

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 Electric)	Case No. 13-990-EL-BGN
Generation Facility in Huron County, Ohio)	
)	

**MEMORANDUM CONTRA OF CROSSROADS WIND POWER, LLC TO THE
MOTION OF GREENWICH NEIGHBORS UNITED FOR LEAVE TO INTERVENE**

I. INTRODUCTION

Crossroads Wind Power, LLC (f.n.a. 6011 Greenwich Windpark, LLC) has commenced construction of the Crossroads Wind project as recognized by Greenwich Neighbors United (“GNU”). Yet GNU is seeking to intervene in this case **more than five years** after the deadline to intervene has passed. Ignoring GNU’s underlying motives (it wants to stop the project), the Board should deny GNU’s motion to intervene for three reasons. First, there is no pending certification proceeding under R.C. 4903.221(B)(3) in which to intervene. If GNU has a complaint about the project’s certificate compliance, then it should have submitted a complaint to the Board so the Board can decide whether to initiate a separate proceeding under OAC 4906-7-02(A). Second, GNU has neither established a valid interest in this case nor shown good cause and extraordinary circumstances that warrant an untimely intervention. GNU fails to name one member that has been harmed and admits its members have participated in the proceeding since its “infancy.” Third, GNU’s intervention would unduly prolong and delay these proceedings in violation of R.C. 4903.221(B)(3) given GNU’s desire to continue to put up road blocks to the project’s construction like its past (and failed) litigation over a simple turbine model change. GNU has no reason for intervening in this case other than to try and stop the project’s construction. Its motion for intervention should be denied in all respects.

II. BACKGROUND

On April 19, 2013, 6011 Greenwich Windpark, LLC (n.k.a. Crossroads Wind Power, LLC) filed with the Board its pre-application notice and a motion for waivers of four provisions of O.A.C. 4906-17-04, which was subsequently granted. Greenwich published notice of the public informational meeting in the *Norwalk Reflector* and the *Greenwich Enterprise Review* on May 9, 2013, and May 14, 2013, respectively.

Commencing on December 23, 2013 and through December 27, 2013, Greenwich filed its application for a certificate to construct a wind-powered electric generation facility pursuant to O.A.C. 4906-17. In a March 10, 2014 Entry, the Administrative Law Judge scheduled this matter for a local public hearing on May 6, 2014, and an evidentiary hearing on May 29, 2014. The ALJ also ordered that petitions to intervene be filed within 30 days following publication of the first notice but by **no later than April 18, 2014**. Greenwich published notice of the hearings on March 12, 2014, and April 14, 2014, in the *Norwalk Reflector* and on March 18, 2014, and April 22, 2014, in the *Greenwich Enterprise Review*. The local public hearings were held as scheduled. On May 16, 2014, the parties in the case executed and filed a Stipulation and Recommendation with the Board.

On August 21, 2014, Omega Crop Co. LLC (“Omega”) filed an untimely motion to intervene. The Board denied Omega’s motion. (Opinion, Order, and Certificate (August 25, 2014).) Omega filed two applications for rehearing. Both times, the Board found that it had properly denied Omega’s late-filed intervention request. (Entry on Rehearing (August 27, 2015); Second Entry on Rehearing (November 12, 2015).) Omega then appealed the Board’s decision to the Supreme Court of Ohio. The Court subsequently dismissed Omega’s appeal because Omega was never a party to the proceedings before the Board and therefore had no right to

appeal under R.C. 4903.13. (*In re Application of 6011 Greenwich Windpark, LLC*, Case No. 2015-2097 Case Announcement (February 8, 2016).)

The Board issued Greenwich (now called Crossroads) a certificate on August 25, 2014. (Opinion, Order and Certificate (August 25, 2014).) Under the certificate (which adopted the conditions in the stipulation), Crossroads must submit information to the Board’s Staff to show compliance with certain conditions. Crossroads, however, is not required to make any filings with the Board. *See In re Application of Buckeye Wind, LLC*, 131 Ohio St. 3d 449, 2012-Ohio-878, at ¶16 (noting that “[t]he General Assembly vested the board with authority to allow its staff to monitor [the Applicant’s] compliance with conditions that the board has set”).

On August 22, 2019, Crossroads filed a Notice of On-Site Construction. On the same day, Crossroads also filed a letter with the Board providing copies of the project’s Safety Plan Compliance Document and Complaint Resolution Plan. Both documents were previously provided to the Board’s Staff per the letter. Four days later, on August 26, 2019, GNU filed a motion to intervene in this case claiming it was doing so to ensure certificate compliance.

III. ARGUMENT

A. GNU’s motion to intervene should be denied because nothing is pending in this proceeding.

Contrary to GNU’s claim, there is nothing pending in this proceeding that gives GNU a right to intervene. Revised Code 4906.08 sets forth “[t]he parties to a **certification proceeding**,” which include “[e]ach person entitled to receive service of a copy of the application . . . if the person has filed with the power siting board a notice of intervention as a party, within thirty days after the date the person was served with a copy of the application[.]” (Emphasis added). Additionally, “[t]he board, in extraordinary circumstances for good cause shown, may grant a

petition, for leave to intervene as a party to participate **in subsequent phases of the proceeding.**” R.C. 4906.08(B) (emphasis added).

Here, there are no more “subsequent phases” of this certification proceeding in which to intervene. The evidentiary record in this matter closed on May 19, 2014, and the Board issued Greenwich’s certificate on August 25, 2014. There are no remaining or pending “phases” of the case which give rise to a right of intervention (timely or untimely). If GNU is concerned about Crossroads’ compliance with its Certificate, then it must follow the Board’s complaint process where the Board will **only** initiate a **new proceeding** if the Board believes a complaint about a project is reasonable. *See* OAC 4906-7-02(A) (“[u]pon finding reasonable grounds the board shall initiate a proceeding to investigate an alleged violation of section 4906.98 of the Revised Code”).

GNU’s motion to intervene is procedurally improper and should be denied for that reason alone.

B. GNU cannot establish an interest in the proceedings and has not shown extraordinary circumstances and good cause warranting intervention.

GNU neither has a valid interest in this case nor can it make any good faith argument for its untimely intervention. As an initial point, GNU has not and cannot establish an interest that warrants intervention in this case as required by Rule 4906-2-12(A)(2). Under Rule 4906-2-12(A)(2), a petition to intervene must “set[] forth the grounds for the proposed **intervention and the interest of the petitioner in the proceedings.**” (Emphasis added.) GNU vaguely describes its members as “owners of real property located adjacent to the property which has been or will be leased by Windpark,” and states that they “will be affected by the proposed wind farm, if it is in fact built and operated.” (Memorandum in Support p. 3.) Yet, GNU does not name a single one of its members in its motion, nor assert with specificity what property any of its individual

members own in order to allow Crossroads and the Board to assess GNU's interest in the project. GNU also fails to state with any specificity how the alleged lack of condition compliance implicates any interest of or harm to GNU. That failure warrants denial of the intervention because GNU must show membership harm in order to have associational standing in this matter.

To show associational standing, which GNU must satisfy as an organization alleging injury to its members, an association must show that (1) its members have standing to sue in their own right, (2) the interests at stake in the case are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members. *See, Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (2000), 528 U.S. 167, 180 – 181, 120 S.Ct. 69 (citing *Hunt v. Washington State Apple Advertising Comm'n.* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434); *see also Ohio Acad. Of Nursing Homes, Inc. v. Barry*, 37 Ohio App.3d 46, 47 (10th Dist. 1987).

To maintain standing, the association must identify and name the specific members through which it asserts standing. *See Summers v. Earth Island Institute*, 555 U.S. 488, 497-499 (2009). In *Summers*, the United States Supreme Court stated:

[T]he Sierra Club asserts in its pleadings that [because] it has more than 700,000 members nationwide, including thousands of members in California' who 'use and enjoy the Sequoia National Forest,' it is probable (according to the dissent) that some (unidentified) members have planned to visit some (unidentified) small parcels affected by the Forest Service's procedures and will suffer (unidentified) concrete harm as a result. This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least *one identified member* had suffered or would suffer harm.

Id. at 497-98 (emphasis added) (internal citations omitted). GNU has failed to meet this obligation by failing to identify in its motion even one member that **has suffered** or **will suffer harm** as a result of the alleged lack of condition compliance.

Second, GNU has not established good cause nor the extraordinary circumstances necessary to warrant intervention (five years after the fact).¹ Ohio Administrative Code Rule 4906-2-12 sets a high-bar for untimely intervention in a certification proceeding:

The board or the administrative law judge may, **in extraordinary circumstances and for good cause shown**, grant a petition for leave to intervene in subsequent phases of the proceeding, filed by a person identified in paragraph (A)(1) or (A)(2) of this rule, who failed to file a timely notice of intervention or petition for leave to intervene. **Any petition filed under this paragraph must contain, in addition to the information set forth in paragraph (A)(1) or (A)(2) of this rule, a statement of good cause for failing to timely file the notice or petition** and shall be granted only upon a finding that:

- (1) **Extraordinary circumstances justify the granting of the petition.**
- (2) The intervenor agrees to be bound by agreements, arrangements, and other matters previously made in the proceeding.

O.A.C. Rule 4906-2-12 (emphasis added).

GNU asserts that good cause exists because “adjacent property owners and other local residents affected by the proposed wind farm did not fully grasp the scope and legal consequences of this proceeding until after the intervention deadline.”² (Memorandum p. 4.) But GNU admits that the adjacent property owners participated in this matter and expressed their comments and concerns regarding the proposed windfarm on the public comment docket. (*Id.*) GNU even goes as far to state that GNU’s members have been “participating in this proceeding since its infancy.” (Memorandum p. 4.) GNU’s admission that its members have participated in this proceeding since its infancy is fatal to its motion to intervene.

¹ GNU does not even attempt to establish the “extraordinary circumstances” required by Rule 4906-2-12(C).

² GNU does not state whether the “adjacent property owners” GNU describes are GNU members or other adjacent property owners.

For example, *In the Matter of the Application of Hardin Wind LLC*, the Board rejected an attempt by local residents to intervene in a proceeding after the certificate was issued and during rehearing. The local residents argued that extraordinary circumstances justified their intervention because the certificate proceedings took place in the winter when they were not residing by Indian Lake and therefore did not receive actual notice of the proceedings. (Case Nos. 13-1177-EL-BGN, Entry on Rehearing (May 19, 2014) at ¶ 36.) The Board found “no merit to the claim that extraordinary circumstances exist[ed] to warrant granting the motion to intervene.” (*Id.* at ¶ 37.) The Board noted that Hardin Wind had provided the statutorily required notice of the Board proceedings and it then became “incumbent upon those persons potentially affected by the project to partake in reasonable due diligence regarding their properties and interests.” (*Id.*)

GNU’s basis for intervention is even weaker than the basis relied upon by the local residents in the *Hardin Wind* matter. GNU does not dispute that Greenwich provided the statutorily required newspaper notice of Board proceedings for its project. GNU admits that the adjacent property owners participated in these proceedings and expressed their “comments,” “concerns,” and “opposition” to the project on the public docket and participated in this proceeding from its infancy. (Memorandum in Support p. 4.). Given that GNU alleges its members were aware of the project at its “infancy,” it then became incumbent upon those persons to exercise reasonable due diligence regarding their properties and interests to intervene in this matter. (See *In the Matter of the Application of Hardin Wind LLC* at ¶ 37.) Their failure to do so does not constitute good cause or extraordinary circumstances to support GNU’s intervention.

GNU's final claim for good cause also fails. GNU asserts that "without intervention and action by GNU it is not apparent whether [the project's compliance with its certificate] would otherwise be brought to the Board's attention." (Memorandum p. 5.) But as GNU knows, Crossroads filed a Notice of On-site Construction on August 22, 2019 with the Board four days prior to GNU's filing of its motion. Crossroads also filed a letter on August 22, 2019 with the Board providing documents related to its certificate conditions and indicating it had previously provided the documents to Staff. Given those facts, GNU cannot claim in good faith that its intervention is somehow making the Board aware of "this matter."

GNU does not have a valid interest in this case and cannot make any good faith argument for its untimely intervention. Its motion to intervene should be denied.

C. GNU's intervention will result in undue delay and prejudice.

As this Board previously recognized, "R.C. 4903.221(B)(3) only allows the Board to grant intervention (timely or late), if such intervention does not unduly prolong or delay the proceedings." (Ohio Power Siting Board Motion to Dismiss, *In the Matter of the Application of 6011 Greenwich Windpark*, Case No. 15-2097 (the Supreme Court of Ohio) p. 6.) Omega Crop Co., LLC sought to intervene in this case on August 21, 2014, well after the record closed on May 19, 2014. The Board rejected that late intervention, stating that "Omega's petition to intervene was filed 125 days after the filing deadline for petitions to intervene, and fails to set forth any statement of good cause for failing to timely file its request for intervention and no showing that extraordinary circumstances justify granting the motion." (Opinion, Order, and Certificate (August 25, 2014).)

Notably, in its motion to dismiss Omega's appeal to the Supreme Court of Ohio, the Board reasoned that "given its **extreme lateness** Omega's efforts can only be viewed as causing

undue delay and prejudice in violation of R.C. 4903.221(B)(3).” (Motion to Dismiss, *In the Matter of the Application of 6011 Greenwich Windpark*, Case No. 15-2097 (the Supreme Court of Ohio) p. 7 (emphasis added).) Here, compared to Omega’s 125 day late intervention request, GNU has filed a motion to intervene **more than five years** after the deadline to intervene has passed. The lateness of GNU’s motion to intervene is egregious. Moreover, like Omega, GNU’s intervention can only be viewed as leading to delay and prejudice in violation of R.C. 4903.221(B)(3) because the intervention reflects an attempt by GNU to gain party status simply as a way to try and delay this project through litigation.

Just as with Omega’s motion to intervene, GNU’s motion “can only be viewed as causing undue delay and prejudice in violation of R.C. 4903.221(B)(3).” As such, GNU’s motion must be denied.

IV. CONCLUSION

GNU has no good faith reason for filing a motion to intervene in this case. GNU should know that the Board has a complaint process through which the Board will initiate a **separate proceeding** if it believes reasonable grounds exist for a complaint about certificate compliance. But rather than follow that process, GNU is trying to intervene in the original certificate proceeding to gain party status and force additional litigation over the project. The Board’s governing statutes and rules, however, prevent GNU’s intervention in this case. GNU’s motion should be denied.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 10th day of September, 2019.

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Summary: Memorandum Memorandum Contra of Crossroads Wind Power, LLC to the Motion of Greenwich Neighbors United for Leave to Intervene electronically filed by Mr. Michael J. Settineri on behalf of Crossroads Wind Power, LLC