BEFORE THE OHIO POWER SITING BOARD

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

JOINT INITIAL COMMENTS
OF
HARDIN WIND LLC AND RWE RENEWABLES AMERICAS, LLC

I. INTRODUCTION

Hardin Wind LLC and RWE Renewables Americas, LLC jointly submit the following comments on the Ohio Power Siting Board's proposed rule Ohio Adm.Code 4906-4-10. RWE Renewables Americas, LLC is the sole owner of Hardin Wind LLC, the developer of the Scioto Ridge Wind Farm which is currently under construction. Hardin Wind and RWE are providing comments to the rule as presented in its entirety in the August 17, 2020 Entry to ensure the Board considers and addresses all issues presented in these comments in any final order issued. Hardin Wind and RWE appreciate the opportunity to submit these comments and welcome any questions from the Board's Staff.

II. INITIAL COMMENTS

A. Imposing Time Requirements on Staff's Site Visit and Allowing for Restart of the Equipment is an Improvement over the Initial Proposed Rule.

The Board has improved the proposed rule with the addition of timelines. First, the Board is proposing that its Staff visit a site within three business days after notice of an incident. Second, the Board will allow a wind farm operator to restart damaged property five business days after docketing the final written report and a notarized statement from either a professional engineer or the manufacturer's representative stating that "it is safe to restart the damaged property."

As to only the proposed timelines (three business days and five business days), Hardin Wind believes it is reasonable that Staff visit the site within three business days after notice of an incident. Hardin Wind asks that the Board consider adopting an automatic restart timeline of three business days versus five business days if Staff and the Board's Executive Director believe three business days provides enough time for Staff and the Executive Director to review the final incident report and determine whether a restart should not be allowed. The difference between five business days and three business days may not seem significant from a time perspective, but two days of lost power generation can result in over $350,000 in lost revenue per day for a facility shutdown (for example, a collection line system terminating at a substation or an incident impacting all turbines).

B. Asking a Professional Engineer or a Turbine Manufacturer to Provide a Notarized Warranty/Guarantee that Damaged Equipment is Safe to Restart Does not Make Sense.

While the Board's new timeframes are an improvement, the Board has added a new documentation requirement to the proposed rule that is highly problematic. Specifically, the Board will allow a wind farm operator to restart its equipment only if it provides the Board with a "*notarized statement* from either a licensed professional engineer or a qualified representative from the manufacturer of the damaged equipment that *it is safe to restart the damaged property*." (Emphasis added). The Board does not provide any reason or rationale for this new warranty/guarantee requirement. A notarized statement that warrants/guarantees that a repair is safe is very likely impossible to obtain from any individual.

For example, licensed professional engineers in Ohio are limited in the certifications they can give and are governed by ethical rules. Ohio Adm.Code 4733-35-04(C) states that:

> [t]he engineer or surveyor shall decline to sign and/or seal any form of certification, warranty, or guaranty that (1) Relates to matters beyond his or her technical competence, (2) Involves matters which are beyond the scope of

> services for which he or she was retained, or (3) Relates to engineering or surveying work for which he or she does not have personal professional knowledge and direct supervisory control and responsibility.
>
> "Certification" shall mean a statement signed and/or sealed by an engineer or surveyor representing that the engineering or surveying services addressed therein have been performed, according to the engineer or surveyor's knowledge, information and belief, in accordance with commonly accepted procedures consistent with applicable standards of practice, and is not a guaranty or warranty, either expressed or implied.

A professional engineer in Ohio also cannot "… sign and/or seal professional work for which he or she does not have personal professional knowledge and direct supervisory control and responsibility." Ohio Adm.Code 4733-35-07(A).

Similarly, given the experience of its development team, Hardin Wind believes that original equipment manufacturers ("OEMs") will not be willing to make any sort of guarantee that equipment is "safe to restart." Turbine purchase contracts for a utility-scale wind project can be well over one hundred million dollars in value. Asking an OEM to provide a notarized statement that equipment is safe to restart essentially puts in place a written warranty and guarantee by the OEM, which would be a new business term on a multi-million dollar purchase contract. Moreover, allocating liability and cost responsibility for any type of turbine failure (minor or major) can take months and years to resolve. OEMs are not in the business of providing guarantees to wind farm operators or to non-contracting third parties (for example, to the Ohio Power Siting Board) that repaired equipment is "safe to restart." Rather, absent a valid warranty claim under the turbine purchase contract, OEMs provide operation and maintenance services to wind farm operators at the wind farm operator's expense.

In fact, asking an OEM to provide a notarized statement that a turbine is "safe to start" is equivalent to asking the Ford Motor Company to provide Avis Rental Car with a certificate that a Ford automobile in Avis' rental fleet is "safe to operate" after it has been repaired. Likewise, car

dealerships do not provide a "safe to operate" guarantee to you after repairing your car. Similarly, an elevator manufacturer does not provide a "safe to restart" certificate/guarantee when the elevator is taken out of service for repairs by the repair company. These are just a few of the many examples that illustrate why the Board's proposed safety warranty/guarantee requirement is unworkable and will simply result in projects not being able to restart after an incident because projects will be unable to obtain that safety warranty/guarantee.

Another issue with the proposed documentation requirement is that the Board's proposed rule would require statements from these third-party individuals/entities for the apparent purpose of holding them responsible and/or liable if the equipment is subsequently found not safe (for example, if a repair was not done correctly). Licensed professional engineers and turbine manufacturers, however, are not subject to the Board's jurisdiction. To the extent the Board is seeking to assert jurisdiction over such entities through the proposed rule, that act is well beyond the Board's statutory authority set forth in R.C. 4906.03.

Rather than look to professional engineers and turbine manufacturers for the warranty/guarantee, the Board should allow the wind farm operator to notify the Board that repairs are complete and the equipment is ready to restart. Wind farm operators are subject to the Board's jurisdiction while turbine manufacturers are not subject to its jurisdiction, and are responsible under R.C. 4906.98(B) to "construct, operate, or maintain a major utility facility or economically significant wind farm" in compliance with their certificates. Wind farm operators should be tasked as the entity to confirm that repairs have been completed and that the equipment is ready to restart. Note, that in many cases, more than one company may be involved in repairs, so having the wind farm operator provide the statement makes much more sense than requiring the wind farm operator to obtain certifications from every company involved in the repair.

Simply put, there is no reason why anyone other than the wind farm operator should have the responsibility to notify the Board that the equipment is ready to restart. A straight forward statement to the Board from the wind farm operator (the entity operating the equipment) that repairs are complete and the equipment is ready to restart is sufficient to show statutory compliance with R.C. 4906.98(B). Requiring anything more (like a notarized statement that the equipment is "safe to restart") could easily affect the business terms and conditions between an OEM and a wind farm operator, especially if responsibility for the cost of repairs and the cause of the repairs is in dispute (again noting that turbine contracts can easily be over one-hundred million dollars in value). It also could result in significant delays or an inability to restart if the warranty/guarantee required under the proposed rule cannot be obtained for business or ethical reasons.

C. The Board Continues to Lack the Statutory Authority to Impose New Certificate Conditions on Existing Certificates by Rule.

Hardin Wind and RWE both emphasize the absence of any language in the proposed rule that precludes application of the rule to certificates existing prior to the rule's effective date. As Hardin Wind has previously stated to this Board, it is well settled that the Board can only exercise that authority granted to it by statute. *See Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537 (1993) (the Public Utilities Commission of Ohio, of which the Board is a division, is a creature of statute); *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097, 1101, 1996 -Ohio- 224 ("[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute").

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

> The power siting board shall render a decision upon the record either granting or denying the application as filed, or **granting it upon such terms, conditions, or**

> **modifications** of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and rules adopted under sections 1501.33, 1501.34, and 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code.

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

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

The Board also cannot rely on R.C. 4906.20 as authority to apply its proposed rule on existing certificates. That statute applies to economically significant wind farms and not to wind farms that constitute a major utility facility like the Scioto Ridge Wind Farm. Accordingly, the Board cannot impose a notice requirement on existing certificates through rulemaking because to do so would be beyond the Board's statutory authority and contradictory to R.C. 4906.10(A). It also would impair rights that vested upon issuance of the certificate. *See e.g. Gibson v. City of Oberlin*, 171 Ohio St. 1, 5–6, 167 N.E.2d 651 (1960); *Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360, 372-373 (2007) (finding PUCO exceeded its authority

by retroactively applying statute); *O'Brien v. Columbus*, 10th Dist. Franklin No. 89-AP-877, 1990 Ohio App. LEXIS 443, *7 (Feb. 6, 1990) (recognizing that permit applicant has a vested right in relying on laws existing at time of application "so long as the building permit is valid" and rejecting argument that any changes to original permit must be reviewed under newly enacted law).

The Board's proposed revisions to its proposed rule are again unlawful and unreasonable. The better approach for any new rule requiring notice of events is to place that requirement in Rule 4906-4-09, which addresses requirements for certificate applications. Alternatively, as noted in the redline in Section F (below), language can be added to the rule to apply the rule to future certificates.

D. The Proposed Rule Leaves Open What Constitutes an Incident.

The Board was very clear in its November 21, 2019 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. The proposed rule, however, states that "[f]or purposes of this rule incidents include events where: …." (Ohio Adm.Code 4906-4-10(A)(2). The use of the word "include" still means that the list of events that follows is illustrative, and not exhaustive. This conflicts with the reasoning in the November 21 Order and Hardin Wind again asserts with RWE that the rule should be revised as shown below in the redlined revisions to the proposed rule (see Section F).

E. The Proposed Rule as Drafted Includes Non-Turbine Events.

The proposed 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. Because collection lines are not part of a wind turbine and because the rule involves only to wind turbine incidents, the phrase "collector or feeder line failure" should be removed from the list of events for which a report is required. 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."

F. Hardin Wind and RWE Propose the Following Revisions to the Proposed Rule.

Hardin Wind and RWE believe the below redline revisions to the initial proposed rule are appropriate and justified. The Board will be able to apply its new rule to future projects and can use its existing authority to open investigations on any incidents at existing wind farm facilities.

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

(A) Telephone notice of incidents.

(1) Wind farm operators should notify the board's executive director by calling: 1-844-OHCALLI (1-844-642-2551), 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 incident~~s include~~is an~~,~~ event~~s where~~that involves a turbine or turbines 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~~ There is a ~~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 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 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. 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. Staff will make its initial visit to review any damaged property within three business days of the notice provided for in paragraph (A)(1) unless otherwise prohibited from accessing the area of the damaged property by public safety officials.

(2) Subject to part (D)(3) of this section, ~~A~~a wind farm operator will not restart 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 ~~pursuant to the following process~~:

a) The approval provided for in this section (D)(2) ~~Such approval~~ is premised upon the filing of a complete and final written report fully addressing the factors set forth in paragraph (C), as well as a ~~notarized~~ statement from the operator that all repairs have been completed and that the equipment may be returned to operation ~~from either a licensed professional engineer or a qualified representative from the manufacturer of the damaged equipment that it is safe to restart the damaged property.~~

(3) Unless otherwise suspended for good cause shown by the board, executive director, or an administrative law judge, a wind farm operator may restart ~~damaged property~~equipment that was damaged within ~~five~~ three business days after docketing the final written report and ~~notarized~~ statement required in this section.

(E) This rule shall only apply to wind farm operators of certificates issued by the board after the effective date of this rule.

III. CONCLUSION

Hardin Wind and RWE ask that the Board and its Staff consider these initial comments, and are available to answer any questions.

Respectfully submitted

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below on this 24th day of August 2020.

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Summary: Comments Joint Initial Comments of Hardin Wind LLC and RWE Renewables Americas, LLC electronically filed by Mr. Michael J. Settineri on behalf of Hardin Wind LLC and RWE Renewables Americas, LLC