

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
6011 Greenwich Windpark, LLC for a)	
Certificate to Construct a Wind-Powered)	Case No. 13-990-EL-BGN
Electric Generation Facility in)	
Huron County, Ohio.)	

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT
OF OMEGA CROP CO., LLC, AN OWNER OF PROPERTY
ADJACENT TO THE WIND FARM PROPERTY**

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September 23, 2014

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**APPLICATION FOR REHEARING OF OMEGA CROP CO., LLC, AN OWNER OF
PROPERTY ADJACENT TO THE WIND FARM PROPERTY**

Omega Crop Co., LLC ("Omega")¹ hereby respectfully requests the Ohio Power Siting Board ("Board") to grant rehearing for purposes of remedying the unreasonable and unlawful aspects of the Opinion, Order, and Certificate ("Order") issued in this proceeding by the Board on August 25, 2014.²

¹ Omega is a small farming business owned by Gerald and Connie Oney and is, as has been acknowledged by 6011 Greenwich Windpark, LLC ("Greenwich"), an owner of property which is adjacent to the wind farm property. Proof of Service, Exhibits 2a and 2b (February 21, 2014). Greenwich's Exhibit 2b identifies Omega and many other property owners who have expressed opposition to the wind farm as adjacent property owners. The last paragraph of Greenwich's February 21, 2014 letter transmitting these exhibits states:

Pursuant to O.A.C. Rule 4906-5-08(C)(3), the applicant is required to submit to you the name and address of each property owner and/or affected tenant within the planned project area, each contiguous property owner to the planned project area, and each property owner who may be approached by 6011 Greenwich Windpark, LLC for any additional easement necessary for the construction, operation or maintenance of the wind-powered electric generation facility. The names and addresses of these persons are listed on Attachments 1 and 2 to this letter.

Omega is one of the many local property owners who are assembling an association, Greenwich Neighbors United, to make sure that their interests get the attention they deserve. Like other local owners of property throughout Ohio who have property in, near or adjacent to the project area of proposed wind farms, the members of Greenwich Neighbors United have direct and firsthand knowledge that has mostly been ignored by organizations like the Ohio Farm Bureau Federation ("Bureau"), the Board's Staff and, up until now, the Board.

² Section 4906.12, Revised Code, states that Sections 4903.02 to 4903.16 and 4903.20 to 4903.23, Revised Code, shall apply to any proceeding or order of the Board under Chapter 4906, Revised Code, in the same manner as if the Board were the Public Utilities Commission of Ohio ("PUCO") under such sections.

Omega previously made an appearance in this proceeding by its August 21, 2014 Late-Filed Motion to Intervene and Memorandum in Support³ and is, therefore, entitled to seek rehearing pursuant to Section 4903.10, Revised Code.

In view of the Board's refusal to grant Omega's late-filed intervention request and the resulting uncontested nature of the proceeding, Omega, an owner of property adjacent to the wind farm property, is also entitled to seek rehearing pursuant to Section 4903.10, Revised Code, which allows any affected person to seek rehearing in an uncontested proceeding.

Alternatively and as further explained in the Memorandum in Support attached hereto and incorporated herein, Omega requests that the Board grant Omega leave to file an application for rehearing because: (1) any failure to enter an appearance prior to the issuance of the Order was due to just cause; and (2) the interests of Omega were not adequately considered in the proceeding.

The grounds on which Omega considers the Order to be unreasonable or unlawful are as follows:

1. The Order is unreasonable or unlawful because the Board processed the application under rules that violate Ohio law and rules the Board rescinded early in 2014. In Case No. 12-1981-GE-BRO and pursuant to a Finding and Order issued on February 18, 2014, the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, Ohio Administrative Code ("O.A.C."), and thereafter adopted new Chapters 4906-1 through 4906-7, O.A.C. However, the Board did not file the new Chapters with the Joint Committee on Agency Rule Review ("JCARR") in accordance with Section 111.15, Revised Code. Since the Board has failed to satisfy the statutory

³ Omega's owners, Gerald and Connie Oney, also filed several comments with the Board which are posted in the public comments section of the case file.

requirements⁴ that must be satisfied to effectuate new rules, new Chapters 4906-1 through 4906-7, O.A.C., are not in effect. Since the Board is obligated to, but failed to, adopt and apply rules that respect such things as the minimum setback requirements established by the General Assembly, the Board lacked jurisdiction to issue the Order until such time as it adopts rules which, among other things, respect the minimum setback requirements established by the General Assembly. Section 4906.20(A), Revised Code, states that “[a] certificate shall be issued only pursuant to this section.” The Certificate of Environmental Compatibility and Public Need (“Certificate”) issued by the Order is incompatible with the requirements in Section 4906.20(B)(2), Revised Code, and, therefore, was not lawfully issued by the Board in accordance with the authority delegated to the Board by the General Assembly.⁵ Because the Order issued by the Board is outside of the Board’s authority, the Order and the associated Certificate are void.

⁴ On January 10, 2011, the Governor of the State of Ohio issued Executive Order 2011-01K, entitled “Establishing the Common Sense Initiative,” which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Executive Order 2011-01K is available at: <http://www.governor.ohio.gov/Portals/0/pdf/executiveOrders/EO2011-01.pdf> (last accessed September 21, 2014). Among other things, the Board is obligated to review its rules to determine the impact on small businesses; attempt to balance the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative, unintended consequences, or unnecessarily impede business growth.

⁵ Greenwich’s Certificate application was submitted to the Board during the period running from December 24, 2013 through December 27, 2013, more than three months after House Bill 59 went into effect and, among other things, increased the minimum setback requirements. Also, a letter indicating that Greenwich’s application was in compliance “with Chapters 4906-01, et seq., of the Ohio Administrative Code (OAC)” was not issued until February 19, 2014, shortly after the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C. (as discussed herein and noted below). According to the Entry issued in this proceeding on March 10, 2014, the “effective date of the filing of the application shall be March 6, 2014.”

Section 4906.07(A), Revised Code, provides that upon receipt of an application complying with Section 4906.06, Revised Code, the Board must promptly fix a date for a public hearing thereon not less than 60 nor more than 90 days after such receipt. The Entry issued in this proceeding on March 10, 2014 set the local public hearing (the one which local property owners were not able to attend) for May 6, 2014, the **earliest** date permitted by Section 4906.07, Revised Code (based on an application filing effective date of March 6, 2014). The Entry issued on March 10, 2014 also set the evidentiary hearing for May 19, 2014. The Staff Report of Investigation was filed with the Board on April 18, 2014, the date by which the Board requested that notices of intervention or petitions to intervene be filed. As discussed herein, the procedural schedule associated with this proceeding significantly compressed the time required for affected property owners to gain an understanding of the risks presented by Greenwich’s application and the recommended response to that application contained in the Staff Report of Investigation.

2. The Order unreasonably and unlawfully grants a Certificate to construct an economically significant wind farm without imposing a condition requiring Greenwich to comprehensively comply with applicable minimum setback requirements set down by the General Assembly in Section 4906.20(B)(2), Revised Code. The uncontested evidence shows that: (A) Greenwich did not seek a waiver from the minimum setback requirements in accordance with Rules 4906-17-08 and 4906-1-03,⁶ O.A.C.; (B) Greenwich's construction plan violates such minimum setback requirements at 16 of the proposed 25 wind turbine locations;⁷ and (C) Greenwich did not secure waivers from such setback requirements from all owners of property adjoining the wind farm property including, but not limited to, Omega, thereby precluding, as a matter of law, any waiver from such minimum setback requirements.
3. The Order unreasonably or unlawfully adopts a settlement when the settlement was not supported by the record evidence, the uncontested record evidence shows that the settlement package does not benefit ratepayers and the public interest and the uncontested evidence shows that the settlement violates an important principle by violating the law of Ohio including the minimum setback requirements.
4. In view of the Board's affirmative duty to adopt rules on many of the subjects referenced in public comments, the Order unreasonably or unlawfully fails to address the issues and concerns submitted to the Board through the Board's public comment portal. Indeed, the Order fails to mention the issues, questions and significant local opposition to Greenwich's proposed wind farm that were identified to the Board through the Board's public comment process. Additionally, since the Board has not complied with the rulemaking requirements in Section 4906.20(B), Revised Code, and is only permitted to issue a certificate pursuant to Section 4906.20, Revised Code, the Board lacked authority to issue the Order.

⁶ As discussed herein, the Order issued on August 25, 2014 applies rules that the Board rescinded earlier in 2014. In Case No. 12-1981-GE-BRO and pursuant to a Finding and Order issued on February 18, 2014, the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., and, thereafter, adopted new Chapters 4906-1 through 4906-7, O.A.C. However, the Board has not filed the new Chapters (as somewhat revised through the rehearing process) with JCARR in accordance with Section 111.15, Revised Code. Since the Board has failed to satisfy the statutory requirements that must be satisfied to effectuate new rules, new Chapters 4906-1 through 4906-7, O.A.C., are not in effect. But even if Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., had not been rescinded, the Board's Order would still be unreasonable and unlawful since the Order violates statutory requirements.

⁷ Turbine numbers 1, 3-7, 9-10, 12-15, 17, 21-22 and 25 violate the minimum setback requirements. Order at 13.

5. The Order unreasonably and unlawfully denied Omega's Late-Filed Motion to Intervene. Omega satisfied the criteria applicable to such interventions.⁸
6. The Order unreasonably and unlawfully denied Omega's intervention request by requiring that Omega agree to be bound by a prior agreement (the Joint Stipulation and Recommendation) between parties adverse to Omega. The practical effect of the Board's insistence that Omega agree to be bound by such prior agreement is that Omega would have been unable to protect its legitimate interests even if the Board had granted intervention subject to a condition designed to deprive Omega of an opportunity to be heard on a recommendation made without notice to the public generally or Omega specifically. A requirement that Omega agree, as a condition for late-filed intervention, to be bound by an unreasonable or unlawful agreement in circumstances where the agreement was not filed until shortly before the evidentiary hearing (and well after the local public hearing) and there was no public notice of the proposal's evasion of the minimum setback requirements, effectively precludes Omega from protecting the property rights it enjoys pursuant to Article I of the Ohio Constitution. More specifically, the Ohio Constitution confirms that Omega has inalienable rights among which are acquiring, possessing and protecting property as well as seeking and obtaining safety and happiness. The Board's decision in this proceeding effectively delegates to Greenwich, the Bureau and the Board's Staff the right to deprive Omega of its right to possess, protect and enjoy its property thereby unreasonably and unlawfully subordinating Omega's constitutionally protected and inalienable property rights to their wishes and without the heightened scrutiny demanded of the Board in circumstances where its actions may affect the cherished and venerable rights of citizens like Omega.

⁸ The notice of the application published by Greenwich in accordance with the notice content specifications contained in the Administrative Law Judge Entry issued in this proceeding on March 10, 2014 states as follows (emphasis added): "Petitions to intervene in the adjudicatory hearing will be accepted by the Board up to 30 days following publication of the notice required by Ohio Adm.Code 4906-5-08(C)(1), **or later if good cause is shown**." Among other things, the Order subjected Omega's late-filed intervention request to a much higher standard – the standard contained in rules rescinded by the Board in February 2014. The proof of publication which Greenwich filed in this proceeding on March 25, 2014 shows that the content of the newspaper notice actually published by Greenwich matches the notice specified by the March 10, 2014 Entry.

Accordingly and for the additional reasons set forth in the attached Memorandum in Support incorporated herein, Omega requests that the Board: (1) grant rehearing and vacate the Order; or (2) grant rehearing, grant Omega's intervention request, grant the request for a second local public hearing, specify that additional evidence shall be taken for the purpose of evaluating the Joint Stipulation and Recommendation ("Stipulation") filed in this proceeding on May 16, 2014 in accordance with the applicable criteria and direct the parties, including Omega, to work in good faith to submit a joint proposed procedural schedule governing the balance of this proceeding.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In support of the foregoing Application for Rehearing, Omega states that it is the owner of real property consisting of approximately 1,200 acres.⁹ Such property is farmland and adjacent to the property which has been or will be leased by Greenwich to construct a wind-powered electric generation facility located in Huron County.

Economically significant wind farms like the one proposed in this proceeding affect the inalienable rights of Ohio citizens like Omega. Among these rights are the right to acquire, possess and protect property as well as seeking and obtaining safety and happiness. Because of the direct and substantial impact of wind farms on the ability of adjacent property owners and citizens like Omega to hold and exercise their

⁹ Omega is a small farming business owned by Gerald and Connie Oney and is, as has been acknowledged by Greenwich, an owner of property which is adjacent to the wind farm property. Proof of Service, Exhibits 2a and 2b (February 21, 2014). Greenwich's Exhibit 2b identifies Omega and many other property owners who have expressed opposition to the wind farm as adjacent property owners. The last paragraph of Greenwich's February 21, 2014 letter transmitting these exhibits states:

Pursuant to O.A.C. Rule 4906-5-08(C)(3), the applicant is required to submit to you the name and address of each property owner and/or affected tenant within the planned project area, each contiguous property owner to the planned project area, and each property owner who may be approached by 6011 Greenwich Windpark, LLC for any additional easement necessary for the construction, operation or maintenance of the wind-powered electric generation facility. The names and addresses of these persons are listed on Attachments 1 and 2 to this letter.

constitutionally-confirmed rights, the Board was obligated to subject the certification application and the Stipulation which it ultimately adopted to heightened scrutiny.¹⁰ This the Board did not do.

Instead, the Board went through the motions of discharging its duties and obligations as defined by Chapter 4906, Revised Code, and as amplified by the letter and spirit of Ohio's Constitution.

The Board simply accepted the Stipulation criteria chants of the parties who urged the Board to go through the motions rather than subject their representations, claims and assertions (factual and legal) to the rigorous analysis required of the Board. The Board actively dismissed the concerns of Omega's owners and many other local property owners who filed comments identifying fundamental problems with the proposed wind farm and the nature and scope of the injury that the wind farm would impose on the local community if the Board did not pay attention to the views of the local community. The Board proceeded to do all this (as discussed below) at the same time that the Board was comprehensively non-compliant with statutory rulemaking requirements mandated by the General Assembly. This was and is not right.

While there are individual reasons expressed below for why the Board's decision in this proceeding is unreasonable or unlawful, the unreasonableness or unlawfulness of what has been done in this proceeding is most visible when the full measure of the Board's handling of this case is placed in view.

¹⁰ See *Norwood v. Horney*, 110 Ohio St.3d 353.

I. OMEGA'S STANDING TO SEEK REHEARING

A. Omega Made an Appearance

Omega previously made an appearance in this proceeding by its August 21, 2014 Late-Filed Motion to Intervene and Memorandum in Support and is, therefore, entitled to seek rehearing pursuant to Section 4903.10, Revised Code.¹¹

B. Rehearing in an Uncontested Proceeding

In view of the Board's refusal to grant Omega's late-filed intervention request and the uncontested nature of the proceeding at the time the Board issued the Order, Omega, an owner of property adjacent to the wind farm property, is also entitled to seek rehearing pursuant to Section 4903.10, Revised Code. Section 4903.10, Revised Code, allows any affected person to seek rehearing in an uncontested proceeding.¹² Clearly, Omega and its right to use and enjoy its property which is adjacent to the wind farm property are affected by the Board's Order.

C. Alternatively, Just Cause Exists and Omega's Interests Were Not Represented

Alternatively, Omega requests that the Board grant Omega leave to file an application for rehearing because: (1) any failure to enter an appearance prior to the issuance of the Order was due to just cause; and (2) the interests of Omega were not adequately considered in the proceeding.

¹¹ Omega's position that it has standing to seek rehearing because it made an appearance is consistent with the comments made at the Board meeting on August 25, 2014 by a Board legal representative. The comments indicated that Omega has a right to seek rehearing.

¹² Omega's position that it has standing to seek rehearing because it is affected by the Board's Order and this is an uncontested proceeding is consistent with the comments made at the Board meeting on August 25, 2014 by a Board legal representative. The comments indicated that Omega has a right to seek rehearing.

1. Just Cause

Throughout this proceeding, there are clear indications that local officials and adjacent property owners viewed Greenwich's proposed wind farm as a threat to the local community and their individual right to possess, protect and enjoy property. Even the members of the local school board advised the Board that they did not want the incremental tax revenue attributed to the Greenwich project in view of the negative impact that the wind farm would have on the local community.¹³

Real people in touch with the local community and local small businesses such as Omega and the Rural Coonhunters, Inc.¹⁴ knew that something was not right with the

¹³ The letter from South Central Board of Education (filed in the public comments section on August 22, 2014) states:

... people in our community were sold on new tax dollars for our schools, township and fire department without realizing the size, scale and potential problems associated with the wind turbines. ... We have concerns about sleep deprivation associated with the wind turbines and how they can affect our children coming to school energized and ready to learn, as well as adults in their work place, not to mention in their homes.

We now have a peaceful, rural setting and we would hate to see it ruined for a short term profit for our community.

Please help us do the right thing and stop the wind farm.

¹⁴ A letter dated July 21, 2014 (filed in the public comments section on July 25, 2014) described the beginning of their organization in 1956 and how the Greenwich wind farm would fundamentally alter the future of Rural Coonhunters, Inc.:

Now a company that does not know or care that I exist wants to destroy 58 years of hard work and development. Three of the 25 wind turbines proposed by Wind Lab are very close to my border. Just the building of these mega monuments would be very disruptive to our sensitive ecosystem for many miles around. It would take years to recover from such a shattering event. After the turbines are built they will permanently tower over my trees and impose on the beauty and serenity that so many people have enjoyed over the years. That would possibly change the members ability to rent the property thus diminishing income. With the background noise of the turbines will anyone hear and enjoy the sound of the hawks call as she hunts the field, the coyote pups howl when they test the tornado siren every month or the owls conversation after dark. Background noise would definitely affect the ability to hear the dogs in competition hunts or the music during music festivals. Once again that is going to affect income.

Of what value will I be if you allow the Wind Turbines?

Greenwich wind farm. And they were trying to alert the Board to this reality. This is evident in the public comments as well as the testimony given at the local public hearing and evidentiary hearing by Walter Leber, a township trustee.¹⁵

These local property owners and concerned citizens knew something was not right. But the hearing transcripts and public comments indicate that they were having difficulty keeping up with the pace of the process and asking the right questions at a time when it was difficult to take time away from their day jobs to learn enough to ask the right questions. As the Board knows, the local public hearing was also held on May 6, 2014 when the consequences of a harsh winter and challenges of a wet planting season were demanding the attention of most people in this farming community.¹⁶

No Beauty! No Peacefulness! No Serenity! No closeness to Nature! No Income!!!

As you contemplate the future of wind turbines in Greenwich Township, please remember you may also hold my future in your hands.

By letter dated July 25, 2014, the Executive Director of the Board advised Rural Coonhunters, Inc. that "[i]t is noted that your organization is opposed to the project" and indicated that noise and ecological impact concerns are outlined in the Staff Report of Investigation. However, there is no mention of the impact of the project on this organization's viability.

¹⁵ Trustee Leber also filed a public comment with the Board on July 24 (filed in the public comments section on July 25, 2014) stating (emphasis added):

I Walter Leber Greenwich Township Trustee do not have a road agreement with Wind Lab concerning the project in Huron county. I don't believe any thing wind lab tells me about noise levels shadow flicker or road issues. I personally went to Vanwert where wind farms exist, heard complaints and seen what issues arrive without a road agreement. **I testified in Columbus and still don't have answers for the residents of my township.**

¹⁶ Greenwich's May 9, 2014 testimony acknowledges that the hearing was held at a time when it was unlikely that members of the local community would be able to attend. More specifically and at page 4 of the testimony of Monica Jensen dated May 9, 2014, the testimony states (emphasis added):

10. Are there any other matters you would like to bring to the attention of the Board concerning this case?

Yes, I wanted to mention that there were no witnesses at the public hearing who opposed this project. Though we had talked with many people in the area about supporting the project by attending and testifying at the public hearing on May 6,

Nonetheless, these citizens worked to educate themselves about Greenwich's proposal and how it would impact their individual and collective wellbeing. They sifted through complicated and technical documents to which they were directed or deflected by the Board's Staff or Greenwich. And through self-help, these citizens began to put the pieces together in ways that allowed them to progressively put a finer point on their concerns and objections. They were told at the local public hearing¹⁷ that their comments would be considered by the Board and the public comments submitted after May 6, 2014¹⁸ document these escalating concerns and objections. In response to these concerns and objections, Greenwich attacked the motives of these local citizens and small businesses and accused them of communicating concerns after the evidentiary record was closed at the same time that Greenwich was submitting "evidence" after the close of the evidentiary record.¹⁹

2014, because of the timing of the hearing and the fact that the people in the community are mostly farmers who are now considerably behind in spring planting due to uncooperative weather, only a few were able to attend the hearing.

¹⁷ Public Hearing Transcript at 7. At the public hearing, attendees received the following directions: "The purpose of tonight's hearing is to receive comments from the public regarding Greenwich's application. **It is not a question-and-answer session.**" Public Hearing Transcript at 5 (emphasis added).

¹⁸ The comments submitted shortly after this proceeding was opened in response to Greenwich's request indicate that persons supporting the wind farm do not live in or near the project area.

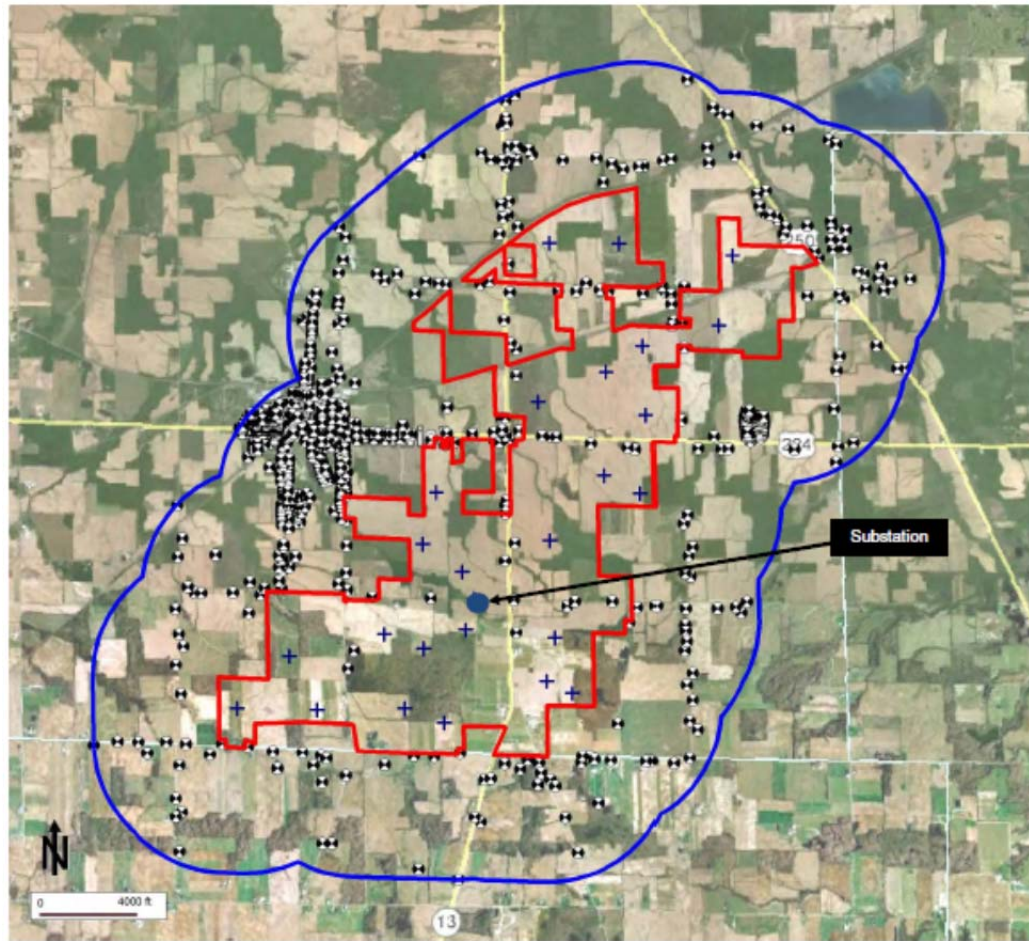
¹⁹ On August 19, 2014, Greenwich filed a letter in the case records portion of this proceeding in which Greenwich expressed opposition to the concerns and objections posted in the public comments section. (Without explanation, the Board moved the August 19, 2014 letter filed by Greenwich from the case documents section to the public comments section shortly after Omega filed its Late-Filed Motion to Intervene.) Also, on July 15, 2014, well after the evidentiary record closed, Greenwich filed documents which it described as "executed waivers of the minimum property line setback with participating property owners in the project area". The Order at page 3 states (incorrectly and without any record support) that this July 15, 2014 filing by Greenwich contains "executed copies of a setback waiver from affected property owners". Beyond being a submission by Greenwich after the close of the evidentiary record, a casual review of the content of Greenwich's July 15, 2014 filing compared with Greenwich's identification of affected property owners in the project area shows that the so-called waivers are **not from all affected property owners.** Rather, if Greenwich's July 15, 2014 filing can be used by the Board to draw any conclusions, the most that can be said is that it contains waivers executed by **some owners of property on which Greenwich proposes to install wind turbines.** As explained elsewhere, the opportunity for

Should these citizens, including Omega, have known that they would be required to formally intervene in this proceeding to make sure that the Board, an agency charged with protecting the public interest and advancing the Governor's Common Sense Initiative, would not grant a Certificate to Greenwich in circumstances where the information readily available to the Board shows that the minimum setback requirements would be violated in 62% of the proposed turbine locations? Should these citizens have known that the Board and the Board's Staff would ignore the information in the record showing that there are more than 900 non-participating residential structures located within one mile of the wind farm's project area?²⁰ Should they have known that the Board would not subject Greenwich's application to the rules required by the statute that the Board must follow to grant a Certificate to Greenwich?

Greenwich to evade the minimum setback requirements is, as a matter of law, precluded unless and until waivers are secured from all owners of property adjacent to the wind farm property.

²⁰ Pages 11 and 12 of Greenwich's Exhibit O shows 906 residential structures within a one-mile radius. Page 2 of Greenwich's Exhibit Q states: "Land use within the Project area is dominated by active agriculture, with farms and single-family rural residences generally occurring along the road frontage."

Figure 2.
Aerial Photo of Proposed Greenwich Wind Farm Site with 25 Turbines (+), Substation, Project Boundary (Red),
and 906 Non-Participant Residential Structures within One-Mile Project Buffer Boundary (Blue).



Greenwich Exhibit O, Figure 2 Showing 906 Non-Participating Residential Structures within One-Mile of the Project Area



6011 Greenwich Windpark, LLC
Viewpoint 8

Alpha Road east of State Route 13.
Existing and with-project
simulated views looking south.

Greenwich Exhibit Q, Illustration of Visual Impact on Residence

Nearest Turbine to Viewpoint is .8 Miles, with 7 Turbines Visible.

With regard to the above illustration, Greenwich asserted that the due to the proximity of the viewpoint to the turbines, the “overall contrast they create is strong”. Undaunted, Greenwich then said: “However, the presence of the turbines does not alter the agricultural character of the landscape”.

The safety manual provided by the manufacturer of Greenwich’s turbines warned that even the minimum setback requirements were not adequate in case of fire. Greenwich’s Exhibit R is the turbine safety manual. At page 53 of 134 and regarding fire danger, the manual states that (emphasis added):

DANGER

FALLING TURBINE PARTS

In case of a fire in the nacelle or on the rotor, parts may fall off the wind turbine.

In case of a fire, nobody is permitted within a radius of 500 m [1640 feet] from the turbine.

Gerald Oney, one of Omega's owners, submitted a handwritten letter dated August 10, 2014 to the Board (filed in the public comments on August 21, 2014) in which he respectfully alerted the Board to the fire risks presented by the proposed wind farm, risks elevated by the wind farm's closeness to grain fields, schools and residences. The letter states:

Dear Chairman Johnson:

Re: Greenwich Wind Park Docket # 13-099-ELBGN

I am an adjacent land owner to the Wind Park. My family and I have a dairy farm very close to the proposed turbines. We also have schools very close to the Wind Park.

We are basically an agricultural & residential community. I fear that the noise and distraction of 25 turbines will be very detrimental to the quality of life for man or beast in our fine community.

Another concern is "turbine fires" from lightning strikes etc. We have large fields of ripe & dry grain between the turbines and residents & schools. We have a great volunteer fire department, but not equipped to handle a turbine fire, fanning a 100 ac field of wheat. "Could be disastrous"

Also, being a farmer all my life, it makes me shutter, knowing the permanent damage that will be done to our precious cropland, and resources in the "pretense of green energy".

I am very opposed to the Wind Park for the ill effect it will have on the health, safety & welfare of the residents of our community. We can & need to spend tax \$ more wisely.

If you can, please help us to stop this project.

Thank You

Gerald T. Oney

Ms. Marcia Ledet, an owner of property adjacent to the wind farm property, notified the Board on June 5, 2014 that she was opposed to the “turbines going up.”²¹ After the close of the evidentiary record, Greenwich filed a letter dated June 13, 2014 which contested letters expressing positions against the wind farm which had been submitted to the Board by various local property owners including Ms. Ledet. Greenwich’s June 13, 2014 letter acknowledges that “Ms. Ledet owns three parcels near the Project area,” one of her parcels borders the project area and that she is an adjacent property owner.

The application was not accepted until March 6, 2014. Based on the filing dates of the application, it is ironic that it took the Board longer to review and accept the application than interested parties were given (after publication of the newspaper notices) to announce their participation or file their intervention (on or prior to April 18, 2014). The second newspaper notice appears to have been published in the Greenwich Enterprise Review on April 22, 2014²² or after the April 18, 2014 date specified by the Board for intervention. The local public hearing took place on May 6, 2014 and the evidentiary hearing was over and done on May 16, 2014.

None of the notices published by Greenwich alerted the public to the fact that the construction of the proposed wind farm would violate minimum setback requirements in any case, let alone in the case of 16 of the proposed 25 turbine towers.²³ None of the notices published by Greenwich indicated that all owners of property adjacent to the

²¹ Ms. Ledet’s opposition is documented by a public comment posted on June 5, 2014.

²² Proof of Service (May 12, 2014).

²³ Turbine numbers 1, 3-7, 9-10, 12-15, 17, 21-22 and 25 violate the minimum setback requirements. Order at 13.

wind farm property had to execute waivers before Greenwich could build the proposed wind farm. None of the newspaper notices or other information provided to the public by the Board suggested that the Board would process Greenwich's application without first adopting the rules required by Section 4906.20, Revised Code.

The Staff Report of Investigation was filed on April 18, 2014 and evaluated the application based on rules that had already been rescinded by the Board as of the effective date of the application. There is no record indicating when the Staff Report of Investigation was distributed to local authorities or, at least when it might have been received by such authorities. While the Staff Report recommended adherence to the minimum setback requirements in the case of two pipelines, it does not contain any meaningful discussion of the extent to which the minimum setbacks would be violated by Greenwich and it completely ignored the impact of the violation of the minimum setback requirements on adjacent property owners like Omega.

None of the notices issued to the public revealed that Greenwich, the Board's Staff and the Bureau had jointly recommended that the Board issue a Certificate to Greenwich without regard for the concerns expressed by local property owners, including owners of property adjacent to the wind farm. Since the testimony of Greenwich filed on May 9, 2014 references these parties' settlement, it is highly probable that these settlement intentions were known at the time of the local public hearing on May 6, 2014. Yet, the transcript from the local public hearing contains no disclosure of these parties' settlement intentions or any identification of how their planned settlement might affect the ability of local property owners to protect their

interests and property. None of the parties that participated in the settlement made the slightest effort to address the objections and concerns of local property owners.

It is not an easy thing for property owners like Omega who must attend to their “day job” to also figure out how they must present facts and information to the Board in ways that might get the Board’s needed attention in cases where the value and use of their property may be affected by the for-profit ambitions of a wind farm developer.²⁴ Omega and other similarly situated property owners, local officials and members of the General Assembly have repeatedly asked the Board to hold another local public hearing which would provide a meaningful opportunity for the Board to hear the truth about the scope and degree of opposition to Greenwich’s proposed wind farm as well as the injury to individual and community interests. The Board did not grant the request for a second local public hearing, suggesting that the request came too late. But a handwritten respectful request for a second public hearing (confirming an earlier oral request) was submitted to the Board on June 16, 2014 (filed in the public comments section on June 18, 2014) by Clark and Bonnie Hunter, owners of a farm adjoining the wind farm property:

Dear Sirs:

I spoke with a party in your office on Monday and she suggested writing with the case no. which is 13-990-EL-BGN.

I am writing because we just learned of additional issues which may not have been raised in the public hearing on May 6, 2014 at the South Central High School.

²⁴ On August 20, 2014 and as soon as Omega appreciated the significance of intervenor status, it sought legal representation and authorized the filing of the late-filed intervention request. Counsel for Omega worked diligently thereafter to review the case file, prepare an intervention-related motion and memorandum and to otherwise assist, to the best of his ability, Omega in its efforts to protect its interests.

Since our farm adjoins one of the proposed turbines we are requesting you to slow down the process enough to have one more public hearing. We feel since these 2.4 MW wind turbines & their footprint will be here forever that some additional information should be forthcoming.

Thank you for considering this request. I think the citizens who are on the edges should have further opportunity to express their concerns.

Sincerely yours,

Clark & Bonnie Hunter

As the Board knows, Senate Bill 310 ("SB 310") modifies Ohio's portfolio mandates as they relate to renewable resources. One of the modifications removes the in-state purchase requirement for compliance with the renewable mandate. The views expressed in the Staff Report of Investigation (at page 50) are predicated on the continuation of the in-state purchase requirement. And recently in House Bill 483 ("HB 483"), the General Assembly increased the minimum setback requirements, a fact that would suggest to most people that granting a Certificate in circumstances where the construction of the wind farm will violate lesser minimum setback requirements in the case of 62% of the proposed turbines is not granting a Certificate that is compatible with the public interest.²⁵

Given the facts and circumstances documented in the public comments and evidentiary record of this proceeding, Omega urges the Board to find that Omega has shown good cause to the extent such a showing is required to give it standing to file an application for rehearing. Given the pace of the procedural schedule, it was not reasonably possible for Omega to earlier bring the issues raised herein to the Board's attention and Omega had no reason to expect that it would need to bring these issues

²⁵ HB 483 specifies a minimum setback of at least one thousand one hundred twenty-five feet in horizontal distance between the tip of the turbine's nearest blade at ninety degrees to the property line of the nearest adjacent property.

to the Board's attention through a rehearing application in order to prevent an unreasonable and unlawful outcome.

2. Omega's Interests Were Not Adequately Considered

For the reasons expressed herein, Omega urges the Board to find that Omega's interests were not adequately considered in the proceeding.

II. ERRORS NECESSITATING REHEARING

- A. The Order is unreasonable or unlawful because the Board processed the application under rules that violate Ohio law and rules the Board rescinded early in 2014. In Case No. 12-1981-GE-BRO and pursuant to a Finding and Order issued on February 18, 2014, the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., and thereafter adopted new Chapters 4906-1 through 4906-7, O.A.C. However, the Board did not file the new Chapters with JCARR in accordance with Section 111.15, Revised Code. Since the Board has failed to satisfy the statutory requirements²⁶ that must be satisfied to effectuate new rules, new Chapters 4906-1 through 4906-7, O.A.C., are not in effect. Since the Board is obligated to, but failed to, adopt and apply rules that respect such things as the minimum setback requirements established by the General Assembly, the Board lacked jurisdiction to issue the Order until such time as it adopts rules which, among other things, respect the minimum setback requirements established by the General Assembly. Section 4906.20(A), Revised Code, states that "[a] certificate shall be issued only pursuant to this section." The Certificate issued by the Order is incompatible with the requirements in Section 4906.20(B)(2), Revised Code, and, therefore, was not lawfully issued by the Board in accordance with the authority delegated to the Board by the General Assembly. Because the Order issued by the Board is outside of the Board's authority, the Order and the associated Certificate are void.**

²⁶ On January 10, 2011, the Governor of the State of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative," which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Executive Order 2011-01K is available at: <http://www.governor.ohio.gov/Portals/0/pdf/executiveOrders/EO2011-01.pdf> (last accessed September 21, 2014). Among other things, the Board is obligated to review its rules to determine the impact on small businesses; attempt to balance the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative, unintended consequences, or unnecessarily impede business growth.

On February 18, 2014, the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., and, thereafter, adopted new Chapters 4906-1 through 4906-7, O.A.C. However, the Board did not file the new Chapters with JCARR in accordance with Section 111.15, Revised Code. Since the Board has failed to satisfy the statutory requirements that must be satisfied to effectuate new rules, new Chapters 4906-1 through 4906-7, O.A.C., are not in effect ²⁷

The version of Section 4906.20(B), Revised Code, in effect when Greenwich filed its application required the Board to have a rule in place that respected the minimum setback requirements established by the General Assembly. The Board did not have such a rule in place when Greenwich filed its application and the Board still has no such rule in place.

Section 4906.20(A), Revised Code, states that a certificate shall be issued only pursuant to this Section (which contains the rulemaking requirements). The version of Section 4906.20(B), Revised Code, in effect when Greenwich filed its application and the Board issued the Order also specifically states that the minimum setback requirements control unless and until **ALL** owners of property adjacent to the wind farm property waive the application of the setback requirements to the wind farm property.

The record evidence in this proceeding shows that the minimum setback requirements will be violated in the case of 16 of 25 of the proposed wind turbines²⁸ and that all owners of property adjacent to the wind farm property have not (and will not)

²⁷ *Ryan v. State Teachers Retirement System*, 71 Ohio St.3d 362 (1994).

²⁸ Turbine numbers 1, 3-7, 9-10, 12-15, 17, 21-22 and 25 violate the minimum setback requirements. Order at 13.

waived application of the minimum setback requirements to the Greenwich wind farm property.

As discussed above, the evidence also shows that the minimum setback requirements should have been expanded by the Board (which the Board may do even where waivers have been properly secured) to deal with the turbine clearance that is required, according to the turbine manufacturers' safety manual, in the event of a turbine fire.

Since the Board is obligated to but failed to adopt and apply rules that respect such things as the minimum setback requirements established by the General Assembly, the Board lacked jurisdiction to issue the Order until such time as it effectuates rules which, among other things, comply with the minimum setback requirements established by the General Assembly. In addition, the Certificate issued by the Board's Order is incompatible with the requirements in Section 4906.20(B)(2), Revised Code, and, therefore, was not lawfully issued by the Board in accordance with the authority delegated to the Board by the General Assembly. Because the Order issued by the Board is outside of the Board's authority or, more specifically, it was not issued pursuant to Section 4906.20, Revised Code, the Order and the associated Certificate are void.

- B. The Order unreasonably and unlawfully grants a Certificate to construct an economically significant wind farm without imposing a condition requiring Greenwich to comprehensively comply with applicable minimum setback requirements set down by the General Assembly in Section 4906.20(B)(2), Revised Code. The uncontested evidence shows that: (A) Greenwich did not seek a waiver from the minimum setback requirements in accordance with Rules 4906-17-08**

and 4906-1-03,²⁹ O.A.C.; (B) Greenwich's construction plan violates such minimum setback requirements at 16 of the proposed 25 wind turbine locations; and (C) Greenwich did not secure waivers from such setback requirements from all owners of property adjoining the wind farm property including, but not limited to, Omega, thereby precluding, as a matter of law, any waiver from such minimum setback requirements.

Assuming that Rule 4906-17-8, O.A.C., was not rescinded and could be properly applied by the Board to process Greenwich's application, this Section required Greenwich to seek a waiver from the minimum setback requirements in accordance with Rule 4906-1-03, O.A.C., which states:

The board or the administrative law judge may, for good cause shown, as supported by a motion and supporting memorandum, waive any requirement, standard, or rule set forth in Chapters 4906-1 to 4906-17 of the Administrative Code, except where precluded by statute.

Greenwich did file a motion seeking waivers on April 19, 2013. But, Greenwich did not file any motion requesting a waiver from the minimum setback requirements.

Greenwich's proposed wind farm will violate that applicable minimum setback requirement at 16 of the 25 turbines.³⁰ While the Staff Report of Investigation and the Board's Order evidence a concern about compliance with the minimum setback

²⁹ As discussed herein, the Order issued on August 25, 2014 applies rules that the Board rescinded earlier in 2014. In Case No. 12-1981-GE-BRO and pursuant to a Finding and Order issued on February 18, 2014, the Board rescinded Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., and, thereafter, adopted new Chapters 4906-1 through 4906-7, O.A.C. However, the Board has not filed the new Chapters (as somewhat revised through the rehearing process) with JCARR in accordance with Section 111.15, Revised Code. Since the Board has failed to satisfy the statutory requirements that must be satisfied to effectuate new rules, new Chapters 4906-1 through 4906-7, O.A.C., are not in effect. But even if Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17, O.A.C., had not been rescinded, the Board's Order would still be unreasonable and unlawful since the Order violates statutory requirements.

³⁰ Turbine numbers 1, 3-7, 9-10, 12-15, 17, 21-22 and 25 violate the minimum setback requirements. Order at 13.

requirements in the case of two pipelines in the project area,³¹ the Order arbitrarily and unreasonably does not impose the same condition requiring compliance with the minimum setback requirements in the case of other owners of property within or adjacent to the project area.

Based on the facts and circumstances in this case and assuming that the Board had authority to grant any certificate in this proceeding, the Board was obligated to either: (1) reject Greenwich's application because it called for many violations of the minimum setback requirements; or, (2) condition any certificate on satisfying such minimum setback requirements and thereby extend to all property owners within or adjacent to the project area the same protection the Board provided to the two pipeline owners.

The opportunity for Greenwich to obtain a waiver from the minimum setback requirements was foreclosed by Greenwich's failure to comply with Rules 4906-17-08 and 4906-1-03, O.A.C. Greenwich did not even attempt to comply with such rules. As importantly, Section 4906.20(B)(2), Revised Code, states that no waiver from the minimum setback requirements can occur (by Board action or otherwise) unless and until all property owners adjacent to the wind farm property waive the application of the minimum setback requirements.

³¹ Order at 15, 33. Perhaps the Staff Report's insensitivity to the comprehensive violation of the minimum setback requirements is rooted in the Staff's lack of appreciation for the views of local property owners. At page 52 of the Staff Report of Investigation, property within the agricultural districts negatively affected by Greenwich proposed wind farm was labeled as "unremarkable comparable to contiguous parcels of land."

- C. The Order unreasonably or unlawfully adopts a settlement when the settlement was not supported by the record evidence, the uncontested record evidence shows that the settlement package does not benefit ratepayers and the public interest and the uncontested evidence shows that the settlement violates an important principle by violating the law of Ohio including the minimum setback requirements.**

At pages 43 and 44, the Order discusses the criteria the Board used to evaluate the Stipulation (Joint Exhibit 1) which was submitted to the Board by Greenwich, the Board's Staff and the Bureau. As the Board knows, a stipulation is merely a recommendation which must be supported by evidence. The Order states that the "ultimate issue ... is whether the stipulation ... is reasonable"³² and that the Board must apply the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

Neither the direct testimony offered by the Board's Staff nor Greenwich discussed the above criteria. The Bureau offered no testimony.

Perhaps sensing the complete failure of the stipulating parties to satisfy the three-prong test, the Administrative Law Judge attempted to elicit responses from Greenwich's witness and the Staff witness that would assemble the evidence needed to evaluate the Stipulation based on the above criteria. This attempt was unsuccessful.

³² Order at 44.

For example, the evidentiary hearing transcript (at pages 22-23) contains the following exchange between the Administrative Law Judge and Ms. Jensen, Greenwich's only witness:

- Q. I'd like to switch topics a little bit here. Ms. Jensen, you said you were familiar with the three-part test that the Board uses to evaluate a stipulation?
- A. Yes. I'm not overly familiar but a little. Read it.
- Q. Okay. And you did participate and you sat in negotiates to develop the stipulation, correct?
- A. Correct.
- Q. Are you aware of any -- to your knowledge, does this stipulation violate any important regulatory principle or practice?
- A. I don't understand the question, your Honor.
- Q. Okay. Are you familiar with Ohio Power Siting Board proceedings?
- A. Have I ever done one, no. Am I that familiar with them, no. But I understand them from reading other hearing process.

For example, the evidentiary hearing transcript (at page 29), contains the following exchange between the Administrative Law Judge and Mr. Zeto, the Staff's only witness (emphasis added):

- Q. And to your knowledge, does it violate any important regulatory principle or practice of the rule?
- A. No, it does not.

The evidence shows that Ms. Jensen was unfamiliar with the three-part test and Board proceedings. She struggled to, but did not, provide a useful response to the Administrative Law Judge's efforts to make the case which Greenwich, the Staff and the Bureau did not make to support the Stipulation. The evidence shows that the question put to Mr. Zeto by the Administrative Law Judge was so qualified that, at best, Mr. Zeto simply answered that he was not aware of any violation of any important regulatory principle.

More importantly and as discussed above, the Stipulation, the Order and the Certificate all violate the law of Ohio by: (1) granting a Certificate that was not issued pursuant to Section 4906.20, Revised Code; (2) allowing Greenwich to construct a wind farm that will comprehensively violate the applicable minimum setback requirements when Greenwich did not file a motion seeking a waiver from the minimum setback requirements; and (3) ignoring the fact that **ALL** owners of property adjacent to the wind farm property have not waived application of such requirements.

The Order is unreasonable and unlawful.

- D. In view of the Board's affirmative duty to adopt rules on many of the subjects referenced in public comments, the Order unreasonably or unlawfully fails to address the issues and concerns submitted to the Board through the Board's public comment portal. Indeed, the Order fails to mention the issues, questions and significant local opposition to Greenwich's proposed wind farm that were identified to the Board through the Board's public comment process. Additionally, since the Board has not complied with the rulemaking requirements in Section 4906.20(B), Revised Code, and is only permitted to issue a Certificate pursuant to Section 4906.20, Revised Code, the Board lacked authority to issue the Order.**

The public comments filed with the Board in this proceeding identify numerous concerns, objections and issues and the parties submitting the comments repeatedly ask for the Board's assistance.

Some of the comments and objections conveyed to the Board were based on the intrusive noise produced by the wind turbines.

Some of the comments and objections conveyed to the Board were based on the impact of the proposed wind farm on local agriculture (including the permanent destruction of farmland in agricultural districts).

Some of the comments and objections conveyed to the Board were based on the fire risks associated with the proposed wind farm and the proximity of the proposed wind farm to grain fields, schools and residences.

Some of the comments and objections conveyed to the Board focused on the shadow flicker impacts on owners of property within and adjacent to the wind farm project area.

Some of the comments and objections conveyed to the Board identified how the proposed wind farm would threaten the existing recreational uses of property within or adjacent to the project area.

Some of the comments and objections conveyed to the Board identified how the proposed wind farm would threaten the ability of organizations or businesses to survive if the wind farm is developed in accordance with Greenwich's plans.

Regardless of the subjects that the Board was asked to address through the public comments, Section 4906.20(B)(2), Revised Code, requires the Board to adopt rules that:

prescribe reasonable regulations regarding any wind turbines and associated facilities of an economically significant wind farm, including, but not limited to, their location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement and including erosion control, aesthetics, recreational land use, wildlife protection, interconnection with power lines and with regional transmission organizations, independent transmission system operators, or similar organizations, ice throw, sound and noise levels, blade shear, shadow flicker, decommissioning, and necessary cooperation for site visits and enforcement investigations.

Many of the subjects which the Board is obligated to address by rule are subjects which were flagged in the public comments but not addressed in the Order.

The Board has not adopted rules that contain reasonable regulations for each subject area identified in Section 4906.20(B)(2), Revised Code. Section 4906.20(A), Revised Code, states that the Board shall only issue a certificate pursuant to Section 4906.20, Revised Code. The Board's failure to adopt the rules required by Section 4906.20(B)(2), Revised Code, means that: (1) the Order and associated Certificate issued in this proceeding were not issued pursuant to Section 4906.20, Revised Code; (2) the Order and Certificate were issued without the Board having authority to do so; (3) the Order is unreasonable or unlawful; and, (4) the Order and Certificate are void since they were not issued pursuant to the requirements of Section 4906.20, Revised Code.

Even if the Board had complied with the rulemaking requirements in Section 4906.20(B), Revised Code, the Order also unreasonably or unlawfully neglects to address each of the subject areas identified in Section 4906.20(B)(2), Revised Code, in light of the many issues, concerns and objections raised by the public comments and in the testimony of Township Trustee, Walter Leber. The Board's public interest obligation is not fulfilled when it fails to consider and address the issues, concerns and objections raised in the public comments it invited, particularly when the public comments touch on subjects that the Board was obligated to but did not address by rule.

E. The Order unreasonably and unlawfully denied Omega's Late-Filed Motion to Intervene. Omega satisfied the criteria applicable to such interventions.

To the extent the Board finds that Omega has standing to seek rehearing for the reasons stated above, this alleged error may be moot. In the event the Board does not do so, Omega urges the Board to find that the denial of Omega's Late-Filed Motion to Intervene was unreasonable or unlawful based on the specific facts and circumstances of this case.

As an owner of property adjacent to the wind farm property, Omega has a right to party status by virtue of Section 4906.08(A)(2), Revised Code, provided that it timely files the specified notice. Clearly, Omega's late-filed intervention request (which was pulled together and filed with the Board as quickly as possible after Omega sorted things out and retained counsel) was not filed within the period specified by the Board.

As noted above, the notice of the application published by Greenwich in accordance with the notice the Administrative Law Judge Entry issued in this proceeding on March 10, 2014 states as follows (emphasis added):

Petitions to intervene in the adjudicatory hearing will be accepted by the Board up to 30 days following publication of the notice required by Ohio Adm.Code 4906-5-08(C)(1), or later if **good cause** is shown.³³

The proof of publication which Greenwich filed in this proceeding on March 25, 2014 indicates that the content of the newspaper notice actually published by Greenwich matches the notice specified by the March 10, 2014 Entry.

³³ Entry at 3-4 (March 10, 2014).

Greenwich's testimony acknowledges that farmers, like Omega's owners, were too busy trying to get a crop in the ground to participate in the local hearing.³⁴ The people who did attend the local public hearing were told that the hearing was not the place to ask questions and if they had any, they should take them to Greenwich.

The purpose of tonight's hearing is to receive comments from the public regarding Greenwich's application. It is not a question-and-answer session. You should get your questions answered before offering testimony. If you have questions about the project, approach Greenwich.

The effective date of Greenwich's application was March 6, 2014. According to Greenwich, it appears that the Board's formal powers of observation regarding a proposal that will affect local property owners for more than two decades were formally open for 74 days (starting on March 6, 2014 and ceasing on May 19, 2014.)

The last newspaper notice that identified April 18, 2014 as the date by which intervention requests were to be filed was run on April 22, 2014.

³⁴ Greenwich's May 9, 2014 testimony acknowledges that the hearing was held at a time when it was unlikely that members of the local community would be able to attend. More specifically and at page 4 of the testimony of Monica Jensen dated May 9, 2014, the testimony states (emphasis added):

10. Are there any other matters you would like to bring to the attention of the Board concerning this case?

Yes, I wanted to mention that there were no witnesses at the public hearing who opposed this project. Though we had talked with many people in the area about supporting the project by attending and testifying at the public hearing on May 6, 2014, **because of the timing of the hearing and the fact that the people in the community are mostly farmers who are now considerably behind in spring planting due to uncooperative weather, only a few were able to attend the hearing.**

The public hearing was held at the earliest date permitted by law and the Board did not act on the many requests for a second local public hearing to provide local property owners and local officials with a meaningful opportunity to provide input.

Despite the “good cause” standard set forth in the notice which was published in accordance with the Board’s specifications, the Order subjected Omega’s late-filed intervention request to a much higher standard – the standard contained in rules rescinded by the Board in February 2014 and contained in Section 4906.08(B), Revised Code. In hindsight, it appears that both Greenwich and the Board expected Omega to conform its actions to standards contained in a rescinded rule in circumstances that show the public notice required by the Board and published by Greenwich identified a different standard than that contained in the rescinded rules.

In any event, only Greenwich opposed Omega’s late-filed intervention request. Greenwich did not contest Omega’s assertions that:

- Omega has a direct, real and substantial interest in the issues and matters involved in this proceeding.
- Omega is so situated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect that interest.
- Omega’s participation will significantly contribute to the full development and equitable resolution of the factual and other issues.
- The interests of Omega have not been represented by any existing parties to the proceeding.

Rather, Greenwich asserted that Omega did not allege any extraordinary circumstances and this assertion is adopted in the Order. While the Board may reasonably exercise discretion in addressing a late-filed intervention request, the assertion that Omega did not allege any extraordinary circumstances was and is not correct.

Greenwich also opposed the intervention request based on the assertion that the record closed on May 19, 2014. But, Greenwich filed information for the Board's consideration well after May 19, 2014.

As noted above, Greenwich filed the defective waivers in the case file on July 15, 2014. This is confirmed by the Order at page 3. The Order draws conclusions based on the July 15, 2014 filing by Greenwich as though the filing was part of the evidentiary record:

On July 15, 2014, Greenwich filed executed copies of a setback waiver from affected property owners.

As explained above and assuming the rescinded rules which the Board applied in this case were properly applied, the opportunity for any waiver from the minimum setback requirements was foreclosed in this case since Greenwich did not file a motion requesting such waivers.

For what it may be worth, there is nothing in the record (as it existed on May 19, 2014) or the July 15, 2014 filing by Greenwich that supports a conclusion that the July 15, 2014 filing contains an executed setback waiver from affected property owners. A casual review of the so-called executed waivers shows that they are not from all the property owners affected by the wind farm. As demonstrated by other filings made by

Greenwich after May 19, 2014 and the list of property owners and adjacent property owners submitted to the Board by Greenwich on February 21, 2014, Greenwich's July 15, 2014 transmittal letter wrongly asserts that the filing contains "...waivers of the minimum property line setback with the participating landowners in the **project area**".³⁵ (emphasis added).

Greenwich also filed other information for the Board's consideration after May 19, 2014.

On June 13, 2014, Greenwich filed information for the Board's consideration to refute opposition expressed in letters identified by Greenwich. Greenwich's June 13, 2014 filing also includes maps which confirm that Ms. Marcia Ledet, who expressed opposition to the wind farm, is an owner of property adjacent to the wind farm property.

On July 3, 2014, Greenwich filed information for the Board's consideration to refute the opposition expressed in letters the Board posted between June 13, 2014 and June 30, 2014. Greenwich's July 3, 2014 filing also includes maps which confirm that owners of property adjacent to the wind farm property are opposed to Greenwich's wind farm.

On August 19, 2014, two days before Omega filed its intervention request, Greenwich filed a letter in the case records portion of this proceeding in which Greenwich expressed opposition to the concerns and objections contained in letters submitted between July 3, 2014 and August 18, 2014. (Without explanation, the Board

³⁵ Under the rescinded rules which the Board applied in this proceeding, "'project area' means the total wind-powered electric generation facility, including associated setbacks," and "'Wind-powered electric generation facility' or 'wind-energy facility' or facility means all the turbines, collection lines, any associated substations, and all other associated equipment." Rule 4906-17-01(B), O.A.C.

moved Greenwich's August 19, 2014 filing from the case documents section to the public comments section shortly after Omega filed its late-filed motion to intervene.) The August 19, 2014 letter submitted by Greenwich for the Board's consideration acknowledges that five of the letters expressing objections to Greenwich's proposed wind farm were submitted by adjacent property owners. Again, the maps which Greenwich supplied with the August 19, 2014 filing show that owners of property adjacent to the wind farm property oppose the proposed wind farm.

Greenwich also contested Omega's intervention request based on Omega's statement that it accepted all agreements, arrangements and other matters previously made in the proceeding except for the Stipulation. According to Greenwich and the Order, Omega was obligated to accept the Stipulation as a condition for intervention (based on a rule that the Board rescinded in February 2014). As discussed below and assuming that reliance on the rescinded rule is appropriate, such a condition is unreasonable and unlawful because it effectively precludes Omega from using the party status it has sought to challenge the lawfulness and reasonableness of the Stipulation, a recommendation by the parties taking positions adverse to the interests of Omega.

For the reasons stated herein, the denial of Omega's intervention request was unreasonable or unlawful.

- F. The Order unreasonably and unlawfully denied Omega's intervention request by requiring that Omega agree to be bound by a prior agreement (the Stipulation) between parties adverse to Omega. The practical effect of the Board's insistence that Omega agree to be bound by such prior agreement is that Omega would have been unable to protect its legitimate interests even if the Board had granted intervention subject to a condition designed to deprive Omega of an opportunity to be heard on a recommendation made without notice to the public generally or Omega specifically. A requirement that Omega agree, as a condition for late-filed intervention, to be bound by an unreasonable or unlawful agreement in circumstances where the agreement was not filed until shortly before the evidentiary hearing (and well after the local public hearing) and there was no public notice of the proposal's evasion of the minimum setback requirements, effectively precludes Omega from protecting the property rights it enjoys pursuant to Article I of the Ohio Constitution. More specifically, the Ohio Constitution confirms that Omega has inalienable rights among which are acquiring, possessing and protecting property as well as seeking and obtaining safety and happiness. The Board's decision in this proceeding effectively delegates to Greenwich, the Bureau and the Board's Staff the right to deprive Omega of its right to possess, protect and enjoy its property thereby unreasonably and unlawfully subordinating Omega's constitutionally protected and inalienable property rights to their wishes and without the heightened scrutiny demanded of the Board in circumstances where its actions may affect the cherished and venerable rights of citizens like Omega.**

To the extent the Board finds that Omega has standing to seek rehearing for the reasons stated above, this alleged error may be moot. In the event the Board does not do so, Omega urges the Board to find that requiring Omega to be bound by an unreasonable and unlawful stipulation between parties adverse to Omega was unreasonable or unlawful based on the specific facts and circumstances of this case.

According to Greenwich and the Order, Omega was obligated to accept the Stipulation as a condition for intervention (based on a rule that the Board rescinded in February 2014). Assuming the Board's reliance on the rescinded rule is appropriate, such a condition is unreasonable and unlawful because it effectively precludes Omega

from using the party status it sought and continues to seek to challenge the Stipulation, a recommendation by the parties taking positions adverse to the interests of Omega.

Economically significant wind farms like the one proposed in this proceeding affect the inalienable rights of adjacent property owners and citizens like Omega. Among these rights are the right to acquire, possess and protect property, as well as seeking and obtaining safety and happiness. Because of the direct and substantial impact of proposed wind farms on the ability of citizens like Omega to hold and exercise their constitutionally-confirmed rights, the Board was obligated to subject the certification application and the Stipulation which it ultimately adopted to heightened scrutiny. Instead of heightened scrutiny, the Board deferred to the recommendations in a stipulation that was first announced on May 15, 2014.

As explained above, the evidence shows that the Stipulation fails to satisfy the criteria applied by the Board. As also explained above, the Stipulation unlawfully deprives all property owners adjacent to the wind farm property of their statutory right to protect their constitutionally-protected property interests by refusing to waive the application of the statutory minimum setback requirements.

The Stipulation did not materialize in the case records until May 15, 2014. There was no effort by the Board or Greenwich to alert the public and affected property owners to the recommendations which the Stipulation urged the Board to adopt. Had Omega discovered the Stipulation and educated itself about the significance of the Stipulation relative to its property interests, any intervention request it submitted after the Stipulation was filed with the Board would have been late based on the Board's procedural schedule. Insisting that Omega agree to be bound by the Stipulation in this

context is fundamentally at odds with the public interest and it unfairly and unlawfully subjects Omega (and other local property owners opposed to the wind farm) to a standard that effectively requires citizens to let go of their rights in exchange for doing what they must to protect such rights.

The Stipulation is not an agreement on the order of witnesses, when briefs will be filed or the timing of other procedural steps. It is a substantive recommendation submitted by parties adverse to Omega which diminishes the rights of Omega and other local property owners who were not represented by any party and were being attacked by Greenwich because they were attempting, through their public comments, to alert the Board to their problems, objections and concerns.

If a rule or law chills the exercise of a constitutional right by punishing those who choose to exercise the right, then it is unconstitutional.³⁶

For the reasons stated herein, the Board's rejection of Omega's intervention request was unreasonable and unlawful because it required Omega to accept a condition for intervention that chills Omega's exercise of its right to possess and protect its property as well as seeking and obtaining safety and happiness.

³⁶ See *United States v. Jackson*, 390 U.S. 570, 581 (1969); *Nollan v. California Coastal Com'n*, 483 U.S. 825, 842 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 356-386 (1994).

III. CONCLUSION

For the reasons set forth above, Omega urges the Board to: (1) grant rehearing and vacate the Order; or (2) grant rehearing, grant Omega's intervention request, grant the request for a second local public hearing, specify that additional evidence shall be taken for the purpose of evaluating the Joint Stipulation and Recommendation filed in this proceeding on May 16, 2014 in accordance with the applicable criteria and direct the parties, including Omega, to work in good faith to submit a joint proposed procedural schedule governing the balance of this proceeding.

Respectfully submitted,

/s/ Samuel C. Randazzo

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Application for Rehearing and Memorandum in Support of Omega Crop Co., LLC, An Owner of Property Adjacent to the Wind Farm Property* has been served via electronic mail upon the following parties of record this 23rd day of September 2014.

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Case No(s). 13-0990-EL-BGN

Summary: App for Rehearing Application for Rehearing and Memorandum in Support of Omega Crop Co., LLC, An Owner of Property Adjacent to the Wind Farm Property electronically filed by Mr. Samuel C. Randazzo on behalf of Omega Crop Co., LLC