Code, Mr. Heffner failed to cite Section 1331.11, Revised Code which provides in part:

> Courts of Common Pleas are invested with jurisdiction to restrain and enjoin violators of sections 1331.01 to 1331.14 of the Revised Code. For a violation of such sections, the attorney general, or the prosecuting attorney of the proper county, shall institute proper proceedings in a court of competent jurisdiction in any county in which there is proper venue.

*Thus, Courts of Common Pleas, not the Board, are invested with jurisdiction to determine if* violations of the Valentine Anti-Trust Act of 1898 have occurred.

Just as important, the General Assembly has not vested the Board with the task of regulating competition among power plant developers. (See ORC §§ 4906.03 and 4906.10.) In this case, the Board approved the Project as proposed in the application and the Stipulation, applying the applicable statutory criteria set forth by the General Assembly. That criteria does

not include ensuring that landowners have the opportunity to select their preferred developer. This ground for rehearing must be rejected.

### B. Application for Rehearing of Intervener John Warrington

#### 1. The Administrative Law Judges properly excluded Mr. Warrington's testimony and attempt to have a real estate expert testify by Skype teleconference.

In his first ground for rehearing, Mr. Warrington claims that the Board lacks the ability to render an objective and non-biased decision. (Application for Rehearing, p. 1.) He stated that the Board acted only as enablers of industrial wind installation in Ohio. (Id.) He also stated that the Board had complete disregard for testimony or criteria which disagreed with its industrial wind agenda. (Id.)

Mr. Warrington alleged that his intervention document, which he claims was used by permission of Mike McCann Real Estate, should have been considered; that the installation of 91 industrial wind turbines would have a negative impact on real estate value and that his real estate expert should have been permitted to testify by a Skype teleconference. (Memorandum in Support, p. 1.)

Ohio Evidence Rule 702 provides in pertinent part:

> A witness may testify as an expert if all of the following apply:
>
> (a) the witness' testimony either relates to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons;
>
> (b) the witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony;
>
> (c) the witness' testimony is based on reliable scientific, technical, or other specialized information . . .

Mr. Stoner's testimony related to matters beyond the knowledge or experience possessed by laypersons and was attempting to dispel a misconception common among laypersons. Mr. Stoner was qualified as an expert because of his specialized knowledge and experience regarding wind projects and their impact on property values. His testimony was based on specialized information as a result of his experience. Thus, Mr. Stoner's testimony was admitted into evidence. (Tr. 70; Tr. 111.)

Unlike Mr. Stoner, Mr. Warrington was not qualified as an expert witness to render an opinion. Mr. Warrington admitted that he was not qualified as an expert. (Tr. 694-697). Thus, much of Mr. Warrington's testimony was stricken and Mr. Stoner's testimony was not. Such a distinction was made based upon Ohio evidence rules, not on any alleged inability of the Board to render an objective and non-biased decision. Mr. Warrington's first ground for rehearing must be rejected.

**2. The granting of the application does not constitute a regulatory taking without compensation.**

In his second ground for rehearing, Mr. Warrington alleges that the approval of the application in this case forces a regulatory taking of property without compensation in violation of the United States and Ohio Constitutions upon hundreds of Crawford and Richland County residents. (Application for Rehearing, p. 1.) Mr. Warrington claims that his intervention documents present the opinion of non-wind industry real estate studies that display the inevitable loss of residential value. (Memorandum in Support, p. 2.) Mr. Warrington also believes that there was a very real possibility of a total loss of marketability of a home. (Id.) He believes that the Board, by approving the application, has imposed a regulatory taking of private property without compensation and in effect a reverse condemnation of real estate. (Id.) He believes this

violated Sections 4906.10(A)(2), (3), and (6) of the Revised Code and the U.S. and Ohio Constitutions. (Id.)

As an initial point, the Board should not consider the statements Mr. Warrington makes to support his second ground for rehearing. Mr. Warrington was not qualified as an expert and large pieces of his pre-filed direct testimony were stricken from the record. However, Mr. Warrington now relies on parts of that stricken testimony to support his second ground for rehearing.

As to Mr. Warrington's constitutional claims, before compensation is required, it must be determined whether a "taking" (i.e. physical or regulatory) has occurred at all. State ex rel. Pitz v. City of Columbus, 56 Ohio App. 3d 37, 41 (Franklin Cty. 1988). The Supreme Court of Ohio has described a "taking" as follows: "any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." (Id. at 41, citing Smith v. Erie RR. Co., 134 Ohio St. 135, 142 (1938); see also State ex rel. Reich v. City of Beachwood, 158 Ohio App. 3d 588, 591 (Cuyahoga Cty. 2004) ("[t]o establish a taking ... the landowner has to demonstrate that the state has caused a substantial or unreasonable interference with his property right"). In McKee v. Akron, 176 Ohio St. 282 (1964), the Court further refined its definition to include "'something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking.'" Pitz, 56 Ohio App. 3d at 41, citing McKee, 176 Ohio St. at 285. Thus, "in order for a governmental activity to constitute a 'taking,' there must be substantial interference with the owner's property rights." Pitz, 56 Ohio App. 3d at 41.

In Pitz, the plaintiff alleged that the city's prior work to a part of his property resulted in raising the property's elevation into a flood plain. (Id.) at 38. Consequently, the plaintiff's

subsequent application to build on his property was denied as inconsistent with the zoning restrictions of building in a flood zone, and plaintiff asserted a takings claim. (Id.) The court held, however, that "[w]hile it is true that the zoning restrictions did not affirmatively permit plaintiff to build on his property, this does not constitute a "taking." (Id. at 41.) Instead, "[p]laintiff may have been inconvenienced by not being able to build on his property until completion of the legal process, but mere inconvenience is not sufficient." (Id.) Moreover, "[e]ven if plaintiff were able to show that he suffered a monetary loss due to a decline in market value of his property, under the rule of McKee ... it is still not enough to constitute a 'taking' which would require compensation." (Id. at 41-42.) Instead, the court reasoned, "there was not deprivation of continued enjoyment of use of which the property had been devoted. Rather, the issue was and is whether plaintiff can create a new use of his property." (Id. at 42.)

It should also be noted 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.)

Accordingly, Mr. Warrington's claim that the construction of the wind farm may reduce surrounding property values, does not constitute a compensable taking. See e.g. State ex rel. Reich v. City of Beachwood, 158 Ohio App. 3d 588, 593 (Cuyahoga Cty. 2004), citing McKee, 176 Ohio St. at 285 ("A reduction in economic value for land that has not been appropriated is not compensable as consequential damages; 'the fact that property is rendered less desirable as a

result of the governmental activity does not in and of itself constitute a taking so as to entitle the owner thereof to compensation.'").

In his second ground for rehearing, Mr. Warrington also claims that Sections 4906.10(A)(2), (3) and (6), Revised Code were violated as well. This is not correct.

Pursuant to Section 4906.10(A), Revised Code, 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 all of the following:

> (2) the nature of the probable environmental impact.
>
> (3) 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.
>
> (6) the facility will serve the public interest, convenience and necessity.

The Board found ample evidence to support a finding and determination that each of these three criteria were met. (See Certificate at pp. 6-11; 11-25; and 29-33.) This ground must be rejected.

### 3. The Board reasonably and lawfully granted the application by weighing and evaluating all admissible evidence from all parties.

In his third ground for rehearing, Mr. Warrington alleges that the Board created an evidentiary double standard that violated due process. (Application for Rehearing, p. 1.) He believes that the Board accepted without "evidence of research of preparation" all of the testimony in support of the application while facilitating a severe marginalization of non-participating residents within the project area by heavily scrutinizing all opposition questioning and testimony. (Memorandum in Support, pp. 2-3.) In addition, Mr. Warrington alleges that the

Board improperly delegated its authority to the Administrative Law Judges. (Memorandum in Support, p. 2.)

The Board did not create an evidentiary double standard. Mr. Stoner had the requisite experience and specialized knowledge to testify as an expert; Mr. Warrington admitted that he had no such experience or training. (TR. 694-697). Thus, the Board followed Ohio rules of evidence and permitted experts to render opinions but declined to allow non-experts to render opinions.

With respect to the argument that the Board accepted at face value all testimony in support of the application while heavily scrutinizing all opposition questioning and testimony, this is not true. The Board carefully weighed all evidence before rendering its opinion.

Mr. Warrington goes on to claim that the Board violated Section 4906.10, Revised Code, by improperly delegating its authority to the Administrative Law Judges. The Board rejected a similar argument regarding the delegation by the Board to the drafting of the Order by the Administrative Law Judge 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.

The Board should deny Mr. Warrington's third ground for rehearing.

## III. CONCLUSION

For the foregoing reasons, the Board should deny each of the grounds for rehearing raised by Intervenors Mr. Heffner and Mr. Warrington.

Respectfully Submitted,

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I certify that a copy of the foregoing document was served via U.S. Mail, postage prepaid, upon the following persons this 2nd day of March, 2012:

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