

## BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting                     )  
Board's Consideration of Ohio Admin. Code            )     Case No: 19-778-GE-BRO  
Chapter 4906-4.                                                 )

### REPLY COMMENT OF INNOGY RENEWABLES US LLC

#### I. INTRODUCTION

Innogy Renewables US LLC ("Innogy") submits the following reply comment in response to comments submitted by certain parties in this rule proceeding. Innogy is a subsidiary of innogy SE and the sole owner of Hardin Wind LLC, the developer of the Scioto Ridge Wind Farm. Innogy appreciates the opportunity to submit this reply comment and welcomes any questions from the Board's Staff on the proposed rule.

#### II. REPLY COMMENT

##### A. The Board Lacks the Statutory Authority to Impose New Certificate Conditions on Existing Certificates by Rule.

None of the commenters addressed the statutory authority of the Board to impose new conditions on existing certificates through rule-making. While MAREC noted that parts of proposed rule 4906-4-10 may duplicate some conditions in existing certificates, it did not address the issue of whether the Board has the statutory authority to impose new conditions on existing certificates through rulemaking. The "Local Resident Intervenor" advocate for the proposed rule as does Julia Johnson, but fail to consider whether the rule can be applied to existing certificates. The answer is the rule cannot and should not be applied to existing certificates.

It is well settled that the Board can only exercise that authority granted to it by statute. *See Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537 (1993) (the Public Utilities Commission of Ohio, of which the Board is a division, is a creature of statute); *Time Warner AxS*

*v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097, 1101, 1996 -Ohio- 224 (“[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute”).

As to certificate conditions, the Board only has statutory authority to impose conditions on a certificate through its decision on an application. As R.C. 4906.10(A) states (emphasis added):

The power siting board shall render a decision upon the record either granting or denying the application as filed, or **granting it upon such terms, conditions, or modifications** of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and rules adopted under sections 1501.33, 1501.34, and 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code.

Likewise, R.C. 4906.04 states “[a]ny facility, with respect to which such a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate and any terms, conditions, and modifications contained therein.” Neither R.C. 4906.10(A) nor any other part of Chapter 4906 of the Revised Code authorizes the Board to pass rules that retroactively impose conditions on an existing certificate.

Innogy notes that the Board has general rulemaking authority under R.C. 4906.03(C) but that statutory section does not provide express authority to the Board to adopt a rule that will impose conditions on existing certificates that are final and non-appealable. Instead, R.C. 4906.03(C) only provides for rules that are necessary and convenient to implement Chapter 4906 such as “evaluating the effects on environmental values of proposed and alternative sites” and “projected needs for electric power.” *See* R.C. 4906.03(C). The Board’s ability to impose conditions on a certificate is controlled by 4906.10(A) and not through the Board’s general rulemaking authority under R.C. 4906.03(C).

Accordingly, the Board cannot impose a notice requirement on existing certificates through rulemaking because to do so would be beyond the Board’s statutory authority and contradictory to

R.C. 4906.10(A). It also would impair rights that vested upon issuance of the certificate. *See e.g. Gibson v. City of Oberlin*, 171 Ohio St. 1, 5–6, 167 N.E.2d 651 (1960); *Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360, 372-373 (2007) (finding PUCO exceeded its authority by retroactively applying statute); *O’Brien v. Columbus*, 10th Dist. Franklin No. 89-AP-877, 1990 Ohio App. LEXIS 443, \*7 (Feb. 6, 1990) (recognizing that permit applicant has a vested right in relying on laws existing at time of application “so long as the building permit is valid” and rejecting argument that any changes to original permit must be reviewed under newly enacted law).

The better approach for any new rule requiring notice of events is to place that requirement in Rule 4906-4-09, which addresses requirements for certificate applications.

### **III. CONCLUSION**

While it supports MAREC’s comments on proposed Rule 4906-4-10, Innogy is submitting the above reply comment to respond to other commenters that advocate for the rule with no apparent consideration for whether the rule can be applied to existing certificates. Innogy appreciates the Board’s and Staff’s consideration of this reply comment, and is available to answer any questions Staff may have on the comment.

Respectfully submitted

/s/ Michael J. Settineri

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Summary: Comments Reply Comment electronically filed by Mr. Michael J. Settineri on behalf of Innogy Renewables US LLC