

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of 6011 Greenwich)
Windpark, LLC for an Amendment to its) Case No. 15-1921-EL-BGA
Certificate to Install and Operate a Wind-Powered)
Electric Generation Facility in Huron County, Ohio)

**6011 GREENWICH WINDPARK, LLC MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF GREENWICH NEIGHBORS UNITED**

I. INTRODUCTION

Pursuant to Ohio Administrative Code (“O.A.C.”) Rule 4906-2-32(B), 6011 Greenwich Windpark, LLC (“Greenwich”) submits its Memorandum Contra (“Memo Contra”) to the Application for Rehearing (“Application for Rehearing”) filed by Greenwich Neighbors United (“GNU”). Greenwich urges the Ohio Power Siting Board (“OPSB” or “Board”) to dismiss the Application for Rehearing filed by GNU in its entirety for the reasons set forth below.

II. ARGUMENT

On November 16, 2015, Greenwich filed an application to amend its certificate issued by the Board in Case 13-990-EL-BGN (“Certificate Case”). The application requested approval of three new turbine models for potential operation of the project. On March 22, 2016, Greenwich supplemented this filing by replacing one of the turbine models with a different model. The change in turbine technology was the sole change requested by Greenwich: the locations of the facility components will not change and the facility will continue to adhere to all conditions originally established in the Certificate Case.

A. The Board properly applied its own precedent on the impact of the application to established project setbacks.

The Board properly applied its own precedent that a change in turbine technology, without a change in location or a new or additional material adverse environmental impact, does not constitute an amendment that triggers the enhanced setback provisions in Ohio Revised Code Section (“R.C.”) 4906.201. The Ohio Supreme Court instructs the Public Utilities Commission of Ohio—and, by extension, the Ohio Power Siting Board—to “respect its own precedents in its decisions to assure predictability which is essential in all areas of law, including administrative law.”¹ The Board’s decision is consistent with its precedent.²

GNU continues its attempt to use the amendment application to attempt to re-litigate issues determined in the Certificate Case. GNU, in its motion to intervene, in its Comments and Objections, and now in its application for rehearing, disputes the status of the project’s setback waivers. First, GNU argues that the project’s setback waivers violate R.C. 4906.20(B).³ Second, GNU argues that R.C. 4906.20(B) requires Greenwich to secure waivers from every owner adjacent to the wind farm project footprint, regardless of their proximity to the particular turbine setback at issue.⁴

¹ *In Re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512, 523 (April 19, 2011).

² *In the Matter of the Application of Black Fork Wind Energy, LLC Regarding its Certificate of Environmental Compatibility and Public Need Issued in Case No. 10-2865-EL-BGN*, Case No. 14-1591-EL-BGA (August 27, 2015) (holding that a change in turbine technology does not trigger enhanced setbacks); *In the Matter of the Application of Paulding Wind Farm and Paulding Wind Farm III, LLC for Amendments to Their Certificates to Install and Operate Wind Powered Electric Generation Facilities in Paulding County, Ohio*, Case No. 15-2030-EL-BGA (May 19, 2016) (holding that a change in turbine technology does not trigger enhanced setbacks).

³ Application for Rehearing, p. 19.

⁴ *Id.*, p. 20.

These issues are beyond the scope of this proceeding. The issue of the project's waivers' compliance with Ohio's setback laws was already fully addressed in the Certificate Case.⁵ In fact, the entity that challenged the Board's decision in the Certificate Case is a member of GNU.⁶ This application for rehearing is simply an attempt at a second bite at the apple. The same turbine sites that originally required a waiver continue to require a waiver, and the new turbine models will not require additional property line setback waivers.⁷

Even if the issue of the project's property line setback waivers were not precluded from this proceeding, GNU's arguments are unpersuasive. First, GNU's argument that the project's waivers are invalid because the Board has not issued a rule establishing a setback waiver procedure ignores prior Board rulings and the Board's rules. The Board has clearly stated that R.C. 4906.20 does not grant to the Board or the [administrative law judge] the authority to waive the minimum setback requirement."⁸ Simply put, under R.C. 4906.20, *property owners* waive setback requirements, *not* the Board. GNU ignores that the Board's rules expressly state that a project must secure setback waivers from property owners.⁹

Further, the subject of setback waivers is subsumed within the Board's certificate application rules. For example, any application for a certificate to construct a wind powered electric generation facility submitted to the Board must include a section providing certain "social and ecological data," which includes information on turbine setbacks from property lines

⁵ Certificate, at 17-19 (August 25, 2014) (addressing the setbacks, and acquired necessary waivers, applicable to the Project); see also, Second Entry on Rehearing, Case No. 13-990-EL-BGN, at ¶ 13 (November 12, 2015) ("[t]he Board reviewed the issue [of setbacks] . . . noting 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.").

⁶ See, GNU webpage, noting that the owners of Omega Crop Co. are also members of GNU and indicating that their interests are the same (<http://www.greenwichneighborsunited.com/page/6/>).

⁷ Order on Certificate, p. 5.

⁸ Entry on Rehearing, Case No. 13-990-EL-BGN, ¶ 36.

⁹ See, O.A.C. Rule 4906-17-08 (now O.A.C. Rule 4906-4-08).

and residential structures.¹⁰ While the Board does not grant setback waivers, its rules require that a project obtain necessary setback waivers and provide relevant data about the setback waivers, which then may be subject to further Board investigation.¹¹ To argue that the Board lacks rules addressing setback waivers is nonsensical.

Second, GNU's argument that R.C. 4906.20(B)(2)(c) requires every property owner adjacent to the entire wind farm project footprint to waive the setback, *regardless* of their proximity to the particular turbine setback has already been rejected by the Board.¹² GNU's interpretation is contrary to basic tenants of statutory interpretation, leading to an absurd result.¹³ GNU's interpretation also undermines the property and rights of landowners because it would allow every property owner adjacent to any part of the entire project area should have veto power over the ability of another property owner to waive the setback requirements applicable to his or her property, even if the objecting party's property is not adjacent to the particular wind farm property seeking a waiver.¹⁴

¹⁰ Id.

¹¹ Greenwich's Certificate Application, filed on December 24, 2013, discussed the setback waivers. These setback waivers were also a topic of OPSB Staff Data Requests and Interrogatories. Greenwich filed actual copies of the executed setback waivers in the public docket at the request of OPSB Staff on July 15, 2014. Greenwich's required setback waivers were reviewed in the Staff Report of Investigation and in the Board's Order approving the project.

¹² In contrast, the Board's interpretation of R.C. 4906.20 provides that minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the turbine agree to such waiver.

¹³ See, *Reply Comments of the American Wind Energy Association and Greenwich Windpark, LLC*, Case No. 12-1981-GE-BRO, at 4-6 (February 13, 2015).

¹⁴ See i.e., *Ohio Farm Bureau Federation's Memorandum Contra Second Application of Rehearing*, Case No. 13-990-EL-BGN, 5: "Omega cites that 16 of the 25 project's turbines are within the minimum property line setback. In each instance, a waiver has been executed. **Notably, the adjacent landowners of each of these turbines are participating landowners in the project, who have leased turbine sites to Greenwich.** Omega's proposed interpretation of R.C. 4906.20(B)(2)(c) would allow interference with this exercise of property rights. In some cases, the owner of the adjacent property who executed the waiver *also owns the property with the turbine*. Again, Omega's proposed interpretation of R.C. 4906.20(B)(2)(c) would completely destroy the efficacy of a waiver executed by a property owner relating to a turbine on *his own adjacent property*. Farmers and other property owners need to be able to waive property line setbacks so turbines can be placed at the edges of fields and not in the middle of the fields, where they would have a greater disturbance to farming operations or other uses of the property. It would be illogical to prevent this edge of field placement when the adjacent property is willing to execute a waiver."

B. GNU's argument that the Board improperly limited the scope of GNU's intervention is without merit.

GNU argues that the Board violated O.A.C. Rule 4906-2-12(D), which governs limited intervention by the Board proceedings.¹⁵ Under O.A.C Rule 4906-2-12(D), the Board may limit a person's intervention "with respect to one or more *specific* issues," if the person has no real and substantial interest with respect to the remaining issues and if the person's interests with respect to the remaining issues is adequately represented by existing parties. Emphasis added.

The Board did not violate this rule because the Board did not limit GNU's participation in the proceeding to one or more *specific* issues. Rather, the Board, when granting intervention to GNU and the Ohio Farm Bureau, simply reminded the parties of the scope of the proceeding. Intervention to address "irrelevant matters other than the amendment application or that outside the scope of the proceeding" was not permitted.¹⁶ However, the Board did not limit GNU to a specific issue or issues, and GNU was free to raise—and did—a variety of issues within the scope of the proceeding.

C. GNU's assertions that the Board failed to conduct an investigation, respond to GNU's concerns, or provide reasoning for the decision lack any semblance of reality.

Shortly after Greenwich filed the application at issue, GNU filed comments and objections to the application.¹⁷ GNU now argues that its "comments on and objections to the

¹⁵ Application for Rehearing, p. 12.

¹⁶ Order on Certificate, p. 3.

¹⁷ Comments and Objections of Greenwich Neighbors United, filed December 3, 2015 and supplemented on December 29, 2015.

Wind Farm's Application are not mentioned in or addressed by the Order.”¹⁸ According to GNU, the Board violated R.C. 4903.09 by failing to address its comments and objections.¹⁹

Nonsense. Even a cursory review of the case record indicates that the Board reasonably considered and addressed GNU's comments and objections. For example, GNU's comments and objections argued that Greenwich's newspaper notice improperly contained a timeframe for intervention.²⁰ The Board responded by requiring Greenwich to publish additional newspaper notice.²¹ GNU, in its comments and objections, also raised concern about a potential pipeline to be built in the project area.²² This issue was subsequently investigated by the Staff and addressed in the Order on Certificate.²³ Finally, a significant portion of GNU's comments and objections dealt with the application of setbacks and use of waivers.²⁴ The Board discusses the applicable setback, the use of waivers, and it's the rationale for its position in its decision.²⁵

Notably, GNU shoots itself in the foot by attempting to use *In Re Application of Columbus Southern Power* as support for its argument that the Board violated R.C. 4903.06.²⁶ GNU correctly cites dicta generally indicating that R.C. 4906.03 requires that the Commission (applied here, the Board) decision to sufficiently detail “the reasons prompting the decisions

¹⁸ Application for Rehearing, p. 3.

¹⁹ Id., p. 19.

²⁰ Comments and Objections of GNU, p. 1. But see, *Reply to GNU's Filing on December 29, 2015*, Case No. 15-1921-EL-BGA (Jan. 6, 2016) (noting that the initial intervention deadline provided by Greenwich had been approved legal counsel for the Board).

²¹ Entry, Case No. 15-1921-EL-BGA (Feb. 25, 2016); Order on Certificate, p. 2.

²² Comments and Objections of GNU, p 2.

²³ Staff Report of Investigation, p. 5; Order on Certificate p.7.

²⁴ Comments and Objections of GNU, pp. 4-7.

²⁵ Order on Certification, pp. 5, 9.

²⁶ 128 Ohio St. 3d 512 (April 19, 2011).

arrived at.”²⁷ However, GNU overlooks how the Ohio Supreme Court actually applied R.C. 4903.06 in that case:

Last in the seventh proposition of law, IEU alleges that the commission violated RC 4903.09 by failing to sufficiently detail ‘the reasons prompting the decisions arrived at.’ IEU lodges this objection at a fatally high level of generality. Had the Commission a one-page summary order to resolve this case, it might be suffice to assert simply that ‘the orders omit the required documentation of the Commission’s reasoning.’ But the order and entries on rehearing filled 140 pages – while we do not equate breadth with depth, IEU must do more to show error.²⁸

Simply substitute “GNU” for “IEU” and the Ohio Supreme Court’s criticism is directly applicable. Ignoring that the Board *actually* responded to GNU’s objections and concerns and *actually* provided reasoning for its decision, GNU simply makes general claims that the Board violated R.C. 4906.03. And as it was for IEU, this high level of generality is fatal to GNU’s objection.

GNU also asserts that the Board failed to evaluate the application under R.C. 4906.10.²⁹ Again, GNU misses the mark entirely. First, GNU fails to provide any specific example of how the Board actually failed to consider R.C. 4906.10 and instead offers only a highly general objection. Moreover, the Board, in the Order on Certificate, expressly explains that its review of the application concentrated on the impact of the application on “the statutory requirements set forth in R.C. Chapter 4906 *and, in particular, R.C. 4906.10*, as well as the conditions established in the [Certificate Case].”³⁰ Emphasis added. The Board did not neglect R.C. 4906.10; rather, it was a cornerstone of the Board’s review of the application.

²⁷ Application for Rehearing, pp. 15-16.

²⁸ 128 Ohio St. 3d 512, 526-27 (April 19, 2011).

²⁹ Application for Rehearing, p. 8.

³⁰ Order on Certificate, p. 8.

In addition to the issues discussed above, the Board and Staff investigated and addressed other issues raised by GNU relevant to the specific changes requested in the application. For instance, Staff investigated, and the Board addressed, the safety manual of the proposed turbines, as well as the impacts of the proposed turbine models to the noise and shadow flicker thresholds set in the Certificate Case.³¹ As the Board indicates:

Intervenors raise issues regarding possible variances from the conditions established in the Certification Case. However all of those issues were thoroughly reviewed in our Order approving the Stipulation in the Greenwich Certification Case, and, as verified in the Staff Report, none of the requirements established in the certificate will be changed or violated with the technological advancements proposed in this application.³²

In all, GNU's assignments of error alleging that the Board failed to conduct an investigation, respond to GNU's concerns, or provide reasoning for the decision are nothing more than vague and general objections and are without merit.

D. The Board did not error by not requiring Greenwich to publish a third public notice.

GNU argues that the Board should have required Greenwich to provide additional public notice after Greenwich had supplemented the amendment application on March 22, 2016.³³ The sole purpose of the supplement was to substitute one of the proposed turbine models with a different model; the scope and purpose of the amendment application did not change. The Board acted reasonably in not requiring additional public notice for this supplement to the application.

Greenwich had already published public notice about the amendment application on two occasions. In fact, Greenwich purposefully exceeded Board's public notice requirements as a best practice to ensure that the local community was informed. As required by the Board's rules

³¹ Staff Report of Investigation, pp. 3-6.

³² Order on Certificate, p. 9.

³³ Application for Rehearing, p. 8.

and a subsequent entry, Greenwich filed public notice of the amendment application in the *Norwalk Reflector*, a newspaper of general circulation in Huron County, on November 20, 2015 and March 1, 2016. Greenwich also published the same notice in the *Greenwich Enterprise Review*, a local paper specific to the locality where the project is located, on November 24, 2015 and March 8, 2016.

GNU can show no harm to support its argument that notice was somehow inadequate. GNU intervened within ten days of Greenwich filing the application, and GNU was directly served with the supplement to the application. Moreover, the Board received a variety of public comments from community members in direct reference to the amendment application, and the application was well known throughout the local community.³⁴ GNU has no basis to argue that notice was insufficient.

E. GNU's due process rights were not violated by the Board's decision.

R.C. 4906.07 requires that, when considering an application for amendment of a certificate, the Board shall hold a hearing “if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application. . . .” The amendment application proposes no material increase in any environmental impact of the facility and no change in any portion of the facility's location. Board precedent overwhelming indicates that a hearing is not necessary where an amendment application seeks

³⁴ See, webpage of Greenwich Neighbors United, discussing filing public comments to the proceeding docket shortly after amendment application was filed (<http://www.greenwichneighborsunited.com/whew-finally-posted-my-complaintcomment-to-opsb/>); discussing procedural motions in the proceeding (<http://www.greenwichneighborsunited.com/proof-of-publishing-document-submitted-to-opsb-obviously-they-are-being-a-little-more-careful-this-time/>); and discussing Greenwich's second publication notice (<http://www.greenwichneighborsunited.com/proof-of-publishing-document-submitted-to-opsb-obviously-they-are-being-a-little-more-careful-this-time/>).

only to include additional turbine models as suitable for a project.³⁵ In contrast, the Board has only required hearings for amendment applications requesting to include additional turbines to a project when the request is accompanied by other changes to the project.³⁶

As described in more detail above, GNU was given actual notice of the amendment application and participated in the proceeding. GNU provided the Board with its feedback concerning the application, and the Board directly addressed GNU's comments and objections when investigating and deciding the case. GNU simply has no basis to argue that it was somehow denied due process.³⁷

III. CONCLUSION

For the reasons stated above, the Board should deny GNU's application for rehearing. Additionally, Greenwich respectfully requests that the Board act swiftly and decisively in rejecting GNU's application for rehearing. In the prior Certificate Case proceeding, a non-party filed an application for rehearing after the Board granted the Certificate, in September 2014. The Board did not rule on this motion for nearly twelve months, despite the clear fact that the non-party had no standing to file the application for rehearing in the first place, in August 2015. Although the application for rehearing was ultimately denied by the Board, the nearly twelve

³⁵ *Order on Certificate Amendment, Paulding Wind Farm II, LLC*, Case No. 10-3128-EL-BGA, at 5 (February 28, 2011) (approving the addition of a turbine model with increased hub height); *Order on Certificate Amendment, Hog Creek Wind Farm, LLC*, Case No. 11-757-EL-BGA, at 6 (July 25, 2011) (approving the addition of two turbine models); *Order on Certificate Amendment, Blue Creek, LLC, Case No. 11-1995-EL-BGA*, 8 (July 25, 2011) (approving the construction of eight additional turbines); *Order on Certificate Amendment, Hog Creek Wind Farm, LLC, Case No. 11-5542-EL-BGA*, 8 (November 28, 2011) (approving the addition of two new wind turbines); *Order on Certificate Amendment, Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA, at 8 (August 27, 2015) (approving the addition of two new wind turbines).

³⁶ *In the Matter of the Application of Paulding Wind Farm and Paulding Wind Farm III, LLC for Amendments to Their Certificates to Install and Operate Wind Powered Electric Generation Facilities in Paulding County, Ohio*, Case No. 15-2030-EL-BGA (May 19, 2016) (holding that a change in turbine technology does not constitute a material change requiring a hearing but other changes to the project, such as changed access roads and substation does require a hearing).

³⁷ Moreover, GNU's contention that it is being deprived of a property right depends entirely on its dubious interpretation of Ohio's setback law, refuted in detail in Section A of this memorandum contra.

months of delay harmed the project significantly. The project was unable to capitalize on off-take contract opportunities or negotiate to secure the production tax credit and other financial discussions due to the lingering application for rehearing. Moreover, after the Board's denial of the application of rehearing, the non-party filed a second application for rehearing. The Board, and later the Ohio Supreme Court, both rejected the non-party's application for rehearing, but only after further delay to the project.

Respectfully submitted on behalf of
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memo Contra has been served upon the following parties listed below by electronic mail, this 30th day of June 2016.



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