

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)	
)	

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

MEMORANDUM CONTRA OF CROSSROADS WIND POWER, LLC TO THE MOTION OF GREENWICH NEIGHBORS UNITED REGARDING THE INVALIDITY AND CANCELLATION OF CERTIFICATE

I. INTRODUCTION

Greenwich Neighbors United’s (“GNU”) motion cannot be heard in this proceeding for two reasons. First, GNU does not have standing to file its motion in either of the above-referenced proceedings. GNU does not have standing to file this motion in Case No. 13-990-EL-BGN (the “Certificate Case”) because GNU is not—and should not be—a party to the Certificate Case. Likewise, GNU does not have standing to file its motion in Case No. 15-1921-EL-BGA (the “Amendment Case”) because the scope of that case was limited to addressing Greenwich’s amendment to its certificate to upgrade certain turbine models.

Second, GNU’s motion is procedurally and substantively deficient in both the Certificate Case and the Amendment Case. It is an attempt to use existing proceedings as a way to circumvent the Board-initiated complaint process set forth in R.C. 4906.97 and O.A.C. Chapter 4906-7. Importantly, under that process, the Board will **only initiate a proceeding** if it believes that reasonable grounds exist for a compliance complaint. *See* O.A.C. 4906-7-02(A).

Finally, even if GNU had submitted a complaint to the Board, GNU has failed to establish reasonable grounds to justify a separate proceeding. This is especially true given that

GNU admits that equipment was at the site on August 22 and that one of its members saw construction activities occurring on August 23 (prior to the Certificate's deadline to commence construction). Likewise, an unsubstantiated subjective belief that Crossroads Wind Power, LLC (f.k.a. 6011 Greenwich Windpark, LLC) is not in compliance with the Certificate does not constitute reasonable grounds for the Board to initiate a proceeding.

GNU's motion should be stricken from the docket as improper, and moved to the public comment docket in both the Certificate Case and the Amendment Case.

II. ARGUMENT

A. GNU does not have standing to file its motion to cancel the certificate in either the Certificate Case or the Amendment Case.

GNU lacks standing to file this motion in the Certificate Case because GNU is not a party in the Certificate Case. GNU has not been granted intervention in the Certificate Case, nor can it given that **more than five years** has passed since the intervention deadline. GNU has also failed to establish a valid interest or show good cause, or extraordinary circumstances necessary to intervene as set forth in O.A.C. 4906-2-12, as fully set forth in Crossroads' contemporaneously filed memorandum contra. Thus, GNU's motion to cancel the certificate cannot be heard in the Certificate Case.

Likewise, GNU has not been granted intervention status in the Amendment Case such that it can go outside the scope of that proceeding. When the Board granted GNU's motion to intervene in the Amendment Case, the Board held that:

In accordance with Ohio Adm.Code 4906-7-04, the Board finds that the motions to intervene filed by GNU and Farm Federation are reasonable to the extent they address Greenwich's request to add new turbine models to the list of suitable turbine models for the project. With this qualification, the Board finds that their motions to intervene should be granted. However, consistent with the Board's decision in the *Black Fork Wind* case, **the motions to intervene are denied to the extent the movants request intervention to address irrelevant matters**

other than the amendment application or that are outside the scope of this proceeding.

(Order on Certificate, filed May 19, 2016, p. 3 (emphasis added).) Thus, GNU cannot use the Amendment Case to seek cancelation of the certificate (which is well outside the scope of that proceeding).

Given GNU's lack of party status in the Certificate Case and given the Board's directive that GNU stay within the scope of the Amendment Case, GNU is precluded from having its motion heard by the Board in either case. The motion should be stricken from the dockets and transferred to the public comment docket for the Certificate Case and the Amendment Case.

B. GNU's motion in the Certificate Case and Amendment Case is procedurally improper.

GNU filing of its motion in both cases is improper because it attempts to circumvent the clearly defined Board-initiated complaint process. Under R.C. 4906.97 and O.A.C. 4906-7, the Board may "initiate a proceeding to investigate an alleged violation" of a certificate if it finds "reasonable grounds" for the complaint. O.A.C. 4906-7-02(A). The Board's Staff must then "file with the [B]oard . . . a written report of the investigation," providing "staff's findings and recommendations for [B]oard action." O.A.C. 4906-7-02(D). At that point, the Board "may require an evidentiary hearing." O.A.C. 4906-7-02(E).

GNU claims that Crossroads has not commenced a continuous course of construction and that GNU "believes" that Crossroads has not complied with certain certificate conditions. (Memorandum, p. 4.) These claims appear to be a complaint by GNU over Crossroad's compliance with the Certificate. But GNU has not followed the Board's compliant process, which may or may not result in the initiation of a new proceeding. Instead, GNU is trying to use the original certificate proceeding and an amendment proceeding that was limited in scope as a forum to litigate its claims and elude the complaint procedures set forth in R.C. 4906.97 and

O.A.C. 4906-7 that only initiate a proceeding if the Board finds reasonable grounds for the complaint.

It is axiomatic that the authority of an administrative agency is limited to those powers granted to it by statute. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917). It is therefore no surprise that GNU fails to cite any legal authority that the Board can ignore the procedures set forth in R.C. 4906.97 and O.A.C. 4906-7 and cancel a certificate on a motion from a party or non-party to the certificate proceeding. To address GNU's attempt to circumvent the complaint process, the Board should strike GNU's motion from both dockets and transfer GNU's motion to the public comment docket of both cases. Alternatively, because the motion seeks relief which this Board cannot grant in either case, GNU's motion must be denied.

C. Even if the motion was proper (which it is not), GNU has failed to state reasonable grounds for a complaint.

GNU has also failed to state reasonable grounds for a complaint that Crossroads is not in compliance with the Certificate's conditions. Throughout its motion, GNU claims that it "does not believe" that a continuous course of construction has commenced, and GNU otherwise attempts to place the burden on Crossroads to establish its compliance with the certificate conditions. These allegations are insufficient to establish reasonable grounds that a violation of R.C. 4906.98 has occurred.

First, GNU cannot make a good faith argument that Crossroads has not commenced construction of the project. Specifically, GNU admits that construction equipment was on site on August 22, 2019, the same day that Crossroads filed a Notice of On-Site Construction with the Board. GNU also states in its memorandum that excavation at a project site was occurring on August 23, 2019 (two days prior to August 25, 2019 – the deadline imposed in the Certificate).

(Memorandum pp. 10-11.) GNU even provided a picture of excavation equipment at one of the project sites dated August 22, 2019. Thus, GNU by its own statements cannot dispute that construction has commenced. See R.C. 4906.01(C) and O.A.C. 4906-1-01(L) (defining “commence to construct” as “... any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route of a major utility facility. . . .”).¹

Despite its own admissions, GNU baldly claims that it “**does not believe** that a continuous course of construction has commenced.” (*Id.* p. 4 (emphasis added).) As an initial point, GNU’s subjective beliefs do not constitute evidence and cannot be used to establish reasonable grounds for complaint that Crossroads has not commenced construction of the project. See *Ferron v. Fifth Third Bank*, 10th Dist. Franklin No. 08AP-473, 2008-Ohio-6967, ¶ 12 (December 31, 2008) (without supporting factual allegations, mere conclusions are insufficient to state a claim and complaint was properly dismissed).

And to the extent that GNU believes that a certain level of construction activity is required in order to qualify as a continuous course of construction, GNU is wrong. Crossroads Certificate simply states at Condition 6 that “[t]he certificate shall become invalid if the Applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.” It does not impose a requirement that Crossroads conduct a certain level of construction activities necessary to qualify as “continuous.”²

¹ The Board has previously stated that “[w]e believe that the phrase ‘continuous course of construction’ is sufficiently clear to include the constant, uninterrupted pre-construction activities necessary to prepare for construction as well as the construction itself.” See *In the Matter of the Power Siting Board Review of Chapters 4906-01, 4906-05, 4906-07, 4906-09, 4906-11, 4906-13 and 4906-15 of the Ohio Administrative Code*, 2008 Ohio PUC LEXIS 600, Opinion and Order, ¶18 (Sept. 15, 2008).

² It is also worth noting that the Board has authorized Crossroads to conduct construction in stages. The Certificate states at Condition 3 that “[t]he Applicant may conduct separate preconstruction meetings for each stage of construction.”

Second, GNU's statement that it "does not believe that [Crossroads] has satisfied all of the prerequisites to the commencement of any type of construction" does not rise to the level of presenting reasonable grounds for a complaint. A complaint must have more than speculation in order to show reasonable grounds for a complaint. *Ferron*, 2008-Ohio-6967. Yet, based on its "belief", GNU asks the Board to "require [Crossroads] to present affirmative evidence demonstrating that it had commenced a continuous course of construction by August 25, 2019, and that it had met all 15 prerequisite conditions to have lawfully started any construction." (Memorandum p. 5.)

Through that request, GNU is attempting to usurp the Board's role and manufacture a procedure under which Crossroads has to prove that there are no "reasonable grounds" to commence an investigation. But to the contrary, the *Board* must find "reasonable grounds" to initiate a proceeding in the first instance. O.A.C. 4906-7-02(A). Once the Board has done so, it is the "*complaining party* (which may include staff)" who has "the burden to prove the occurrence of the violation, by a preponderance of the evidence." *Id.* at (F) (emphasis added). In other words, GNU cannot use an existing proceeding to force Crossroads to prove compliance with its Certificate.

For these reasons, even if GNU's motion were procedurally sound (which it is not), the motion must be denied.

III. CONCLUSION

For the foregoing reasons, GNU's motion for order confirming that certificate is invalid and a cancellation of the certificate should be moved to the public comment docket of both the

Certificate Case and the Amendment Case or, in the alternative, the motion should be denied.

Respectfully submitted,

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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 Regarding the Invalidity and Cancellation of Certificate electronically filed by Mr. Michael J. Settineri on behalf of Crossroads Wind Power, LLC