

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application)	
of Black Fork Wind Energy, LLC to)	
Amend its Certificate of Environmental)	Case No. 14-1591-EL-BGA
Compatibility and Public Need Issued in)	
Case No. 10-2865-EL-BGN)	

**BLACK FORK WIND ENERGY LLC’S MEMORANDUM CONTRA TO PETITIONS
TO INTERVENE BY JOHN WARRINGTON AND BRETT A. HEFFNER**

I. INTRODUCTION

Despite the fact that the addition of two types of turbine models to the current list of three turbine models already approved for the project will have no greater impact than previously permitted, John Warrington and Brett A. Heffner now seek leave to intervene in the amendment proceedings (Case No. 14-1591-EL-BGA). Mr. Warrington seeks to intervene stating his property will be subject to shadow flicker and that a meteorological tower (“MET tower”) is located next to his property, as well as implying that Amended Substitute House Bill 483 (“H.B. 483”) applies to this proceeding (Warrington at 1). Mr. Heffner also seeks to intervene regarding the applicability of the new setback rules set forth in H.B. 483. (Heffner at 1-2). These interests do not present good cause justifying their intervention in this proceeding. Mr. Heffner resides well outside the project area and fails to raise a single issue concerning the Amendment’s proposed turbine models. Mr. Warrington’s residence is approximately 0.5 miles away from the nearest turbine and will experience a minimal amount of flicker, well below what the Board has already approved as acceptable for the project (30 hours per year). As well, H.B. 483 was not effective until after the application was filed, a fact that eliminates any discussion of H.B. 483 in this proceeding. Accordingly, the Ohio Power Siting Board (the “Board”) should deny the petitions for intervention.

II. BACKGROUND

Mr. Heffner resides at 3429 Stein Road, Shelby, Ohio 44875. (Heffner at 1). Mr. Heffner's residence is outside of the certificated project area, approximately 3.9 miles outside the project boundary and 4.4 miles from the nearest turbine. (Certificate at 23-24). Mr. Warrington resides at 7040 SR 96, Tiro, Ohio 44887. (Warrington at 1). Mr. Warrington's residence is outside of the certificated project area, approximately 0.5 miles away from the nearest turbine, and his property will experience minimal shadow flicker given the distance from the nearest turbine.

As addressed in Black Fork's Amendment application, and again in Black Fork's Response to Petitions to Intervene by Margaret Rietschlin, Gary Biglin, and Karel Davis, Black Fork simply seeks to add two additional types of turbine models. These new models as presented in the Amendment application will not only reduce the number of receptors experiencing greater than 30 hours per year of shadow flicker, but will also meet all of the operational requirements as set forth within the Certificate of Environmental Compatibility and Public Need issued in Case No. 10-2865-EL-BGN (the "Certificate").

Mr. Warrington filed his Petition to Intervene on October 16, 2014 (Mr. Warrington did not attach a certificate of service). Mr. Heffner served his Petition to Intervene on October 21, 2014 (Mr. Heffner's petition was filed twice, on October 21, 2014 and October 24, 2014, in both Case No. 14-1591-EL-BGA and, mistakenly in, Case No. 10-2865-EL-BGN).

III. ARGUMENT

As an initial point, Mr. Warrington and Mr. Heffner must petition for intervention in this proceeding regardless of whether they participated in the original application proceeding. *See* ORC § 4906.08; OAC 4906-7-03. Despite either of their statuses in Case No. 10-2865-EL-BGN,

Mr. Heffner and Mr. Warrington must satisfy the requirements for intervening in the amendment proceeding. Further, as a separate proceeding and case, the Board must reassess each petitioner's request to intervene the amendment proceeding irrelevant of his status in any related proceeding. *Id.* Accordingly, Mr. Heffner's belief that being a party in Case No. 10-2865-EL-BGN grants him status in the amendment proceeding is erroneous. (Heffner at 1).

A. Standard of Review

The petitioners' request for intervention is governed by Rule 4906-7-04 of the Ohio Administrative Code. Under that rule, Petitioner must show good cause for the intervention. OAC Rule 4906-7-04(B). In considering whether good cause exists, the Board or the administrative law judge may consider (a) the nature and extent of petitioners' interest, (b) the extent to which the petitioners' interest is represented by existing parties, (c) the petitioners' potential contribution to a just and expeditious resolution of the issues involved in the proceeding, and (d) whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party. *Id.* Since neither Mr. Heffner nor Mr. Warrington can satisfy these requirements, the Board should deny their petitions to intervene in the amendment proceeding.

B. Intervention is Not Warranted

As discussed below, Mr. Heffner lives well outside the project boundary. In addition, the only issue either petitioner raised that is relevant to the amendment proceeding, i.e., shadow flicker, is already sufficiently represented by the prior intervening parties. Additionally, the petitioners should not be permitted to challenge the Board's decision to issue the Certificate or raise issues such as the location of a MET tower or H.B. 483's new setback requirements, both of

which go beyond the scope of adding two new turbine models to this project and have no applicability to this proceeding.

1. The nature and extent of the petitioners' interest do not support intervention.

a. *Brett A. Heffner*

Despite his status in Case No. 10-2865-EL-BGN, Mr. Heffner should be excluded from intervention in the amendment proceeding because he does not reside within the project area. Mr. Heffner lives approximately 3.9 miles outside the project boundary and 4.4 miles from the nearest turbine. (Heffner at 1). The Amendment does not increase the size of the project. (Amendment at 6, 10, 18). The two new turbine models in the Amendment will not adversely impact Mr. Heffner's residence because the property is simply too far away. Further, the Amendment will not increase the project's impact beyond what was studied in the Certificate. As Mr. Heffner lives outside the applicable area of this project, he does not have sufficient interest in this amendment proceeding to justify intervenor status.

Even if the Board determines Mr. Heffner lives close enough to the project, which he does not, he has raised no specific issues with regard to the Amendment itself. Instead, to support his intervention Mr. Heffner asserts that the new setback rules set forth in H.B. 483 should apply. (Heffner at 1). However, H.B. 483, codified at Section 4906.201 of the Revised Code, is entirely outside the scope of the Amendment. The effective date of H.B. 483 was September 15, 2014. Black Fork filed its Amendment on September 12, 2014—***three days before the effective date of H.B. 483***. H.B. 483 has no applicability to this proceeding. ORC § 1.48 (“[a] statute is presumed to be prospective in its operation unless expressly made retrospective”); *see also, e.g., Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360 (2007); *see also, e.g., Gibson v. City of Oberlin*, 171 Ohio St. 1, 6 (1960)

(“The right [to establish a nonconforming use] became vested, under the law applicable thereto, upon the filing of the application for the permit.”).

Failing to present any factual interest in the Amendment, Mr. Heffner tries to develop legal arguments to justify his intervention. However, none of the legal issues he raises address the merits of the Amendment and “[i]t would be inappropriate to allow an intervention for an entity that does not demonstrate a present and immediate interest in the proceeding or have a legal position that directly addresses the merits of the case.” *In the Matter of the Self-Complaint of Akron Thermal, Limited Partnership*, Case No. 04-1298-HT-SLF, 2004 Ohio PUC LEXIS 486 (Oct. 25, 2004). As Mr. Heffner resides outside the project area, and because he has failed to present any specific factual issues, the Board should deny Mr. Heffner’s petition to intervene.

b. *John Warrington*

Mr. Warrington’s request to intervene should also be denied. Mr. Warrington’s petition identifies two irrelevant issues, the location of a MET tower and his incorrect interpretation of H.B. 483. Mr. Warrington also alleges concerns about shadow flicker even though his property is far enough from the nearest turbine so that it will experience a minimal amount of flicker, and well below what the Board has already approved as acceptable for the project (30 hours per year). These interests do not present good cause justifying his intervention in this proceeding.

The MET tower location and the setback requirements of H.B. 483 are not relevant to the Amendment. As noted above, H.B. 483 is a legal argument which fails because the effective date of H.B. 483 is ***three days after the Amendment was filed*** and cannot apply retrospectively. See Section B.1.a., *supra*. The MET tower is not relevant to this proceeding because the Amendment does not propose to relocate any MET tower. Therefore, the Board should not permit Mr. Warrington to go beyond the scope of the Amendment and intervene on issues that

are not relevant to this proceeding.

The Board also should not grant petitioner status on the issue of shadow flicker. Mr. Warrington's interest with regard to shadow flicker will already be represented by Mr. Biglin and Ms. Rietschlin, both of whom identified shadow flicker as one of the issues upon which they were intervening.¹ Further, the potential shadow flicker at Mr. Warrington's residence will be well below the allowable amount approved by the Board in the Certificate. Mr. Warrington resides approximately 0.5 miles from the nearest turbine and as a result his property will experience a de minimis amount of shadow flicker, less than 5 minutes per year and well below that already approved by the Board in the Certificate for the turbine sites.

The applicable conditions are Certificate conditions (Condition 54 and 55) which ensure that no non-participating receptors will exceed thirty hours a year of shadow flicker. The conditions read as follows:

(54) That at least thirty (30) days prior to the pre-construction conference, the Applicant shall complete a "realistic" shadow flicker analysis for all inhabited non-participating receptors already modeled to be in excess of 30 hours per year of shadow flicker and provide the results to OPSB Staff for review and acceptance. This analysis shall incorporate reductions for trees, vegetation, buildings, obstructions, turbine line of sight, operational hours, wind direction, and sunshine probabilities.

(55) That any turbine forecasted prior to construction to create in excess of 30 hours per year of shadow flicker at a non-participating habitable receptor within 1,000 meters shall be subject to further review and possible mitigation. Mitigation shall be completed before commercial operation commences and consist of either reducing the turbine's forecasted impact to 30 hours per year, or other measures approved by OPSB Staff in consultation with the affected receptors.

¹ Margaret Rietschlin served her Request to Preserve the Ability to Intervene in the Proposed Amended Case on September 27, 2014; Gary J. Biglin served his Petition to Intervene on September 29, 2014 (Mr. Biglin's Petition was filed twice, on September 29, 2014 and October 1, 2014).

Regardless of the turbine used, Black Fork must meet the standard of 30 hours per year of shadow flicker. Mr. Warrington has not alleged his property will exceed the standard approved by the Board, and the dimensions of the Vestas V110 or GE 2.3-107 proposed turbine models ensure that any shadow flicker on his property will remain at a de minimis level. The nature of Mr. Warrington's interests do not warrant his intervention in this proceeding.

2. Petitioners' interests do not need to be represented.

As noted above, the petitioners have no real interest in the amendment proceeding. Moreover, the petitioners' interests will be represented by existing parties. Mr. Biglin and Ms. Rietschlin have already filed their petitions to intervene representing similar, if not the same, interests. Specifically, to the extent that Mr. Warrington asserts the issue of shadow flicker, Mr. Biglin and Ms. Rietschlin are able to represent his interests. (Warrington at 1). *See also* Section B.1.b., *supra*. Thus, these facts do not support intervention and there is no interest in this proceeding that must be represented by other parties.

3. Petitioners will not contribute to a just and expeditious resolution.

The petitioners' involvement in this proceeding is unnecessary given the nature of their interest in this proceeding. Mr. Heffner resides miles outside the project area and Mr. Warrington resides at a distance from the nearest turbine to avoid any operational impacts. They raise no issues that are relevant to this proceeding or specific to the Amendment. Increasing the number of intervenors for the amendment proceeding will contribute no additional assistance and not contribute to a just and expeditious resolution. Moreover, the Board can arrive at a just resolution without either Mr. Heffner or Mr. Warrington's involvement given the nature of the amendment.

4. Granting the petitioners intervention in this Amendment will unduly delay the proceeding and cause unjust prejudice to Black Fork.

Petitioners' participation in this Amendment proceeding will cause unnecessary delay and prejudice to Black Fork. As expressed above, neither Mr. Heffner nor Mr. Warrington have any real interest in the Amendment, and all issues raised in their requests are already represented through the prior intervention of Mr. Biglin and Ms. Rietschlin. *See* Sections B.1.b. & B.2., *supra*. The petitioners' intervention will only cause Black Fork to suffer unjust prejudice in the form of needless litigation, including any appeals from the Board's ruling in this proceeding. These facts do not support either Mr. Heffner or Mr. Warrington's intervention in this proceeding.

IV. CONCLUSION

This Amendment arises due to Black Fork's continued pursuit of the best and latest technology available for the project. Mr. Heffner raises no new issues with regard to the Amendment itself. Further, Mr. Heffner has no interest in the Amendment and resides miles outside the project area. Similarly, Mr. Warrington resides approximately 0.5 miles from the nearest turbine, and his only concern regarding the proposed Amendment modifications will not exceed the original Certificate's operational requirements and is sufficiently represented by prior intervenors. Considering these facts, the petitioners should not be allowed to intervene in this proceeding and their petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties of record via U.S. Mail on this 31st day of October 2014.

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Summary: Memorandum Memorandum Contra to Petitions to Intervene by John Warrington and Brett A. Heffner electronically filed by Mr. Andrew P Guran on behalf of Black Fork Wind Energy LLC