

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE OHIO POWER
SITING BOARD'S CONSIDERATION OF
OHIO ADM.CODE CHAPTER 4906-4.

CASE NO. 19-778-GE-BRO

ENTRY ON REHEARING

Entered in the Journal on February 20, 2020

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Power Siting Board denies the applications for rehearing filed by Innogy Renewables US LLC and Hardin Wind LLC, and The Mid-Atlantic Renewable Energy Coalition.

II. DISCUSSION

{¶ 2} On November 21, 2019, the Power Siting Board (Board) issued a Finding and Order (Order) finding that Ohio Adm.Code 4906-4-09(A)(1) should be amended, and Ohio Adm.Code 4906-4-10 should be adopted, in order to improve the construction and incident management of wind farms.

{¶ 3} On December 23, 2019, Innogy Renewables US LLC and Hardin Wind LLC (Innogy) filed both an application for rehearing, and an amended application for rehearing (the only change in the amended application is a reference to the applicable rule in the first two assignments of error that Innogy asserted) from the Board's Order.

{¶ 4} On December 23, 2019, The Mid-Atlantic Renewable Energy Coalition (MAREC) filed an application for rehearing from the Board's Order.

{¶ 5} No other applications for rehearing or memoranda contra have been filed in this case since the journalization of the Board's Order.

{¶ 6} On January 8, 2020, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the administrative law judge (ALJ) granted the applications for rehearing filed

separately by Innogy and MAREC in order to afford the Board more time to consider the issues raised in the applications for rehearing.

A. *Innogy's Application for Rehearing*

{¶ 7} In its application for rehearing, Innogy asserts three assignments of error: (1) the Board erred in failing to explain its authority for imposing rule requirements as to existing certificates; (2) the Board erred in imposing rule requirements as to existing certificates; and, (3) the incident reporting rule is legally flawed regarding its scope and operation. Regarding the first two assignments of error, Innogy claims that the Board erred both in explaining the basis for its decision, as well as in amending rule language to address incident responses that apply to both current and prospective certificates. Innogy claims that existing certificates are beyond the scope of the Board's rulemaking, as they are vested property rights that cannot be retroactively impacted through rulemaking. Regarding the third assignment of error, Innogy asserts that the definition of "incident" is improperly drafted, cannot be intended to apply to non-turbine events, and illegally fails to provide parameters as to the timing of a post-incident investigation and the authorization to restart wind farm operations.

{¶ 8} The Board finds that rehearing on these assignments of error should be denied. Regarding the first two assignments of error, the Board disagrees with Innogy's claim that the Board's jurisdiction regarding the safe operation of wind farm incidents ceases at the moment that the Board issues a certificate. There are several legislative directives contra to Innogy's stated position. R.C. 4906.03 directs the Board's powers and duties, mandating that the Board must: (A) require such information from persons subject to its jurisdiction as it considers necessary to assist in any investigations or studies it may undertake; and, (B) conduct investigations that it considers necessary or appropriate to carry out its responsibilities under this chapter. R.C. 4906.20(B)(2) requires that the Board adopt rules that prescribe regulations regarding wind turbines and associated facilities that include, but are not limited to, their maintenance and use, *including requiring necessary cooperation for site*

visits and enforcement investigations. R.C. 4906.97 prescribes the Board's required response where there are reasonable grounds to believe that a wind farm has operated or maintained its facility in a manner inconsistent with its certificate, providing the Board authority to: (1) suspend operations "for the duration of the Board's consideration of the complaint;" and, (2) impose a wide range of operator penalties, including aggregate fines of up to one million dollars. Finally, R.C. 4906.98 prohibits the operation of a wind farm that is not in compliance with any Board order, including a suspension order.

{¶ 9} In applying these revised code sections, the Board is confident in its legislative mandate to regulate not only the siting aspects of wind farms, but also their continued safe and compliant operation. Inherent with the obligation to regulate the continued safe and compliant operation of a wind farm is the ability to investigate significant incidents to determine whether they potentially result from deviations in a wind farm's construction or operation. There can be no other reason for the legislature to provide such authority, and the protection of public safety demands that the Board remain attentive to these safe operating issues.

{¶ 10} The Board acknowledges that, as a creature of statute, that it acts and is bound by the terms of the certificates that it issues. *In re Black Fork Wind Energy, LLC*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787; R.C. 4906.07, 4906.10. Accordingly, the Board is unable to amend the terms of a certificate where the certificate holder complies with its terms. The rule at issue does not violate this principle. The Board's issuance of a certificate does not protect a wind farm operator from all further Board oversight. The Board retains authority to investigate and enforce matters within its jurisdiction, including the operations of a certificate holder to ensure that they comply with certificate conditions. R.C. 4906.03, 4906.20, 4906.97, 4906.98. Applying these principles, where an incident investigation concludes that the incident occurred in spite of compliance with the construction, operation, and maintenance requirements contained in a certificate, the Board's authority to act is limited in accordance with the certificate, as the operator has vested rights in the certificate.

But where the operator's actions deviate from the terms of its certificate, the Board's regulatory oversight is clear. R.C. 4906.97; 4906.98. In order to determine whether an incident occurred in spite of an operator's compliance with its certification, it is imperative that the Board be able to compel reasonable measures by the certificate holder as are necessary to fully investigate incidents that occur. These include requiring investigation compliance and shutting in any operations that are impacted by a significant safety incident during the period of investigation. For these reasons, the rule at issue is within the legislative directive to the Board, and not inconsistent with the property rights conveyed by the issuance of prior certificates.

{¶ 11} Regarding Innogy's third assignment of error, the Board rejects Innogy's claims that: (1) the definitional use of the word "include" somehow opens up an argument that the "incidents" identified in Ohio Adm.Code 4906-4-10(A)(2) are not exhaustive; (2) the rule improperly includes non-turbine events; and, (3) the rule is invalid because it fails to impose time limits regarding Staff investigations and restarting operations after an incident. The Board finds that using the word "include" to identify the subject of the rule is clear and unambiguous, rejecting Innogy's claim that the language implies that the enumerated incidents are illustrative, rather than exhaustive. Moreover, as the Board's authority regarding the regulation of electric generating facilities is broad, and includes both the electric generating plant and its associated facilities, we find that the rule's application to collection lines is reasonable based on their role within the operation of a wind farm in spite of the fact that they are not a part of the structure of a wind turbine. R.C. 4906.01(B)(1)(a). Finally, with regard to not defining the time frame for a Staff investigation or the Board's order to restart operations, neither of Innogy's claimed rights is provided in R.C. Chapter 4906. As previously outlined, the Board will adhere to the legislature's mandate that it exercise authority: (1) where reasonable; and, (2) until such time as the Board is satisfied that all incidents have been addressed. R.C. 4906.97(A) and (B). Accordingly, the Board rejects Innogy's insistence that the rule define the time periods associated with safety investigations or operational stays.

B. MAREC's Application for Rehearing

{¶ 12} In its application for rehearing, MAREC asserts two assignments of error: (1) the Board erred by defining "incidents" more broadly than those that involve turbines; and, (2) the Board erred in not defining the time period for investigating incidents and restarting wind farm operations.

{¶ 13} The Board finds that rehearing on these assignments of error should be denied. Initially, we disagree with MAREC's argument that the Board's rule is beyond the scope of this case. Beginning even before the rule was opened for public comments during the workshop phase of the rule consideration process, the ALJ Entry of April 4, 2019 (Workshop Entry), expressed the Board's intention to broadly consider rules addressing the manner of reporting and responding to incidents that impact major utility facilities. The Workshop Entry highlighted the Board's authority regarding the overall construction, operation, and maintenance of major utility facilities (Workshop Entry ¶ 3). The Entry also described suggestion topics for workshop commentary, including the types of incidents subject to reporting requirements and Board investigations (Workshop Entry ¶ 4). Following the workshop, the Board published a draft rule and opened the case for formal public comment pursuant to an Entry dated June 29, 2019. As before, the Board's intention to broadly review wind farm incidents, rather than merely turbine incidents, was clear. The draft rules accompanying that Entry defined "incidents" broadly, and specifically included "collector or feeder line failure," in addition to providing language indicating that the "incidents" definition was not exhaustive. In response to public comments in this area, the Board modified and restricted its definition of "incidents" as part of the final rule in order to specify an exhaustive list of incidents, rather than maintaining the prior "but not limited to" language. In short, the Board never expressed any intention to limit its review in this critical area of public safety to solely those incidents that relate to turbines, nor is there any reasonable basis for such a conclusion in regard to this rehearing request.

{¶ 14} The Board also rejects MAREC’s second assignment of error regarding the fact that the rule does not prescribe time periods for Staff investigations and Board decisions regarding restarting operations after an incident. As stated earlier, the legislature requires that this Board intervene where there are reasonable grounds to believe that a wind farm was constructed, operated, or maintained in a manner inconsistent with its certification. There are no defined limitations regarding the exercise of this oversight, other than the fact that any suspension of operations must terminate when the Board’s chairperson is satisfied that the operational concerns have been addressed satisfactorily. R.C. 4906.97. Based on this legislative directive, and the matters of public safety that it is intended to address, the Board declines to self-restrict in regard to the conduct of post-incident investigations or the timing of restarting operations.

C. Conclusion

{¶ 15} The Board finds that the rule changes outlined in its Order of November 21, 2019, should be implemented without further modification. The rules align with the legislative mandate that the Board exercise continuing jurisdiction regarding wind farm operations even after certificates are issued. As the rules are narrowly tailored and merely define the subject matter and process for reporting and investigating significant wind farm incidents, they comply with the legislative mandate placed upon the Board in this area. Accordingly, the rules should be adopted.

III. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That the applications for rehearing filed by Innogy and MAREC be denied. It is, further,

{¶ 18} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

BOARD MEMBERS:

Approving:

Sam Randazzo, Chairman
Public Utilities Commission of Ohio

Rachel Near, Designee for Lydia Mihalik, Director
Ohio Development Services Agency

Mary Mertz, Director
Ohio Department of Natural Resources

Gene Phillips, Designee for Amy Acton, M.D., MPH, Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

George McNab, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

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