

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of **REPUBLIC**)
WIND, LLC for a Certificate of Environmental)
Compatibility and Public Need for a Wind-)
Powered Electric Generating Facility in Seneca)
and Sandusky Counties, Ohio)

Case No. 17-2295-EL-BGN

**REPUBLIC WIND, LLC'S
APPLICATION FOR REHEARING**

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**REPUBLIC WIND, LLC'S
APPLICATION FOR REHEARING**

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Republic Wind, LLC ("Republic Wind") requests rehearing of the Opinion and Order issued in this proceeding on June 24, 2021 ("Order"). Republic Wind submits that the Board's Order is unlawful, unjust, unreasonable, and unwarranted based on the following grounds:

ASSIGNMENT OF ERROR NO. 1: THE ORDER IS UNREASONABLE AND UNLAWFUL BECAUSE IT REQUIRES REPUBLIC WIND TO SUBMIT FULLY DETAILED GEOTECHNICAL INFORMATION BEFORE A CERTIFICATE IS GRANTED, THUS UNLAWFULLY AMENDING O.A.C. 4906-4-09(A)(2)(b)(i), AND DENYING REPUBLIC WIND DUE PROCESS.

- A. The Board's Holding Violates R.C. 4906-4-09(A)(2)(b)(i) Because it Required Republic Wind to Introduce *Post-Certification* Documents into the *Pre-Certification* Evidentiary Record of this Proceeding.
- B. The Board Violated Republic Wind's Due Process Rights by Amending O.A.C. 4906-4-09(A)(2)(b)(i) without the Notice, Hearing and Review Required by R.C. Chapter 119.

ASSIGNMENT OF ERROR NO. 2: THE ORDER IS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE IT FAILED TO MAKE FINDINGS OF FACT, BASED UPON EVIDENCE OF RECORD, THAT SUPPORT THE BOARD'S DECISION, IN VIOLATION OF R.C. 4903.09.

- A. 4906.10(A)(3). The Board Violated R.C. 4906.10(A)(3) by Failing to Make Findings on Probative Evidence Regarding whether the "Facility Represents the Minimum Adverse Environmental Impact, Considering the State of

Available Technology and the Nature and Economics of the Various Alternatives, and Other Pertinent Considerations.”

- B. 4906.10(A)(6). The Board’s Determination that the Project Will Not Serve the Public Interest, Convenience, and Necessity under R.C. 4906.10(A)(6) is Unlawful and Unreasonable, and Against the Manifest Weight of the Evidence.**

ASSIGNMENT OF ERROR NO. 3: THE ORDER IS UNREASONABLE, UNLAWFUL AND CONSTITUTES AN ABUSE OF DISCRETION BECAUSE THE BOARD REFUSED TO MAKE FINDINGS AS TO WHETHER REPUBLIC WIND HAD SATISFIED EACH CRITERION IN R.C. 4906.10(A).

ASSIGNMENT OF ERROR NO. 4: THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE THE BOARD DEFERRED TO THE OPINION AND OPPOSITION OF LOCAL GOVERNMENTS IN DENYING THE APPLICATION, IN VIOLATION OF R.C. 4906.13(B).

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I. INTRODUCTION

“[P]assionately held views of one or more opponents of a project do not necessarily mean that the positions held by the developer are not reasonable, are without merit or incapable of being sustained by the Board. And, as importantly, passionately advanced opposition does not license the use of our evidentiary proceedings to fish for things that might appear to make the passion logical, rational or, when accompanied by credible evidence, compelling.”

Concurring Opinion of Former Chairman Sam Randazzo, *Ohio State University*, Case No. 19-1641-EL-BGN. Opinion, Order, and Certificate, (September 17, 2020).

The Board’s Opinion and Order issued June 24, 2021 (the “Order”) is nothing more than an attempt to apply a new, unprecedented standard that fails in the search for facts and law to support it. This new standard unlawfully elevates the importance of “passionately advanced opposition” over the probative evidence submitted in this proceeding and the due process rights of Republic Wind.

Board Chair French admitted as much by commenting at the June 24, 2021 Board meeting that “substantial local government opposition” led her to determine that Republic Wind’s Project is not in the public interest. She admitted that no rules were in place to guide the Board as to the level of opposition necessary to deny an application that otherwise complied with all applicable law. However, she stated that the Board was working on rules that would provide more guidance – a likely reference to the rules necessary to implement recently enacted SB 52, which gives local governments more authority over the siting of solar and wind projects.

The problem with the Chair’s, and the Order’s, reasoning is that existing R.C. 4906.13 precludes local governmental interference with the siting of wind farms. Further, to the extent that the Board is attempting to apply SB 52 (at least in spirit) to this proceeding, it is precluded from doing so. The Ohio Constitution protects the public from the retroactive application of laws. Ohio Const. Article II, Section 28.

Unfortunately, the Board's abuse of authority does not stop here. After over a year and a half of deliberations, the Board's opinion addressed only two of the eight required criteria in R.C. 4906.10(A) in denying the application, to the prejudice of Republic Wind's appellate due process rights. With respect to each criterion (R.C. 4906.10(A)(3) and (6)), the Board found that Republic Wind failed to meet its burden of proof, primarily regarding the potential effects of turbines near karst formations. The Board based its findings on Republic Wind's "failure" to introduce in the evidentiary record the detailed geotechnical information called for in O.A.C. 4906-4-09(A)(2)(b)(i). However, that information is not to be submitted to Board Staff until *after* a certificate is issued. The Board not only violated its own rule, but violated Republic Wind's due process rights by changing the applicable burden of proof post-hearing and post-order.

The Order attempts to bolster its conclusion that Republic Wind did not meet its burden of proof by relying on the testimony of one expert and the comments of numerous laypersons regarding the potential effects of karst formations. However, the lone expert, Local Residents' witness Sasowsky, merely speculated about the potential effects of karst formations and admitted that he did not know any of the specific geotechnical details of the actual turbine locations. Tr. VI at pp. 1197-99. The laypersons, most without being subject to cross-examination, offered only "concerns" with the karst formations, as a part of their shared effort to stop the Project. At the end of the day, the Board was left with speculation and concerns that did not rise to the level of probative and reliable factual findings necessary to support its decision, as required by R.C. 4903.09.

To support that Republic Wind did not meet its burden of proof, it is necessary for the Board to weigh the factual evidence presented by all parties. The Board based its decision on the cherry-picked, non-factual speculation and concerns of the Local Residents. It ignored not only

Republic Wind’s factual geotechnical report and testimony in support, but amazingly ignored the findings of its own expert Staff that there are “no particular geological features that exist that would adversely affect or restrict the construction of the wind turbine facility.” Staff Ex. 1 (Staff Report) at 26. The Board’s finding that Republic did not meet its burden of proof was against the manifest weight of the evidence. Indeed, the Board committed reversible error because it did not even bother to weigh the evidence.

For the reasons that follow, Republic requests that the Board grant rehearing, make the eight required findings listed in R.C. 4906.10)(A), and approve Republic Wind’s application subject to applicable conditions, including the condition that Republic Wind make post-certification compliance with O.A.C. 4906-4-09.

In the alternative, Republic Wind requests the Board to grant rehearing for the limited purpose of submitting in the record the fully detailed geotechnical information called for in O.A.C. 4906-4-09(A)(2)(b)(i).

II. STANDARD OF REVIEW

After an order is entered, parties to a Board proceeding have a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”¹ An application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”²

In considering an application for rehearing, R.C. 4903.10 provides that the Board may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the Board may

¹ R.C. 4903.10. R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 are applicable to Board proceedings pursuant to R.C. 4906.12.

² R.C. 4903.10(B). *See also* O.A.C. 4901-1-35(A).

“abrogate or modify” the order in question if it “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.”³

The Order is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The Board should grant this application for rehearing and abrogate or modify the Order, consistent with the recommendations in this application for rehearing.

III. GROUNDS FOR REHEARING

ASSIGNMENT OF ERROR NO. 1: THE ORDER IS UNREASONABLE AND UNLAWFUL BECAUSE IT REQUIRES REPUBLIC WIND TO SUBMIT FULLY DETAILED GEOTECHNICAL INFORMATION BEFORE A CERTIFICATE IS GRANTED, THUS UNLAWFULLY AMENDING O.A.C. 4906-4-09(A)(2)(b)(i), AND DENYING REPUBLIC WIND DUE PROCESS.

R.C. 4906.10(A)(1)-(8) set forth the findings the Board must make to approve applications for major electric generating facilities, including wind farms. R.C. 4906.03(C) gives the Board the authority to adopt rules that elicit information from applicants to enable the Board to make the required statutory findings. These rules are contained in O.A.C. Chapter 4906-4. The information the applicant provides serves as a basis upon which the Board determines whether the applicant has met its burden of proving the criteria contained in R.C. 4906.10(A)(1)-(8).

The Board denied Republic Wind’s application, holding that it had not carried its burden of proof with respect to two of the eight criteria contained in R.C. 4906.10(A); specifically, R.C. 4906.10(A)(3) (the facility must represent the minimum adverse environmental impact) and R.C. 4906.10(A)(6) (the facility will serve the public interest, convenience, and necessity) Order, ¶ 60. The Board’s holding as to each criterion was based on concerns of the potential effects karst formations could have within the Project’s footprint. Order, ¶¶ 98 and 132. Specifically, the Board found that Republic Wind failed to sustain its burden, because Republic Wind did not introduce

³ R.C. 4903.10(B).

into the evidentiary record the “fully detailed geotechnical exploration and evaluation” required by O.A.C. 4906-4-09(A)(2)(b)(i). See Order, ¶ 98 (“...the Board is unable to find that this Project is in the public interest without [the information required by O.A.C. 4906-4-09(A)(2)(b)(i)] first being in the record.”) See, also, Order, ¶ 132 (“...concerns [regarding karst formations] are too significant to wait until the conducting of post-certificate studies [required by O.A.C. 4906-4-09(A)(2)(b)(i)]”).⁴

A. The Board’s Holding Violates R.C. 4906-4-09(A)(2)(b)(i) Because it Required Republic Wind to Introduce *Post-Certification* Documents into the *Pre-Certification* Evidentiary Record of this Proceeding.

The Board’s holding constitutes plain error. O.A.C. 4906-4-09(A)(2)(b)(i) requires fully detailed geotechnical evaluations to be submitted as post-certification reports sixty days before the pre-construction conference is conducted pursuant to O.A.C. 4906-3-14. The Board violated the rule by requiring that the evaluations be introduced as part of the pre-certification hearing record in this proceeding. Republic Wind was not required to introduce the information on the record at hearing, and its failure to do so cannot serve as a basis to deny this application. Moreover, the Board’s holding violates Republic Wind’s due process rights by: (1) changing Republic Wind’s burden of proof post-hearing; and (2) amending O.A.C. 4906-4-09(A)(2)(b)(i) without notice, hearing, and review by the Joint Committee of Rule Review (“JCARR”).

B. The Board Violated Republic Wind’s Due Process Rights by Changing Republic Wind’s Applicable Burden of Proof Post-Hearing.

As stated above, the information elicited under O.A.C. Chapter 4906-4 serves as the basis upon which the Board determines whether applicants have met their burden of proving a project

⁴ As discussed further below, by this statement, it is apparent that the Board misunderstands the purpose of submitting the detailed post-certification geotechnical information. Construction of the proposed turbines will not begin until the detailed information Republic submits receives approval after the pre-construction conference. The Board’s insinuation that the public may be harmed in the interim is unfounded and prejudicial.

satisfies the criteria contained in R.C. 4906.10(A)(1)-(8). Applicants necessarily rely on these rules in compiling the information to be submitted in their applications and testimony in order to meet the required burden of proof.

In preparing its amended application, filed December 26, 2018,⁵ Republic Wind relied on the existing general requirements of O.A.C. 4906-4-08(A)(5) related to geological features.⁶ It also relied on the existing special requirements for wind farms contained in O.A.C. 4906-4-09(A)(2)(b), related to its commitment to provide *post*-certification geotechnical information.⁷

In compliance with the general requirements of O.A.C. 4906-4-08(A)(5)(c), Republic Wind introduced in the record the required maps and the Geotechnical Report that described the

⁵ See App. Ex. 1C.

⁶ The rule requires the application to provide information on:

(5) Geological features. The applicant shall provide a map of suitable scale showing the proposed facility, geological features of the proposed facility site, topographic contours, existing gas and oil wells, and injection wells. The applicant shall also:

- (a) Describe the suitability of the site geology and plans to remedy any inadequacies.
- (b) Describe the suitability of soil for grading, compaction, and drainage, and describe plans to remedy any inadequacies and restore the soils during post-construction reclamation.
- (c) Describe plans for the test borings, including closure plans for such borings. Plans for the test borings shall contain a timeline for providing the test boring logs and the following information to the board:
 - (i) Subsurface soil properties.
 - (ii) Static water level.
 - (iii) Rock quality description.
 - (iv) Per cent recovery.
 - (v) Depth and description of bedrock contact

⁷ O.A.C. 4906-4-09(A)(2)(b) provides that the wind farm applicants commit to the following requirements:

- (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. [Emphasis added.]
 - (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.

suitability of the site for the proposed project, as directed under O.A.C. 4906-4-08(A)(5)(c)(i) and (ii).⁸ The information was supported by the testimony of Republic Wind witness Shawn McGee, PE, filed October 21, 2019.⁹

Per the special rules for wind farms, Republic Wind was not required to include in the amended application or offer at hearing a “fully detailed geotechnical exploration and evaluation” of geologic features. The information was not required to be submitted to the Board until after the hearing – sixty days before the preconstruction conference – as a post-certification mandate. O.A.C. 4906-4-09(A)(2)(b)(i). Board Staff witness Collins agreed, testifying that the Project would need to perform site-specific geotechnical investigations before the final pre-construction conference in order for Staff to understand the potential impacts on karst formations. Tr. VII at 1414.

The only information that O.A.C. 4906-4-09(A)(2)(b)(i) required to be introduced into the hearing record was Republic Wind’s commitment to perform the detailed post-certification evaluation of geological features, including karst formations. This commitment was expressly made in the Amended Application,¹⁰ Geotechnical Report,¹¹ and by Republic Wind witness McGee.¹²

Because the “fully detailed geotechnical exploration and evaluation” required by O.A.C. 4906-4-09(A)(2)(b)(i) is a post-certification document, the information that it may contain obviously cannot be considered by the Board in determining whether to grant a certificate. It follows that the fully detailed geotechnical evaluation is not a component of Republic Wind’s

⁸ See App. Ex. 1C, Ex. F (Groundwater, Hydrogeological, and Geotechnical Report (“Geotechnical Report”) dated December 10, 2018).

⁹ See App. Ex. 47 (McGee Direct).

¹⁰ App. Ex. 1C at p. 81.

¹¹ App. Ex. 1C, Ex. F, at p. 8.

¹² App. Ex. 47 (McGee Direct) at 5.

burden of proof in this proceeding, a fact upon which Republic Wind correctly relied in prosecuting its case.

By basing its denial of Republic Wind's application on the failure to introduce the fully detailed geotechnical evaluation into the evidentiary record, the Board changed Republic Wind's burden of proof. This post-hearing change of Republic Wind's burden is patently unfair and deprived Republic Wind of its right to due process.

As explained above, Republic Wind met its applicable burden of proof on geotechnical issues by fully complying with the requirements of O.A.C. 4906-4-08(A)(5) – and Staff's experts agreed. Pursuant to R.C. 4906.07(C), Staff conducted an investigation of the Project's geologic features and compliance with the O.A.C. 4906-4-08(A)(5). During its investigation, Staff reviewed the information in the Geotechnical Report and issued various data requests regarding the turbine foundations and geotechnical issues. Loc. Res. Ex. 1 (Staff Data Requests and Responses). Staff never indicated during its investigation that Republic Wind's application was incomplete or that fully detailed geotechnical information must be submitted prior to certification. After performing its investigation, Staff agreed with the Geotechnical Report's conclusions that "there are no particular geological features that exist that would adversely affect or restrict the construction of the wind turbine facility." Staff Ex. 1 (Staff Report) at p. 26. Consistent with existing law, Staff recommended that Republic Wind comply with the post-certification requirements contained in O.A.C. 4906-4-09, which includes the submission of the fully detailed geotechnical evaluations. Staff Ex. 1 at p. 61, Condition 2. On rehearing, the Board should accept that Republic Wind met its burden of proof in this proceeding, as recognized by the Board's expert Staff.

C. The Board Violated Republic Wind’s Due Process Rights by Amending O.A.C. 4906-4-09(A)(2)(b)(i) without the Notice, Hearing, and Review Required by R.C. Chapter 119.

The Board effectively amended O.A.C. 4906-4-09(A)(2)(b)(i) by requiring Republic Wind to introduce the fully detailed geotechnical evaluation into the evidentiary record in this proceeding, when the existing rule only requires that it be submitted post-certification. By amending the rule, the Board violated Republic Wind’s due process rights to notice and hearing. See *Fairfield Cty. Bd. Of Commrs. v. Natty*, 143 Ohio St.3d, 2015-Ohio-991 ¶42, quoting *State v. Hudson*, 2013-Ohio-647, 986 N.E.2d 1128, ¶48 (3d Dist.) (“...the basic requirements of procedural due process are notice and an opportunity to be heard.”).

The Board is an “agency” as defined in R.C. 119.01¹³ and, as such, is subject to the process required by R.C. Chapter 119 to amend existing rules. The process to amend an existing rule requires reasonable public notice (R.C. 119.03(A)) and hearing (R.C. 119.03(D)). Republic Wind was provided neither. Moreover, the revised rule was not filed with the Ohio Secretary of State or the Director of the Legislative Service Commission, as required by R.C. 119.03(B). See, also, R.C. 111.15. Nor was it filed with JCARR for review, as required by R.C. 119.03(C).¹⁴ See, also, R.C. Chapter 106.

¹³ It is noted that the Board’s sister agency, the Public Utilities Commission of Ohio is exempted from Chapter 119 (R.C. 119.01(A)(1); the Board is not.

¹⁴ JCARR review provides essential oversight over proposed rule changes:

A proposed rule ‘is subject to legislative review and invalidation under sections 106.02, 106.021 and 106.022 of the Revised Code’ and it must be filed with [JCARR]. R.C. 119.03(C). Members of the House of Representatives and the Senate serve on JCARR, and it may recommend that the House and Senate adopt a concurrent resolution to invalidate the proposed rules. R.C. 106.21; R.C. 106.041. By reserving authority to adopt such an invalidating concurrent resolution, the General Assembly retains a legislative veto over agency rulemaking. R.C. 106.042. That oversight is lost if [the proposed rule is not filed for JCARR review as R.C. Chapter 106 requires.]

In Re Application of Black Fork Wind Energy, 156 Ohio St.3d 181, 2018-Ohio-5206 ¶ 44 (Kennedy, J., concurring). It is unlawful for the Board to escape JCARR review by not filing the amended rule.

Because the Board failed to comply with the proper procedure to amend O.A.C. 4906-4-09(A)(2)(b)(i), the amendment must be invalidated. R.C. 119.02. Because the attempted amendment of the rule is invalid, it cannot serve as the basis to hold that Republic Wind failed to meet its burden of proof in this proceeding. Accord: *Northeast Ohio Regional Sewer Dist.*, 58 Ohio St.3d at 24, 567 N.E.2d 993. (“[F]ailure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule. R.C. 119.02.”)

ASSIGNMENT OF ERROR NO. 2: THE ORDER IS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE IT FAILED TO MAKE FINDINGS OF FACT, BASED UPON EVIDENCE OF RECORD, THAT SUPPORT THE BOARD’S DECISION, IN VIOLATION OF R.C. 4903.09.

The Board denied this application, claiming that Republic Wind failed to meet its burden of proof under R.C. 4906.10(A)(3) and 4906.10(A)(6). As explained below, the Board’s decision as to each criterion not only was against the manifest weight of the evidence, but completely lacked factual findings that support its decisions.

A. R.C. 4906.10(A)(3). The Board Violated R.C. 4906.10(A)(3) by Failing to Make Findings on Probative Evidence Regarding whether the “Facility Represents the Minimum Adverse Environmental Impact, Considering the State of Available Technology and the Nature and Economics of the Various Alternatives, and Other Pertinent Considerations.”

R.C. 4906.10(A) sets forth the Board’s authority to issue a decision that either grants or denies the application, or grants the application upon “terms, conditions, or modifications” as the Board considers appropriate. Pursuant to R.C. 4906.10(A)(3), the Board is required to determine if:

the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.

The General Assembly did not task the Board with eliminating *all* environmental impacts when certificating major utility facilities. Rather, the Board is required to determine if the potential

environmental impacts of the proposed project have been minimized. When considering if the impacts are minimized, the Board must assess the technological and economic limitations of remedying potential impacts. The Board must also consider any other “pertinent considerations” when evaluating the potential impacts of the project. This analysis requires careful consideration of the probative evidence submitted regarding the actual impacts that may occur from the project and the potential remedies for these impacts.

In this case, the Board failed to give any weight to the probative evidence submitted by Republic Wind regarding potential geotechnical impacts and remedies. Instead, the Board imposed an absolute prohibition on construction of any and all of the proposed turbines. The prohibition was based upon generalized “concerns” and mere speculation about potential impacts due to karst formations, without consideration of circumstances at actual turbine locations. The Board’s unprecedented denial of Republic Wind’s application was made without consideration of the various factors that could minimize the Board’s “concerns.” This absolute bar on construction violates the intent of R.C. 4906.10(A)(3). Based solely on generalized claims regarding the geology underlying the footprint of the project area, the Board came to the following sweeping conclusion:

The Board finds that there is a high likelihood of harm with no reliable remedy and that the identified concerns are too significant in nature to wait until the conducting of post-certificate studies.

Order, ¶132. This conclusion contains a number of unreasonable and inaccurate statements which demonstrates that the Board failed to perform its statutory duty under R.C. 4906.10(A)(3).

1. There is no probative evidence in the record to support the Board’s claim that there is a “high likelihood of harm” from karst formations.

The Board’s claim that there is “a high likelihood of harm” is not supported by the record. While the Board relies heavily on the testimony of Local Residents witness

Sasowsky, Sasowsky admitted that he did not know any of the specific geotechnical details of the actual turbine locations nor did he have any understanding of the actual construction methods to be used at the turbine site locations. Tr. VI at pp. 1197-99. The Board also relies on Sasowsky's testimony regarding grouting to deny the application, but Sasowsky readily admits that he does not know if any of the final turbine site locations will actually require grouting. *Id.*

While Sasowsky speculates about the potential impacts that may be caused by construction near karst formations, nothing in his testimony demonstrates that the Project will, in fact, result in any harm to the public. It is impossible for the Board to credibly claim there is a "high likelihood of harm" due to impacts from karst formations if site-specific geotechnical surveys have yet to be performed. The Board is basing its claims on pure supposition rather than probative evidence in the record.¹⁵

The most reliable and probative evidence in the record regarding impacts of karst formations and groundwater were submitted by Republic Wind. Republic Wind's Geotechnical Report demonstrated that the Project would not have a negative impact on groundwater. App. Ex. 1C, Ex. F. The Geotechnical Report describes how Republic analyzed the various regulations that restrict specific activities with Source Water Protection Areas ("SWPA"). *Id.* at pgs. 3-5. In the report, the engineering firm Hull & Associates, LLC ("Hull") concludes that the Project would not restrict or have an adverse effect on groundwater SWPAs within the project area and will have limited impacts on private wells. *Id.* at pg. 8. Further, Republic Wind witness McGee testified that the final project design, which may include potential grouting in certain locations, would manage groundwater such that existing natural drainage patterns would not be modified. Tr. IV at pp. 846-47. Board Staff

¹⁵ And, as set forth above, the Board acted in derogation of law by concluding that Republic had to submit, during the application hearing process, full geotechnical reports/evaluations.

agreed with Hull's conclusions from the Geotechnical Report and found that the Project would not have a negative impact on groundwater. Staff Ex. 1 (Staff Report) at 25.

The Board summarily dismissed this evidence regarding the limited impacts on groundwater and relied entirely on the speculative concerns raised by Sasowsky. In its Order, the Board relied upon Sasowsky's testimony that "the installation of turbine bases in shallow bedrock and grouting the karst openings under the foundations can limit the water recharges to an underlying aquifer, potentially disrupting the supply residential and other water resources." Order, ¶130. However, Sasowsky admitted: (1) he does not have any knowledge of the final foundation designs that will be used at particular turbine locations; (2) he does not have any knowledge of the specific geotechnical site conditions of the final turbine locations; and (3) he does not know if any of the final turbine locations will actually require grouting. Tr. VI at pp. 1197-99.

Sasowsky's testimony also demonstrates that he does not actually know the extent to which karst formations are prevalent throughout the Project area. While the Board relies upon Sasowsky's claim that "between 70 and 100 percent of the project area is occupied by karst or potential karst," Sasowsky stated this was just an "estimate." Tr. VI at p. 1208. More importantly, the fact that karst formations are within the project area does not necessarily mean every turbine will impact karst formations. Detailed geotechnical studies must be performed to determine if particular turbines will potentially impact karst formations. Republic Wind witness McGee testified that the Project would perform geotechnical borings at the exact turbine locations to determine the subsurface conditions. Tr. IV at p. 824. This detailed geotechnical evaluation would occur before construction begins, and the results of this evaluation would be shared with Board Staff. *Id.* As discussed

above, Republic committed to submitting this post-certificate information as required by O.A.C. 4906-4-09(A)(2)(b).

Further, the process of submitting fully detailed geotechnical surveys after certification is consistent with Board precedent in wind cases.¹⁶ Indeed, the Board has described the post-certification requirement as “dynamic.” *Duke Energy Ohio, Inc.*, Case No. 16-0253-GA-BTX, Opinion and Order (November 11, 2019) (“*Duke*”). In *Duke*, the Board stated:

[T]he Supreme Court has recognized that the Board is vested with the authority to issue certificates upon such conditions as the Board considers appropriate. As acknowledged by the Court, the construction of power siting projects subject to the Board's authority necessitates a dynamic process that does not end with the issuance of a certificate. The Court concluded that the Board has the authority to allow Staff to monitor compliance with the conditions that the Board has set.

Duke, ¶164, citing *In re Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878.

Although the Board’s precedent, rules, and Staff support a process of performing detailed site-specific geotechnical surveys after the certificate is issued, the Board denied the application *in toto* because the detailed site-specific geotechnical surveys were not submitted during the hearing. This conclusion was unreasonable and unlawful because submittal of such information was not required during Staff’s investigation and is not required under Board’s rules (as set forth above). Further, the fact that detailed site-specific geotechnical information was not submitted during the hearing completely undercuts the Board’s baseless claim that there is a “high likelihood of harm” due to impacts to karst formations.

¹⁶ *Heartland Wind*, Case No. 09-1066-EL-BGN, Opinion and Order, at p. 29 (Condition 30); *Paulding Wind Farm*, Case No. 09-0980-EL-BGN, Opinion and Order, at p. 28 (Condition 24); *Paulding Wind Farm*, Case No. 10-0369-EL-BGN, Opinion and Order, at p. 28, (Condition 27); *Hog Creek*, Case No. 09-0277-EL-BGN, Opinion and Order, at p. 19 (Condition 12); *Hog Creek*, Case No. 10-0654-EL-BGN, Opinion and Order, at p. 28 (Condition 29); *Greenwich Windpark*, Case No. 13-0990-EL-BGN, Opinion and Order, at p. 32, (Condition 30).

2. The Board’s claim that there is “no remedy” for purported harm is not supported by the record and is inconsistent with Board’s statutory authority to impose conditions aimed to minimize impacts under R.C. 4906.10(A).

R.C. 4906.10(A) states that the 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*.” (Emphasis added.) This statute provides the Board the ability to impose conditions or modify proposed conditions to remedy potential adverse impacts from the project. The Board has exercised the ability to modify conditions in other matters. In *Duke*, despite vociferous opposition to the project, the Board granted the application with modifications to proposed conditions, stating:

The conditions attached to the certificate issued herein have been specified, altered, or modified so as to address issues or concerns raised in this proceeding; facilitate ongoing constructive engagement between Duke Energy Ohio, Inc., local officials, and the public; provide for needed monitoring and documentation regarding compliance with the stated conditions; and meet the requirements of R.C. 4906.10.

Duke, ¶ 1.

The Board’s claim that there was no remedy for its “concerns” regarding potential impacts to karst formations and local water supplies is unfounded. The most obvious remedy is the Board’s own rules. O.A.C. 4906-4-09(A)(2)(b) requires applicants to submit fully detailed geotechnical evaluations before the preconstruction conference. In addition, Staff Witness Conway recommended that the final project and turbine foundations account for any potential impacts due to karst formations. Conway Direct at p. 9; Tr. Vol. V. at pp. 1311-1312.

Further, in *Firelands Wind, LLC*, Case No. 18-1607-EL-BGN, Opinion and Order (June 24, 2021) (“*Firelands*”), the Board *sua sponte* modified Condition 7 to specifically

address potential impacts to karst formations. In *Firelands*, the Board established a process where grouting can potentially be used to address construction in areas with karst formations if Staff approves. Based on its action in *Firelands*, it is abundantly clear that the Board could have modified the conditions in Republic Wind's case to ensure that Staff review the final detailed geotechnical investigation and approve the final turbine designs before construction. The Board chose not to do so here. Instead, it completely rejected Republic Wind's application based on speculative concerns. This action violates the Board's obligation under R.C. 4906.10(A)(3) to consider the potential technology, various alternatives, and other pertinent considerations when deciding if the project represents the minimum adverse environmental impact.

3. The Board's claim that its "concerns are too significant to wait for post-certificate studies" is illogical, unreasonable, and inconsistent with the Board's own rules.

The Board failed to explain why it cannot "wait for post-certificate studies." Republic Wind would not be able to start any construction until it submits fully detailed geotechnical studies for each turbine site location. Further, as recommended by Staff, the final project engineering designs would have to account for any potential impacts due to karst formations. Conway Direct at p. 9; Tr. Vol. V. pp. 1311-1312. Republic Wind would have to submit to Staff the final design details from a registered engineer that demonstrate the facility can be safely constructed at the location. With all these protections in place, what purported harm can occur if Republic Wind cannot start construction until these steps are completed? The answer is "none."

Further, Board's rules and precedent demonstrate that the environmental impacts can be minimized with the submittal of post-certificate studies. As already discussed, the very purpose of O.A.C. 4906-4-09(A)(2)(b) is to allow for the submittal of post-certificate geotechnical studies. In addition, the Board concluded in *Firelands* that the imposition of post-certificate conditions was an appropriate method of addressing potential impacts to karst formations. The Board's conclusion

that post-certificate studies are problematic in Republic Wind's case but acceptable in *Firelands* and numerous prior wind cases is unreasonable, unlawful, and not supported by the record.

- a. **The Order, without explanation, departs from the Board's precedent established in *Firelands*, that grouting is a method that could be used to minimize the potential impact on karst formations.**

The Board's Order is unreasonable because it conflicts with the decision in *Firelands*, decided the same date. In this proceeding, the Board completely foreclosed any opportunity for Republic Wind to perform fully detailed geotechnical investigations to determine the Project's potential impacts on karst formations. In addition, the Board concluded that grouting was not an appropriate construction method under any circumstance.

In *Firelands*, however, the Board established a process whereby Firelands can submit post-certificate studies regarding a detailed geotechnical analysis in accordance with O.A.C. 4906-4-09(A)(2)(b). *Firelands* at ¶50 (Condition 2). The Board also allowed Firelands to submit, 30 days prior to the preconstruction conference, detailed engineering drawings that account for karst topography. *Id.* at ¶50 (Condition 7). The detailed engineering drawings must be reviewed and accepted by Staff. In addition, the Board modified Condition 7 in *Firelands* as follows:

[W]e modify Stipulated Condition 7 to require that, where it intends to employ grouting measures, Firelands must file in the case docket detailed engineering drawings outlining its intended use of grouting. Further, the use of the proposed grouting shall be contingent upon Staff filing a written approval of any proposed grouting in the case docket at least 30 days prior to the preconstruction conference.

This modification, which was made *sua sponte*, establishes a process where grouting can potentially be used to address construction in areas with karst formations, if Staff approves.

There are glaring inconsistencies between the Order in this proceeding and in *Firelands*. In *Firelands*, the Board considered the various alternatives available to ensure potential impacts

to karst formations are minimized while also creating a path forward for the issuance of the certificate. The *Firelands* decision is more consistent with Board precedent because it allows for submittal of detailed post-certificate studies rather than completely denying the application based solely on preliminary investigations. Further, in *Firelands* the Board indicated that grouting can be an accepted method of addressing potential geological concerns. In contrast, a complete bar on grouting was applied here. Although the Board may claim that karst formations are more prevalent in Republic Wind's project area, it is undeniable that the Board has taken an inconsistent position regarding whether grouting can be used to address potential impacts to karst formations. The Board's failure to explain why post-certificate studies and potential grouting is permissible for *Firelands* but not Republic Wind is unreasonable.

B. The Board's Determination that the Project Will Not Serve the Public Interest, Convenience, and Necessity under R.C. 4906.10(A)(6) is Unlawful and Unreasonable, and Against the Manifest Weight of the Evidence.

The Board determined the record failed to establish, under R.C. 4906.10(A)(6), that the Project will serve the public interest, convenience, and necessity. Order, at ¶¶91; 165. In support of this conclusion, the Board cited the "general opposition" from local citizens and opposition of certain local governments, noting the "potential" impact on local parks and "concerns" relating to the impact on roads and bridges. *Id.* at ¶¶ 92-93. In addition, the Board stated that the "potential" impact of turbines on local water supplies had not been sufficiently investigated by Republic, while the Local Residents set forth credible evidence "raising concerns" about the impacts to local water sources. *Id.* at ¶95. In this regard, the Board noted that the "prevalence of karst topography" heightens the "*potential* complications that *could* flow from construction of turbines in the area." *Id.*; emphasis added.

On this latter point, Republic has already set forth in detail above (relating to the Board's findings as to the minimum adverse environmental impact under R.C. 4906.10[A][3]) why the

Board's findings regarding geotechnical/karst and water supply "concerns" and "potential" issues relating to same are unlawful, unreasonable, and against the manifest weight of the evidence. These will not be repeated here. Suffice it to say, for those reasons and the reasons set forth below, the Board made the same error by basing its conclusion regarding the public interest, convenience, and necessity on the mere "potential" for disruption to karst formations and related "concerns" as to local water supplies.

1. **Written comments submitted to the public docket, not subject to cross-examination or given under oath, must be given very little weight by the Board generally and especially when such docket comments express mere speculative "concerns." Here, the public comments posted to the docket do not serve as support for the Board's conclusion as to R.C. 4906.10(A)(6).**

In support of its determination, the Board relied *heavily* on the perception that most residents living near the Project oppose the Project. Setting aside the general futility of that reliance, to the extent the Board considered comments posted on the public docket, such consideration was unlawful and unreasonable. In summarizing the evidence, the Board referenced the "nearly 700 document records of comments" that had been filed in this matter and summarized the "concerns" raised in such public comments as including "issues emanating from the karst formations in the project area; [and] flooding and contamination of drinking water... ." Order, at ¶62. Relying on general "concerns" expressed by members of the public, whose comments were not subject to cross-examination or provided under oath, cannot and should not serve as substantial, reliable or probative evidence that supports the Board's finding that the Project will not serve the public interest, convenience, and necessity.¹⁷

¹⁷ Even the Board recognizes that while such comments may "inform" the Board and Staff, they do not carry the same weight as the sworn testimony presented at the local public hearing, and certainly not the sworn testimony of witnesses at the adjudicatory hearing. See OPSB website on public participation: <https://opsb.ohio.gov/wps/portal/gov/opsb/about-us/resources/public-participation>

The Board also erroneously relied on documents posted by certain local governmental entities to the public docket. Specifically, the Board relies on a January 6, 2020 Resolution of non-party Board of Thompson Township Trustees (posted May 14, 2020) opposing the Project; and a March 18, 2021 Resolution of the Seneca County Commissioners (posted March 22 and 25, 2021), which purportedly rescinded or repealed an October 18, 2016 Resolution authorizing a Road Use Maintenance Agreement (“RUMA”) between Republic, the County, and Adams, Pleasant, Thompson, Scipio, and Read Townships. Order, at ¶¶92; 94. Not only were these comments/documents not subject to cross-examination under oath, one was submitted by an intervening party (Seneca County), *after* the close of the November 2019 adjudicatory hearing.¹⁸ As a party to the matter, Seneca County had ample opportunity to address its position on any RUMA at the adjudicatory hearing. Indeed, Seneca County Commissioner Mike Kerschner testified at the hearing. Neither Mr. Kerschner’s written direct testimony nor his testimony at the hearing addressed a RUMA or concerns that the Project would not be responsible for addressing impacts to roads.

As for the RUMA itself, even if the Board could consider the March 18, 2021 Seneca County Resolution (which it could not), reliance on the purported rescission of Seneca County’s authorization of a RUMA is unreasonable. The Board simply accepted that the County would have the unilateral authority to void (or breach) an agreement and opined that no RUMA would be in place. The Board then made the wholly unreasonable and unsupported determination that “[w]ithout a RUMA in place, and without optimism that such an agreement can be made, the Board is *concerned* that the impacts of the various construction and maintenance vehicles associated with

¹⁸ The evidentiary proceedings were subsequently reopened, upon the request of Staff and the Local Residents, to receive limited and specific evidence on issues relating, respectively, to aviation and bald eagles.

the Project would negatively affect the local roads and bridges and thus would not be in the public interest.” Order, at ¶94; emphasis added.

Not only is (yet another) mere “concern” insufficient to support a conclusion that the Project is not in the public interest, convenience, and necessity—there is no requirement that a RUMA be in place. More importantly, the absence of a RUMA does not affect Republic’s obligations in relation to the Project’s impacts on roadways and bridges. Indeed, as pointed out in the Application, R.C. 5727.75 would require Republic to repair and restore any damages roads, bridges, and culverts and post a bond in favor of the applicable county commissioners to ensure funding for such work. Appl. at p. 39. Further, the only evidence in the record establishes that Republic—regardless of whether a RUMA is in place—will obtain all required transportation permits; make all road improvements and modifications necessary to accommodate delivery and construction vehicles; coordinate with the appropriate authorities, including the county engineer(s), ODOT, local law enforcement, and health and safety officials,; provide a final delivery route plan and traffic study reports to Staff and the county engineer(s) thirty days before the preconstruction conference; and promptly repair any damage to public roads and bridges caused by construction and maintenance activities, under the guidance of the appropriate regulatory agency. Staff Report at pp. 34-35; Appl. at pp. 40-46.¹⁹

The Board acted unreasonably and unlawfully in ignoring the sole evidence in the record that clearly establishes the Project will not negatively affect the local roads and bridges. The Board’s unfounded “concern” (based on the purported lack of a RUMA) that the impacts of the

¹⁹ Although Republic believes it is completely unreasonable for the Board rely on information outside of the record regarding the RUMA or any other matter, if it were to rely on such non-record evidence, it is noted that Republic Wind and the County have been negotiating an amended RUMA since 2019. In fact, an updated RUMA has been signed by both the county prosecutor and county engineer. Republic Wind is willing to file this updated RUMA on the docket or submit this evidence into the record to the extent the Board allows for additional hearings in this matter.

various construction and maintenance vehicles associated with the Project would negatively affect the local roads and bridges, and related determination that the Project would not be in the public interest, is against the manifest weight of the evidence. Indeed, the speculative “concerns” noted by the Board cannot constitute the factual findings required by R.C. 4903.09 upon which the Board must make its determination.

Although the Board claims that vast majority of the docket comments opposed the project, the record demonstrates that this is not necessarily the case. In his testimony, Republic witness Dalton Carr summarized the public comments. App. Ex. 13 [Carr Direct] at p. 9. As of October 15, 2019, only a few weeks before the adjudicatory hearing started, approximately 450 persons had submitted written comments to the public docket. *Id.* Of these, approximately 250 commenters supported the Project and approximately 200 opposed it. *Id.* The Board conveniently ignores this testimony and focuses only on the opposition comments.

2. The Board’s Order is erroneously based on mere speculative “concerns” of laypersons that do not outweigh the overwhelming probative and reliable evidence that the Project will serve the public interest, convenience, and necessity.

The Board’s determination that the Project will not serve the public interest, convenience, and necessity is against the manifest weight of reliable and probative evidence establishing otherwise. The Board’s “findings” on this factor were based largely on speculative concerns expressed by laypersons—many of whom do not even live in the Project areas—relating to karst formations, private wells, and the proposed mitigation activities, as expressed by “a number” of laypersons at the local public hearing. Order at ¶¶63, 97. Not one of these witnesses claimed to be an expert in the field of geology or hydrology. Not one of these witnesses provided any reliable or probative evidence that the Project will or will likely result in damage to karst formations and/or contamination of local water supplies/wells or that the Project cannot safely mitigate against

impacts to karst formations/local water supplies. Instead, the witnesses merely expressed their “fears” or “concerns.” Assuming for the sake of argument only that the majority of witnesses at the local public hearing opposed the Project, this does not somehow turn their speculative concerns into reliable or probative evidence that such concerns are in fact valid.

The Board relied on the written testimony of Seneca County Commissioner, Mike Kerschner, who claimed the majority of county residents oppose “these projects.” Order, at ¶92. Like the witnesses at the local public hearing, Mr. Kerschner’s testimony expressed mere “concern about the role Karst will play during and after the construction of the turbines.” Seneca County Ex. 1 at p. 1. Further, it is clear from his testimony that what he (and allegedly a majority of residents) oppose is “large industrial wind turbines” in general. *Id.* In other words, his “concerns” regarding karst are not even directed at the Republic Project specifically. Indeed, it is evident that the Board found significance in Mr. Kerschner’s testimony—not because it provides probative evidence of the actual impact *this* Project may have on local water supplies or other local interests—but because it provided further “evidence” of the “one-sided” opposition to the Project. Order at ¶92.

The Board also noted the “potential” impact on the Bowen Nature Preserve. *Id.* at ¶93. The Board cited the testimony of Seneca County Park District Board member, Bill McCallister, who stated it was his “belief” that he would be able to see a wind turbine from every direction while at the nature preserve. Seneca Cty. Pk. Dist. Ex. 3 at p. 2. Notably, Mr. McCallister did not provide any specifics about where in the park he would allegedly see turbines “from every direction.” The Board stated it would have been prudent for the Applicant and Staff to have visited Bowen Nature Preserve to “best assess the potential impacts of the Project.” Order, at ¶93. In so

noting, the Board entirely ignored the actual reliable and probative evidence that showed the visual impacts to all parks, including Bowen Nature Preserve.

Consistent with O.A.C. 4906-4-08(D)(4), Republic conducted and provided the Board a thorough Visual Impact Assessment (“VIA”) covering a 10-mile radius around the Project Area. App. Ex. 1C, Exhibit AA. The VIA identified over 430 potential visually sensitive resources, including county parks. Hearing Testimony of Robinson, Tr. III at pp. 535 and 563; App. Ex. 1C, Exhibit AA (VIA), at pp. 15-19. The VIA provides a specific analysis of the visual impact on the all of Seneca County Park District’s nature preserves, including Bowen Nature Preserve, and notes that “open views are generally limited due to intervening mature vegetation.” App. Ex. 1C, Exhibit AA (VIA), at pp. 18-19. Mr. Robinson opined there was a potential that turbines could be visible from some trails at Bowen Nature Preserve. Tr. III at p. 540; 546. In short, the VIA sufficiently complied with O.A.C. 4906-4-08(D)(4), and a specific visit to Bowen Nature Preserve was not required to establish the potential visual impact.

In addition, the Board failed to give any weight to testimony at local public hearing that supported the project. For example, the Board ignored the testimony of Attorney Ronald Smith who stated his discussions with Republic representatives led him to believe that the foundations of constructed turbines would not create issues with karst formations. App. Ex. 13 at p. 13 (Carr Direct). Mr. Smith testified that he reviewed research prepared by Republic Wind regarding karst formations and concluded that there would not be any issues regarding sinkholes or impacts to karst formations due to the project. *Id.* The Board also overlooked the testimony of numerous individuals who testified at the local public hearing and who actually live within the project area. *Id.*

The Board's decision to base its decision almost entirely on whether the project is popular with local governments and residents is inconsistent with *Duke*. The Board held multiple public hearings in *Duke*, and the majority of individuals attending those meetings opposed the pipeline project. See generally *Duke*, June 15, 2017 Local Public Hearing Transcript; March 21, 2019 Local Public Hearing Transcript. In addition, the over one thousand comments were submitted in the *Duke* case, and the vast majority of those commenters opposed the project. *Duke*, ¶ 147. Regardless, the Board approved Duke's application.

Finally, the Board ignored all the other evidence presented that shows the Project will serve the public interest, convenience, and necessity. Indeed, Staff recommended that the Board so conclude. See Staff Report at p. 56. The evidence going to the Project serving the public interest, convenience, and necessity includes:

- **The Project will benefit the local economy and landowners**
 - The Jobs, Economic and Development Impact (JEDI) model projects an increase in local tax revenues between \$1.2 and \$1.8 million annually. Tr. I at p. 16.
 - Lease payments to participating landowners will allow them to maintain the rural and/or agricultural character of their property, while passively enjoying a new and predictable revenue stream. Tr. I at p. 126; App Ex. 16 at p. 3 [Rice Direct]; App. Ex. 1H at p. 25 [Confidential Socioeconomic Report].
 - On a state-wide basis, construction of the Project is expected to produce \$41.4 million in employment earnings and \$112.2 million in total economic output. App Ex. 16 at p. 3 [Rice Direct].
 - During operation, the Project will create forty-one jobs with associated annual earnings of \$2.3 million; ten of the forty-one jobs will be full time on-site operations and maintenance jobs that will produce an estimated \$600,000 in annual earnings; twenty-two of these jobs will be supply chain jobs that produce an estimated \$1.2 million in annual earnings; and the remaining nine jobs will be created through induced impacts and produce an estimated \$500,000 in annual earnings. App Ex. 16 at p. 3 [Rice Direct].
 - Per the Market Impact Study (MIS), the Project will not negatively affect the value or marketability of the rural residential and agricultural properties in and around the Project footprint, and may have a positive impact on value and marketability.

App. Ex. 28 [Direct Testimony of Michael MaRous] at pp. 2-3 and att. MM-1 [MIS]; Tr. IV at p. 857.

- **Emergency First Responders will not be adversely impacted**
 - Republic will require its contractors to implement emergency action plan(s) and consult with all necessary local emergency services, including medical facilities; and the Project provide proper equipment to fire and emergency responders to enable them to respond to emergencies. Staff Ex. 1 at pp. 40-41.
 - The Project will not have any negative impact on the abilities of EMS providers, including EMS helicopters and Life Flight. App. Ex. 24 [Marcotte Direct]; Tr. III at p. 694; 705; App. Ex. 13 [Carr Direct] at p. 15.
- **The Project will provide significant benefits to local farmers**
 - The Project will diversify farmers' and landowners' streams of income and provide a safety net when the agricultural industry is experiencing unpredictable challenges and/or unfavorable weather. App. Ex. 32 [Direct Testimony of lifelong area resident and farmer, Gary Baldosser] at pp. 2-3.

The Board ignored this evidence—instead relying heavily on the local opposition to the Project. Local opposition alone, even if that opposition is “prominent,” cannot lawfully or reasonably serve as support for finding that a project is not in the public interest, convenience, and necessity. That opposition must be founded on material and substantial interests that are likely to be directly and adversely impacted by the project. That kind of probative evidence does not exist here. Nothing in the regulatory scheme applicable to this Project, or in Board precedent, allows for the wholesale denial of a Certificate based on a popularity contest; nor does the current law permit local governmental opposition to trump all other evidence and factors that support the granting of a Certificate (with appropriate Conditions).

The Board's reliance on the largely “one-sided” local opposition for its conclusion that the Project is not in the public interest, convenience, and necessity was unreasonable, unlawful, and overwhelmingly against the manifest weight of the evidence showing otherwise.

ASSIGNMENT OF ERROR NO. 3: THE ORDER IS UNREASONABLE, UNLAWFUL AND CONSTITUTES AN ABUSE OF DISCRETION BECAUSE THE BOARD REFUSED TO MAKE FINDINGS AS TO WHETHER REPUBLIC HAD SATISFIED EACH CRITERION IN R.C. 4906.10(A).

R.C. 4906.10(A) provides that the Board “shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the [criteria listed in R.C. 490.10(A)(1)-(8)]”. The Board interprets this language to mean that if it finds an applicant has failed in its burden as to one or two of the criteria, as in this case, the Board need not address the remaining criteria. The Board’s interpretation is unreasonable and unlawful.

The proper interpretation of the statute is that the Board must make a determination as to each criterion and, having made those determinations, can only approve the application if each criterion is satisfied. Ohio’s rules of statutory construction support this interpretation.

R.C. 1.47 provides that “[i]n enacting a statute, it is presumed...[a] just and reasonable result is intended.” The Board’s interpretation is unjust and unreasonable at the rehearing and appellate levels and is prejudicial to Republic Wind. For instance, if Republic Wind is successful in reversing the Board’s determinations regarding R.C. 4906.10(A)(3) and (6) on rehearing, Republic Wind will get no relief. Instead, the Board will be required to make further determinations as to the remaining statutory criteria. Under its interpretation of R.C. 4906.10(A), the Board could find that Republic Wind failed to meet its burden as to another, single criterion and, again, deny the certificate.²⁰ Then, if Republic is successful again on rehearing, the Board could repeat the process with each individual criterion, delaying Republic relief and, over time,

²⁰ Frankly, it appears a forgone conclusion that the Board has decided—due to local government opposition—that it will not approve this project. Accordingly, it is not unreasonable to presume that the Board would simply find another groundless basis to deny the certificate. If there was a valid ground to deny the certificate based on another statutory criterion, the Board certainly would have included that in its original Order.

jeopardizing the feasibility of the Project. The General Assembly clearly did not contemplate this piecemeal approach to the Board's orders.

The Board's interpretation is also unjust and unreasonable when considering its prejudicial effect on Republic Wind's appellate rights. Assume that the Board upholds its determinations on the two criteria at issue (R.C. 4906.10(A)(3) and (6)) and that Republic Wind is successful on appeal to the Ohio Supreme Court. Republic Wind still would obtain no relief. The case necessarily would need to be remanded to the Board to make determinations on the remaining criteria in the statute. The Board could continue its piecemeal approach to its orders on remand, continuing the futility of Republic Wind's appeal, delaying Republic Wind relief and jeopardizing the feasibility of the Project over time. The law favors an end to litigation. The Board's construction of the statute is unjust and unreasonable.²¹

Further, Republic Wind is aware that the Board has a degree of discretion on procedural matters to decide how it may "best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplicative efforts." *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 210-Ohio-1841 ¶17. However, issuing piecemeal orders that have the effect of denying Republic its due process right to a meaningful appeal is arbitrary, capricious and wholly lacks justification, and it is a clear abuse of discretion.

The term "abuse of discretion" is defined to mean "more than an error of law or error of judgment. * * * It means 'discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.'" *State ex rel. Wilms v. Blake et al., Industrial Commission*, 144

²¹ Similarly, assuming that R.C. 4906.10(A) is ambiguous (which it is not), a statute should be construed giving consideration to the consequences of a particular construction. R.C. 1.49. As with the analysis under R.C. 1.47, the consequences of the Board's construction of R.C. 4906.10(A) is to deprive Republic Wind of its appellate due process rights. The Board's construction is unjust, unreasonable, and lawful.

Ohio St. 619, 624, 60 N.E.2d 308, 311 (1945) (“*Wilms*”). See, also, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983) (“*Blakemore*”) (“The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.”). In *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590–591, 113 N.E.2d 14, 19 (1953), the Court found that “[t]he exercise of an honest judgment, however erroneous it may seem to be, is not an *abuse of discretion*. Abuse of discretion * * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.”)

It is troublesome that the Board did not sufficiently explain the reason it chose to issue a piecemeal order in this matter. A full and complete record was made at the initial hearing conducted from November 4 to November 25, 2019, as well as the supplemental hearing held September 30, 2020, which addressed highly contested aviation and eagle issues. No reasonable explanation has been given why determinations could not have been made on these and all criteria listed in R.C. 4906.10(A). The failure to make these determinations constitutes an abuse of discretion under each standard cited above. The failure is unreasonable and arbitrary under *Wilms* and *Blakemore*. More seriously, under *Shafer*, the failure to determine each criterion of R.C. 4906.10(A) is intentionally prejudicial to Republic Wind by denying its due process rights, and necessarily is a partial to intervenors opposing the application.

Republic Wind requests that the Board make determinations on all of the criteria listed in R.C. 4906.10 when issuing its entry on rehearing in this matter.

ASSIGNMENT OF ERROR NO. 4: THE ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE THE BOARD DEFERRED TO THE OPINION AND OPPOSITION OF LOCAL GOVERNMENTS IN DENYING THE APPLICATION IN VIOLATION OF R.C. 4906.13(B).

The General Assembly tasked the Board with the sole responsibility of determining whether a certificate shall be issued to a major utility facility. R.C. 4906.03(B) requires that the Board investigate certificate applications, and R.C. 4906.03(D) provides that the Board is obligated to “[a]pprove, disapprove, or modify and approve applications for certificates.” More importantly, R.C. 4906.13(B) states that “[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility ... authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” This statutory provision clearly demonstrates that the Board is the final arbiter regarding the construction of major utility facilities—not local governments. The Board cannot delegate its authority to make findings under R.C. 4906.10(C) and determine, based on the record, whether an application should be granted. *In re Application of Am. Transm. Sys., Inc.*, 2010-Ohio-1841, ¶ 21, 125 Ohio St. 3d 333, 337 (The Board’s “authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.”).

Despite this clear statutory obligation, the Board unreasonably and unlawfully delegated its authority to local governments. As a basis for its denial, the Board points to the opposition of local governments. Order, ¶¶ 3; 91-92. The Board was clearly swayed by the number of local governments that opposed the Project. In an attempt to point to something other than mere opposition, the Board relied on speculative concerns of the local governments. In doing so, however, the Board fails to cite to any reliable or probative evidence regarding potential impacts that cannot be mitigated. As discussed above, the Board cites the Park District’s general concerns

regarding visual impacts, but fails to make any specific finding regarding the visual impacts and fails to consider the detailed analysis set forth in the VIA. Order, ¶93. In addition, the Board expresses concerns regarding Seneca County’s purported resolution regarding a RUMA, yet it fails to cite any evidence or make any findings regarding actual impacts to roads and entirely ignored the uncontroverted evidence that established impacts to roads and bridges will be addressed by Republic Wind. *Id.* at ¶93. The Board’s empty “analysis” is telling. Its decision was not based on actual impacts—it was based purely on local opposition.

While it is true local governments expressed opposition to the Project, the Board is obligated to make a decision based on probative evidence in the record going to the substantive statutory criteria. The Board cannot, as it did here, base its position on the general opposition of local governments. If this were the case, the Board would have denied certificates in a number of prior cases. See *Duke; Buckeye Wind, LLC*, Case No. 08-0666-EL-BGN (“*Buckeye Wind*”); and *Champaign Wind, LLC*, Case No. 12-0160-EL-BGN (“*Champaign Wind*”). In *Duke*, the following entities/individuals intervened to oppose the project:

- NOPE (local opposition group of more than 750 individuals)
- City of Cincinnati
- Hamilton County Commissioners
- City of Madeira
- City of Reading
- City of Blue Ash
- Columbia Township
- Sycamore Township

Despite the significant opposition of all of the entities to Duke’s proposed project, the Board granted Duke’s application. *Duke*, ¶ 234.

In *Buckeye Wind*, the following entities/groups intervened and raised concerns regarding potential impacts of the project:

- Union Neighbors United

- Champaign County Board of County Commissioners and
- Goshen Township
- Salem Township
- Union Township
- Urbana Township
- Wayne Township
- City of Urbana

The Board granted the application *Buckeye Wind* despite local opposition. *Buckeye Wind*, Opinion and Order (March 22, 2010). In addition, the Board issued a certificate in *Champaign Wind* despite local resident opposition, and opposition from Champaign County, Goshen Township, Union Township, Urbana Township, and the City of Urbana. *Champaign Wind*, Opinion and Order (May 28, 2013).

Duke, *Buckeye Wind*, and *Champaign Wind* demonstrate that the mere fact local governments or local residents have opposed projects has never served as a basis for completely denying a certificate application. However, the Board inexplicably changed course in Republic's case by prohibiting any construction based on speculative concerns of local opposition.

This drastic change in Board precedent makes it appear that the Board is attempting to apply Ohio Substitute Senate Bill 52 (SB 52) to Republic Wind's project to provide more power to local governments. While it is within the General Assembly's authority to pass SB 52 to provide local governments the ability to limit utility-scale wind development within their communities, the Board cannot retroactively apply the intent of SB 52 to Republic Wind's project. Ohio Const. Article II, Section 28 explicitly prohibits the General Assembly from passing retroactive laws. Further, all Ohio statutes are presumed to be prospective in their operation unless expressly made retrospective. R.C. 1.48. The Board process cannot be used as a backchannel to retroactively apply SB 52.

During the Board meeting where Republic's application was denied, Board Chair French clearly indicated in her comments that "substantial local government opposition" led her to determine the Project is not in the public interest. Board Member Senator Williams, however, expressed her concerns regarding the denial of the application, stating as follows:

We have [SB 52] before the legislature right now, and in the past many residents have come out to oppose and local governments have said that they have come out to oppose and the Power Siting Board heard, but did not take into consideration their thoughts. So how does this denial set guard rails for the Power Siting Board in the future? How are we picking and choosing winners and losers when it comes to rejecting or accepting these projects? What are our parameters? Is it 50%? 75? What are we looking at? Is there a standard in place?

Senator Williams was spot on with her concerns regarding the new precedent the Board was setting and whether the Board was setting clear "guard rails." As her comments suggested, the Board's unprecedented decision appears to be aligned with the goals of SB 52. When Senator Williams asked what percentage of local support is necessary for a project to be approved, Board Chair French indicated that the Board is currently working on its rules to provide more guidance to developers. While it may be true that the Board is working on rules regarding the exact percentage of local support an applicant needs to obtain Board approval, it is fundamentally unfair—and clearly unlawful to apply a non-existent standard to Republic Wind today. Republic Wind has tried to diligently work within existing Board rules and Ohio law for years. For the Board to use this case a way to retroactively implement the "spirit" of SB 52 is not only fundamentally unfair, it violates R.C. 4906.13(B).

IV. CONCLUSION

For the foregoing reasons, Republic requests that the Board grant this application for rehearing, finding that Republic has met the applicable burden of proof to satisfy R.C. 4906.10(A)(3) and (6). Republic further requests that the Board find, based upon the existing evidence of record, that Republic also has met the applicable burden of proof to satisfy the

remaining criteria of R.C. 4906.10(A), and grant the certificate (with appropriate conditions).
Alternatively, Republic requests the Board to grant rehearing for the limited purpose of submitting in the record the fully detailed geotechnical information called for in O.A.C. 4906-4-09(A)(2)(b)(i).

Respectfully submitted on behalf of
REPUBLIC WIND, LLC



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing was served upon the following parties of record via electronic mail this 26th day of July 2021.



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Summary: Application for Rehearing by Republic Wind, LLC electronically filed by Teresa Orahoad on behalf of Devin D. Parram