

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
6011 GREENWICH WINDPARK, LLC
REGARDING ITS CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED ISSUED IN CASE NO. 13-990-
EL-BGN.

CASE NO. 15-1921-EL-BGA

SECOND ENTRY ON REHEARING

Entered in the Journal on August 17, 2017

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by Greenwich Neighbors United.

II. PROCEDURAL HISTORY

{¶ 2} 6011 Greenwich Windpark, LLC (Greenwich) is a person as defined in R.C. 4906.01.

{¶ 3} R.C. 4906.04 provides that no person shall commence to construct a major utility facility in the state without first having obtained a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 4} On August 25, 2014, the Board adopted a Joint Stipulation and Recommendation authorizing Greenwich to build a 60 megawatt (MW) major utility facility with up to 25 wind turbines on 4,650 acres of leased land in Greenwich Township, Huron County, Ohio in *In re 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN, Opinion, Order, and Certificate (Aug. 25, 2014) (*Greenwich Certificate Case*).

{¶ 5} On May 19, 2016, the Board authorized Greenwich to add three new turbine models to the list of turbine models suitable for installation at the wind-powered electric generation facility in Greenwich Township, Huron County, Ohio in *In re Greenwich Windpark, LLC Regarding the Certificate Issued in Case No. 13-990-EL-BGN*, Case No. 15-1921-EL-BGA,

Order on Certificate (May 19, 2016) (15-1921 Order). The Order on Certificate also granted the motions to intervene in Case No. 15-1921-EL-BGA filed by Greenwich Neighbors United (GNU) and Ohio Farm Bureau Federation (OFBF) to the limited extent that movants seek to address Greenwich's request to add new turbine models to the list of suitable turbine models for the project. The Board clarified, however, that the motions to intervene were denied to the extent the movants request intervention to address irrelevant matters other than the specific application in this case or any other matter that is outside the scope of this proceeding.

{¶ 6} On June 20, 2016, GNU filed an application for rehearing.

{¶ 7} R.C. 4903.10, which is made applicable to Board proceedings by R.C. 4906.12, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On July 12, 2016, the administrative law judge (ALJ) found, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), that to the extent GNU's application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in GNU's application for rehearing.

III. DISCUSSION

A. *GNU First Assignment of Error - Minimum Setback Waiver Requirements*

{¶ 9} GNU's first assignment of error is that the 15-1921 Order is unreasonable, unlawful, and capriciously vague to the extent it might be read to permit Greenwich to evade minimum setback requirements by securing a waiver from any less than all owners of property adjacent to the wind farm property and without the Board first satisfying its duty to establish, by rule, the procedure by which any such setback waiver must be acquired from all such property owners.

{¶ 10} In its memorandum contra, Greenwich claims that GNU is merely attempting to use the current application seeking to add turbine models as a pretense to re-litigate the Board's ruling on setback waivers adopted in the *Greenwich Certificate Case*. This issue is beyond the scope of this proceeding and was already fully addressed in the *Greenwich Certificate Case* Greenwich maintains. Additionally, Greenwich asserts that GNU's argument that the project's waivers are invalid because the Board has not issued a rule establishing a setback waiver procedure ignores prior Board rulings and the Board's rules.

{¶ 11} The Board denies GNU's first assignment of error. The issue regarding from whom waivers must be secured to the minimum property line and residential setbacks for the turbine locations sited in the *Greenwich Certificate Case* is beyond the scope of this proceeding. The issue was already fully addressed in the *Greenwich Certificate Case, Greenwich Certificate Case, Opinion, Order, and Certificate* (Aug. 25, 2014) at 13, 19; *Greenwich Certificate Case, First Entry on Rehearing* (Aug. 27, 2015) at 14-15; *Greenwich Certificate Case, Second Entry on Rehearing* (Nov. 12, 2015) at 3-4.

{¶ 12} Likewise, GNU's argument that the project's waivers are invalid because the Board has not issued a rule establishing a setback waiver procedure is beyond the scope of this proceeding. In 2009, the Board adopted rules under R.C. 4906.20, which included a rule on setback waivers, governing the certificating of economically significant and major utility wind farm facilities. The rules, including Ohio Adm. Code 4906-17-08,¹ were applied when the issue of setback waivers was addressed by the Board in the *Greenwich Certificate Case*. GNU's argument is untimely now because the review of the turbine locations for setback compliance - to include the issue of setback waivers as governed by the Board's rules - has already been adjudicated in the *Greenwich Certificate Case*. Furthermore, the Board has already stated that R.C. 4906.20 does not grant to the Board or the administrative law judge the authority to waive the minimum setback requirement. *Greenwich Certificate Case, Entry on Rehearing* (Aug. 27,

¹ Ohio Adm. Code 4906-17-08 was subsequently replaced by Ohio Adm. Code 4906-4-08 effective June 26, 2016.

2015) at 14. Rather, under R.C. 4906.20, property owners waive setback requirements not the Board.

B. GNU Second Assignment of Error – Failure to hold a hearing and to make the required evidentiary findings

{¶ 13} GNU next argues that the Board erred when it issued the 15-1921 Order without holding a public and evidentiary hearing, without taking evidence or addressing comments and objections, and without making or reporting the findings of fact and conclusions of law setting forth the reasons prompting the decisions arrived at. GNU submits that the addition of the three turbine models in this case introduces changes that cannot be reasonably and lawfully held to have no material increase in any environmental impact and no substantial change in any portion of the facility and thus, under R.C. 4906.07, the Board was required to hold a hearing in this matter.

{¶ 14} The Board finds that GNU's second assignment of error should be denied. The Board's 15-1921 Order thoroughly examined the hearing requirements set forth in R.C. 4906.07 and specifically found that, as attested to in the application, and as verified in the Staff Report, there was no material increase in any environmental impact of the facility and no substantial change in any portion of the facility's location, including the location of the individual turbines from what was originally approved by the Board in the *Greenwich Certificate Case*. 15-1921 Order, Order on Certificate (May 19, 2016) at 8. Moreover, as the Board noted, the addition of the three new turbine models did not affect the Board's conclusion from the *Greenwich Certificate Case* that the project satisfies the criteria set forth in R.C. Chapter 4906, promoted the public interest, and did not violate any important regulatory principle or practice. 15-1921 Order, Order on Certificate (May 19, 2016) at 8.

{¶ 15} Similarly, the assertion that the Board ignored GNU's comments and objections is without merit as demonstrated by the record in this matter. For example, GNU's comments and objections regarding Greenwich's newspaper notice containing an improper intervention time frame was addressed by the Board in an Entry issued February 25, 2016, directing Greenwich to publish additional newspaper notice. GNU's comments and objections also

discussed a concern regarding a potential pipeline proposed to be built in the project area. This issue was subsequently investigated by the Staff and addressed in the 15-1921 Order. 15-1921 Order, Order on Certificate (May 19, 2016) at 7. Additionally, the Staff addressed and the Board discussed in the 15-1921 Order issues raised by GNU involving safety manuals, noise, and shadow flicker of the proposed turbine models. 15-1921 Order, Order on Certificate (May 19, 2016) at 5-7. Finally, a significant portion of GNU's comments and objections addressed the application of setbacks and the use of waivers. As previously discussed, the waivers issue is beyond the scope of this proceeding because it was previously addressed in the *Greenwich Certification Case* and is not the subject of Greenwich's application in this case. 15-1921 Order, Order on Certificate (May 19, 2016) at 9. GNU cannot use this case to attempt to re-litigate issues properly reviewed in the original *Greenwich Certification Case*.

{¶ 16} GNU's final argument under this assignment of error posits that the Board erred by not conducting a hearing, creating a transcript, and issuing findings of fact supporting the decision rendered. As noted above, in its May 19, 2016 Order, the Board specifically discussed why a hearing was not required as set forth in R.C. 4906.07(B). 15-1921 Order at 8. Similarly, the Board set forth specific findings of fact supporting our decision in this matter at pages 9-10. For all the foregoing reasons, GNU's second assignment of error is denied.

C. GNU Third Assignment of Error - Limitations on intervention

{¶ 17} GNU's third assignment of error asserts that the Board unreasonably and unlawfully limited the scope of GNU's intervention, failed to provide GNU with due process guaranteed by the Ohio and U.S. Constitutions, and violated R.C. 4903.09 by failing to respond to GNU's comments and objections.

{¶ 18} GNU's third assignment of error is denied. The Board did not improperly limit GNU's intervention to specific issues, but was merely advising the parties to remain within the scope of this proceeding. In doing so, the Board followed its precedent established in *In re Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (*Black Fork Wind*), Order on Certificate (Aug. 27, 2015) at 3. In fact it would have been unreasonable, unlawful, and prejudicial to the

applicant to have re-litigated issues that had been decided previously in the *Greenwich Certification Case*. Therefore, the Board did not limit GNU's participation, and GNU was free to raise, as it did, a variety of issues within the scope of this proceeding.

{¶ 19} GNU also argues that it has a constitutionally guaranteed right to due process and that the Board entirely ignored the comments and objections that GNU did file. As a creature of statute, the Board does not render decisions on constitutional matters; such decisions are left to a court of appropriate jurisdiction to review. Nonetheless, GNU's assertion that the Board ignored the comments and the objections of GNU is erroneous. As discussed in more detail in paragraph 15 above, the Board did address GNU's concerns regarding newspaper publication, a pipeline proposed to be built in the project area, the safety manual of the proposed turbines, the impacts of the proposed turbine models to the noise and shadow flicker thresholds established in the *Greenwich Certification Case*, and the issue of setback waivers. Thus, the Board did consider and address the concerns raised by GNU in the 15-1921 Order. Any argument to the contrary is incorrect.

D. GNU Fourth Assignment of Error – Interpretation of R.C. 4906.20 and R.C. 4906.201

{¶ 20} In its fourth assignment of error, GNU asserts that the Board acted unreasonably and unlawfully by not subjecting Greenwich's application in this case to the most recently enacted minimum setback requirements despite the General Assembly specifically directing the Board to apply such setback requirements to applications to amend a certificate. Without authority to do so, GNU argues, the Board interpreted the current minimum setback requirements as though the General Assembly gave the Board the authority to permit Greenwich to evade such requirements when the Board determines that an amendment does not involve a substantial change in the location of a turbine or result in a material increase in an environmental impact. GNU submits that the General Assembly gave the Board no such discretion. Finally, GNU argues that the Board acted unlawfully by adopting and applying a standard having uniform application without first promulgating the standard as a rule.

{¶ 21} GNU's fourth assignment of error is denied. R.C. 4906.20 and 4906.201 both address the certificating of wind farms. Initially, R.C. 4906.20 provides that the Board "shall prescribe reasonable regulations regarding any wind turbines and associated facilities of an economically significant wind farm, including, but not limited to, their location, erection, construction, reconstruction, *change, alteration, maintenance, removal, use, or enlargement**** (emphasis added)." Subsequently, R.C. 4906.20 and R.C. 4906.201 set forth an enhanced setback in cases of an "amendment to an existing certificate." As both of these statutes are silent as to the definition of an "amendment to an existing certificate" that would trigger the enhanced setbacks, the Board has used its discretion and expertise to determine what qualifies, just as it must create parameters around the concepts of "change" and "alteration." Here, the Board reasonably determined the new turbine models comply with the criteria in R.C. 4906.10 and are adequately covered by the existing conditions of the certificate in the *Greenwich Certification Case*. In other words, the impacts of the proposed turbine model changes in this case do not require a change to the existing certificate. Such an interpretation is consistent with R.C. 4906.20(B)(2)(b)(ii).² The original certificate conditions will adequately mitigate the impact of the new turbine models; and, therefore, the addition of new turbine models does not constitute an "amendment to an existing certificate" as contemplated by R.C. 4906.20 and R.C. 4906.201. Thus, application of the enhanced setbacks is not warranted. Not every proposed change to a major utility facility requires an amendment to an existing certificate. Where the existing certificate conditions are adequate to address/mitigate any impacts of the proposed modification, such as new turbine models, the Board can approve the change without amending the existing certificate.

{¶ 22} The Board relied upon its expertise in applying an interpretation of "[a]ny amendment made to an existing certificate" under R.C. 4906.20(B)(2)(b)(ii) that recognizes the practicality of wind farm siting, while still adhering to the law. The Board and the staff of its member agencies provide a broad spectrum of expertise in subjects such as engineering,

² R.C. 4906.20(B)(2)(b)(ii) provides in relevant part, "the amendments to this section by the act [H.B. 483] shall not be construed to limit or abridge any rights or remedies in equity or under the common law."

environment, agriculture, natural resources, land use planning, and geology. These areas of expertise are necessary to review applications before the Board. It would be wholly impractical for every modification to a wind farm project, no matter how insignificant or technical, to constitute an amendment to the certificate. Certificated wind farm projects can take years for the project to actually commence construction for a variety of reasons. These include delays in financing due to appeals of certificate decisions, finalizing property agreements with landowners, and many other reasons. During that period, between initial certification and actual construction, circumstances can and often do evolve. Such evolution could be very minor in nature, such as a change in the wind farm developer's corporate name. Such evolution could also be dramatic in nature, such as the movement of turbine locations. One form of evolution that the Board sees with frequency involves updates of wind turbine models or software that could serve to make wind turbines more efficient and in many circumstances, less obtrusive to surrounding property owners. Again, the Board declines to interpret "amendment to an existing certificate" to include project changes that are adequately addressed by existing certificate conditions and, thus, do not require an amendment to the original certificate.

{¶ 23} Moreover, applying the enhanced setbacks to every type of change that occurs to a project could prove detrimental to the originally certificated project due to a myriad of reasons, including cost of reconfiguring turbine locations and associated facilities. This could result in a previously certificated wind farm project, wherein significant investment has been made over a span of years, to be irreparably impeded. As such, the Board must be very thoughtful about how these projects evolve over a span of years when considering, on a case-by-case basis, whether a proposed change constitutes an "amendment to an existing certificate," thereby evoking the enhanced setbacks.

{¶ 24} The Board further declines to adopt an interpretation that would impute intent from the statute that would serve to eliminate existing wind farm projects from commerce for minor modifications to an application that often dates back many years. If this was in fact the intent, such intent could have been explicitly stated. To the contrary, the law does not affix a

definition to “amendment” within a statute that also cites “change” and “alteration.” Thus, the Board must utilize its expertise of the siting process to interpret these words in a manner that recognizes the practicality of siting commercial wind farms while also adhering to the words of the statute.

{¶ 25} Here, we noted that the application merely requested to upgrade the list of possible turbine models in order to take advantage of technological advancements, and that none of the requirements in the existing certificate would be changed or violated in approving the application. Thus, neighboring landowners would not experience adverse effects that have not already been contemplated and mitigated under the existing certificate. Finally, the Board finds no reason to depart from its application of precedent in this case *Black Fork Wind*, Case No. 14-1591-EL-BGA, Order on Certificate (Aug. 27, 2015); *In re Trishe Wind Ohio, LLC*, Case No. 16-1687-EL-BGA, Order on Certificate (Mar. 2, 2017). Therefore, GNU’s fourth assignment of error is denied.

E. GNU’s Fifth Assignment of Error – Failure to Promulgate Rules

{¶ 26} GNU’s fifth assignment of error argues that the May 19, 2016 Order is unreasonable and unlawful because it states that the Board has failed to promulgate the rules that the General Assembly required the Board to adopt to establish reasonable regulations regarding wind turbines and associated facilities as well as prescribing minimum setback requirements. GNU further submits that the Board has a long-standing and unfulfilled duty to promulgate a package of rules identifying Ohio’s statewide approach to the location, construction, operation, and use of wind farms. Until and unless the Board promulgates the required rules, according to GNU, the Board has no legal authority to issue certificates or approve amendments to certificates.

{¶ 27} GNU’s fifth assignment of error is denied. An application solely seeking to add new turbine models to the list of turbine models suitable for a wind farm project is not the appropriate procedural vehicle to challenge whether or not the Board has adopted all required rules outlined by the General Assembly in statute. Rather, the proper venue to challenge

whether or not the Board has adopted all required rules outlined by the General Assembly in statute would be in a rulemaking proceeding where notice of that issue and due process is afforded all interested persons. The instant case is not the appropriate proceeding for doing so. In fact, the Board notes that GNU has availed itself of such an opportunity to challenge the sufficiency of the Board rules in a pending rulemaking proceeding, Case No. 16-1109-GE-BRO. A Finding and Order was issued in that rules case on May 4, 2017, and applications for rehearing are currently being considered by the Board. GNU's fifth assignment of error is beyond the scope of this proceeding and is, therefore, denied.

F. GNU Sixth Assignment of Error - Amendment of a Void Certificate

{¶ 28} GNU's final assignment of error argues that, for the reasons explained in the applications for rehearing filed by Omega Crop Co., LLC in Case No. 13-990-EL-BGN on September 23, 2014 and September 24, 2015, the Board lacked authority to issue the certificate in Case No. 13-990-EL-BGN and that certificate is, accordingly, void. GNU continues that since the certificate issued in Case No. 13-990-EL-BGN is void, the Board is without authority to amend that certificate.

{¶ 29} Rehearing on GNU's sixth assignment of error is denied. The Board issued a certificate to Greenwich to construct a wind-powered electric generation facility on August 25, 2014, in Case No. 13-990-EL-BGN. GNU's sixth assignment of error is beyond the scope of this proceeding. Accordingly, it is denied.

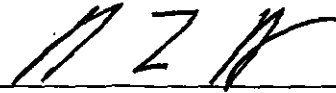
{¶ 30} Any assignment of error not specifically addressed by the Board in this Entry on Rehearing should be considered denied.

{¶ 31} It is, therefore,

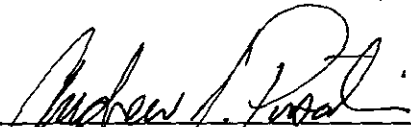
{¶ 32} ORDERED, That the application for rehearing filed by GNU be denied. It is, further,

{¶ 33} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

THE OHIO POWER SITING BOARD



Asim Z. Haque, Chairman
Public Utilities Commission of Ohio



David Goodman, Board Member
and Director of the Ohio
Development Services Agency



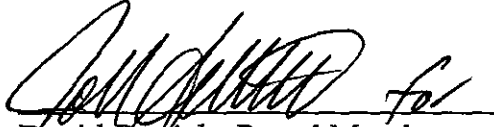
James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources



Lance Himes, Board Member
and Director of the Ohio
Department of Health



Craig Butler, Board Member
and Director of the Ohio
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David Daniels, Board Member
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Secretary