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April 17, 2020

**MAILED VIA FEDEX**

Ohio Power Siting Board  
Docketing Division  
180 E. Broad Street, 11th Floor  
Columbus, OH 43215-3797

Re: Case No. 19-778-GE-BRO

Dear Docketing Division:

Enclosed are an original and 20 copies of a Notice of Appeal to the Supreme Court of Ohio (with attachments) for immediate filing in the above referenced matter. Please call me at 614-439-5206 or Daniel Shuey at 740-607-1941 with any questions regarding this filing.

Very truly yours,

Michael J. Settineri

MJS/des  
Enclosure

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
Technician MJ Date Processed APR 20 2020

# IN THE SUPREME COURT OF OHIO

In the Matter of the Ohio Power Siting  
Board's Consideration of Ohio  
Amd.Code Chapter 4906-4

Case No. \_\_\_\_\_

On Appeal from  
The Ohio Power Siting Board  
Case No. 19-778-GE-BRO

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## NOTICE OF APPEAL OF APPELLANTS INNOGY RENEWABLES US LLC AND HARDIN WIND LLC

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**COUNSEL FOR APPELLEE  
THE OHIO POWER SITING BOARD**

PUCO

2020 APR 20 PM 1:16

Appellants Innogy Renewables US LLC and Hardin Wind LLC<sup>1</sup> hereby give notice of their appeal pursuant to R.C. 4903.11, 4903.13, and R.C. 4906.12 to the Supreme Court of Ohio from the following attached orders of the Ohio Power Siting Board (the "Board") in Case No. 19-778-GE-BRO: (1) Finding and Order, entered by the Board on November 21, 2019, and (2) Entry on Rehearing, entered by the Board on February 20, 2020 (collectively, "Board's Orders"). Pursuant to S.Ct.R.Prac. 10.02(A)(2), copies of the Board's Orders are attached hereto.

On December 23, 2019, Appellants timely filed their Amended Application for Rehearing of the Board's Finding and Order, which is also attached hereto.

In the Board's Orders, the Board found that Ohio Adm.Code 4906-4-09(A)(1) should be amended and that Ohio Adm.Code 4906-4-10 should be adopted. The Board's Orders are unlawful or unreasonable for the following reasons:

1. The Board unreasonably and unlawfully failed to set forth the reasons for its conclusions that the Board possesses the authority to impose new conditions on existing certificates through a subsequent rule-making (Ohio Adm.Code 4906-4-10).

- This issue is raised as the first ground for rehearing in Appellants' Amended Application for Rehearing and is further argued on pages 4 and 5 in the Memorandum in Support of the Application for Rehearing

2. The Board unreasonably and unlawfully imposed new conditions on existing certificates through subsequent rule-making (Ohio Adm.Code 4906-4-10), contrary to the Board's limited statutory authority.

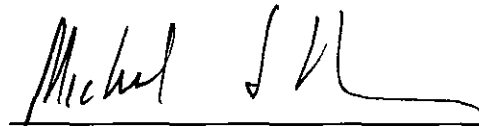
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<sup>1</sup> Hardin Wind LLC is the holder of the Certificate issued by the Board in Case No. 13-1177-EL-BGN for the Scioto Ridge Wind Farm.

- This issue is raised as the second ground for rehearing in Appellants' Amended Application for Rehearing and is further argued on pages 6 through 10 in the Memorandum in Support of the Application for Rehearing.

WHEREFORE, Appellants respectfully request that the Board's Orders be reversed.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served by mail, via Fedex, on the 17<sup>th</sup> day of April, 2020 for delivery on April 20, 2020, upon the following:

Chairman Samuel Randazzo,  
Ohio Power Siting Board  
180 East Broad St.  
Columbus, OH 43215

The undersigned hereby further certifies that a copy of the foregoing Notice of Appeal was served by regular U.S. Mail, postage prepaid, on the 17th day of April, 2020, upon the following:

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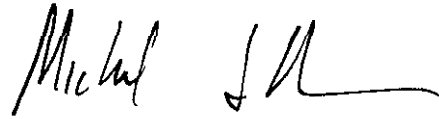
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Van Wert County Commissioners  
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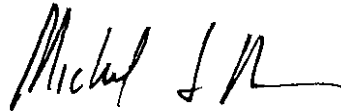
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Michael J. Settineri (0073369)

### **CERTIFICATE OF FILING**

In-person filing of documents with the Ohio Power Siting Board's docketing division is currently suspended pursuant to Entry issued in Case No. 20-601-GE-UNC on March 17, 2020. Pursuant to S.Ct.Prac.R. 3.11(D)(2) and 10.02(A)(2), the undersigned certifies that the foregoing was filed with the Docketing Division of the Public Utilities Commission of Ohio and the Ohio Power Siting Board by sending on April 17, 2020 by mail, via Fedex, for delivery on April 20, 2020, along with 20 copies, to the Ohio Power Siting Board, Docketing Division, 180 East Broad St., Columbus, Ohio 43215-3797 pursuant to R.C. 4903.13, R.C. 4906.12, and Ohio Admin. Code §§ 4901-1-02(A), 4901-1-36, 4906-2-02, and 4906-2-33.

A handwritten signature in black ink, appearing to read "Michael J. Settineri", written over a horizontal line.

Michael J. Settineri (0073369)



FILE

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

FINDING AND ORDER

Entered in the Journal on November 21, 2019

I. SUMMARY

{¶ 1} The Ohio Power Siting Board finds 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.

II. DISCUSSION

A. *Procedural History*

{¶ 2} The Ohio Power Siting Board (Board) has jurisdiction to issue certificates for construction of major utility facilities or economically significant wind farms, and to ensure that such facilities are constructed, operated, and maintained in compliance with the certificate obtained. R.C. 4906.04, 4906.20(A), 4906.98(A)-(B). Ultimately, the Board sets forth certificated conditions directed at, among other things, ensuring the safe operation of major utility facilities.

{¶ 3} In response to weather-related incidents that impacted the safe operation of wind turbines, the Board initiated this rulemaking proceeding to investigate whether additional or modified rules were necessary as to the construction and incident management of wind farm operations.

{¶ 4} On April 30, 2019, the Board held an informal stakeholder workshop to discuss the propriety of rule changes relating to the construction and incident management of wind farms.

{¶ 5} On June 20, 2019, the Board published an Entry seeking public comment as to:

- (1) proposed rule (Ohio Adm.Code 4906-4-10) (Incident Reporting Rule), which would
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adopt notice and reporting requirements when an incident causes a shut down of a wind turbine; and, (2) proposed edits to Ohio Adm.Code 4906-4-09 (Building Code Rule), which would ensure that the construction and operation of non-generating plant wind farm facilities are consistent with local building codes. In addition to the proposed rule changes, the Board also published the business impact analysis (BIA) instrument setting forth the anticipated adverse impact to businesses that would result from the rule modifications, as required by R.C. 121.82. The Board sought formal comments as to the rule proposals.

{¶ 6} Comments were filed by the following: the Ohio Farm Bureau Federation (OFB); Local Resident Intervenors (LRI)<sup>1</sup>; Mid-Atlantic Renewable Energy Coalition (MAREC); the Ohio Environmental Council (OEC); Avangrid Renewables, LLC (AR); and, Julia F. Johnson. Reply comments were filed by: LRI; MAREC; Julia F. Johnson; OEC; and Innogy Renewables US LLC (Innogy).

**B. *Summary of the Comments***

{¶ 7} Comments focused on the scope and clarity of the proposed building code changes, the determination of what types of incidents should be subject to the proposed incident management changes, the reporting and investigation responses to incidents, and the protocol for restarting operations after an incident.

{¶ 8} OFB's comment related to whether the scope of proposed Ohio Adm.Code 4906-4-10 is intended to address "facilities" broadly [citing to the definition in Ohio Adm.Code 4906-1-01(W)], or whether the scope is actually intended to address individual components within a wind farm operation. OFB seeks clarity as to this issue in order to determine the reporting, investigating, and restarting requirements provided in the rule.

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<sup>1</sup> LRI is self-identified as a collection of residents, property owners, taxpayers and electricity customers within Erie, Huron, Seneca and Sandusky counties who have been granted intervention in Case Nos. 17-2295-EL-BGN, 18-0488-EL-BGN, or 18-1607-EL-BGN.

{¶ 9} LRI's comments were supportive of clarifying the application of state building code standards to structures not involved in the generation or transmission of electricity. LRI also supports requiring wind farm operators to timely report incidents, prepare publicly accessible post-incident reports, and cooperate in Staff investigations of incidents prior to restarting operations.

{¶ 10} MAREC's comments question whether the Board can legally act via rulemaking as to wind farm facilities that are already operational, and whether the Board has accurately stated the costs of the proposed rule in the BIA. Further, MAREC contends that the proposed Building Code Rule fails as to its objective, and the Incident Reporting Rule fails to provide an exhaustive and definite list of the types of "incidents" that trigger the additional notice and reporting requirements. As to the proposed Building Code Rule, MAREC contends that requiring compliance with state building code regulations is meaningless because the underlying state building codes continue to exempt commercial scale wind farm operations from enforcement authority by any entity other than the Board. MAREC proposes that if the Building Code Rule is adopted, that it be revised to clarify its intent that only operation and maintenance structures not involved in the generation or transmission of electricity are subject to state building code compliance. As to the Incident Reporting Rule, MAREC proposes that the 30-minute reporting requirement be extended to one business day, that the type of reportable incidents be explicitly identified and defined as "extraordinary" in character, that Staff investigatory site visits be mandated to occur within no more than seventy-two hours, that only equipment that is the subject of an extraordinary incident be subject to shut down during an incident review, and that an operator should be authorized to restart operations three business days after providing notice to the Board.

{¶ 11} OEC's comments seek: (1) clarification that the Building Code Rule vests compliance authority solely with the Board; and, (2) that the Incident Reporting Rule provide an exhaustive and definite list of the "incidents" that trigger the rule, and that any

shut down response triggered by an incident be narrow and limited to only the specific turbine or other equipment that was the subject of the incident.

{¶ 12} AR's comments focus on four areas: (1) the Building Code Rule is confusing and unnecessary; (2) the definition of "incidents" is overly broad and open-ended; (3) the facility shut-down requirement is unnecessary and cannot be applied to operators that are already certified by the Board; and, (4) the BIA understates the financial impacts of the facility shut-downs contemplated by the Incident Reporting Rule. AR contends that the Board's intention of requiring state building code compliance for structures outside of the generation and transmission of electricity is best accomplished through the use of certification conditions, rather than rulemaking. As for the Incident Reporting Rule, AR recommends that the definition of reportable "incidents" be narrowed and not left open-ended. AR advocates for a rule in line with the Gas Pipeline Safety Rule [OAC 4901:1-16-01(K)], which limits "incident" reportability to circumstances where there is at least a personal injury requiring inpatient hospitalization or property damage estimated at \$50,000. AR further argues against the necessity of the rule with respect to emergency responses, post-incident reporting, Staff investigations prior to turbine restarts, and obtaining Board approval to restart operations, asserting that these requirements are unnecessary and create the potential for excessive shut-downs. According to AR, the combined effect of the proposed incident responses violates prior certification decisions and creates significant financial costs to the wind farm industry.

{¶ 13} Julia F. Johnson's comments advocate for restrictions in addition to those in the proposed rules.<sup>2</sup> Specifically, Ms. Johnson seeks: (1) a requirement that turbines be stopped during tornadic periods; (2) a means for incident witnesses to participate in post-

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<sup>2</sup> The Board notes that Ms. Johnson's initial comments were timely filed on July 11, 2019. Due to a filing error, Ms. Johnson's comments were initially included in the Public Comments, rather than the Case Documents, file. As her filing was timely and she remedied the filing error by July 19, 2019, which was 5 days prior to the reply comment deadline, the Board accepts her initial and reply comments in this case.

incident investigations; and, (3) a robust plan for incident investigation that requires documentation as to all evidentiary fragments regardless of their size.

{¶ 14} Julia F. Johnson's reply comments advocate for requiring the filing of written incident reports that are subject to public disclosure. Further, Ms. Johnson would require a public hearing or comment period after the filing of an incident report in order to assess the cause and appropriate corrective action plans in response to each incident.

{¶ 15} LRI's reply comments reiterate agreement with and the legal defense of the proposed rules. Further, LRI continues its advocacy for mandating broad distribution of post-incident operator and staff reports.

{¶ 16} MAREC's reply comments summarize its interpretation of the combined initial comments as follows: (1) the definition of "facilities" is unclear and could lead to conflicting and unclear interpretations and expectations; (2) the Building Code Rule should either be clarified to identify those structures that are subject to state building code requirements or eliminated in favor of addressing these issues on a case-by-case basis through the Board certification process; (3) the Incident Reporting Rule is overly broad and open-ended such that they create potential regulatory confusion and significant economic hardship; (4) the rules lack clarity as to the respective responsibilities of the wind developers, the public and the Board staff; and, (5) the rules are unclear and could lead to misreporting and possibly overly burdensome incident responses. MAREC reiterates its position that the rules conflict with existing law, previously issued certificates, and reasonable expectations of wind farm developers. Further, MAREC notes its exception to the LRI proposals, noting that they would create unnecessary and overly burdensome filing requirements. Similarly, MAREC opposes the LRI proposal that the Board conduct public hearings in response to incidents based on the statutory provisions in ORC 4906.97.

{¶ 17} OEC's reply comments suggest a more restrictive, alternative definition of "incident" that focuses on whether there are "circumstances reasonably calculated to pose

a risk to the public." OEC also reiterates that the proposed Building Code Rule is unneeded and leads to regulatory uncertainty. Finally, OEC emphasizes its position that the application of the incident reporting rule to "facilities" is overly broad and potentially leads to the unintended result of impairing the operation of an entire wind farm facility in response to an isolated equipment incident such as a single turbine failure. Finally, OEC expresses concerns that LRI's proposal for conducting public hearings for every incident, including minor incidents where there is no public safety impact, imposes an overly burdensome requirement on wind farm operators.

{¶ 18} Innogy's reply comments assert that the Board lacks legal authority to adopt rules that impose conditions on existing operator certificates. As for rules that might apply prospectively to new applicants, Innogy asserts that the best approach for a new incident reporting rule is to place that requirement in Ohio Adm.Code 4906-4-09, which addresses requirements for certificate applications.

### **C. Board Conclusion**

{¶ 19} Upon review of the public comments, the Board finds that the rule proposals in the Entry should be amended. Subject to the amendments outlined herein, the Board finds that the rule proposals should be adopted.

{¶ 20} R.C. 107.53 sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among other things, the Board must review any proposed rules to determine the impact that a rule has on small businesses; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and, amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, needlessly burdensome, have had negative unintended consequences, or unnecessarily impede business growth.

{¶ 21} Additionally, in accordance with R.C. 121.82, in the course of developing draft rules, the Board must conduct a business impact analysis regarding the rules. If there will

be an adverse impact on business, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Board is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative (CSI) office the draft rules and the BIA.

{¶ 22} The Board finds that actions taken to develop the Building Code Rule and Incident Reporting Rule are compliant with the legal mandates applicable to rule implementation. As amended herein, the proposed rules balance regulatory objectives and compliance costs.

{¶ 23} The proposed Building Code Rule is amended to clarify that non-generation/transmission buildings within a wind farm must be constructed in accordance with building code standards so long as those standards do not unreasonably interfere with the Board's certification authority. The amended rule proposal: (1) creates a presumption that non-generation/transmission buildings will be constructed in accordance with the Ohio Building Code; and, (2) acknowledges the Board's authority to override building standards where they unreasonably interfere with the development of a wind farm project. Thus, Ohio Adm.Code 4906-4-09, in pertinent part, shall read as follows:

Except where compliance is waived by the Board pursuant to section 4906.13 of the Revised Code, an applicant shall comply with state building code regulations in constructing for structures not involved in generation or transmission of electricity.

{¶ 24} The proposed Incident Reporting Rule is amended as attached to clarify: (1) what types of "incidents" are subject to the rule; (2) the application of the terms "facility" and "facilities" within the rule; and, (3) the telephone notice obligations. The description of "incidents" that give rise to the rule is clarified in order to remove minor events from reporting requirements and eliminate potential uncertainty related to "catch-all" language. Reportable wind farm incidents under this rule are limited to events where there is injury to any person, damage to others' property, or where a tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure, nacelle fire, or ice throw results in

operator property damage that is estimated to exceed fifty thousand dollars. This definition provides reporting certainty and avoids the reporting of minor incidents while maintaining Board awareness of significant events even where they might not cause personal injury or third-party property damage. Further, the rule is modified to clarify the references to "facilities" in divisions (C) and (D). References to "facilities" in these divisions are clarified such that reports of damage, repair plans, Staff investigations, and restart plans are presumed to involve only the impacted components of a wind farm operation, rather than the entire wind farm facility. Further, in order to eliminate confusion and ensure a consistent emergency response, the rule provides operators a state incident reporting telephone number, which is identical to the number used in gas pipeline emergency instances.

{¶ 25} The Board considered and rejects additional public comment suggestions, including, but not necessarily limited to: imposing additional post-incident report publication and circulation requirements; expressing that the proposed rules are solely prospective; extending the time frames for initial reporting; mandating the time for a post-incident site visit; allowing operators to restart turbine(s) prior to receiving express approval from the Board's executive director; mandating turbine operations during storm events; publicizing site visit information; and, detailing Staff investigation requirements. The proposed rule changes, as amended, strike a fair balance between public safety and operational efficiency in addressing the safety concerns that arise from extraordinary wind farm incidents. By requiring a timely incident response and investigatory cooperation with Staff, the Board is satisfied with the public safety enhancements contained in these rules. As a result, the Board declines to further modify the rules to address the additional public comments cited herein.

{¶ 26} In conclusion, the Board finds that the Building Code Rule and Incident Reporting Rule should be amended and adopted, respectively. We find that Ohio Adm.Code 4906-4-09 and 4906-4-10 should be filed with the Joint Committee on Agency



Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with R.C. 111.15.

### III. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That Ohio Adm.Code 4906-4-09(A)(1) be amended as set forth herein. It is, further,

{¶ 29} ORDERED, That newly proposed Ohio Adm.Code 4906-4-10, as amended, be adopted as set forth in Attachment A. It is, further,

{¶ 30} ORDERED, That Ohio Adm.Code 4906-4-09 and 4906-4-10 be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with R.C. 111.15. It is, further,


{¶ 31} ORDERED, That the final rules be effective on the earliest date permitted. Unless otherwise ordered by the Board, the five-year rule review date for Ohio Adm.Code 4906-4-09 and 4906-4-10 shall be in compliance with R.C. 119.032. It is, further,

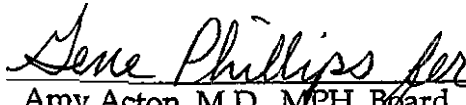
{¶ 32} ORDERED, That a copy of this Finding and Order be served upon all commenters and interested persons of record in this matter.


## THE OHIO POWER SITING BOARD

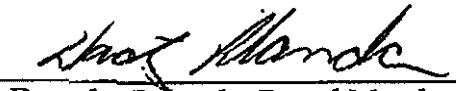
  
Sam Randazzo, Chairman  
Public Utilities Commission of Ohio

  
Lydia Mihalik, Board Member  
and Director of the Ohio  
Development Services Agency

 for  
Mary Mertz, Board Member  
and Director of the Ohio  
Department of Natural Resources

  
Amy Acton, M.D., MPH, Board  
Member and Director of the Ohio  
Department of Health

 for  
Laurie Stevenson, Board Member  
and Director of the Ohio  
Environmental Protection Agency

  
Dorothy Pelanda, Board Member  
and Director of the Ohio  
Department of Agriculture

  
Greg Murphy, Board Member  
and Public Member

MLW/hac

Entered in the Journal



Tanowa Troupe  
Secretary

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**AMENDED**

**4906-4-09 Regulations associated with wind farms.**

For both an economically significant wind farm and a major utility facility consisting of wind-powered electric generating units, the application shall state the applicant's commitment to comply with the following regulations and the board shall require that each of the following requirements be satisfied.

**(A) Construction, location, use, maintenance, and change.**

(1) Adherence to other regulations. Construction and operation of all proposed wind farms shall be consistent with all applicable state and federal requirements, including all applicable safety, construction, environmental, electrical, communications, and federal aviation administration requirements. Except where compliance is waived by the Board pursuant to section 4906.13 of the Revised Code, an applicant shall will comply with state building code regulations for in constructing structures not involved in generation or transmission of electricity.

**(2) Construction, operations, and maintenance safety.**

**(a) Equipment safety**

- (i) The applicant shall comply with the manufacturer's most current safety manual, unless such safety manual conflicts with paragraph (C)(2) of rule 4906-4-08 of the Administrative Code.
- (ii) The applicant shall maintain a copy of this safety manual in the operations and management building of the facility.

**(b) Geological features**

- (i) Sixty days prior to the preconstruction conference, the applicant shall provide a fully detailed geotechnical exploration and evaluation to confirm that there are no issues to preclude development of the facility.
- (ii) The geotechnical exploration and evaluation shall include borings at each turbine location to provide subsurface soil properties, static water level, rock quality description, per cent recovery, and depth and description of the bedrock contact and recommendations needed for the final design and construction of each wind turbine foundation, as well as the final location of the transformer substation and interconnection substation.
- (iii) The applicant must fill all boreholes and borehole abandonment must comply with state and local regulations.

**\*\*\*DRAFT - NOT FOR FILING\*\*\***

- (iv) The applicant shall provide copies of all geotechnical boring logs to board staff and to the Ohio department of natural resources division of geological survey prior to construction.
- (c) Blasting. Should site-specific conditions warrant blasting, the applicant shall submit a blasting plan to the board, at least thirty days prior to blasting.
  - (i) The applicant shall submit the following information as part of its blasting plan:
    - (a) The name, address, and telephone number of the drilling and blasting company.
    - (b) A detailed blasting plan for dry and/or wet holes for a typical shot. The blasting plan shall address blasting times, blasting signs, warnings, access control, control of adverse effects, and blast records.
    - (c) A plan for liability protection and complaint resolution.
  - (ii) Prior to the use of explosives, the applicant or explosive contractor shall obtain all required licenses and permits. The applicant shall submit a copy of the license or permit to the board within seven days of obtaining it from the local authority.
  - (iii) The blasting contractor shall utilize two blasting seismographs that measure ground vibration and air blast for each blast. One seismograph shall be placed beside the nearest dwelling, or at least at the nearest accessible property line to the dwelling, and the other placed at the discretion of the blasting contractor.
  - (iv) At least thirty days prior to the initiation of blasting operations, the applicant must notify, in writing, all residents or owners of dwellings or other structures within one thousand feet of the blasting site. The applicant or explosive contractor shall offer and conduct a pre-blast survey of each dwelling or structure within one thousand feet of each blasting site, unless waived by the resident or property owner. The survey must be completed and submitted to the board at least ten days before blasting begins.
- (3) Location. Wind farms shall be sited in locations that comply with paragraph (C)(2) of rule 4906-4-08 of the Administrative Code and applicable provisions of this rule.
- (4) Maintenance and use.
  - (a) The applicant shall maintain the wind farm equipment in good condition. Maintenance shall include, but not be limited to, painting, structural repairs, and security measures.
  - (b) The applicant shall have a construction and maintenance access plan based on final plans for the facility, access roads, and types of equipment to be used. The plan shall consider the location of sensitive resources, as identified by the Ohio department of natural resources, and explain how impacts to all sensitive resources will be avoided or minimized during construction, operation, and

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maintenance. The plan shall include locations of erosion control measures. The plan shall provide specific details on all wetlands, streams, and/or ditches to be impacted by the facility, including those where construction or maintenance vehicles and/or facility components such as access roads cannot avoid crossing the waterbody. In such cases, specific discussion of the proposed crossing methodology for each wetland and stream crossing, and post-construction site restoration, must be included. The plan shall include the measures to be used for restoring the area around all temporary access points, and a description of any long-term stabilization required along permanent access routes.

- (c) The applicant shall have a vegetation management plan. The plan must identify all areas of proposed vegetation clearing for the project, specifying the extent of the clearing, and describing how such clearing work will be done so as to minimize removal of woody vegetation. The plan must also describe how trees and shrubs around structures, along access routes, at construction staging areas, during maintenance operations, and in proximity to any other project facilities will be protected from damage. Priority should be given to protecting mature trees throughout the project area, and all woody vegetation in wetlands and riparian areas, both during construction and during subsequent operation and maintenance of all facilities; low-growing trees and shrubs in particular should be protected wherever possible within the proposed right-of-way. The vegetation management plan should also explore various options for disposing of downed trees, brush, and other vegetation during initial clearing for the project, and recommend methods that minimize the movement of heavy equipment and other vehicles within the right-of-way that would otherwise be required for removing all trees and other woody debris off site.
- (d) For both construction and future right-of-way maintenance, the applicant shall limit, to the greatest extent possible, the use of herbicides in proximity to surface waters, including wetlands along the right-of-way. Individual treatment of tall-growing woody plant species is preferred, while general, widespread use of herbicides during initial clearing or future right-of-way maintenance should only be used where no other options exist, and with prior approval from the Ohio environmental protection agency. Prior to commencement of construction, the applicant shall describe the planned herbicide use for all areas in or near any surface waters during initial project construction and/or future right-of-way maintenance.
- (e) Within its plans for post-construction site restoration and stabilization of disturbed soils, such restoration plans shall include:
  - (i) The applicant shall remove all temporary gravel and other construction staging area and access road materials after completion of construction activities, as weather permits, unless otherwise directed by the landowner.
  - (ii) The applicant shall not dispose of gravel or any other construction material during or following construction of the facility by spreading such material on agricultural land. All construction

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debris and all contaminated soil shall be promptly removed and properly disposed of in accordance with Ohio environmental protection agency regulations.

(5) Change, reconstruction, alteration, or enlargement.

- (a) Any amendment to a wind farm certificate shall be proposed by the applicant to the board as an amendment application, as provided in rule 4906-3-11 of the Administrative Code.
- (b) Unless otherwise ordered by the board or administrative law judge, modification(s) shall not be considered amendments under this rule if such modification(s) would be minimal in nature, and would be adequately addressed by the conditions of a certificate.
- (c) An applicant may seek review of a proposed modification(s) sought under paragraph (A)(5)(b) of this rule by filing the proposed modification(s) in the public docket of the certificate case and shall provide written notification of such filing to staff and all landowners immediately adjacent to the site of the proposed modification(s). The notification shall reference, and include a copy of, paragraph (A)(5) of this rule. In the filing submitted in the public docket, the applicant shall present its rationale as to why the applicant is seeking the proposed modification(s) and must demonstrate that the proposed modification(s) satisfies paragraph (A)(5)(b) of this rule. Staff or any interested person may file objections to the applicant's proposal within twenty-one days. If no objections are filed within the twenty-one day period, the applicant may proceed with the proposed modification(s). If objections are filed within the twenty-one day period, board staff may subsequently docket its recommendation on the matter. The board will process proposed modification(s) under the suspension process set forth for accelerated applications as outlined in rule 4906-6-09 of the Administrative Code.

(B) Erosion control. Within its procedures for inspection and repair of erosion control measures, the applicant shall employ the following erosion and sedimentation control measures, construction methods, and best management practices when working near environmentally-sensitive areas or when in close proximity to any watercourses:

- (1) During construction of the facility, seed all disturbed soil, except within actively cultivated agricultural fields, within seven days of final grading. Denuded areas, including spoils piles, shall be seeded and stabilized in accordance with the applicant's approved stormwater pollution prevention plan, if they will be undisturbed for more than twenty-one days. Re-seeding shall be conducted in accordance with the applicant's approved stormwater pollution prevention plan as necessary until sufficient vegetation in all areas has been established.
- (2) Inspect and repair all erosion control measures after each rainfall event of one half of an inch or greater over a twenty-four-hour period, and maintain controls until permanent vegetative cover has been established on disturbed areas.
- (3) Delineate all watercourses, including wetlands, by fencing, flagging, or other prominent means.

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- (4) Avoid entry of construction equipment into watercourses, including wetlands, except at specific locations where construction has been approved.
- (5) Prohibit storage, stockpiling, and/or disposal of equipment and materials in these sensitive areas.
- (6) Locate structures outside of identified watercourses, including wetlands, except at specific locations where construction has been approved.
- (7) Divert all storm water runoff away from fill slopes and other exposed surfaces to the greatest extent possible, and direct instead to appropriate catchment structures, sediment ponds, etc., using diversion berms, temporary ditches, check dams, or similar measures.

(C) Aesthetics and recreational land use.

- (1) In the event of vandalism on any generating facility, the applicant shall immediately remove or abate the damage to preserve the aesthetics of the project to pre-vandalism condition.
- (2) No commercial signage or advertisements may be displayed on any turbine, tower, or related infrastructure, except for reasonable identification of the manufacturer or operator of the wind farm.
- (3) All structures that require lighting by the federal aviation administration, including construction equipment, shall be lit with the minimum lighting required by the federal aviation administration. Lighting of other parts of the wind farm, such as associated structures and access roads, shall be limited to that required for safety and operational purposes, and shall be reasonably shielded from adjacent properties.
- (4) The visible surfaces of wind farm structures shall be a non-reflective, matte finished, non-obtrusive, and neutral color such as white, off-white, gray, or beige.
- (5) The applicant shall provide a plan to avoid adverse impacts of the proposed facility on landmarks in the surrounding area. Landmarks, for the purpose of this rule, refer to those districts, sites, buildings, structures, and objects that are recognized by, registered with, or identified as eligible for registration by the national registry of natural landmarks, the state historic preservation office, or the Ohio department of natural resources. If avoidance measures are not feasible, the applicant shall describe why impacts cannot be avoided and shall provide an evaluation of the impact of the proposed facility on the preservation and continued meaningfulness of registered or potentially eligible landmarks of historic, religious, archaeological, scenic, natural, or other cultural significance and describe plans to mitigate any adverse impact. The mitigation plan shall contain measures to be taken should previously-unidentified archaeological deposits or artifacts be discovered during construction of a project.
- (6) The applicant shall provide photographic simulations or artist's pictorial sketches of the proposed facility from at least one vantage point in each area of three square miles within the project area, showing views

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to the north, south, east, and west. The photographic simulations or artist's pictorial sketches shall incorporate the environmental and atmospheric conditions under which the facility would be most visible.

- (D) Wildlife protection. The applicant shall satisfy the following requirements to avoid or mitigate impacts to federal or state listed and protected species.
- (1) The applicant shall coordinate with the United States fish and wildlife service, the Ohio department of natural resources division of wildlife, and board staff to determine if any actions are necessary to avoid impacts to federal or state listed and protected species or other species which may be impacted. The applicant shall provide coordination letters received from the United States fish and wildlife service and the Ohio department of natural resources division of wildlife. If the United States fish and wildlife service, the Ohio department of natural resources division of wildlife, or board staff identify any recommendations for the avoidance of impacts to specific species, the applicant shall describe how it shall address all recommendations.
  - (2) The applicant shall contact board staff within twenty-four hours if federal or state listed species are encountered during construction activities. Construction activities that could adversely impact the identified plants or animals shall be halted until an appropriate course of action has been agreed upon by the applicant, board staff, and other applicable administrative agencies.
  - (3) The applicant shall avoid construction in federal or state listed and protected species' habitats during seasonally restricted dates, or at restricted habitat types, as provided by the Ohio department of natural resources and the United States fish and wildlife service, unless coordination efforts with the Ohio department of natural resources and the United States fish and wildlife service allows a different course of action.
  - (4) The applicant shall submit a post-construction avian and bat monitoring plan to the board. During operation of the facility, if significant mortality occurs to birds or bats, the applicant will develop a mitigation plan.
  - (5) At least sixty days prior to the first turbine becoming operational, the applicant shall describe plans for maintaining turbine blades in a stationary or nearly stationary stance during low wind speed conditions at night during bird and bat migratory seasons.
  - (6) If construction activities result in significant adverse impact to federal or state listed and protected species, the applicant will develop a mitigation plan or adaptive management strategy.
- (E) Ice throw.
- (1) The ice throw analysis shall, at a minimum, include the probability of ice throw impacts at the nearest property boundary and public road.



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(2) The applicant's plans to minimize potential impacts shall include:

- (a) Restricting public access to the facility with appropriately placed warning signs or other necessary measures,
- (b) Instructing workers on the potential hazards of ice conditions on wind turbines, and
- (c) Installing and utilizing an ice warning system to include an ice detector installed on the roof of the nacelle, ice detection software, warranted by the manufacturer to detect ice, for the wind turbine controller, or an ice sensor alarm that triggers an automatic shutdown.

(3) In addition to the use of the safety measures enumerated in paragraph (E)(2) of this rule, the potential impact from ice throw shall be presumptively deemed to satisfy safety considerations if the probability of one kilogram of ice landing beyond the statutory property line setback for each turbine location is less than one per cent per year.

(F) Noise.

- (1) General construction activities shall be limited to the hours of seven a.m. to seven p.m., or until dusk when sunset occurs after seven p.m. Impact pile driving, hoe ram, and blasting operations, if required, shall be limited to the hours between ten a.m. to five p.m., Monday through Friday. Construction activities that do not involve noise increases above ambient levels at sensitive receptors are permitted outside of daylight hours when necessary. Sensitive receptor, for purposes of this rule, refers to any occupied building. The applicant shall notify property owners or affected tenants within the meaning of paragraph (B)(2) of rule 4906-3-03 of the Administrative Code of upcoming construction activities including potential for nighttime construction activities.
- (2) The facility shall be operated so that the facility noise contribution does not result in noise levels at any non-participating sensitive receptor within one mile of the project boundary that exceed the project area ambient nighttime average sound level (Leq) by five A-weighted decibels (dBA). During daytime operation only (seven a.m. to ten p.m.), the facility may operate at the greater of: the project area ambient nighttime Leq plus five dBA; or the validly measured ambient Leq plus five dBA at the location of the sensitive receptor. After measured ambient Leq plus five dBA at the location of the sensitive receptor. After commencement of commercial operation, the applicant shall conduct further review of the impact and possible mitigation of all project-related noise complaints through its complaint resolution process. Non-participating, as used in this context, refers to a property for which the owner has not signed a waiver or otherwise agreed to be subject to a higher noise level.

(G) Blade shear. The applicant shall provide its plans to minimize potential impacts from blade shear. These plans shall include restricting public access to the facility with appropriately placed warning signs or other necessary measures, and instructing workers on the potential hazards.

- (1) To minimize the possibility of blade shear, all wind turbine generators must be equipped with:

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- (a) Two independent braking systems, which may include aerodynamic overspeed controls and mechanical brakes operated in a fail-safe mode, but shall not include stall regulation;
- (b) A pitch control system;
- (c) A lightning protection system; and
- (d) Turbine shutoffs in the event of excessive wind speeds, uncontrolled rotation, excessive blade vibration, stress, or pressure on the tower structure, rotor blades, and turbine components.

(2) Bypass or override of wind turbine safety features or equipment is prohibited.

- (3) At a minimum, the design of the wind turbine generators shall conform to industry standards, as effective at the time the applicant submits its application, including those of the American national standards institute, the international electrotechnical commission, or an equivalent industry standard. The applicant shall submit certificates of design compliance obtained by the equipment manufacturers from underwriters laboratories, det norske veritas, Germanischer Lloyd wind energies, or other similar certifying organizations.

**(H) Shadow flicker.**

- (1) The facility shall be designed to avoid unreasonable adverse shadow flicker effect at any non-participating sensitive receptor within one thousand meters of any turbine. At a minimum, the facility shall be operated so that shadow flicker levels do not exceed thirty hours per year at any such receptor. Non-participating, as used in this context, refers to a property for which the owner has not signed a waiver or otherwise agreed to be subject to a higher shadow flicker level.
- (2) After commencement of commercial operation, the applicant shall conduct further review of the impact and possible mitigation of all project-related shadow flicker complaints through its complaint resolution process.

**(I) Decommissioning and removal.**

- (1) The applicant shall provide the final decommissioning plan to the board and the applicable county engineer(s) at least thirty days prior to the preconstruction conference. The plan shall:
  - (a) Indicate the intended future use of the land following reclamation.
  - (b) Describe the engineering techniques and major equipment to be used in decommissioning and reclamation; a surface water drainage plan and any proposed impacts that would occur to surface and ground water resources and wetlands; and a plan for backfilling, soil stabilization, compacting, and grading.

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- (c) Provide a detailed timetable for the accomplishment of each major step in the decommissioning plan, including the steps to be taken to comply with applicable air, water, and solid waste laws and regulations and any applicable health and safety standards in effect as of the date of submittal.
- (2) The applicant shall file a revised decommissioning plan to the board and the applicable county engineer(s) every five years from the commencement of construction. The revised plan shall include advancements in engineering techniques and reclamation equipment and standards. The revised plan shall be applied to each five-year decommissioning cost estimate.
- (3) The applicant shall, at its expense, complete decommissioning of the facility, or individual wind turbines, within twelve months after the end of the useful life of the facility or individual wind turbines. If no electricity is generated for a continuous period of twelve months, or if the board deems the facility or turbine to be in a state of disrepair warranting decommissioning, the wind farm or individual wind turbines will be presumed to have reached the end of its useful life. The board may extend the useful life period for the wind farm or individual turbines for good cause as shown by the applicant. The board may also require decommissioning of individual wind turbines due to health, safety, wildlife impact, or other concerns that prevent the turbine from operating within the terms of the certificate.
- (4) Decommissioning shall include the removal and transportation of the wind turbines and towers off site. Decommissioning shall also include the removal of buildings, cabling, electrical components, access roads, and any other associated facilities, unless otherwise mutually agreed upon by the facility owner and/or facility operator and the landowner. All physical material pertaining to the facility and associated equipment shall be removed to a depth of at least thirty-six inches beneath the soil surface and transported off site. The disturbed area shall be restored to the same physical condition that existed before construction of the facility. Damaged field tile systems shall be repaired to the satisfaction of the property owner.
- (5) During decommissioning, all recyclable materials, salvaged and non-salvaged, shall be recycled to the furthest extent practicable. All other non-recyclable waste materials shall be disposed of in accordance with state and federal law.
- (6) The facility owner and/or facility operator shall not remove any improvements made to the electrical infrastructure if doing so would disrupt the electric grid, unless otherwise approved by the applicable regional transmission organization and interconnection utility.
- (7) At least seven days prior to the preconstruction conference, the applicant shall retain an independent, registered professional engineer, licensed to practice engineering in the state of Ohio to estimate the total cost of decommissioning in current dollars, without regard to salvage value of the equipment. Said estimate will be converted to a per-turbine basis calculated as the total cost of decommissioning of all facilities divided by the number of turbines in the most recent facility engineering drawings. This estimate shall be conducted every five years. Said estimate shall include:

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- (a) An identification and analysis of the activities necessary to implement the most recent approved decommissioning plan including, but not limited to, physical construction and demolition costs assuming good industry practice and based on publication or guidelines approved by staff;
  - (b) The cost to perform each of the activities; and
  - (c) An amount to cover contingency costs, not to exceed ten per cent of the above calculated reclamation cost.
- (8) The applicant, facility owner, and/or facility operator shall post and maintain for decommissioning a performance bond in an amount equal to the per-turbine decommissioning costs multiplied by the sum of the number of turbines constructed and under construction. For purposes of this condition, a turbine is considered to be under construction at the commencement of excavation for the turbine foundation. The form of the performance bond shall be mutually agreed upon by the board and the applicant, the facility owner, and/or the facility operator. The performance bond shall ensure the faithful performance of all requirements and reclamation conditions of the most recently filed and approved decommissioning and reclamation plan. At least thirty days prior to the preconstruction conference, the applicant, the facility owner, and/or the facility operator shall provide an estimated timeline for the posting of decommissioning funds based on the construction schedule for each turbine. Prior to commencement of construction, the applicant, the facility owner, and/or the facility operator shall provide a statement from the holder of the performance bond demonstrating that adequate funds have been posted for the scheduled construction. Once the performance bond is provided, the applicant, facility owner and/or facility operator shall maintain such funds or assurance throughout the remainder of the applicable term. The applicant, facility owner, and/or facility operator shall obtain a new performance bond every five years with an updated decommissioning cost estimate from its engineer and revised decommissioning plan.
- (9) The facility owner and/or facility operator shall repair damage to government-maintained (public) roads and bridges caused by decommissioning activity. Any damaged public roads and bridges shall be repaired promptly to their pre-decommissioning state by the facility owner and/or facility operator under the guidance of the appropriate regulatory agency. The applicant shall provide financial assurance to the counties that it will restore the public roads and bridges it uses to their pre-decommissioning condition. These terms shall be defined in a road use agreement between the applicant and the county engineer(s) prior to construction. The road use agreement shall contain provisions for the following:
- (a) A pre-decommissioning survey of the condition of public roads and bridges conducted within a reasonable time prior to decommissioning activities.
  - (b) A post-decommissioning survey of the condition of public roads and bridges conducted within a reasonable time after decommissioning activities.

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- (c) An objective standard of repair that obligates the facility owner and/or facility operator to restore the public roads and bridges to the same or better condition as they were prior to decommissioning.
  - (d) A timetable for posting of the decommissioning road and bridge bond prior to the use or transport of heavy equipment on public roads or bridges.
- (10) The performance bond shall be released by the holder of the bond when the facility owner and/or facility operator has demonstrated, and the board concurs, that decommissioning has been satisfactorily completed, or upon written approval of the board, in order to implement the decommissioning plan.

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**NEW**

**4906-4-10 Notice and reports of incidents involving wind farm facilities.**

**(A) Telephone notice of incidents.**

(1) Wind farm operators shallshould notify the board's executive director or the executive director's designee by calling: 1-855-945-3321, as well as local law enforcement and first responders on all incidents involving a wind turbine, within thirty minutes after discovery unless notification within that time is impracticable under the circumstances.

(2) For purposes of this rule incidents include, but are not limited to, events where:

(a) There is injury to any person.

(b) There is damage to property other than the property of the wind farm operator.

(c) Where an event such as tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure, damaging ice throw, or nacelle fire, or injury to any person causes damage to the wind farm operator's property that is estimated to exceed fifty thousand dollars, excluding the cost of electricity lost, which is the sum of the estimated cost of material, labor, and equipment to repair and/or replace the operator's damaged property.

**(B) Written reports regarding incidents.**

(1) Within thirty days after the incident is discovered, a wind farm operator shallwill submit a written report to the executive director describing the cause of the incident, where ascertainable, and any damage to the wind farm facility or to neighboring properties or persons, on a form provided by the board.

(2) Each wind farm operator shallwill also docket, in the wind farm certificate case, a final written report on a form provided by the board within sixty days after discovery of the incident, unless the wind farm operator:

(a) For good cause shown, demonstrates more time is needed; and

(b) Submits interim reports to the executive director at intervals of not more than sixty days until a final report is docketed.

**(C) Each final written report shallwill address:**

(1) Cause of the incident;

(2) Date and time the incident occurred and date and time it was discovered;

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- (3) If the incident involved a turbine, the distance between debris and the wind turbine base;
- (4) If the incident involved a turbine, the distance between debris to habitable structures and property lines, and photographs of the debris field;
- (5) A narrative description of the incident and actions taken by the wind farm operator, including a timeline of events;
- (6) What, if any, damage occurred to the ~~other~~ property within the wind farm ~~facilities~~ facility;
- (7) What steps were necessary to repair, rebuild, or replace damage to any property within the wind farm ~~facilities~~ facility;
- (8) What, if any, personal injury was caused by, or related to, the incident.
- (9) What, if any, damage to properties within or adjacent to the wind farm project area was caused by, or related to, the incident;
- (10) What, if any, steps were, or will be, taken to prevent future incidents.

(D) Staff investigation and restart

- (1) Staff ~~shall~~ will investigate every incident that results in a report being submitted pursuant to this rule. Except as necessary for public safety, a wind farm operator ~~shall~~ should not disturb any damaged ~~facilities~~ property within the facility or the site of a reportable incident until after staff has made an initial site visit.
- (2) A wind farm operator ~~shall~~ will not restart ~~facilities~~ any damaged property within a facility involved in a reportable incident until such restart is approved by the board's executive director or the executive director's designee.

## **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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**Case No(s). 19-0778-GE-BRO**

Summary: Entry on Rehearing that 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 electronically filed by Docketing Staff on behalf of Docketing

**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.	)	

**AMENDED APPLICATION FOR REHEARING OF INNOGY RENEWABLES US LLC  
AND HARDIN WIND LLC**

Innogy Renewables US LLC and Hardin Wind LLC (collectively, "Innogy")<sup>1</sup> file this Amended Application for Rehearing under R.C. 4906.12 and R.C. 4903.10 from the November 21, 2019, Finding and Order (the "November 21 Order") of the Ohio Power Siting Board (the "Board"). The only change from the prior application for rehearing filed is a reference to the applicable rule in the first two assignments of error. The November 21 Order was unreasonable and/or unlawful in these respects:

1. The Board unreasonably and unlawfully failed to set forth the reasons for its conclusion that the Board possesses the authority to impose new conditions on existing certificates through a subsequent rule-making (Ohio Adm.Code 4906-4-10).

2. The Board unreasonably and unlawfully imposed new conditions on existing certificates through subsequent rule-making (Ohio Adm. Code 4906-4-10), contrary to the Board's limited statutory authority.

3. The Board unreasonably and unlawfully adopted text for a new Incident Reporting Rule (Ohio Adm.Code 4906-4-10), that is in conflict with the Board's findings and reasoning in the November 21 Order and that fails to impose any timeframe on Staff's and its Executive Director's obligations under the rule.

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<sup>1</sup> Hardin Wind LLC is a wholly-owned subsidiary of Innogy Renewables US LLC, and is the holder of the Certificate issued by the Board in Case No. 13-1177-EL-BGN for the Scioto Ridge Wind Farm.



A memorandum in support setting forth the specific grounds for rehearing follows.

Innogy requests that the Board grant rehearing for the reasons set forth in this Application for Rehearing and modify its November 21 Order.

Respectfully submitted

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and Hardin Wind LLC

**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.    )

**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF INNOGY  
RENEWABLES US LLC AND HARDIN WIND LLC**

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## I. INTRODUCTION

Innogy Renewables US LLC and its wholly-owned subsidiary, Hardin Wind LLC, seek rehearing of the Board's November 21, 2019 Order in which the Board adopted a new rule, entitled "Notice and reports of incidents involving wind farm facilities" as Ohio Adm.Code 4906-4-10 (the "Incident Reporting Rule"). The Incident Reporting Rule purports to impose telephonic and written reporting requirements regarding wind turbine incidents, as well as restart approval oversight by the Executive Director, on **all** wind farm operators in the state including wind farm developers and operators holding previously issued certificates of environmental compatibility and public need. The Board should grant rehearing for three reasons.

First, in adopting the Incident Reporting Rule, the Board did not address the argument made by Innogy Renewables US LLC<sup>2</sup> that applying the Incident Reporting Rule to wind farm operators with existing certificates is contrary to Ohio law. The Board's November 21 Order notes that "[t]he Board considered and rejects additional public comment suggestions ... expressing that the proposed rules are solely prospective ...." (November 21 Order at ¶25). But the Board never provided its reasoning for *how* it believes it has the authority to retroactively add conditions to existing certificates, as R.C. 4903.09 and R.C. 4906.12 require. For this reason alone, the Board should grant rehearing.

Second, the November 21 Order is substantively flawed because the Board lacks the statutory authority to adopt rules that retroactively impose conditions on an existing certificate. The Board cannot impose a reporting and restart requirement on existing certificates through rulemaking because to do so would be beyond the Board's statutory authority and contradictory to

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<sup>2</sup> Hardin Wind LLC is filing this Application for rehearing along with Innogy Renewables US LLC. Both are "affected" by the November 21 Order and are therefore able to file an application for rehearing pursuant to R.C. 4903.10. Innogy Renewables US LLC and Hardin Wind LLC are collectively referred to herein as "Innogy".

R.C. 4906.10(A). It also would unlawfully impair rights that vested upon issuance of the certificate.

Third and finally, the proposed text of the Incident Reporting Rule attached to the November 21 Order is contrary to the Board's November 21 Order and fails to address the timing of the Staff's investigation of those incidents and the restart of the impacted turbines. The Incident Reporting Rule's proposed text includes an illustrative (not exhaustive) list of incidents subject to the Incident Reporting Rule, whereas the November 21 Order specifically limited the applicability of the rule to certain types of incidents. The Incident Reporting Rule also includes "collector or feeder line failure" as incidents justifying a report, which not only are undefined but are unrelated to the turbine incidents that the Incident Reporting Rule is meant to cover. The November 21 Order also establishes specific timeframes for a wind farm operator's investigatory cooperation with Staff, but the Incident Reporting Rule's proposed text does not impose any timeframe for Staff's investigation or the Executive Director's approval for restart.

The existing statutory scheme (conditions imposed at the time of certificate issuance) provides certainty to certificate holders. To preserve that certainty, the Board should grant rehearing to limit the applicability of the Incident Reporting Rule to those projects for which a certificate has yet to be issued. It could do so by moving the text of the rule to Rule 4906-4-09 which requires certificate applicants to commit to certain conditions. The Board should also grant rehearing and revise the text of the Incident Reporting Rule as suggested by Innogy in this memorandum in support.

## **II. RELEVANT BACKGROUND**

There are a number of wind projects with final, non-appealable certificates issued by the Board in varying stages of construction and operation. The Blue Creek, Timber Road I, Timber Road II, Timber Road III, Hog Creek I, Hog Creek II, and Northwest Ohio wind projects have

been issued certificates by the Board and are currently in operation.<sup>3</sup> The Timber Road IV, Hardin, Greenwich, and Scioto Ridge wind projects have been issued certificates, and are currently under construction.<sup>4</sup> The certificates issued to all of these projects include a number of conditions regulating the design, construction, and operation of the projects.

On March 29, 2019, the Board initiated a limited rulemaking process under Case No. 19-0778-GE-BRO to “investigate whether to adopt a rule requiring turbine operators to report blade shear turbine incidents to the Board.” (March 29, 2019 Entry at ¶1). The Board’s mandate then became a more wide-ranging review of “whether to adopt a rule requiring turbine operators to report incidents to the Board.” (April 4, 2019 Entry at ¶1). The Board requested comment on several different issues. (April 4, 2019 Entry at ¶4).

Following the Board’s issuance of the draft rule, which included both reporting obligations and a requirement to not restart turbines until approval is given by the Board’s Executive Director, various entities submitted comments and reply comments to the Board for consideration. Because the rule as drafted could arguably be applied to existing certificates and projects, Innogy Renewables US LLC submitted reply comments arguing that the Board lacks the statutory authority to impose new certificate conditions on existing certificates by rule. Following receipt of the comments and reply comments, the Board issued the November 21 Order. The November 21 Order makes minor changes to the proposed text of the Incident Reporting Rule in response to comments received, but did not address its statutory authority to issue the Incident Reporting Rule as applicable to **all** wind farm operators. The rule as approved also was not consistent with the

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<sup>3</sup> Blue Creek: Case No. 09-1066-EL-BGN; Timber Road I: Case No. 09-0980-EL-BGN; Timber Road II: Case No. 10-0369-EL-BGN; Timber Road III: Case No. 10-0369-EL-BGN; Hog Creek I: Case No. 09-0277-EL-BGN; Hog Creek II: Case No. 10-0654-EL-BGN; Northwest Ohio: Case No. 13-0197-EL-BGN.

<sup>4</sup> Timber Road IV: Case No. 18-0091-EL-BGN; Hardin: 09-0479-EL-BGN; Greenwich: Case No. 13-0990-EL-BGN; Scioto Ridge: Case No. 13-1177-EL-BGN.

November 21 Order and also did not impose any timeframe on Staff's investigation of an incident or the Executive Director's decision to allow a restart of the turbine(s) involved in the incident.

Innogy Renewables US LLC and its wholly-owned subsidiary, Hardin Wind LLC, now seek rehearing on three assignments of error.

### III. ARGUMENT

**Assignment of Error No. 1: The Board unreasonably and unlawfully failed to set forth the reasons for its conclusion that the Board possesses the authority to impose new conditions on existing certificates through a subsequent rule-making (Ohio Adm.Code 4906-4-10).**

By its terms, the Incident Reporting Rule subjects *all* wind farm operators, including those holding existing final, non-appealable certificates, to new reporting conditions and a condition to not restart the turbines involved in an incident until the Board's Executive Director approves the restart. In its comment, Innogy argued that if the Board intended the Incident Reporting Rule to apply to existing certificates, then the Board lacked the statutory authority to do so. (Innogy Renewable US LLC's July 26, 2019, Reply Comment). By implication, the Board's November 21 Order found that the Incident Reporting Rule *is* retrospective. (November 21 Order at ¶ 25) (disagreeing with "public comment suggestions . . . that the proposed rules are solely prospective"). The Board then rejected Innogy's position, concluding only that "the proposed rule changes, as amended, strike a fair balance between public safety and operational efficiency in addressing the safety concerns that arise from extraordinary wind farm incidents." (*Id.*). But nowhere does the November 21 Order address the question that Innogy and other commentators raised: whether the General Assembly ever authorized the Board to retroactively impose new conditions on existing duly issued certificates through rule-making.

In so doing, the Board violated R.C. 4903.09,<sup>5</sup> which states:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the **commission shall file**, with the records of such cases, findings of fact and **written opinions setting forth the reasons prompting the decisions arrived at**, based upon said findings of fact. [Emphasis added].

Under that statute, “when ‘the commission has not set forth in its order its reasons in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside.’” *Interstate Gas Supply, Inc. v. PUC (In re Duke Energy Ohio, Inc.)*, 148 Ohio St.3d 510, 2016-Ohio-7535, 71 N.E.3d 997, ¶ 23, quoting *Gen. Tel. Co. v. Pub. Util. Com.*, 30 Ohio St.2d 271, 285 N.E.2d 34 (1972); *see also Motor Serv. Co. v. Pub. Util. Com.*, 39 Ohio St.2d 5, 313 N.E.2d 803 (1974) (“It is the opinion of this court that the commission failed to make specific findings of fact, supported by the record, **or to state reasons derived therefrom**, which prompted its decision, in violation of the requirements of R.C. 4903.09.”) (emphasis added).

*Interstate Gas Supply* set aside Commission orders that summarily concluded that Duke Energy’s application satisfied state law, but failed to explain *how* Duke complied with the relevant statutes. 148 Ohio St.3d at 516. The same situation confronts the Board here. R.C. 4903.09 requires the Board to explain its reasoning; that is, whether and *how* Ohio law empowered the Board to retroactively impose additional conditions on existing certificates through rulemaking. In failing to include that explanation, the November 21 Order is unlawful and unreasonable.

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<sup>5</sup> R.C. 4903.09 applies to the Board through R.C. 4906.12.



**Assignment of Error No. 2: The Board unreasonably and unlawfully imposed new conditions on existing certificates through subsequent rule-making (Ohio Adm.Code 4906-4-10), contrary to the Board's limited statutory authority .**

**A. The General Assembly did not authorize the Board to impose new conditions on existing certificates by rule.**

The General Assembly did not authorize the Board to retroactively impose new conditions on existing certificates through rulemaking. The November 21 Order is thus unlawful and unreasonable because it requires holders of existing certificates to comply with the new incident reporting and turbine restart rule.

Like any administrative agency, the Board only has that authority granted to it by statute. *See, e.g., Discount Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51 (“The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.”); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993). And that authority is construed narrowly. *Ohio Fresh Eggs, LLC v. Boggs*, 183 Ohio App.3d 511, 2009-Ohio-3551, 917 N.E.2d 833 (10th Dist.) (“[I]n construing a grant of administrative power from a legislative body, the intention of that grant of power, as well as the extent of the grant, must be clear, and, if there is doubt, that doubt must be *resolved against the grant of power*.”) (emphasis added).

Courts also take a particularly dim view of laws or rules that purport to apply retroactively. The Supreme Court of Ohio has noted that “retroactive laws and retrospective application of laws have received the near universal distrust of civilizations.” *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104, 522 N.E.2d 489 (1988). That view is reflected both in R.C. 1.48, which presumes that statutes are prospective “**unless expressly made retrospective**,”<sup>6</sup> as well as Section

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<sup>6</sup> R.C. 1.48 (emphasis added).

28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws. *Discount Cellular* at ¶ 41. “The prohibition against retroactive laws pertaining to legislative enactments also applies to rules and regulations promulgated by administrative agencies.” *Smith v. Ohio Edison*, 2d Dist. Clark C.A. CASE No. 98 CA 37, 1999 Ohio App. LEXIS 16, at \*10 (Jan. 8, 1999); *Cosby v. Franklin Cty. Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 07AP-41, 2007-Ohio-6641.

Here, the General Assembly did not expressly vest the Board with the authority to retroactively add new conditions to previously issued certificates through rule-making. Instead, the Board *only* has the statutory authority to impose conditions as part of its decision to grant a *pending* certificate application. As R.C. 4906.10(A) states:

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 [Emphasis added].

Thus, under R.C. 4906.10(A), the Board’s authority to add conditions ends once the Board issues a final, non-appealable certificate.

Likewise, R.C. 4906.04 states that “[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**.” (Emphasis added). But the General Assembly did *not* require the certificate holder to abide by terms or conditions imposed through a later-enacted rule—one *not* “contained therein”, that is, within the certificate itself.

And while the Board has general rule-making authority under R.C. 4906.06(C), R.C. 4906.10(A) specifically controls the Board’s ability to impose conditions on a certificate. In any

event, nowhere does R.C. 4906.03(C) permit the Board to retroactively impose new conditions on previously issued certificates either. Rather, R.C. 4906.03(C) only provides for rules 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). If the General Assembly intended to allow the Board to modify existing certificates through rulemaking, the Supreme Court of Ohio requires the General Assembly to have said so. *See Discount Cellular* at ¶ 51 (“The General Assembly did not expressly state that R.C. 4927.03 was to be applied retrospectively. Therefore, we hold that the PUCO exceeded its statutory authority when it retroactively applied R.C. 4927.03 in this matter.”).

In sum, nothing in R.C. Chapter 4906 authorizes the Board to pass rules that retroactively impose conditions on an existing certificate. By seemingly requiring holders of existing certificates to comply with the newly promulgated rule, the November 21 Order is unreasonable and unlawful. The Board can rectify this error by moving the text of the rule to Rule 4906-4-09 which requires certificate applicants to commit to certain conditions.

**B. The November 21 Order unconstitutionally deprives certificate holders of the vested right to operate under those conditions set out in a duly issued certificate.**

Even if the General Assembly had authorized the Board to promulgate retroactive rules (and it did not), Section 28, Article II of the Ohio Constitution prohibits the Board from issuing substantive rules that retroactively impair vested rights. *See State v. Cook*, 83 Ohio St.3d 404, 411, 1998-Ohio-291, 700 N.E.2d 570 (explaining that a statute is substantive under a retroactivity analysis “if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.”); *Discount Cellular* at ¶ 41 (“Only if we find that the General Assembly intended the statute

to apply retroactively do we then consider whether the statute is substantive, rendering it unconstitutional.”).

The right to build and develop property, including through a Board-issued certificate, is a quintessential vested right. *See, e.g., Gibson v. Oberlin*, 171 Ohio St. 1, 3, 167 N.E.2d 651 (1960) (“The ability to establish a nonconforming use [under zoning law] constitutes a valuable right and one which cannot be abrogated...”); *O’Brien v. Columbus*, 10th Dist. Franklin No. 89AP-877, 1990 Ohio App. LEXIS 443, at \*7-8 (Feb. 6, 1990) (“Under *Gibson*, an applicant for a building permit has a vested right to establish a nonconforming use in reliance on the zoning code as it existed when the application was filed. It is a vested right to build in reliance on a specific zoning classification.”); *Jackson Twp. Bd. of Trustees v. Donrey Outdoor Advertising Co.*, 10th Dist. Franklin No. 98AP-1326, 1999 Ohio App. LEXIS 4341 (Sep. 21, 1999) (holding that billboard company had a vested right to complete the installation of a billboard under a duly issued zoning certificate, despite a later change to the zoning ordinance).

Likewise here, the right to build and operate under a Board-issued certificate is a substantive right that vests upon the date the application was filed and remains vested during the life of the certificate. In adding onerous new burdens to existing certificate holders, the November 21 Order impermissibly impaired these holders’ vested right to complete and operate the certificated facility on those conditions set out in the certificate. For example, the rule transfers the discretion on whether to restart a turbine involved in an incident from the certificate holder to the Board’s Executive Director – a significant change and new condition on the operation of a certificated facility. The Board has no authority to add new conditions on a certificate through rulemaking, and to do so is unreasonable and unlawful.

For these reasons the Board should limit the applicability of the Incident Reporting Rule to those projects for which a certificate has yet to be issued. It could do so, as noted above, by moving the text of the rule to Rule 4906-4-09 which requires **certificate applicants** to commit to certain conditions.

**Assignment of Error No. 3: The Board unreasonably and unlawfully adopted text for a new Incident Reporting Rule (Ohio Adm. Code 4906-4-10), that is in conflict with the Board’s findings and reasoning in the November 21 Order and that fails to impose any timeframe on Staff’s and its Executive Director’s obligations under the rule.**

The text of the Incident Reporting Rule, as adopted by the Board, does not match the Board’s statements in its November 21 Order. Thus, the Board should grant rehearing to edit the text of the Incident Reporting Rule to match the Board’s stated reasoning. The rule also does not address or impose a standard for timeliness on Staff’s and the Executive Director’s obligations under the rule, which also warrants a grant of rehearing. To address these issues, Innogy has provided suggested revisions to the text of the Incident Reporting Rule below in Section D.

**A. The Incident Reporting Rule leaves open what constitutes an incident.**

The Board was very clear in its November 21 Order that “[r]eportable wind farm incidents under this rule **are limited to events where** there is injury to any person, damage to others’ property, or where a tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure, nacelle fire, or ice throw results in operator property damage that is estimated to exceed fifty thousand dollars.” November 21 Order at ¶24 (emphasis added). The Incident Reporting Rule, however, states that “[f]or purposes of this rule incidents **include** events where: ....” (Ohio Adm.Code 4906-4-10(A)(2)(Emphasis added). The use of the word “include” still implies that the list of events that follows is illustrative, and not exhaustive. This conflicts with the reasoning in the November 21 Order and the rule should be revised as suggested below in Section D.

**B. The Incident Reporting Rule as drafted includes non-turbine events.**

The Incident Reporting Rule requires telephone notice of incidents involving a wind turbine but then includes a “collector or feeder line failure” as a reportable incident. (See 4906-4-10(A)(1) and (A)(2)(c). Nowhere in this proceeding has a “collector or feeder line failure” been defined and more importantly, collection lines are not part of a wind turbine. Instead, as the Board is aware, collection lines are underground lines connecting turbines and eventually connecting the generation system to the collector substation. It was unreasonable and an oversight to leave the phrase “collector or feeder line failure” in the Incident Reporting Rule. Because collection lines are not part of a wind turbine and because the rule relates to incidents involving a wind turbine, the phrase should be removed from the list of events that could lead to a report. Alternatively, if the Board is concerned that a collection line failure can impact the operation of a turbine, then the phrase can be revised at a minimum to read “collector or feeder line failure that results in a turbine incident.”

**C. The Incident Reporting Rule does not require Staff to timely investigate an incident.**

The Board, in the November 21 Order, recognized the importance of timely resolution of an incident, finding that “[b]y requiring a **timely incident response and investigatory cooperation with Staff**, the Board is satisfied with the public safety enhancements contained in these rules.” (November 21 Order at ¶25) (emphasis added). The Board then approved the Incident Reporting Rule’s imposition of strict timeframes for a wind farm operator’s reporting of an incident but did not impose any timeframe for Staff’s investigation of the same incident or the Executive Director’s decision to allow a restart of the turbine. Doing so was unreasonable and ignores the balance between public safety and operational efficiency which the Board’s rule changes sought to attain. (November 21 Order at ¶ 25).

The Board can address this issue by imposing a timeframe on Staff's investigation and the Executive Director's decision to allow a restart. Innogy would propose no more than a seven-day investigation period for Staff following submittal of the final written report by the wind farm operator and a three-day maximum period for any restart decision following notice from the wind farm operator that the turbine or turbines are ready to restart. This will ensure that an investigation is performed in a timely manner and that there is no material delay in restarting turbines after the operator has made a decision that the equipment can be restarted. Importantly, timeframes on both the Staff's investigation and the Executive Director's decision to restart provide certainty to wind farm operators and investors that the Staff investigation will be prompt and that a restart decision will be made expeditiously and quickly after notice from the wind farm operator.

**D. The Incident Reporting Rule can be revised to better match the Board's November 21 Order.**

To address and remedy this third assignment of error, Innogy suggests that the Board at a **minimum** make the following edits to the Incident Reporting Rule:

**4906-4-10 Notice and reports of incidents involving wind farm facilities.**

**(A) Telephone notices of incidents.**

- (1) Wind farm operators should notify the board's executive director by calling: 1-855-945-3321, as well as local law enforcement and first responders on all incidents involving a wind turbine, within thirty minutes after discovery unless notification within that time is impracticable under the circumstances.
- (2) For purposes of this rule ~~an incidents include~~ is an events that involve a turbine or turbines where:
  - (a) There is injury to any person;
  - (b) There is damage to property other than the property of the windfarm operator ~~or~~;
  - (c) ~~Where There is an event such as~~ tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure that results in a turbine incident, ice throw, or nacelle fire that causes ~~cause~~ damage to the wind farm operator's property that is estimated to exceed fifty thousand dollars, excluding the cost of electricity lost, which is the sum of the estimated cost of material, labor, and equipment to repair and/or replace the operator's damaged property.

**(B) Written reports regarding incidents.**

- (1) Within thirty days after the incident is discovered, a wind farm operator will submit a written report to the executive director describing the cause of the incident, where ascertainable, and any damage to the wind farm facility or to the neighboring properties or persons, on a form provided by the board.
- (2) Each wind farm operator will also docket, in the wind farm certificate case, a final written report on a form provided by the board within sixty days after discovery of the incident, unless the wind farm operator:
  - (a) For good cause shown, demonstrates more time is needed; and
  - (b) Submits interim reports to the executive director at intervals of not more than sixty days until a final report is docketed.

**(C) Each final written report will address:**

- (1) Cause of the incident;
- (2) Date and time the incident occurred and date and time it was discovered;
- (3) If the incident involved a turbine, the distance between debris and the wind turbine base;



- (4) If the incident involved a turbine, the distance between debris to habitable structures and property lines, and photographs of the debris field;
- (5) A narrative description of the incident and actions taken by the wind farm operator, including a timeline of events;
- (6) What, if any, damage occurred to the property within the wind farm facility;
- (7) What steps were necessary to repair, rebuild, or replace damage to any property within the wind farm facility;
- (8) What, if any, personal injury was caused by, or related to, the incident;
- (9) What, if any, damage to properties within or adjacent to the wind farm project area was caused by, or related to, the incident;
- (10) What, if any, steps were, or will be, taken to prevent future incidents.

(D) Staff investigation and restart

- (1) Staff will investigate every incident that results in a report being submitted pursuant to this rule and will complete the investigation within seven days of final written report submittal. Except as necessary for public safety, a wind farm operator should not disturb any damaged property within the facility or the site of a reportable incident until after staff has made an initial site visit.
- (2) A wind farm operator will not restart any damaged property within a facility involved in a reportable incident until the wind farm operator provides notification to the board's executive director that the turbine or turbines are ready for restart and such restart is approved by the board's executive director or the executive director's designee, with the decision to approve any restart to be made no later than three days after notification is provided by the wind farm operator that the turbine or turbines are ready for restart.

#### IV. CONCLUSION

For the reasons above, the Board should grant rehearing on the First and Second Assignments of Error to not apply the Incident Reporting Rule to projects for which a final, non-appealable certificate has already been issued by the Board. Additionally, the Board should grant rehearing on the Third Assignment of Error to confirm that the text of the Incident Reporting Rule, as applicable to new certificates issued after the effective date of the rule, matches the Board's intent as expressed in the November 21 Order, and at a minimum imposes timeframes on Staff's and the Executive Director's obligations under the rule.

Respectfully submitted

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## CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of filing this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 23<sup>rd</sup> day of December, 2019.

/s/ Michael J. Settineri

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Summary: App for Rehearing Amended Application for Rehearing of Innogy Renewables US LLC and Hardin Wind LLC electronically filed by Mr. Michael J. Settineri on behalf of Innogy Renewables US LLC and Hardin Wind LLC