



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Jeff Jones, Public Utilities Commission of Ohio

FROM: Michael Bender, Business Advocate

DATE: February 8, 2024

RE: CSI Review – Ohio Power Siting Board (OPSB) Procedural Provisions (OAC 4906-2-01, 4906-2-02, 4906-2-03, 4906-2-04, 4906-2-05, 4906-2-06, 4906-2-07, 4906-2-08, 4906-2-09, 4906-2-10, 4906-2-11, 4906-2-12, 4906-2-13, 4906-2-14, 4906-2-15, 4906-2-16, 4906-2-17, 4906-2-18, 4906-2-19, 4906-2-20, 4906-2-21, 4906-2-22, 4906-2-23, 4906-2-24, 4906-2-25, 4906-2-26, 4906-2-27, 4906-2-28, 4906-2-29, 4906-2-30, 4906-2-31, 4906-2-32, and 4906-2-33)

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Commission as provided for in ORC 107.54.

Analysis

This rule package consists of six amended rules and twenty-seven no-change rules proposed by the Public Utilities Commission of Ohio (PUCO) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on June 21, 2022, and the public comment period was held open through September 2, 2022, after a request by stakeholders for an extension from the original August 12, 2022, date was granted. A supplemental comment period was held from January 20, 2023, through February 6, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on January 20, 2023. On February 1, 2024, the PUCO moved forward with the Finding and Order containing its responses to the comments.

Ohio Administrative Code (OAC) 4906-2-01 states that the rules in the chapter set forth procedural standards which apply to all persons or entities that appear before the Ohio Power Siting Board

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIPublicComments@governor.ohio.gov

(OPSB). The rule is amended to authorize the OPSB to waive any requirements of this chapter not mandated by law upon its own motion. OAC 4906-2-02 provides for the filing of documents with the OPSB via in-person paper filing, facsimile transmission filing, and electronic filing (e-filing). The rule is amended to update language, remove a provision allowing a filer to submit twenty copies of a filing as an alternative to submitting the required number of copies, remove a provision prohibiting protective or confidential documents from being submitted via e-filing, and replace references to “computer disks” and “map disks” with “portable-solid state drives” and “data drives.” OAC 4906-2-03 provides for the manner in which pleadings and other papers must be filed with the OPSB. OAC 4906-2-04 specifies additional requirements that apply to certification applications. The rule is amended to update typography, require an electronic copy of any hard copy map that was prepared using digital, geographically referenced data to be submitted via portable solid-state drive rather than computer disk, and require maps to include a representation of the map scale and the date when the map was produced. OAC 4906-2-05 requires and provides for the service of pleadings and papers filed with the OPSB to all parties to the case. OAC 4906-2-06 explains how periods of time prescribed or allowed by the OPSB to perform actions are computed. OAC 4906-2-07 allows for continuances of public hearings and extensions of time to file pleadings and other papers upon motion of any party for good cause shown, the OPSB, or the administrative law judge (ALJ). OAC 4906-2-08 requires filed papers to be signed by either the person filing or their attorney.

OAC 4906-2-09 provides for hearings before the OPSB, including the powers of the ALJ. OAC 4906-2-10 prohibits an OPSB member or assigned ALJ from discussing the merits of the case with any party or intervenor after the case has been assigned a formal docket number but does provide for the occurrence of ex parte discussions under certain conditions. The rule is amended to update language and provide an ORC cited exception to the prohibition. OAC 4906-2-11 specifies who is a party to an OPSB proceeding with respect to an application for a certificate. OAC 4906-2-12 allows and provides for intervention in an OPSB proceeding. The rule is amended to clarify that when a chief executive officer of the municipal corporation or county or the head of the public agency charged with protecting the environment or of planning land use in the area where the project is proposed wishes to intervene then the official must indicate interest in the proceeding in their submitted statement. OAC 4906-2-13 requires the OPSB or ALJ to accept written or oral testimony from any person at a public hearing regardless of status but reserves the right to examine witnesses for parties to the case and OPSB staff. The rule is amended to clarify that the right to examine witnesses is reserved for OPSB members and ALJ’s as well. OAC 4906-2-14 allows any party to an OPSB proceeding to obtain discovery of any matter relevant to the subject of the proceeding. OAC 4906-2-15 requires discovery to be completed prior to commencement of the hearing. OAC 4906-2-16 requires discovery requests and responses to be served upon all parties and OPSB staff. OAC 4906-2-17 provides for the service of and response to written interrogatories. OAC 4906-2-18 provides for the deposition of a party to an OPSB proceeding by another party concerning any matter within the scope of discovery. OAC 4906-2-19 allows any party to serve a written request upon another party

to permit the requesting party to inspect documents, land, property, and other tangible items that are in the custody or control of the party being served. OAC 4906-2-20 allows any party to serve upon another party a written request for the admission of the truth of any specific matter within the scope of discovery.

OAC 4906-2-21 permits a party to file a motion for protective orders from the OPSB to prevent discovery of information that is sought by another party. OAC 4906-2-22 allows a party to file a motion to compel discovery which would be granted or denied by the OPSB or ALJ in whole or in part. OAC 4906-2-23 provides for the issuance of a subpoena by the OPSB or ALJ. OAC 4906-2-24 permits any two or more parties to enter into a written or oral stipulation regarding issues of fact, the authenticity of documents, or the proposed resolution of some or all issues in an OPSB proceeding. OAC 4906-2-25 authorizes the OPSB or ALJ to hold prehearing conferences. OAC 4906-2-26 requires each party to an OPSB proceeding to be represented by an attorney at law with the exception of an individual appearing on their own behalf. OAC 4906-2-27 requires all motions to be accompanied by a memorandum of support, with the exception of a motion requesting an extension of time to file pleadings or other papers, and allows for any party to file a memorandum contra and a reply memorandum. OAC 4906-2-28 authorizes the OPSB or ALJ to rule in writing upon any procedural motion or other procedural matter. OAC 4906-2-29 permits any party affected adversely by certain rulings to take an immediate interlocutory appeal to the OPSB. OAC 4906-2-30 requires the OPSB to issue a final decision within a reasonable amount of time after conclusion of the hearing and authorizes the OPSB to issue a certificate conditioned upon modifications of the proposed facility. OAC 4906-2-31 authorizes the OPSB or ALJ to reopen a proceeding at any time prior to the issuance of a final order. OAC 4906-2-32 allows any party or affected person, firm, or corporation to file an application for rehearing within thirty days of the issuance of an OPSB order. OAC 4906-2-33 requires notices of appeal of OPSB orders to the Ohio Supreme Court to be filed with the OPSB's docketing division and served upon the chairperson of the OPSB.

During early stakeholder outreach, the OPSB conducted a workshop in October 2021 in addition to three stakeholder engagement meetings that took place in March and May 2020 to receive feedback from interested stakeholders and the general public concerning OAC Chapter 4906-2. The OPSB considered recommendations by stakeholders when making the proposed changes to the rules. During the CSI public comment period, the PUCO received comments from the National Audubon Society, Chain Link Fence Manufacturers Institute, the Ohio Farm Bureau Federation, the Ohio Oil and Gas Association, the Dayton Power and Light Company dba AES Ohio, the Ohio Economic Development Association, the Data Center Coalition, One Energy Enterprises Inc., Buckeye Power, Inc., the Ohio Energy Group, the Ohio Environmental Council (OEC), the Ohio Power Company (AEP Ohio), AEP Ohio Transmission Company (AEP Transmission), the Ohio Chamber of Commerce (Chamber), International Brotherhood of Electrical Workers, District 4 (IBEW District 4), the National Resources Defense Council (NRDC), Ohio Partners for Affordable Energy (OPAE), American Transmission

Systems Incorporated (ATSI), Duke Energy Ohio, Inc., Generation Pipeline LLC, the Ohio Consumers' Counsel (OCC), Columbia Gas of Ohio, Inc. (Columbia), Industrial Energy Users-Ohio, National Grid Renewables Development, LLC, Plus Power, the Ohio Conservative Energy Forum, the Ohio Manufacturers' Association Energy Group (OMAEG), the American Clean Power Association (ACPA), MAREC Action, the Utility Scale Solar Energy Coalition of Ohio (USSEC Ohio), Union Neighbors United (UNN), the Ohio Independent Power Producers, and the Ohio Gas Association. During the supplemental comment period, the PUCO received comments from the NRDC, the Chamber, Buckeye Power, Columbia, AEP Ohio, AEP Transmission, the ACPA, MAREC Action, USSEC Ohio, ATSI, OMAEG, the OEC, UNN, OPAC, and IBEW District 4.

The OCC asked for a required explanation of prudence and a description of how construction of a project will be competitively procured. The PUCO declined to make this change, citing a statutory provision that already requires applicants to demonstrate the basis of need for a project. Other commenters wanted a requirement for the OPSB to issue an order within ninety days of the submission of reply briefs, in addition to requesting the rescission of a provision that permits an order to be issued on an application for rehearing granting the OPSB additional time for review. The PUCO did not adopt this recommendation either, stating that additional time may be needed for review due to the complexity of applications and the associated litigation. However, the PUCO did revise the rules to update language.

The business community impacted by the rules includes entities that seek certificates to build, own, or operate major utility facilities within the state of Ohio. The adverse impacts created by the rules include the time and costs associated with filing documents with the OPSB, serving documents to other parties, entities, or the OPSB, reimbursement of witnesses, allowing a party to inspect documents, land, property, and other tangible items, divulging information as part of a motion for discovery, attending a deposition and giving testimony as a result of a subpoena, hiring an attorney to be represented in a proceeding before the OPSB, and modifying a proposed facility as a result of an OPSB ruling. The PUCO states that the adverse impacts to business are justified to fulfill ORC requirements to establish procedural standards for proceedings before the OPSB with respect to entities seeking certification for new major utility facilities in the state of Ohio.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Commission should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.