

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application )  
of Champaign Wind, LLC, for a  
Certificate to Construct a Wind-Powered)  
Electric Generating Facility in  
Champaign County, Ohio )

Case No. 12-160-EL-BGN

**INTERVENORS CHAMPAIGN COUNTY AND GOSHEN, UNION AND  
URBANA TOWNSHIPS' APPLICATION FOR REHEARING AND  
RECONSIDERATION**

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Four Champaign County political subdivisions, consisting of the Champaign County Board of County Commissioners and Boards of Trustees of Goshen, Union, and Urbana Townships (“Boards”) apply to the Ohio Power Siting Board (“OPSB”) for an order to reconsider or, in the alternative, rehear the issues identified herein prior to the issuance of the Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County (“Certificate”) to Champaign Wind, LLC (“Applicant”).

Pursuant to Revised Code § 4903.10 and Ohio Administrative Code § 4906-7-17(D), the Boards respectfully apply to the Ohio Power Siting Board to grant reconsideration on the evidence presented or rehearing for introduction of further evidence regarding the specific issues outlined herein and for the following reasons:

1. The May 28, 2013 Order (“Order”) fails to include the applicable Boards of Township Trustees as additional holders of the road and maintenance financial assurance which is to be provided by Applicant. The Order is, therefore, unreasonable and unlawful with regard to this Condition to the Certificate.
2. The Order fails to require financial assurance be provided by Applicant in the total amount of decommissioning costs prior to initial construction of the project. Therefore, the Order is unreasonable with regard to this Condition to the Certificate.
3. The Order fails to require setbacks based upon the recommendation of the turbine manufacturer if such recommendation is greater than the minimum setback set by rule. Therefore, the Order is unreasonable with regard to this Condition of the Certificate.
4. The Order is based upon evidence presented which has denied due process to the Boards. Therefore, the Order is unreasonable and unlawful with regard to the resulting decision of the OPSB.

The basis for this application is set forth in more detail in the attached Memorandum in Support.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

The intervening Boards are significantly concerned with the evident failure of the OPSB to set forth adequate protection for Champaign County's infrastructure and other interests as it relates to wind energy development.

The Boards are troubled that the Order of the OPSB approving the Champaign Wind, LLC's Application for a Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County ("Project") has failed to adequately protect the Boards' interests and the interests of the public. As a result, the Boards are seeking reconsideration or rehearing of the issues as set forth in the following memorandum.

### II. LAW

R.C. 4906.10 requires that, in order to grant a Certificate, the Ohio Power Siting Board must determine, in relevant part:

**"(A)(6) That the facility will serve the public interest, convenience, and necessity;"**

*R.C. 4906.10(A).*

The Boards are aware that the OPSB may deny, grant, or grant upon such terms, conditions, or modifications as the board considers appropriate for a certification application for a major utility facility, pursuant to the requirements set forth in R.C. §4906.10 of the Revised Code. *OAC §4906-17-01(C).*

Further, the OPSB has the authority to modify Applicant's proposal in order protect the public interest. *R.C. §4906.10(A).* In order to protect the public interest, it is proper for the OPSB to require an evaluation of the impacts of the proposed wind facility as set forth, and to deny certification or modify the proposal if the identified need could be satisfied with fewer adverse impacts. *City of Columbus v.*

*Ohio Power Siting Commission, 58 Ohio St. 2d 435 (1979); City of Columbus v. Teater, 53 Ohio St. 2d 253, 260-61 (1978).*

### **III. ARGUMENT**

**In order to serve the “public interest, convenience, and necessity” as required by R.C. 4906.10 (A)(6), the Ohio Power Siting Board must address the following areas of county and township Board concern:**

**A. Unless the Ohio Power Siting Board revises Condition 29 of the Certificate to include the relevant Boards of Township Trustees as additional holders of the bond or financial assurance to be provided and maintained by Applicant for repair of the roads and bridges, the Order is unreasonable and unlawful.**

It is the position of each Board that only the proper local governmental official or board has the expertise and legal authority to establish requirements to transport materials over such roads. For instance, the County Engineer would have the expertise to establish the requirements to transport materials over the county roads, including adequate financial assurance to cover the cost of the damage to the county roads due to the construction and the decommissioning associated with the Project. (Tr. IX, pg. 2319, line 23 to pg. 2320, line 17) However, the County Engineer and the Board of County Commissioners have no authority over township roads and would not be the entity to repair the roads if Applicant does not do so.

While the Boards are agreeable and appreciative that the OPSB has acknowledged that the Applicant will need to enter into agreements with the Board of Township Trustees for any township roads utilized in the final transportation plan, Condition 29 does not include the requirement that the relevant Boards of Township Trustees will be included as additional holders of the bond or financial assurance for repair of such roads. The Boards believe that this is just an oversight of the OPSB and staff and ask that such oversight be remedied by the

inclusion of the relevant Boards of Township Trustees as additional holders of any bond or other financial assurance for repair of township roads and bridges by revising Condition 29 as follows:

“Applicant must repair damage to government-maintained (public) roads and bridges caused by construction activity. Any damages public roads and bridges must be repaired promptly to their preconstruction state by Applicant under the guidance of the appropriate public authority. Any temporary improvement must be removed, unless the county engineer(s) *or a board of township trustees* request that they remain. Applicant must provide financial assurance to the Board of Commissioners of Champaign County *and to the relevant Boards of Township Trustees* that it will restore the public county and township roads in Champaign County it used to their preconstruction condition. . . .” (Italics denotes proposed revised language.)

R.C. §5571.02 provides that “[T]he board of township trustees shall have control of the township roads of its township and . . . shall keep them in good repair”. This obligation cannot be delegated to other entity such as the Board of County Commissioners. Therefore, the relevant Boards of Township Trustees should be included in Condition 29.

Therefore, for clarity to all the participants involved, and in order to serve the “public interest, convenience and necessity” for the maintenance of the roads and bridges within Champaign County during construction and upon decommissioning of the Project, each Board strongly urges the OPSB to revise Condition 29 as set forth herein.

**B. Unless the Ohio Power Siting Board sets forth in Condition 52(h) of the Certificate that upon the commencement of initial Project construction, Applicant is required to post financial assurance for decommissioning the**

**Project in an amount sufficient to cover the total decommissioning costs, the Order is unreasonable as to such condition.**

The Boards reiterate their prior position that the OPSB's Condition 52(h) regarding decommissioning should provide that the financial assurance posted prior to initial construction and maintained be in an amount equal to the total Decommissioning Costs and not on a per turbine basis calculated on the number of turbines constructed and under construction. The Boards believe that these revisions are consistent with the testimony of their own witness, Jonathan Knauth. (Tr. VI, pg. 1395, line 20 to pg. 1399, line 22). Mr. Knauth indicated that splitting the total costs into a per turbine cost may not reflect an adequate amount for decommissioning each turbine.

The Boards' position requesting that Applicant post and maintain a bond equal to the total decommissioning amount is based upon the belief that Applicant intends to build the number of turbines requested and approved by the OPSB. Certainly, if Applicant is not intending to build all turbines approved by the OPSB, then it should set forth such.

The OPSB has indicated that requiring a decommissioning bond or financial assurance for the entire project would be excessive assurances and costs for Applicant. Practically speaking, however, to revise the decommissioning bond or financial assurance each time construction is to begin on an additional turbine would certainly involve significant time and expense to the Staff and the Boards in reviewing the adequacy of the additional assurance. That additional time and expense would not be necessary if the total amount of the financial assurance is required prior to initial construction of the project.

Further, the initial posting of financial assurance equal to the total decommissioning amount would encourage Applicant to construct the total project in a short period of time thereby reducing the continued and prolonged damage to roads and bridges, which would also serve the public interest. Therefore, Condition 52(h) should be revised as set forth herein.



**C. Unless the Ohio Power Siting Board includes in Condition 44 the requirement that setbacks from the turbines to non-participating landowners' property lines conform to the manufacturers' setback recommendations if in excess of the minimum setback provided by rule, the Order is unreasonable as to such condition.**

The Applicant has proposed that the setbacks for the Project be the minimum standard allowed by rule, being 541 feet to a non-participating landowners property line and 919 feet from the non-participating residence. (Exhibit 1, Application, Pg. 83-84). The Staff did not recommend any greater setbacks than proposed by Applicant and the OPSB concurred.

The Boards have highlighted a "setback" found in Exhibit R-Turbine Safety Manuals (See Exhibit 1, Application) as an example of a greater setback recommended by the manufacturer. The turbine safety manual for the Gamesa model (one of the turbines proposed) sets forth that, in the event of a fire near the turbine, the area must be cleared and cordoned off in a radius of 400 meters (1,300 feet) from the turbine. (Exhibit 1, Application, Exhibit R, Pg. 42 of 44 of the Gamesa safety manual) Clearly, the area required by the subject safety manual to be cleared and cordoned off in the event of a fire near the turbine is greater than the setback proposed by Applicant. As a result, an occupied residence could be located well within the area to be cleared and cordoned off per the Gamesa safety manual.

The OPSB has indicated that the 1,300 foot setback highlighted by the Boards is only a temporary clearance area in the event of fire or overspeed and are not recommended permanent setback distances. However, whether temporary or permanent, the setback recommended by the Gamesa manufacturer is for the purpose of safety and the OPSB should not disregard such recommendation.

The OPSB relies on Staff witness Conway testimony that he had contacted the turbine manufacturers and was told that the project will exceed all manufacturers' setback recommendations. However, the safety manuals admitted

into evidence do not set forth a setback distance other than a temporary clearance setback much greater than the minimum setback allowed.

It is certainly concerning to the Boards that, in the event that there is a fire or damage to the turbine due to overspeed and personal injury or property damage occurs within the temporary clearance setback, a manufacturer may be able to disclaim liability based upon the turbine being sited within the recommended setback set forth in a safety manual. However, if the OPSB would require as a part of Condition 44 that Applicant obtain, in writing, the chosen manufacturer's statement that the recommended setback was within the minimum setback according to rule, then there should be no issue with liability if there is a manufacturing defect resulting in loss or damage. If the chosen manufacturer states a greater recommended setback than the minimum allowed by rule, then the greater setback should be required by the OPSB.

At this time, as Applicant has not indicated what model of turbine it will use in this Project, the Boards are not necessarily stating that the 1,300 foot setback set forth in the Gamesa safety manual is the setback that should be utilized, but it is certainly uncontroverted evidence of a recommended setback greater than the minimum setback for safety purposes. Certainly, the OPSB should not discount this manufacturer's recommended setback, even though it considers it temporary, in order to cling to the minimum setback. As the setback pursuant to rule is a minimum standard, the OPSB should be considering the purpose for the Gamesa recommended setback, which apparently is to prevent probable injury or damage from the turbine at least within such radius. It is surprising, then, that the OPSB would still allow a setback of 919 feet to occupied non-participating structures when, in essence, a manufacturer has indicated that such setback is within an unsafe radius of the turbine. This is of particular note as the OPSB has also required Applicant to also comply with the safety manual of the manufacturer in Condition 37.

Therefore, Condition 44 should be revised to order that the minimum setback should be the greater of the manufacturer recommended setback, whether it be for temporary clearance or otherwise, or the minimum setback allowed by rule, whichever is greater. Additionally, prior to construction, Applicant should be required to obtain, in writing, the chosen manufacturer's statement of its recommended setback, if not already set forth in the manufacturer's safety manual.

**D. Unless the Ohio Power Siting Board conducts its proceedings to afford the parties "due process" in its hearings, its Order is unreasonable and unlawful.**

During the adjudicatory hearing, the Applicant used a corporate executive to "sponsor" the Application. Through the sponsor's testimony, the Applicant sought to establish the foundational basis for the admissibility of the Application. Upon this sponsor's testimony, the Application, Exhibit 1, was immediately admitted into evidence after the sponsor's testimony over the objection of multiple intervenors. (Tr. II, pg. 419, line 22 to pg. 424, line 22) However, there was some genuine dispute between the parties whether the corporate executive was ever qualified as an expert witness to give testimony on the varied reports submitted as exhibits in support of the Application. Several intervenors addressed the issue at the beginning of the hearing, including then Champaign County Prosecuting Attorney, Nick Selvaggio, who was attempting to ask questions on cross-examination of the Application's "sponsor", Michael Speerschnider. After Mr. Speerschnider could not answer such questions, the following statement was made by Prosecutor Selvaggio:

*"Judge, I will certainly follow the Court's order, but may I respectfully suggest that I think that's the whole argument that the parties have -- well, at least that Union Neighbors United have presented, which is, either he has the expertise or he doesn't, and that my question goes to the conclusion that he has made through his own testimony."* (Tr.I, Pg. 86, lines 9-16)

Indeed, Mr. Speerschnider indicated that he could not answer specifics about some of the subject set forth in the exhibits. (See Tr. 1, pg. 168, line 1 to pg. 170, line 2)

Additionally, Applicant's witness, Hugh Crowell, was called to testify as an expert as to four studies, including a transportation study, which comprised Exhibit E of the Application. However, Mr. Crowell did not have the requisite expertise to answer even the simplest of questions regarding the transportation study nor was he present at the time the information was gathered for said study (See Tr.VI, pg. 1601, line 1 to pg. 1602, line 6). The OPSB has erroneously and unreasonably concluded that Mr. Crowell was qualified to testify due to his position, but there was nothing in the record that indicated that he could testify as to the transportation study. In fact, Mr. Crowell could not answer most of the questions regarding the transportation study asked upon cross-examination. (Tr. VI, pg. 1611, line 13 to pg. 1618, line 9). The Boards take no issue with Mr. Crowell's expertise as to the other three studies of Exhibit E as his experience and education reflect such expertise, but clearly the portion of Exhibit E consisting of the transportation study should have been stricken by the OPSB.

As the intervening Boards had no meaningful ability to cross-examine "experts" regarding parts of the Application, due process has been denied and, therefore, the Order is unreasonable and unlawful and the OPSB should set this matter for re-hearing to resolve the improper admission of the Exhibit 1, the Application, based upon the objections of the Boards set forth in the record.

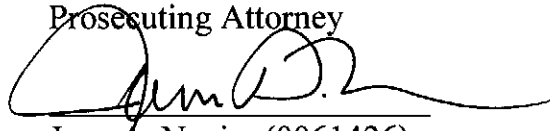
#### **IV. CONCLUSION**

For the reasons set forth herein, the intervening Boards of Champaign County Commissioners and Trustees of Goshen, Union and Urbana Township request that the Ohio Power Siting Board order that the issues presented by the aforementioned Boards be addressed by rehearing or reconsideration and

conditionally met before it determines that the “public interest, convenience and necessity” will be served by the granting of the Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a wind-powered electric generation facility in Champaign County.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Jane A. Napier', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following parties of record via electronic transmission on this 27th day of June, 2013:

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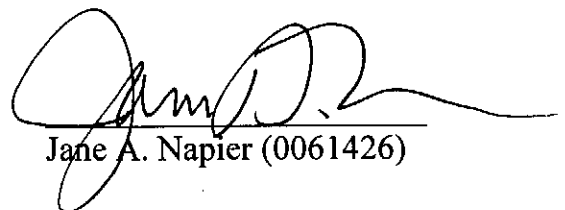
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