

## IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Firelands	)
Wind, LLC for a Certificate of Environmental	) Case No. 2022-0055
Compatibility and Public Need to Construct a	)
Wind-Powered Electric Generation Facility in	) On Appeal from the Ohio Power Siting
Huron and Erie Counties, Ohio	) Board, Case No. 18-1607-EL-BGN

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### AMICUS BRIEF OF LOCAL FARMERS IN SUPPORT OF APPELLEES

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Tom Yingling and Kevin Erf (“Local Farmers”) are longtime residents of Huron County.<sup>1</sup> Both are landowners and farmers who have signed agreements to lease their wind rights to Firelands Wind, LLC (“Firelands”), which plans to construct turbines on their properties as part of the Emerson Creek Wind Farm (the “Project”).

Local Farmers have an interest in the Project’s future, not only as leaseholders, but as farmers whose livelihoods are vulnerable to the impacts of climate change and as members of a community that is poised to benefit economically from the Project. The Project will create jobs, inject hundreds of millions of dollars into the local economy, and increase local tax revenues, which fund the local public schools and other services that Local Farmers and their families use or will use.

If the Court overrules the Ohio Power Siting Board’s (“Board”) June 24, 2021 decision (the “Opinion”) granting Firelands a Certificate of Compatibility and Public Need (“Certificate”), Local Farmers would be denied the supplemental income they expected to receive when they agreed to lease their wind rights. In addition, overruling the Board’s Opinion would harm Local Farmers in the long term by impeding the development of zero-carbon energy, which is necessary to avoid the worst impacts of climate change. The greenhouse gas emissions generated by burning fossil fuels are having serious impacts on the climate in ways that affect Local Farmers, including by increasing the frequency and severity of flooding, droughts, and high temperatures. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, WHAT

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<sup>1</sup> Tom Yingling owns property and resides at 6247 Young Road, Bellevue, OH 44811, and co-owns Woodside Farms, Inc. Kevin Erf owns property and resides at 4704 Yingling Road Bellevue 44811, and co-owns Erf Family Farms, Inc.

CLIMATE CHANGE MEANS FOR OHIO at 2 (Aug. 2016), available at <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-oh.pdf>. Moreover, as the Intergovernmental Panel on Climate Change found in its April 4, 2022 report, rapid and immediate reductions of greenhouse gas emissions are necessary to limit the increase in average global temperatures to no more than 1.5°C above pre-industrial levels. Any increase in excess of 1.5°C would gravely endanger the wellbeing of humans and the natural ecosystems on which human life depends. Minal Pathal et al., *Climate Change 2022: Technical Summary*, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE TS-23 to TS-40 (Priyadarshi Shukla et al. eds., IPCC 2022), available at [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_FinalDraft\\_TechnicalSummary.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_TechnicalSummary.pdf). A rapid buildout of a large number of wind facilities is one essential component of limiting temperature rise. To achieve that goal, the International Energy Agency calls for increasing annual additions of wind energy to 630,000 megawatts (MW) worldwide by 2030, approximately four times the amount installed in 2020. IEA, *Net Zero by 2050* (May 2021) at 14, available at <https://www.iea.org/reports/net-zero-by-2050>.

Pursuant to S.Ct.Prac.R. 16.06, Local Farmers timely submit this amicus brief advising the Court of their support for the Project and urging affirmance of the Board's Opinion. Consistent with their interests and priorities, Local Farmers' amicus brief focuses on the reasonableness of the Board's assessment that the Project will have a positive economic impact on the local economy and that the Project will also serve the public interest, convenience, and

necessity for environmental reasons, including avoiding climate change, under Ohio Revised Code (“R.C.”) 4906.10(A)(6).

### **STATEMENT OF FACTS**

Firelands filed a pre-application notification letter on October 26, 2018, regarding the construction of a 297.66 MW wind energy facility located in Erie and Huron Counties. (2018 Appl., ICN 1.)<sup>2</sup> On November 15, 2018, Firelands held a public informational meeting to discuss the Project at the Bronson-Norwalk Conservation League Facility in Norwalk, Ohio. (Staff Report, ICN 89, 5.) Firelands filed the application for the Emerson Creek Wind Farm with the Board on January 31, 2019. (2019 Appl., ICN 4.) The project area is comprised of approximately 32,000 acres of leased land involving approximately 1,000 parcels. (Staff Report, ICN 89, 7.) Firelands filed four supplements between March and October 2019. (*Id.* at 5–6.) On April 3, 2019, Firelands held a second informational meeting at the Bellevue Veterans of Foreign Wars facility in Bellevue, Ohio. (*Id.* at 5.)

On March 2, 2020, Board Staff issued a Report of Investigation (Staff Report, ICN 89) recommending that the Board grant Firelands a Certificate with certain conditions. (*Id.* at 75–82.) A public hearing was held on August 20, 2020. (Joint Stipulation, ICN 124, 2.) On September 11, 2020, Firelands filed a stipulation signed by Firelands, the City of Willard, the Board of Commissioners of Huron County, the Board of Trustees of Richmond Township of Huron County, the Board of Trustees of Norwich Township of Huron County, Local Farmers, and Staff. (Joint Stipulation, ICN 124.) The stipulation largely adopted the recommendations made by the Board Staff’s report, with minor modifications. (*See id.* at 2–9.) At an adjudicatory hearing held

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<sup>2</sup> Citations to “ICN” refer to the Index of Records on Appeal. Abbreviations are consistent with the Supreme Court of Ohio’s *Writing Manual* (2nd ed., effective July 1, 2013).

from October 5–16, 2020, the Administrative Law Judges heard cross-examination of witnesses from Firelands, Staff, Local Farmers, and local resident intervenors. (*See* Tr. Vol. I–IX.) Following the close of the hearing, the parties filed initial and reply briefs arguing for and against the issuance of a Certificate based on information in the record. (ICNs 169–176.)

The Board issued its Opinion (ICN 182) on June 24, 2021, granting a Certificate to Firelands for the “construction, operation, and maintenance of the wind-powered electric generation facility, subject to the conditions set forth in the Joint Stipulation and this Order.” (Opinion at ¶ 230.) Appellants (the “Project opponents”)<sup>3</sup> filed an application for rehearing on July 23, 2021, (ICN 183), which was denied by the Board on November 18, 2021. (ICN 190.) The Project opponents filed their notice of appeal on January 14, 2022, and their merit brief on April 15, 2022. (Appellants’ Br.)

### **ARGUMENT**

Under R.C. 4906.12, the Court must apply the same standard of review to a Board order that it would apply to an order of the Public Utilities Commission: the Court only “will reverse, vacate, or modify a board order ‘if, upon consideration of the record, [it is] of the opinion that such order was unlawful or unreasonable.’” *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, ¶ 11 (quoting R.C. 4903.13); *see also In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 10. Importantly, “[the Court] will presume orders are reasonable; it falls to an appellant to upset that

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<sup>3</sup> Alvin Didion, Patricia Didion, Jane Fox, Marvin Hay, Theresa Hay, Patricia Olsen, Sheila Poffenbaugh, Walt Poffenbaugh, Christina Popa, John Popa, Lori Riedy, Charles Rogers, Kenn Rospert, Dennis Schreiner, Sharon Schreiner, Donna Seaman, William Seaman, Deborah Weisenauer, Kenneth Weisenauer, and Gerard Wensink, and Black Swamp Bird Observatory are the appellants in this case.



presumption.” *Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, ¶ 79 (citing *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 18). In addition, while the Court reviews legal questions de novo, the Court “will not reverse or modify a [power siting] board decision as to questions of fact when the record contains sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7.

The Board’s Opinion granting the Certificate was supported by extensive evidence in the administrative record and was based on a reasonable review of evidence and arguments from both sides. First, the Board properly considered the Project’s economic impacts in accordance with Ohio Adm.Code 4906-4-06(E)(4) in reaching its decision that the Project will serve the public interest, convenience, and necessity within the meaning of R.C. 4906.10(A)(6). Second, the Board also properly considered the Project’s probable environmental impact in accordance with R.C. 4906.10(A)(2), including the threat of climate change, in reaching that decision.

**Proposition of Law No. I: The Board Properly Considered the Project’s Economic Impacts in Determining that the Project Will Serve the Public Interest, Convenience, and Necessity.**

The Board’s decision to grant the Certificate was based on a lawful and reasonable consideration of the Project’s economic impacts. First, there is ample evidence of economic benefits in the administrative record to support the Board’s assessment that the Project is economically beneficial. Second, the Board reasonably considered evidence from both sides in reaching that decision.

**A. Ample Evidence in the Record Supports the Board’s Conclusion that the Project Will Have Positive Economic Impacts.**

Here, the record contains “sufficient probative evidence to show that the board’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. Indeed, the Board’s assessment that “the project is consistent with the socioeconomic conditions in the project area and should be approved pursuant to this consideration” (Opinion at ¶ 65) is supported by ample evidence. To facilitate the assessment of the Project’s anticipated economic impacts, Firelands submitted a thorough socioeconomic impact report (2019 Appl. Ex. F, ICN 8) and provided supplemental data in response to requests by the Staff of the Board (“Staff”). (*See* Sixth Resp., ICN 78.) Local Farmers and Staff contributed further economic analyses through reports (*see, e.g.*, Staff Report, ICN 89) and testimony (*see, e.g.*, Erf Test., ICN 144; Yingling Test., ICN 145). The information on the record included direct economic impacts, such as the purchase of inputs from local sources, the spending of income earned by workers, annual labor revenues, and the income effect of taxes, as well as indirect impacts, such as the increase in sales of other industry sectors in the region. (2019 Appl., ICN 4, 38.) The Board assessed this data, along with arguments and evidence from Project opponents, throughout its decision-making process. (*See* Opinion ¶¶ 58–65, 178–179.)

Evidence in the administrative record shows that the Project will generate direct local economic benefits, bringing much-needed revenue and income to local governments and residents. (*See* 2019 Appl., ICN 4, 35–38.) According to data submitted by Firelands, Project construction will produce \$62.9 million in employment earnings and \$170.4 million in economic output. (Opinion ¶ 58.) Firelands further estimates that the Project will create demand for 53 full-

time jobs throughout the life of the Project, generating approximately \$3.1 million per year in earnings, and \$10.6 million per year in economic output. (*Id.* ¶¶ 58, 178; 2019 App., ICN 4, 37.)

The record shows that Firelands will pay real and personal property taxes of between \$6,000 and \$9,000 per MW of nameplate capacity every year throughout the life of the Project, the minimum and maximum rates set by R.C. 5727.75. (*See* 2019 Appl., ICN 4, 37.) With a nameplate capacity of 297.66 MW, the increase in local tax revenues will be between approximately \$1.8 million and \$2.7 million per year. (Opinion at ¶ 58; 2019 Appl., ICN 4, 37.) Over a 30-year period, local tax benefits will total \$50-60 million for Huron County and \$20-22 million for Erie County. (Opinion at ¶ 178; Firelands Ex. 31, 19.) Taxing districts that will benefit from the increased revenue include nine municipalities, along with seven school districts. (2019 Appl., ICN 4, 37.) This additional tax revenue will improve educational opportunities for the children of local residents and support maintenance of municipal land, community programs, and public safety.

According to evidence that Local Farmers submitted to the record, “payments to participating landowners ease the financial burden of farmers by providing a significant income stream without impairing the overall farming characteristics of the local farming community.” (Opinion at ¶ 59; *see also* Erf Test., ICN 144, 3; Yingling Test., ICN 145, 3.) Annual lease payments from the Project will provide farmers with revenue to help them maintain ownership of their land as farmland and avoid conversion to other uses. (*See* Opinion at ¶ 171; Pub. Hr’g Tr. IMO, 45–48, 197; Local Farmers’ Initial Br., ICN 171, 5–7.)

In addition to direct benefits, there is evidence that the Project will have indirect economic benefits. For example, evidence in the record shows that indirect economic impacts of increased household income will benefit local commerce and industry. (2019 Appl., ICN 4, 37.)

**B. The Board Reasonably Considered Evidence from Both Sides as to the Project’s Economic Benefits and Costs.**

Despite ample support in the administrative record for the Board’s Opinion, Project opponents claim that the Board lacked support for its assessment that the Project will serve the public interest, convenience, and necessity because Firelands itself did not expressly quantify potential negative economic impacts. (Appellants’ Br. at 39.) The Project opponents argue, among other things, that Firelands should have assessed “whether its electricity production would displace and reduce the electricity sales” of a certain nuclear power plant located in a different county and then “quantif[ied] the direct and indirect losses” to that power plant and other unspecified energy suppliers “in terms of lost jobs, lost tax revenues, and the ripple effects on the local economy from the loss of revenue from the loss of jobs.” (*Id.*)

But there is no such requirement. Ohio Administrative Code 4906-4-06(E)(4) requires generally that applicants “provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities.” The statute *does not*, however, require applicants themselves to quantify negative impacts, and Project opponents have offered no support for the proposition that Firelands was required to do so (*see* Appellants’ Br. at 37–40). “[E]conomic impact” is not defined in Ohio Administrative Code 4906 or R.C. Title 49, and there is no statutory or common law basis for interpreting the law to require quantification of negative impacts by an applicant. *See Duke Energy*, 166 Ohio St.3d 438, 2021-Ohio-3301, at ¶¶ 29–30 (declining to interpret “need” in R.C. 4906.10(A)(1) as “the general public’s need” when the statute did not define the term as such). Finally, the nuclear power plant that Project opponents suggest may suffer a reduction of electricity sales is not located in either of the two counties where the Project will be located. Thus, to the extent there would be any tax impact resulting

from displacement of energy at the nuclear plant, that impact primarily would be felt outside of the counties where the Project is located.

Here, the Board reasonably considered evidence of economic impacts submitted by both sides. It was not, as Project opponents suggest, a “one-sided” exercise. (*See* Appellants’ Br. at 39.) As the Board explained in its Opinion, Project opponents offered testimony regarding the potential negative economic impacts of the Project. The Board noted that “[a]mong those opposing the project, primary concerns related to \* \* \* negative economic impacts from the project[.]” (Opinion at ¶ 45.) The Board then described the Project opponents’ economic arguments in detail. (*See* Opinion at ¶¶ 61–64, 173).

Ultimately, the Board reasonably concluded that, upon “[b]alancing the[] considerations” raised by both sides, the Project “is consistent with the socioeconomic conditions in the project area and should be approved pursuant to this consideration.” (Opinion at ¶ 65.) The Board further explained in its Opinion: “While we acknowledge the concerns raised in opposition to the project, we conclude that the project strikes a reasonable balance of the competing local interests in terms of protecting public safety, environmental concerns, landowner rights, renewable energy, and local governmental financial concerns.” (Opinion at ¶ 179.)

Finally, the Project opponents suggest that the Court should disregard Firelands’ computer-based economic modeling because it was prepared by “a consultant trained as a biologist and environmental scientist, not as an economist.” (Appellants’ Br. at 38.) However, the Project opponents fail to identify any requirement in the statute or case law that such modeling must be performed by an economist. Indeed, in an energy siting case decided last year, the Court rejected a similar argument that the Board’s “findings regarding the propensity of caverns to leak are flawed because the findings do not derive from a geologist’s testimony.”

*Duke Energy*, 166 Ohio St.3d 438, 2021-Ohio-3301, ¶ 36.) In rejecting that argument, the Court explained that the project opponents had “cite[d] no requirement that the board must base its decision on such testimony.” *Id.* Ultimately, the Court in that case ““defer[red] to the [board’s] credibility determinations in its role as finder of fact’ because [the geologist’s] testimony provide[d] ‘sufficient probative evidence’ to support the board’s finding.” *Id.* (quoting *Harris Design Servs. v. Columbia Gas of Ohio, Inc.*, 154 Ohio St.3d 140, 2018-Ohio-2395, 112 N.E.3d 858, ¶ 14). The Court should do the same here and defer to the Board’s credibility determinations, consistent with the Court’s previous holding that it “will presume orders [of the Board] are reasonable.” *Duke Energy*, 166 Ohio St.3d 438, 2021-Ohio-3301, ¶ 79.

\* \* \*

The Project opponents fail to establish that the Board’s conclusion that the project is “consistent with the socioeconomic conditions in the project area and should be approved pursuant to this consideration” (Opinion at ¶ 65) was either “manifestly against the weight of evidence” or “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7. The Board’s Opinion is supported by ample evidence in the record and based on reasonable review of evidence submitted by both sides. The Project opponents simply disagree with the Board’s analysis and conclusions, which is not sufficient to justify reversal. *See Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751 at ¶ 17 (“[Appellant] has done little more than register its disagreement with the commission’s approach. That is not enough to justify reversal”).

**Proposition of Law No. II: The Board Properly Considered the Project’s Environmental Impacts, Including Climate Change Impacts, in Determining that the Project Will Serve the Public Interest, Convenience, and Necessity.**

The Board lawfully and reasonably considered the Project’s probable environmental impact pursuant to R.C. 4906.10(A)(2), including the threat of climate change, in determining that the Project “will serve the public interest, convenience, and necessity” within the meaning of R.C. 4906.10(A)(6). As with economic impacts, the Board appropriately balanced support for the Project, as expressed by Local Farmers and others, against opposition to the Project and reasonably found the evidence in support more persuasive.

The record contains ample evidence—submitted by Local Farmers and other community members—that approving the Project will have a “positive impact on reducing the state’s production of greenhouse gases” (Opinion at ¶ 165) and help to avoid climate change by “creating power sources that are independent of fossil fuels” (Opinion at ¶ 59). The Board further noted that, among those in favor of the Project, testimony emphasized “the benefits of renewable energy.” (Opinion at ¶¶ 46, 168.)

In their merit brief, the Project opponents do not mention the threat of climate change. In fact, their brief contains only one oblique reference to renewable power, which is buried in a block quotation. (Appellants’ Br. at 34.) Equally important, the Project opponents fail to acknowledge the real and unavoidable tradeoffs between fighting climate change and minimizing avian collisions with renewable energy infrastructure. Rather, they flatly assert, without acknowledging those tradeoffs, that “[t]he Project [d]oes [n]ot [r]epresent [t]he [m]inimum [a]dverse [i]mpact [u]nder R.C. 4906.10(A)(3), [b]ecause [it] [w]ill [k]ill Bald Eagles.” (*Id.* at 40.) In addition, the Project opponents fail to acknowledge the additional, yet unrequired, lengths to which Firelands has gone in order to minimize wildlife impacts, including, among many other measures, hiring a “Staff-approved environmental specialist,” who will be “on site during

construction activities that may affect sensitive areas,” and who “shall have authority to stop construction to assure that unforeseen environmental impacts do not progress and recommend procedures to resolve the impact.” (Opinion at ¶ 50(18).)

Here, the Board properly considered Local Farmers’ evidence about climate change in reaching its decision that the Project will serve the public interest, convenience, and necessity per R.C. 4906.10(A)(6). Climate change is already harming individuals and municipalities throughout Ohio, including Local Farmers, by causing extreme and unpredictable weather. As Local Farmers stated in the record: “Climate change is impacting everything we do every day. Everything is unpredictable, and unpredictability leads to income instability.” (Local Farmers’ Initial Br., ICN 171, 3.) In assessing whether the Project will serve the public interest, the Board properly cited climate change mitigation as a benefit of the Project. (Opinion at ¶¶ 59, 165.)

The Board acted reasonably in taking these concerns seriously. Climate change is an urgent global problem, and it poses a grave threat to Ohio. In Midwestern states such as Ohio, “[c]limate change is expected to worsen existing health conditions and introduce new health threats by increasing the frequency and intensity of poor air quality days, extreme high temperature events, and heavy rainfalls.” J. Angel et al., *Climate Change 2018: Midwest, in IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II* (Reidmiller et al. eds., IPCC 2018) at 898, *available at* [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch21\\_Midwest\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch21_Midwest_Full.pdf). Finally, as stated in Ohio’s most recent Hazard Mitigation Plan, “[t]he fact that climate change is occurring is not disputed and over the past several decades there has been a marked increase in the frequency and severity of weather-related disasters, both nationally and in the state.” Ohio Dep’t of Pub. Safety & Ohio Emergency Mgmt. Agency, *State of Ohio Enhanced Hazard Mitigation Plan* (Feb. 2019)



at 2-220, *available at* <https://bit.ly/32lcWrr>. The Board’s decision approving the Project will help to avoid these impacts and should be affirmed.

### **CONCLUSION**

The Board’s Opinion granting the Project a Certificate is supported by ample evidence that the Project will serve the public interest, convenience, and necessity. To overturn the Opinion, the Project opponents would need to show that the Opinion was “manifestly against the weight of evidence” or “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty” or that it was otherwise unlawful. The Project opponents fail to meet that heavy burden. Rather, the evidence shows that the Project will support local livelihoods, generate tax revenue, and facilitate greenhouse gas emission reductions, which will benefit Local Farmers and their families as well as the greater community. The Board properly weighed local support for the Project against the opposition and reasonably concluded that the arguments and evidence in support were more persuasive. Therefore, the Court should affirm the Opinion.

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I hereby certify that, on June 6, 2022, a copy of the foregoing Amicus Brief was served upon the following counsel of record by electronic mail:

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COUNSEL FOR AMICI CURIAE,  
LOCAL FARMERS