

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.)

ENTRY ON REHEARING

The Ohio Power Siting Board, in considering the application for rehearing filed by Omega Crop Co., LLC, hereby denies the application for rehearing of the Board's August 25, 2014 Opinion, Order, and Certificate granting the application of 6011 Greenwich Windpark, LLC, to construct a wind-powered electric generation facility in Greenwich Township, Huron County, Ohio. Accordingly, the Board finds:

- (1) All proceedings before the Board are conducted in accordance with the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.
- (2) Ohio Adm.Code Chapter 4906-17 sets forth the specific information an applicant for a wind-powered generation facility must provide in its application, including: a facility overview; a general project area analyses, including the factors and rationale used to determine the preferred and alternate project sites; technical, financial, and environmental data; and socioeconomic, land use, and ecological impact analyses, including a plan for decommissioning the proposed facility.

History of the Proceeding

- (3) On December 23, 2013, and continuing through December 27, 2013, 6011 Greenwich Windpark, LLC (Greenwich) filed with the Board an application for a certificate to construct a wind-powered electric generation facility pursuant to Ohio Adm.Code Chapter 4906-17 (Greenwich Facility).
- (4) Pursuant to R.C. 4906.07, upon receipt of an application that complies with the requirements of R.C. 4906.06, the Board shall promptly fix a date for a public hearing, not less than 60 days and not more than 90 days after receipt of the application, and shall conclude the proceeding as expeditiously as practicable.

- (5) By Entry issued March 10, 2014, the procedural schedule was established for the processing of the Greenwich application, including scheduling a local public hearing and an evidentiary hearing. The March 10, 2014 Entry also directed Greenwich to publish notice of the application and hearings, in accordance with R.C. 4906.08 and Ohio Adm.Code 4906-5-08, and directed that petitions to intervene be filed within 30 days following publication of the first notice but by no later than April 18, 2014.
- (6) The local public hearing was held on May 6, 2014, at South Central High School, in Greenwich, Ohio, and the evidentiary hearing was held on May 19, 2014, at the offices of the Board. Proof that the legal notice of the hearings was published in newspapers in Huron County, in accordance with the March 10, 2014 Entry, was filed on March 25, 2014, and May 12, 2014.
- (7) On August 21, 2014, Omega Crop Co., LLC (Omega) submitted a late-filed motion to intervene to which Greenwich filed a memorandum contra on August 22, 2014. On August 25, 2014, Omega filed a reply.
- (8) On August 25, 2014, the Board issued its Opinion, Order, and Certificate, which approved the Stipulation entered into between Greenwich, Staff, and the Ohio Farm Bureau Federation (Farm Federation), granted the application of Greenwich to construct a wind-powered electric generation facility in Greenwich Township, Huron County, Ohio, subject to 53 conditions, and denied Omega's late-filed motion to intervene. *In re 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN (*Greenwich Case*) at 3-4, 48.

Application for Rehearing

- (9) R.C. 4906.12 states, in relevant part, that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23 apply to a proceeding or order of the Board as if the Board were the Public Utilities Commission of Ohio (Commission).
- (10) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

- (11) Further, Ohio Adm.Code 4906-7-17(D) states, in relevant part, that any party or affected person may file an application for rehearing within 30 days after the issuance of a Board order in the manner, form, and under the circumstances set forth in R.C. 4903.10.
- (12) Ohio Adm.Code 4906-7-17(I) provides that the administrative law judge (ALJ) may issue an order granting rehearing for the limited purpose of affording the Board more time to consider the issues raised in an application for rehearing.
- (13) On September 23, 2014, Omega filed an application for rehearing of the Board's August 25, 2014 Order. In its application for rehearing, Omega first addresses its standing to file an application for rehearing and proceeds to cite six grounds for rehearing, arguing that:
 - (a) the Order unreasonably and unlawfully denied Omega's late-filed motion to intervene;
 - (b) Ohio Adm.Code 4906-07-04 is unreasonable and unlawful to the extent that it requires Omega to agree, as a condition of its late-filed request to intervene, to be bound by the Stipulation and denies Omega the statutory right to protect its property interest;
 - (c) the Order is unreasonable and unlawful to the extent that Greenwich's application was processed pursuant to rules that violate Ohio law and had been rescinded by the Board;
 - (d) the Board failed to adopt rules that address the subjects prescribed in R.C. 4906.20;
 - (e) granting that application is incompatible with R.C. 4906.20(B)(2), because Greenwich did not request a waiver of Ohio Adm.Code 4906-17-08, the minimum turbine setback provision, as is permissible pursuant to Ohio Adm.Code 4906-1-03; and
 - (f) the Order unreasonably and unlawfully adopts the Stipulation filed by Greenwich, Staff, and Farm Federation.

- (14) Greenwich filed a memorandum contra Omega's application for rehearing on October 2, 2014.
- (15) By Entry issued October 22, 2014, Omega's application for rehearing was granted, for the limited purpose of affording the Board additional time to consider the issues raised by Omega in its application for rehearing, without addressing the merits of any arguments raised or whether the filing satisfies the legal requirements set forth in R.C. 4903.10 for an application for rehearing.
- (16) The Board has reviewed and considered all of the arguments raised in the application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and should be denied.

Omega's Standing to File an Application for Rehearing

- (17) In regards to its standing, Omega contends that it made an appearance in this matter with its August 21, 2014 late-filed motion to intervene. Omega equates its motion to an appearance under R.C. 4903.10 and, therefore, claims it is entitled to seek rehearing under R.C. 4903.10. Omega argues that it is entitled to seek rehearing as an affected person in this uncontested proceeding. In the alternative, Omega submits that just cause for its failure to enter an appearance exists and that Omega's interests were not considered in this matter.
- (18) In response, Greenwich argues Omega's motion was filed on August 21, 2014, long after the Board's April 18, 2014 deadline to intervene. Greenwich notes Omega did not state good cause for failing to timely file its request for intervention or to demonstrate extraordinary circumstances to justify granting the motion. *Greenwich Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 3-4. Accordingly, Greenwich avers that Omega's assertion that it made an appearance in this matter is contradicted by the facts.
- (19) As previously stated, R.C. 4903.10 is equally applicable to the Board as to the Commission. As such, R.C. 4903.10 provides, in part, that, after any order by the Board, any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing. Omega filed a late-filed motion to intervene four months after the intervention deadline established in this case pursuant to statute and four days before the Order was scheduled

for consideration by the Board. Although the motion was denied, the fact is that Omega did enter an appearance before the Order was issued. As such, for the limited purpose of contesting the Board's denial of its late-filed motion to intervene, we find that Omega should be permitted to file an application for rehearing of the Board's decision in the *Greenwich Case* pursuant to the first paragraph of R.C. 4903.10, without filing a request for leave to file an application for rehearing. Accordingly, the Board finds Omega's remaining claims in regards to its standing to seek rehearing are moot. Notwithstanding the determination that Omega's right to file an application for rehearing is limited to its objection to the Board's denial of its late-filed motion to intervene, even though Omega was denied intervenor status, we will review and respond to the other arguments presented by Omega in its application for rehearing. This is consistent with the Commission's ruling and consideration under similar circumstances. See *In re Ohio Edison Co., et al.*, Case No. 11-5201-EL-RDR, Entry on Rehearing (Sept. 18, 2013) at 4; Second Entry on Rehearing (Dec. 18, 2013). With this in mind, the Board will first address Omega's assignments of error pertaining to the late-filed request for intervention before proceeding with the other five issues that are not related to the late-filed request for intervention.

Omega Assignment of Error Regarding Denial of Late-Filed Intervention

- (20) In the Order, in considering Omega's late-filed motion to intervene, the Board noted that the intervention deadline was April 18, 2014; however, R.C. 4906.08(B) and Ohio Adm.Code 4906-7-04(C) provide that, in extraordinary circumstances and for good cause shown, the Board may grant an untimely petition for leave to intervene. We further stated that, in such circumstances, the petition must contain a statement of good cause for failing to timely file and the request shall be granted only upon a finding that extraordinary circumstances justify granting the petition and that the intervenor agrees to be bound by agreements previously made in the proceeding. The Board pointed out that Omega's petition to intervene was filed 125 days after the filing deadline for petitions to intervene and failed to set forth any statement of good cause for failing to timely file its request for intervention, with no showing that extraordinary circumstances justify granting the motion. Moreover, it was noted that Omega specifically refused to be bound by the Stipulation previously filed by the parties in this

matter. Thus, the Board denied Omega's motion to intervene finding that it failed to comply with Ohio Adm.Code 4906-7-04.

- (21) In its application for rehearing, Omega argues that the Board's Order unreasonably and unlawfully denied Omega's late-filed motion to intervene. Omega declares that, as an owner of property adjacent to the wind farm, Omega has a right to party status under R.C. 4906.08(A)(2), provided that the filing is timely. Acknowledging that its motion to intervene was filed after the intervention deadline, Omega states that it demonstrated good cause for late intervention and otherwise meets the criteria to be granted intervention under R.C. 4903.221(B). Omega argues that, from the effective date of the application, March 6, 2014, until the date of the evidentiary hearing, May 19, 2014, there were only 74 days, and the last newspaper notice was published on April 22, 2014. Omega notes that the hearing was held at the earliest date permitted by law and the Board did not act on correspondence that requested a second local public hearing. Omega also argues that the Board did not apply the good cause standard for intervention stated in published notices, but, instead, subjected Omega to a much higher standard, contained in rescinded Board rules and R.C. 4906.08(B). Omega claims that Greenwich did not argue that Omega failed to assert the criteria considered by the Board under R.C. 4903.221. Further, Omega argues that it is unreasonable and unlawful for the Board to condition Omega's intervention upon acceptance of the record, including the Stipulation in this case, as it effectively precludes Omega's ability to challenge the Stipulation.
- (22) In its memorandum contra, Greenwich submits that the Board rejected Omega's late-filed motion to intervene for failure to state good cause for the untimely request to intervene. Greenwich avers that Omega continues to make a claim for just cause without any new support for the position. Greenwich challenges Omega's claim that the procedural schedule was a reason for Omega's late-filed request to intervene. Greenwich notes that notice of the public informational meeting for the proposed project was published on May 9, 2013, and May 14, 2013, for a meeting held on May 22, 2013. Greenwich notes that Gerald Oney, co-owner of Omega, attended the May 22, 2013 public informational meeting. Further, Greenwich notes notice of the proposed project was sent to property owners, affected tenants, and adjacent property owners, including Omega, on March 12, 2014, and notice of the hearings, including the intervention deadline, was published on March 12,

March 18, April 14, and April 22, 2014, in newspapers serving the area. Thus, Greenwich reasons Omega had constructive and actual notice of the project and intervention deadline. Greenwich notes that Omega fails to expressly state the interests which were not adequately considered by the Board. Assuming that Omega's interests are as an adjacent property owner and operating farm, Greenwich notes that such interests are considered by the Board, as a matter of law, and were considered in this case. Therefore, Greenwich submits that Omega's failure to properly request to become a party to this proceeding is not for just cause and the application for rehearing is not properly before the Board.

- (23) The Board affirms its decision to deny Omega's late-filed motion for intervention. The record supports that Omega had actual and constructive notice of the Greenwich application, intervention deadline, and hearings, and Omega did not refute that contention. Omega cites, in support of its request for intervention, to R.C. 4906.08(A)(2). R.C. 4906.08(A)(2) specifically applies to persons who are entitled to receive service of a copy of the application under R.C. 4906.06(B). R.C. 4906.06(B) requires that an application be accompanied by proof of service on "****the chief executive officer of each municipal corporation and county, and the head of each public agency charged with***protecting the environment or of planning land use, in the area in which any portion of the facility is located." Omega's motion for intervention did not meet that requirement. While Omega offers that it filed its notice of intervention as soon as possible after it "sorted things out and retained counsel," Omega fails to explain how it has a right to party status under R.C. 4906.06(B) because it is neither the chief executive officer of a municipal corporation or county, nor the head of a public agency.

Further, the Board notes that it was Omega who delayed its efforts to pursue intervention until long after the intervention deadline and the hearings. As pointed out by Greenwich, Omega can not claim that such delay was due to Omega not being aware of the proceeding, as notice of the proposed project was sent to property owners, affected tenants, and adjacent property owners, including Omega, on March 12, 2014, and the co-owner of Omega attended the May 22, 2013 public informational meeting regarding the application. Moreover, as Omega also acknowledges, the Board has a limited window of opportunity to hold the hearings. R.C. 4906.07 directs the Board to "promptly fix a date for a public

hearing thereon, not less than sixty nor more than ninety days" after determining that the application is complete and "conclude the proceeding as expeditiously as practicable." As Omega notes, the Board established March 6, 2014, as the effective date of the application, and held the public hearing on May 6, 2014, consistent with R.C. 4906.07.

Omega also refers to the requirements of R.C. 4903.221(B) regarding the factors the Board will consider in granting a motion to intervene, but overlooks that R.C. 4903.221 affords the Board with discretion to grant late-filed motions to intervene based upon good cause shown. In addition, Ohio Adm.Code 4906-07-04(C) provides that, any late-filed motion to intervene must contain a statement of good cause for failing to timely file and shall be granted only upon the Board finding that: extraordinary circumstances justify the Board granting the late-filed motion; and the intervenor agrees to be bound by the agreements, arrangements, and other matters previously made in the proceeding. Requiring intervenors in Board proceedings that file for party status literally months after the intervention deadline and a few days before the Board agenda, which was publicly noticed, to agree to be bound by previous agreements, arrangements, and other matters made prevents undue delay of proceedings and facilitates the processing of Board matters in compliance with the statute. The Board has the duty under R.C. 4906.07 to expedite the orderly flow of business before it and to manage its dockets. Accordingly, we find that Omega has raised no new argument on this issue that was not already thoroughly considered by the Board. Therefore, Omega's request for rehearing of this issue is without merit and should be denied.

- (24) As stated in Finding (19), the Board determined that Omega is only permitted to file rehearing for the limited purpose of requesting reconsideration of the Board's denial of Omega's late-filed motion to intervene. However, consistent with past precedent, the Board agreed to review and respond to the other five arguments in Omega's application for rehearing, even though they are not part of the arguments concerning our denial of the late-filed motion to intervene. The following is the summary of the arguments and our review of these five issues.

Omega Assignment of Error Regarding Agreeing with the Stipulation

- (25) In this assignment of error, Omega submits that Ohio Adm.Code 4906-07-04 is unreasonable and unlawful to the extent that the rule requires Omega to agree, as a condition of its late-filed request to intervene, to be bound by the Stipulation and denies Omega the statutory right to protect its property interest. In support of this claim, Omega cites, without any explanation, *Nollan v. California Coastal Com'n*, 483 U.S. 825, 842, S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 356-386, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Further, according to Omega, economically significant wind farms affect the property rights of area property owners and their constitutionally-confirmed rights to protect that property. For this reason, Omega contends the Board has a duty to subject wind certificate applications and the stipulations recommending approval of the applications to heightened scrutiny. In support of this argument, Omega footnotes, without explanation, *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.
- (26) In response, Greenwich states Omega had actual and constructive notice of the application, hearings, and intervention deadline for the Greenwich Facility and failed to present any good case for its late-filed motion to intervene. Thus, Greenwich reasons that the Board acted reasonably and lawfully to deny Omega's motion to intervene. Further, Greenwich argues *Norwood* is not applicable to this proceeding. Greenwich submits that *Norwood* involved the interpretation of "public use" and the court's role in reviewing eminent-domain appropriations, particularly where the taking involves a transfer of the property to a private entity and a novel theory of public use is asserted. For this reason, Greenwich concludes any reliance on *Norwood* is misplaced.

Further, in regards to Omega's due process claims, Greenwich notes that Omega failed to indicate the actual property right violated and submits that *Dolan* and *Nollan* are inapplicable to the case at bar. According to Greenwich, in *Dolan* the United States Supreme Court held that a condition to a building permit which required the applicant to grant an easement for a bicycle path constituted a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution. Greenwich emphasizes that, in this matter, the Board is not requiring Omega to provide an easement across its land. In *Nollan*, Greenwich states the United

States Supreme Court held that, where governmental action results in a permanent physical occupation by the government or others, there is a taking to the extent of that occupation. Greenwich submits the Board's Order does not result in any physical occupation, by any entity, of Omega's property. Therefore, Greenwich reasons neither decision is applicable to this case.

Greenwich also argues that Omega's right to participate in this proceeding is based on the Board's administrative rules. Furthermore, Greenwich reasons that Omega has no constitutionally-protected due process rights at stake in this case and, even if Omega did, due process is limited to notice and an opportunity to be heard, which the Board's rules afforded Omega. *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). For all the aforementioned reasons, Greenwich avers that the Board acted reasonably and lawfully when it denied Omega's untimely request to intervene and, therefore, Greenwich requests that Omega's application for rehearing be denied.

- (27) The Board previously explained its authority and rationale for requiring late intervenors to comply with prior agreements. It is Omega who failed to timely exercise its opportunity to participate in this proceeding. Accordingly, we will not address this issue further as a part of this assignment of error.

Furthermore, we agree that the case law cited by Omega is not applicable to this proceeding. First, the Board notes Omega does not claim that the Greenwich Facility encroaches on or will destroy Omega's property. Omega cites case law where government action takes possession or control of private property. However, none of the three cases cited by Omega is applicable to the circumstances of the case at bar. In *Norwood*, the city acquired private property by eminent domain. The city then transferred the property to a private development company to be developed and owned by the developer. The Ohio Supreme Court in *Norwood* examined the standard of review for regulating the use of eminent-domain powers and the taking of private property for public use. The Board's Order does not direct any transfer or control of Omega's property. As such, *Norwood* is distinguishable from this case and does not support Omega's arguments in this matter.

The Board finds that *Nollan* and *Dolan* also do not support Omega's claims in this matter. In *Nollan*, the state required a public

easement across private beachfront property as a condition of a building permit for the property, without compensation to the owner of the property. In a similar situation, in *Dolan*, the city conditioned the property owner's building permit upon the condition that a portion of the lot be dedicated to the city for a bicycle path. The city did not compensate the property owner. In both cases the United States Supreme Court held the governments' actions constituted a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution. In this case, the Board, through its Order, has not ordered the seizure, possession, or control of Omega's property as in the cases cited by Omega. We emphasize that Omega is an adjacent property owner of land leased to Greenwich for the wind facility. Accordingly, we find the cases to be inapplicable to this matter. Therefore, we find that Omega's application for rehearing on this issue is unfounded and should be denied.

Omega Assignment of Error Regarding the Board's Rules

- (28) In this assignment of error, Omega argues the Board's Order is unreasonable and unlawful to the extent that Greenwich's application was processed pursuant to rules that violate Ohio law and had been rescinded by the Board. *In re the Ohio Power Siting Board's Review of Chapters 4906-1, et al. of the Ohio Administrative Code*, Case No. 12-1981-GE-BRO (*Board Rules Proceeding*), Finding and Order (Feb. 18, 2014). Omega avers the adopted rules had not been filed with the Joint Committee on Agency Rule Review (JCARR) and were not effective when the application was granted. Omega notes that R.C. 4906.20(B) directs the Board to promulgate rules for the certification of jurisdictional wind facilities, including the prescribed minimum setback for wind turbines. Omega contends that a certificate may only be issued in accordance with R.C. 4906.20. Omega reasons that, because the Board did not have rules in effect consistent with the setbacks stated in R.C. 4906.20(B) when the Greenwich certificate was approved, the Board lacked jurisdiction to issue the Order and, therefore, the Greenwich certificate is void. Further, Omega submits that the certificate issued in this case is incompatible with the requirements of R.C. 4906.20(B)(2) and, therefore, not lawfully issued by the Board.
- (29) Greenwich acknowledges that the Board rescinded its rules and adopted new rules in the *Board Rules Proceeding*. However, Greenwich emphasizes that, pursuant to R.C. Chapter 119 and R.C.

111.15, for the Board's rescission of the old rules to be completed and for the new rules to become effective, requires that the rules be filed with the Secretary of State and the Legislative Service Commission (LSC). Therefore, Greenwich concludes that, for the same reason that the new rules adopted by the Board in the *Board Rules Proceeding* are not effective, neither are the current rules rescinded. For that reason, Omega's claims are contrary to the administrative rulemaking process. Further, Greenwich notes that Ohio Adm.Code 4906-17-08(C)(1)(c) contains the minimum setback requirements required by R.C. 4906.20(B), and the setback was applied in this case. Thus, Greenwich asks that the Board reject Omega's request for rehearing on this issue.

- (30) The Board finds no merit to Omega's assignment of error on this issue. In the *Board Rules Proceeding*, the Board conducted its five-year review of its rules under Ohio Adm.Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17, pursuant to R.C. 119.032, and issued revised rules to be filed with JCARR and LSC on May 19, 2014. Under this review, the Board: conducted a workshop where interested stakeholders could provide input on the rules; issued Staff's proposed reorganization and amendment to the rules; established a comment period for review of Staff's proposed modifications to the rules; evaluated all of the comments; determined that certain of its rules should be rescinded and replaced by new rules; determined that certain of its rules should be amended; directed that the adopted rules be filed with JCARR and LSC; and directed that the final rules be effective on the earliest date permitted. *Board Rules Proceeding*, Finding and Order (Feb. 18, 2014); Entry on Rehearing, (May 19, 2014).

However, the Board's issuance of an entry ordering that one or more rules should be rescinded and new rules adopted does not immediately make the proposed new rules effective or negate the current rules. Rules go into effect when the rules leave JCARR jurisdiction and when the agency files the rules in final form with JCARR, LSC, and the Secretary of State. Until such time as administrative rules complete the rulemaking process, including leaving JCARR jurisdiction, or become invalidated, existing rules remain in effect. Thus, because the Board's rules have not completed the JCARR process, the rules have not been invalidated, and the existing Board rules were in effect at the time the Board issued its August 25, 2014 Order. Therefore, we find that Omega's

application for rehearing on this issue is unfounded and should be denied.

Omega Assignment of Error Regarding the Statutory Requirement for Rules

- (31) Expanding upon its previous issue, in this assignment of error, Omega contends the Board failed to adopt rules that address the subjects prescribed in R.C. 4906.20. Therefore, Omega reasons the Board lacked the authority to issue the Order in this case; the Order was not issued pursuant to R.C. 4906.20; and the Order is void, and unreasonable or unlawful. Omega further alleges that the Order fails to address each of the subject areas identified in R.C. 4906.20(B)(2) in reference to the testimony offered by the township trustee and comments filed in the public comment section of the docket. On that basis, Omega argues that the Board did not properly consider the public interest.
- (32) Greenwich notes that Omega identified several areas of concern and objections raised in the public comments: noise, impacts to agriculture; emergency response to potential turbine fires; shadow flicker; impacts to recreational property; and potential impacts to business. Greenwich notes that each of the subjects was extensively evaluated by the Board as part of the application, Staff's investigation, and the Board's Order. Further, acknowledging that the Board's currently effective rules address the issues raised by Omega in its application for rehearing, Greenwich avers that Omega's application for rehearing on this issue is without merit.
- (33) The Board finds this assignment of error by Omega to be unfounded. R.C. 4906.10 provides the Board with authority to grant, or modify and grant, a certificate to construct, operate, and maintain a major utility facility, such as the Greenwich Facility, which is defined under R.C. 4906.01 as an electric generating plant and associated facilities operating at a capacity of 50 megawatts (MW) or more. R.C. 4906.20 addresses the subject matters the Board must address in its rules pertaining to economically significant wind farms, which are defined under R.C. 4906.13 as operating at an aggregate capacity of five or more MW, but less than the 50 MW minimum for major utility facilities. In accordance with R.C. 4906.20, the Board promulgated extensive rules that are set forth in Ohio Adm.Code Chapter 4906-17 and apply to economically significant wind farms; these rules address all of the issues that Omega is concerned about. In addition, although not

required to do so under the statute, the Board's rules require major utility facility applicants, such as Greenwich, to include detailed information in their applications regarding all of the subject matters set forth in R.C. 4906.20. With these rules in place, as evidenced by our 48 page Order, the Board thoroughly reviewed and considered the application, the Staff Report, the Stipulation, and all testimony and evidence offered in this proceeding when determining that Greenwich's application to construct the Greenwich Facility should be approved. Accordingly, the Board finds that Omega's request for rehearing of this issue should be denied.

Omega Assignment of Error Regarding R.C. 4906.20(B)(2)

- (34) In its next assignment of error, Omega argues granting Greenwich's certificate application is incompatible with R.C. 4906.20(B)(2). Omega asserts Greenwich did not request a waiver of Ohio Adm.Code 4906-17-08, the minimum turbine setback provision, as is permissible pursuant to Ohio Adm.Code 4906-1-03. Omega contends 16 of the 25 wind turbines proposed do not meet the minimum setback requirements. Omega interprets R.C. 4906.20(B)(2) to prevent the Board from granting a waiver of the minimum setback requirement unless and until all property owners adjacent to the wind farm property waive the minimum setback requirement.
- (35) In response, Greenwich insists that Omega's argument reflects a misunderstanding of Ohio Adm.Code 4906-1-03 in relation to R.C. 4906.20. Greenwich contends that Ohio Adm.Code 4906-1-03 applies to requirements, standards, or rules that the Board or the ALJ may waive. In contrast, Greenwich states that R.C. 4906.20, consistent with the General Assembly's intent, allows the adjacent property owner to waive the setback requirement not the Board or the ALJ.
- (36) The Board notes that R.C. 4906.20(B)(2) provides that the setback shall apply in all cases except those in which all owners of property adjacent to the wind farm property waive application of the setback to that property. R.C. 4906.20 does not grant to the Board or the ALJ the authority to waive the minimum setback requirement. Further, Ohio Adm.Code 4906-1-03 states the Board or the ALJ may, for good cause shown, as supported by a motion and supporting memorandum, waive any requirement, standard, or rule set forth in Ohio Adm.Code Chapters 4906-1 to 4906-17 except

where precluded by statute. Moreover, the Board notes that, consistent with the statute, the Stipulation, as approved by the Board, requires that, for any wind turbine that does not comply with the minimum setback requirements stated in the statute, Greenwich must secure an executed waiver of the minimum setback. If the necessary waivers are not obtained, Greenwich shall not build the turbine. *Greenwich Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 13. Accordingly, the Board finds that Omega's arguments to the contrary are without merit and the request for rehearing on this issue should be denied.

Omega Assignment of Error and the Stipulation

- (37) Finally, Omega contends the Order unreasonably and unlawfully adopts the Stipulation filed by Greenwich, Farm Federation, and Staff. Omega notes the Board uses a three-part test to evaluate the reasonableness of stipulations. According to Omega, the direct testimony offered by Greenwich and Staff do not support the Board's finding that the Stipulation meets the criterion set forth in the three-part test. Omega notes that Greenwich witness Jensen was unable to answer whether the Stipulation violated any important regulatory principle or practice and, when Staff witness Zeto was asked "[a]nd to your knowledge, does it [Stipulation] violate any important regulatory principle or practice of the rule?" the question was too narrowly focused (Evidentiary Tr. at 22-23, 29).
- (38) Greenwich agrees, as Omega states, that the Board uses a three-part test to evaluate the reasonableness of stipulations filed in Board cases. However, Greenwich submits that Omega's claim that the direct testimony of Greenwich witness Jensen did not discuss the three-part test is erroneous. Greenwich states Ms. Jensen's direct testimony specifically addressed the negotiations and knowledge of the parties and the Stipulation's benefit to ratepayers and the public interest (Co. Ex. 5 at 2-4). Further, Greenwich declares that Staff witness Zeto indicated that he was not aware of any violation of any regulatory principle or practice (Evidentiary Tr. at 29). Greenwich points out that Omega ignores the Staff Report as an important part of the evidentiary record that supports the reasonableness of the Stipulation. Greenwich emphasizes the Staff Report states that the facility would serve the public interest, convenience, and necessity by providing additional electric generation to the regional transmission grid (Staff Ex. 1 at 47).

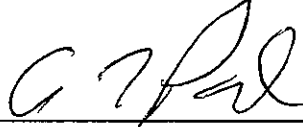
- (39) The Board finds Omega's claim that adoption of the Stipulation was unreasonable or unlawful to be without merit. As discussed in the Order, the Board employs a three-part test to evaluate stipulations and the Board specifically used the test to consider the Stipulation filed in this case. The Board cited record evidence to support the three-part test to find that the Stipulation filed in this case was reasonable and lawful. *Greenwich Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 44-45. In addition, the Staff Report also recommends the Board find that the Greenwich Facility will serve the public interest, convenience, and necessity for reliable electricity. *Greenwich Case*, Opinion, Order, and Certificate (Aug. 25, 2014) at 23. Moreover, the Stipulation also affirms the criterion employed by the Board for consideration of stipulations (Joint Ex. 1 at 1-2). Accordingly, the Board finds that Omega's request for rehearing of this issue should be denied.

It is, therefore,

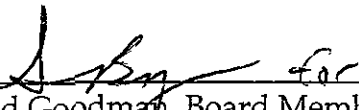
ORDERED, That Omega's application for rehearing is denied. It is, further.

ORDERED, That a copy of this Entry on Rehearing be served upon all interested persons of record.

THE OHIO POWER SITING BOARD



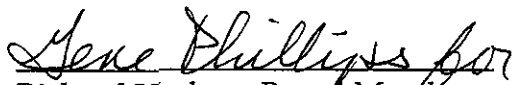
Andre T. Porter, Chairman
Public Utilities Commission of Ohio



David Goodman, Board Member
and Director of the Ohio
Development Services Agency



James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources



Richard Hodges, Board Member
and Director of the
Ohio Department of Health



Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency



David Daniels, Board Member
and Director of the Ohio
Department of Agriculture

Jeffrey J. Lechak, Board Member
and Public Member

GNS/dah/vrm

Entered in the Journal **AUG 27 2015**



Barcy F. McNeal
Secretary