

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)
6011 Greenwich Windpark, LLC for a)
Certificate to Construct a Wind-Powered) Case No. 13-990-EL-BGN
Electric Generation Facility in)
Huron County, Ohio.)

In the Matter of the Application of)
6011 Greenwich Windpark, LLC for an)
Amendment to its Certificate to Install) Case No. 15-1921-EL-BGA
and Operate a Wind-Powered Electric)
Generation Facility in Huron County, Ohio.)

**REPLY OF GREENWICH NEIGHBORS UNITED
IN SUPPORT OF THE MOTION FOR ORDER CONFIRMING
THAT CERTIFICATE IS INVALID AND
A CANCELLATION OF THE CERTIFICATE**

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In response to Greenwich Neighbors United’s (“GNU”) Motion for Order Confirming that Certificate is Invalid and a Cancellation of Certificate (“Motion”), the developer (“Windpark”)¹ makes a compelling omission. Windpark does not allege that it satisfied a single certificate condition necessary to commence construction activities.² Moreover, evidence that has surfaced since GNU filed its Motion confirms that Windpark did not meet all of the certificate conditions necessary to begin construction. Two days after the certificate became void by its own terms, the Huron County Engineer sent to Windpark,

¹ The developer-applicant was 6011 Greenwich Windpark LLC. A new developer has purchased the project, Crossroads Wind Power, LLC.

² See Certificate Conditions 2, 3, 12, 13, 19, 20, 33, 41, 43, 45, 46, 47, 48.

the Ohio Power Siting Board (“Board”), and other local officials a letter (attached) indicating that a Road Use Maintenance Agreement (“RUMA”) had not been executed with the Huron County Engineer.³ Certificate conditions 45 and 46 required that the RUMA be executed and in place prior to construction. As a result of the compliance failures, there can be no doubt that Windpark did not and could not have lawfully commenced construction prior to the certificate becoming void by its own terms.

While Windpark completely ignores the substance of GNU’s Motion, Windpark does allege that the Motion is procedurally improper and also challenges GNU’s Motion for Leave to Intervene in Case 13-990-EL-BGN (“*Certificate Case*”). Windpark’s arguments are nothing more than an attempt to divert the Board’s focus away from its public interest duty. Regardless of whether GNU is granted leave to intervene in the *Certificate Case*, GNU is a party in Case 15-1921-EL-BGA (“*Amendment Case*”) where the certificate conditions were all continued and where the only authority to construct and operate three of the four turbines models exist. And, regardless of whether GNU even filed the Motion, the Board and its Staff have a public interest duty to ensure that its order incorporating the certificate conditions was complied with. Of course, GNU demonstrated that leave for intervention should be granted and that the Motion should be ruled upon and granted.

Below GNU responds to Windpark’s meritless attempt to ignore the inevitable. The certificate cannot be acted upon as it became void by its own terms on August 26, 2019. The appropriate next step is not for GNU to file a complaint or seek an injunction. The Board and its Staff should be independently reviewing Windpark’s compliance with the

³ The letter is attached as Attachment A.

certificate conditions, especially so given that the Huron County Engineer already sent a letter to the Board indicating that Windpark did not comply with the certificate conditions before the certificate became void.

I. ARGUMENT

A. GNU has standing and its motion for leave to intervene was proper. Moreover, having argued that the Amendment Case was inextricably intertwined with the Certificate Case, Windpark's arguments now to the contrary should be given no weight

Windpark alleges GNU lacks standing to file its Motion (which was filed in both cases) because GNU was not a party in the *Certificate Case* (Windpark limits its standing claim to party status).⁴ Windpark also claims that GNU cannot be granted intervention in the *Certificate Case* due to the passage of time.⁵ Both assertions are without merit.

Initially, the Board's rules very clearly contemplate a party filing for leave in a subsequent phase of a proceeding.⁶ And that is what GNU has sought in the *Certificate Case*. Windpark's assertion that GNU cannot seek leave to intervene ignores the plain language in the Board's rules.

As required by the Board's rule governing intervention in a subsequent phase of a proceeding, GNU's Motion for Leave to Intervene also sets forth the good cause for intervention beyond the intervention deadline.⁷ Namely, GNU identified in its motion for leave to intervene that GNU did not exist at the time of the intervention deadline in the *Certificate Case*; that GNU fully participated in the *Amendment Case*; that GNU's

⁴ Memo Contra Motion at 2.

⁵ *Id.*

⁶ Rule 4906-2-12(C), O.A.C.

⁷ GNU Motion for Leave to Intervene at 3-5 (Aug. 26, 2019).

members will be significantly affected by the construction and operation of the proposed wind farm because its members include owners of property adjacent to the wind farm property; that the Board's rules specifically contemplate intervention in later phases of the case; that GNU is seeking to raise the very narrow issue of whether Windpark complied with all of the prerequisite conditions necessary to commence construction; and that the process requested by GNU is not unduly burdensome inasmuch as Windpark only needs to present some affirmative evidence that it did in fact meet all of the prerequisite conditions.⁸ There exists extraordinary circumstances and good cause to grant GNU's motion for leave to intervene in the *Certificate Case*.

Windpark also fails to cite any support for its claim that a prospective intervenor cannot file a motion apart from its Motion to Intervene in a case without intervention being first granted (Windpark goes as far to suggest that the Board move the Motion to the public comment section).⁹ Beyond its completely unsupported legal theory, Windpark's argument ignores the Board's rules and reality of practice before the Board (and the Public Utilities Commission of Ohio). First, Board rule 4906-2-27 permits parties "who have filed notices or petitions to intervene which are pending" to file a motion. Second, and in furtherance of the principle contained in the administrative rule, parties routinely file pleadings and serve discovery on other parties in Board and Public Utilities Commission of Ohio proceedings while a request for intervention is pending. Windpark's desire to bury the Motion in the public comment portal is meritless.

⁸ *Id.*

⁹ Memo Contra Motion at 2.

Moreover, and despite GNU's repeated opposition, both the Board and Windpark treated the *Amendment Case* as an extension of the *Certificate Case*. GNU was granted full party status in the *Amendment Case* and the Board confirmed that "GNU was free to raise, as it did, a variety of issues within the scope of this proceeding."¹⁰ The Board's orders in the *Amendment Case* continue all certificate conditions. The Board's orders in the *Amendment Case* are also the only place where there is authority to construct the three additional turbines models, and conditions the construction or operation of the new turbine models on compliance with all of the original certificate conditions. Windpark's assertion that addressing the certificate conditions in the *Amendment Case* is beyond the scope of the proceeding is meritless and directly contradicted by the Board's orders in the *Amendment Case*. Whether the Board views the two cases as inextricably intertwined, as both the Board and Windpark previously treated the matters, or the Board only looks to its decisions in the *Amendment Case* that continue all of the certificate conditions and specifically so for the new turbine models, the same outcome occurs. The certificate conditions are relevant to the *Amendment Case* and GNU's Motion was therefore properly filed in both cases.

B. There is No Need to File a Formal Complaint

Instead of responding to the substance of GNU's claim that Windpark did not meet all prerequisites to construction, Windpark spends a significant portion of its response dedicated to its belief that a formal complaint is required. The argument ignores two critical points. First, the Board and its Staff have an independent duty to undertake the

¹⁰ *Amendment Case*, Second Entry on Rehearing at 5-6 (Aug. 17, 2017); see also *GNU v. Ohio Power Siting Board*, S.Ct. Case No. 2017-1375, Merit Brief of Appellee The Ohio Power Siting Board at 21 (Sep. 11, 2018) ("the Board never limited the scope of GNU's intervention and participation in the proceeding.").

very action the GNU requests: to confirm whether the certificate is void under its own terms and now whether Windpark unlawfully commenced construction as it alleges to have done.¹¹ This duty is especially important because a second entity, the Huron County Engineer, has independently identified to the Board that Windpark did not meet all prerequisites to construction. Second, the Ohio Supreme Court has already disposed of the form over substance position advanced by Windpark with respect to complaints.¹² If the Board believes there are reasonable grounds stated in GNU's Motion, it can initiate the notice and hearing opportunity specified in the complaint statute.¹³

Moreover, GNU was trying to be respectful of the Board's time, as well as the time of its Staff and Windpark, in not requesting the hearing that Windpark now seems to invite. The process sought by GNU will expeditiously resolve the matter without parties engaging in litigation on injunction or complaint cases. Fundamentally, at the end of the day, whether Windpark admits in a filing or under oath at a hearing that it did not satisfy all prerequisites to commence construction before its certificate became void is not an issue that GNU intends to challenge. GNU is willing to submit to the hearing opportunity called for under the complaint statute if that is the process the Board and Windpark desire.

¹¹ See, e.g. R.C. 4906.04 (no facility shall be constructed or operated that is not in conformance with the terms and conditions in a certificate); R.C. 4906.10 (Board must find all facilities serve the public interest, convenience, and necessity); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Meigs County, Ohio*, Case Nos. 06-30-EL-BGN, et al., Entry at 1-3 (July 30, 2012) (Board initiating a process to determine if a continuous course of construction had been properly commenced).

¹² *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607 at ¶ 24-30.

¹³ *Id.*; R.C. 4906.97.

C. Reasonable grounds have been identified that warrant the Board going forward

Windpark alleges the Board should not move forward because reasonable grounds have not been identified for doing so.¹⁴ Despite its assertion, GNU did in fact demonstrate in its Motion that reasonable grounds exist for the Board moving forward. Since that time, additional evidence demonstrates reasonable grounds to move forward.

Initially, the certificate is void if a continuous course of construction was not commenced within five years. As GNU set forth in its Motion, no construction activity was witnessed on the wind farm property until a couple pieces of construction equipment were delivered days before the five-year continuous course of construction deadline. Other than turning over some dirt, no other activity was witnessed before the 5-year deadline.¹⁵ Moreover, the pieces of construction equipment appear to have been removed in the days subsequent to Windpark's notice alleging that it had begun construction. No additional construction activity has been witnessed by individuals living and working adjacent to the wind farm property.¹⁶ GNU is unaware of a continuous course of construction activity that commenced within the five-year deadline. Other than to note GNU's identification of the last-minute-delivered construction vehicles, Windpark did not respond to GNU's claim in the Motion that a continuous course of construction had not begun by August 25, 2019.

Windpark also failed to not respond to GNU's claim that all of the prerequisite conditions were not satisfied. GNU lacks access to all of the information necessary to confirm or deny compliance with all of the prerequisites, but what GNU does have access

¹⁴ Windpark Memo Contra GNU's Motion at 4-6.

¹⁵ GNU Motion at Attachment A & C.

¹⁶ See *id.*

to confirms that Windpark failed to meet at least three conditions that were prerequisites to the lawful commencement of construction activities. As mentioned above, the attached letter from the Huron County Engineer confirms that a RUMA was not entered into with the County Engineer prior to the five-year deadline even though certificate conditions 45 and 46 require the RUMA be in place prior to construction.

PJM's website also confirms that an interconnection agreement was not entered into before the five-year deadline. The project is still identified as being in the facilities study phase and identifies only an interim interconnection agreement as being executed.¹⁷ The terms of the interim interconnection agreement provide that it "shall not provide for or authorize Interconnection Service for the Interconnection Customer."¹⁸ That is, the interim agreement acknowledges that it is not an interconnection agreement because it does not provide for interconnection service. The "interim" agreement continues that "Interconnection Service will commence only after Interconnection Customer has entered into a final Interconnection Service Agreement with Transmission Provider and the Interconnection Transmission Owner (or, alternatively, has exercised its right to initiate dispute resolution or to have the final Interconnection Service Agreement filed with the FERC unexecuted) after completion of the Facilities Study related to Interconnection Customer's Interconnection Request and otherwise in accordance with the Tariff."¹⁹ The "interim" agreement makes clear that an actual Interconnection

¹⁷ The "interim" agreement is available at: https://pjm.com/pub/planning/project-queues/isa/ac1_051_isa.pdf.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

Agreement must still be executed. The Certificate Conditions, however required an actual interconnection agreement which Windpark has not secured.

GNU has identified that a continuous course of construction was not commenced prior to August 25, 2019. GNU has identified that at least three of the prerequisites to the lawful commencement of construction were not met. Windpark has not publicly identified compliance with any of the certificate conditions with the typical notices filed in the Board's dockets. Windpark does not respond that it commenced a continuous course of construction by August 25, 2019. Windpark does not respond that it met all of the prerequisites conditions to commence any construction activities. The Huron County Engineer has sent a letter to the Board indicating that Certificate Conditions 45 and 46 were not met within the 5-year deadline. Reasonable grounds exist for the Board to investigate whether the certificate became void by its own terms and should therefore be cancelled.

II. CONCLUSION

Independent of any response to GNU's Motions filed in the above-captioned dockets on August 26, 2019, the Board and its Staff have an independent duty to ensure entities that are regulated by the Board lawfully comply with the certificate conditions ordered by the Board. GNU has presented evidence indicating that Windpark's certificate became void on August 26, 2019 due to the lack of a lawful commencement of a continuous course of construction. GNU's Motion for Order Confirming that Certificate is Invalid and a Cancellation of Certificate and Motion for Leave to Intervene seeking to advance this result are not only proper and reasonable, but they invite the same action that the Board should independently be undertaking. GNU respectfully urges the Board

to grant GNU's two motions, confirm the certificate became void by its own terms, and cancel the certificate.

Respectfully submitted,

/s/ Matthew R. Pritchard

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply of Greenwich Neighbors United's in Support of the Motion for Order Confirming that Certificate is Invalid and a Cancellation of the Certificate* has been served via electronic mail upon the following parties of record this 17th day of September 2019.

/s/ Matthew R. Pritchard
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ADMINISTRATIVE LAW JUDGES

The Office of the
Huron County Engineer

Lee E. Tansey, P.E., P.S.

August 28, 2019

Mr. David Fowler
Swift Current
89 Main Street
Yarmouth, ME 04096

Dear Mr. Fowler:

We understand that you are proceeding with construction of the Crossroads Wind Farm located in Greenwich Township, Huron County, Ohio. Swift Current has not submitted a Road Use Maintenance Agreement (RUMA) for review since a preliminary RUMA was submitted in October of 2018.

We would like to know what measures are being taken to prevent and monitor construction traffic from using the local road system until a RUMA is in place. Please provide your latest version of the RUMA for review by the county on or by the close of business, Tuesday, September 9, 2019. Moreover, in the event Swift-Current uses local roads, that is non-state routes any time that the RUMA is not in place, I will have no other alternative but to file an injunction against you and your contractor(s) in a court of competent jurisdiction to prevent you from using the local roads, both county and township, until an acceptable RUMA is in full force and effect.

If you should have any questions, please feel free to call.

Sincerely,



Lee Tansey, P.E., P.S.
Huron County Engineer

CC: Matt Birchby – Swift Current
Randal L. Strickler, Chief Assistant Prosecutor, Huron County Prosecutor's Office
Greenwich Township Trustees
Huron County Commissioners
Huron County Sheriff
Marks's Excavating & Trucking
Ohio Power Siting Board

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Summary: Reply Reply of Greenwich Neighbors United in Support of the Motion for Order Confirming that Certificate is Invalid and a Cancellation of the Certificate electronically filed by Mr. Matthew R. Pritchard on behalf of Greenwich Neighbors United