

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting )  
Board's Review of Rules 4906-4-08 and ) Case No. 16-1109-GE-BRO  
4906-4-09 of the Ohio Administrative Code )

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**JOINT COMMENTS OF  
RENEWABLE ENERGY SYSTEMS AMERICAS INC.,  
AVANGRID RENEWABLES, LLC AND  
6011 GREENWICH WINDPARK, LLC**

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**I. INTRODUCTION & BACKGROUND**

This round of comments represents yet another twist in the ongoing saga of the Ohio Power Siting Board's ("OPSB" or "Board") attempt to establish rules for wind project setback waivers.

In early 2014, the Board reorganized, revised, and replaced its administrative rules, creating new OAC Chapters 4906-1 through 4906-7 (Case No. 12-1981-GE-BRO).

Shortly after, in September 2014, Ohio House Bill 483 amended the setback requirements for wind-powered electric generation facilities approved by the Board.<sup>1</sup> In November 2015, the Board revised the setback requirements pursuant to the new law. Due to the comments received from this limited rulemaking about the regulation and siting of "economically significant wind farms,"<sup>2</sup> the Board determined that a broader stakeholder process to address issues specific to wind projects was necessary.

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<sup>1</sup> Prior to this legislation, a wind turbine was required to have a minimum setback of 1,125 ft. from the *nearest habitable residential structure*. H.B 483 instead required that wind turbines must be a minimum of 1,125 ft. from the *property lines* of the nearest adjacent property at the time of the certificate application.

<sup>2</sup> The OPSB has jurisdiction over "economically significant wind farms," which are defined as projects with an aggregate capacity greater than five MWs.

In early 2016, the OPSB Staff commenced discussions with interested stakeholders, including workshops and the opportunity to submit informal written comments.<sup>3</sup> In June 2016, the Board commenced the formal rulemaking process.<sup>4</sup>

On May 4, 2017, the Board issued a Finding and Order adopting rules pertaining to wind-powered electric generation facilities (the “Order”).<sup>5</sup> The Board issued an entry on rehearing on August 17, 2017 in which the Board revised the previously adopted rules to reflect changes recommended by various stakeholders. In November 2017, the Board submitted the rules for review by the Joint Committee on Agency Rule Review (“JCARR”). However, the Board later pulled the rules from JCARR, which were expected to become effective in March 2108.

On January 18, 2018, the Board issued an entry seeking comments on a proposed revision to the first sentence of Rule 4906-4-08(C)(3). In response, Renewable Energy Systems Americas Inc. (“RES”), Avangrid Renewables, LLC (“Avangrid”), and 6011 Greenwich Windpark, LLC (“Greenwich”) submit these joint comments.<sup>6</sup>

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<sup>3</sup> Resources from the OPSB’s wind power rulemaking efforts, including informal comments from the stakeholder workshops are available at <https://www.opsb.ohio.gov/opsb/index.cfm/calendar/stakeholder-workshop-on-opsb-wind-rules-jan-29-2016/>.

<sup>4</sup> Comments were filed by MidAtlantic Renewable Coalition (“MAREC”), Icebreaker Windpower, Inc. (“Icebreaker”), Greenwich Windpark, LLC (“Greenwich”), Union Neighbors United, Julia F. Johnson, and Robert and Diane McCormell (collectively, “UNU”), the Ohio Environmental Council (“OEC”), the Black Swamp Bird Observatory and the American Bird Conservancy (collectively, “BSBO/ABC”), Greenwich Neighbors United (“GNU”), Senator Michael J. Skindell, the Ohio Farm Bureau Federation (“Farm Bureau”), the Ohio State Historic Preservation Office and Ohio History Connection (collectively, “SHPO”), and a variety of individual property owners.

<sup>5</sup> Case No. 16-1109-GE-BRO.

<sup>6</sup> RES is a global renewable energy company and played a primary role in the development and construction of the Hog Creek Wind Project, an approximately 66 MW facility located in Hardin County, Ohio. Avangrid owns the Blue Creek Wind Farm, a 304 MW wind project in Van Wert County and Paulding County, Ohio. Greenwich is a wholly owned subsidiary of Windlab Developments USA, Ltd. and proposes to construct an approximately 60 MW facility located in Huron County, Ohio.

## II. COMMENTS

- A. **The Board should exercise its authority and expertise and adopt a reasonable interpretation of R.C. 4906.20(B)(2)(c); that is, waivers must only be obtained from property owners adjacent to a turbine that does not meet the statutory setback requirement.**

In earlier iterations of rulemakings involving this issue, the Board clarified, by rule, that setback waivers are only required from properties adjacent to a turbine that does not otherwise meet the statutory setback.<sup>7</sup> In the view of RES, Avangrid, and Greenwich, the Board acted appropriately and within its authority when adopting this reasonable interpretation of the setback statute.

Opponents to wind projects have made the extreme interpretation that a setback waiver must be obtained from all property owners adjacent to the entire wind project footprint. The arguments against the wind opponents' arguments are well established and have periodically been raised as the Board has grappled with this rule. As has been repeatedly and thoroughly outlined to the Board, the wind opponents' position is contrary to well-established legal principles, violates basic tenants of statutory interpretation, offends basic private property rights, and leads to absurd results. For the purposes of brevity and economy, RES, Avangrid, and Greenwich incorporate previous comments on this issue, included as Attachments A – C.<sup>8</sup>

In the most recent rulemaking, the Board retreated from exercising its authority and establishing a clear interpretation. Instead, the Board removed clarifying language that waivers are only required from property owners adjacent to turbines that do not meet the statutory setback, leaving a rule with similar ambiguity to the statute. This was the rule submitted to JCARR in

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<sup>7</sup> See, May 4, 2014 Entry in Case No. 12-1981-GE-BRO, where the Board proposed rule O.A.C. 4906-4-08(C)(2)(d): “Minimum setbacks from property lines and residences may be waived in the event that all property owners of property adjacent to the turbine agree to such a waiver.” This rule became effective June 26, 2016.

<sup>8</sup> Attachment A (Reply Comments of 6011 Greenwich Windpark, LLC, Case No. 16-1109-GE-BRO (Nov. 8, 2016)); Attachment B (Reply Comments of The American Wind Energy Association and Greenwich Windpark, LLC, Case No. 12-1981-GE-BRO (Feb. 13, 2015)); and Attachment C (Stakeholder Collaborative Issues Submitted by the Mid-Atlantic Renewable Energy Coalition, Case No. 12-1981-GE-BRO (Feb. 11, 2016)).

November 2017. Subsequently, however, the Board then withdrew this rule from the JCARR review process.

RES, Avangrid, and Greenwich encourage the Board to return to a rule that actually interprets the statute. As the administrative body with the requisite expertise, the Board has the authority to adopt a clear interpretation of the statute. The Ohio Supreme Court has stated that “it may rely on the expertise of a state agency in interpreting a law where ‘highly specialized issues’ are involved and ‘where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.’” *Ohio Consumers' Counsel v. PUC*, 121 Ohio St.3d 362, 365 (2009) (quoting *Office of Consumers' Counsel v. Public Utilities Com.*, 58 Ohio St. 2d 108, 110 (1979); *see also In re Columbus S. Power Co.*, 134 Ohio St.3d 392 (2012) (“[W]e will defer to the commission's interpretation of a statute ‘where there exists disparate competence between the respective tribunals in dealing with highly specialized issues.’”). This reliance on the agency’s interpretation also applies when a statutory framework is vague or ambiguous; in fact, an agency’s interpretation of the Ohio Revised Code is entitled to deference when not unlawful or unreasonable. *See In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 499 (2016) (“[W]hen a statute does not prescribe a particular formula or methodology, the appropriate administrative agency has broad discretion in deciding how to implement its duties.”); *see also In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 401 (2012) (“[The party]'s interpretation is not necessarily unreasonable, but unlike the [agency], [it] is not entitled to deference.”); *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 (1994) (“[C]onsiderable deference should be accorded to an agency’s interpretation of rules the agency is required to administer. ... [A]n administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter.”).

The Board should use this opportunity to establish a rule that does more than merely repeat the statutory language from which the rule is to be derived. The Board should exercise its authority and return to its earlier proposed rule, which clearly states that waivers are needed only from all property owners adjacent to a particular turbine.

**B. In the alternative, if the Board declines to interpret R.C. 4906.20(B)(2)(c), then the rule should match the statutory language.**

The Board's proposed revision of the rule that was withdrawn from JCARR is limited to the first sentence of Rule 4906-4-08(C)(3):

The owner(s) of all property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.

The sole revision is the addition of the word "all." The addition of the word "all" appears to be an attempt to more closely follow the statutory language of the controlling statute, R.C. 4906.20(B)(2)(c). For reference, the applicable part of the statute states:

The setback shall apply in all cases except those in which all owners of property adjacent to the windfarm property waive application of the setback to that property . . . .

If the Board seeks to adopt a rule that offers no clarifying interpretation of the statute's setback waiver provision, then RES, Avangrid, and Greenwich recommend that the rule closely follow the statutory language. Thus, RES, Avangrid, and Greenwich recommend that Rule 4906-4-08(C)(3) be further revised to state the following:

The owner(s) of all property adjacent to ~~any~~ the wind farm property may waive the minimum setback requirements by signing a waiver of their rights.

By conforming to the statutory language, the Board will avoid creating unneeded ambiguity. The phrase in the statutory waiver provision, R.C. 4906.20(B)(2)(c), requiring that "all property owners of property adjacent to the wind farm property waive application of the setback" must be read in the context and purpose of R.C. 4906.20 as a whole. In part, the purpose of R.C. 4906.20 is

to “prescribe a minimum setback for a wind turbine” from “the property line of the wind farm property.” It is clear from the statutory language that setbacks apply to a particular turbine as it relates to a specific property.

The Board should replace the word “any” in the proposed rule with the word “the,” as stated in the statute. The word “any” will undoubtedly be contorted by wind opponents to mean that wind developers must obtain waivers from *any and all* owners of adjacent properties, even when certain adjacent properties do not violate the minimum setback requirements. In effect, this position would enable unaffected landowners to interfere with the ability of the affected landowner(s) and wind developer to enter into a contract to waive the statutory setbacks. This is contrary to longstanding principles of contract and property law and makes for bad public policy. The Board should deny a foothold for this absurd argument by removing the reference to “any property owner.”

### **III. CONCLUSION**

RES, Avangrid, and Greenwich respectfully request that the Board adopt the changes to the Staff’s proposed revisions consistent with its comments set forth above.

Respectfully submitted on behalf of  
Renewable Energy Services Americas Inc.  
Avangrid Renewables, LLC  
6011 Greenwich Windpark, LLC



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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing JOINT COMMENTS were served by electronic mail this 1<sup>st</sup> day of February 2018.



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**Commission of Ohio Docketing Information System on**

**2/1/2018 4:34:56 PM**

**in**

**Case No(s). 16-1109-GE-BRO**

Summary: Comments of Renewable Energy Systems Americas Inc., Avangrid Renewables, LLC and 6011 Greenwich Windpark, LLC electronically filed by Teresa Orahod on behalf of Dylan F. Borchers