

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Black)
Fork Wind Energy, LLC for a Certificate)
to Site a Wind-Powered Electric) Case No. 10-2865-EL-BGN
Generating Facility in Crawford and)
Richland Counties, Ohio.)

ENTRY ON REHEARING

The Ohio Power Siting Board finds:

- (1) All proceedings before the Ohio Power Siting Board (Board) are conducted in accordance with the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.
- (2) R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Board.
- (3) Black Fork Wind Energy, LLC (Black Fork) is a person as defined in R.C. 4906.01.
- (4) On March 10, 2011, Black Fork filed an application for a certificate of environmental compatibility and public need to construct the Black Fork Wind Energy Project, a wind-powered electric generation facility in Crawford and Richland counties, Ohio, consisting, in part, of up to 91 wind turbines, access roads, an electric collection substation, and an underground electric collection system.
- (5) On January 23, 2012, the Board issued its opinion, order, and certificate (Order) approving and adopting a stipulation entered into by Black Fork and certain other parties to this case. Under the Order, which authorized the construction, operation, and maintenance of the proposed facility, a certificate of environmental compatibility and public need was issued to Black Fork, subject to the 80 conditions set forth in the stipulation. The Order provided that the certificate shall become invalid if Black Fork had not commenced a continuous course of construction of the proposed facility within five years of the date of the journalization of the Certificate, in other words by January 23, 2017.

- (6) After the Board granted the certificate and denied rehearing applications, certain intervenors appealed the decision to the Supreme Court of Ohio (the Court) in May 2012. On December 18, 2013, the Court issued a decision affirming the Board's issuance of the certificate. *In re Application of Black Fork Wind Energy L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173.
- (7) On September 12, 2014, Black Fork filed a motion in this case seeking to have the Board extend the term of its certificate for two additional years, from January 23, 2017, to January 23, 2019. Black Fork argued that the extension requested was warranted for two reasons: (a) to recoup the nearly two years of construction time that was lost while the intervenors' appeal was under consideration by the Court; and also (b) because, to date, Black Fork's ability to proceed with the project has been hampered by recent energy market changes in Ohio.
- (8) By Entry issued March 24, 2016, the Board granted Black Fork's request to extend the term of its certificate for two additional years, from January 23, 2017, to January 23, 2019.
- (9) R.C. 4906.12 states, in relevant part, that R.C. 4903.02 to 4903.16 and 4903.20 to 4903.23 apply to a proceeding or order of the Board as if the Board were the Public Utilities Commission of Ohio (Commission).
- (10) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (11) Further, Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing within 30 days after the issuance of a Board order in the manner, form, and under the circumstances set forth in R.C. 4903.10.
- (12) Ohio Adm.Code 4906-2-32(E) provides that the administrative law judge (ALJ) may issue an order granting rehearing for the limited purpose of affording the Board more time to consider the issues raised in an application for rehearing.
- (13) On April 22, 2016, seven persons who have previously been granted intervention in this case jointly filed an application for

rehearing of the Board's March 24, 2016 Entry. The seven intervenors are: Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, John Warrington, Alan Price, and Catherine Price. The intervenors propound four assignments of error:

- (a) The Board did not comply with the legally mandated procedure for amending a certificate.
- (b) The Board lacks the legal authority to waive legally mandated procedures for amending a certificate.
- (c) Black Fork has not shown good cause to extend its certificate.
- (d) The Entry illegally effects Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201.

- (14) On May 2, 2016, Black Fork filed a memorandum contra the intervenors' rehearing application. Black Fork's position is that the granted extension of Black Fork's certificate is supported by good cause and also by Board precedent. Black Fork submits that common sense and statutory context support the Board's holding. Black Fork argues that, because extending the certificate's expiration date, as proposed in this case, does not change the facility, relocate turbines, or give rise to new or additional environmental impacts, no amendment of the certificate within the meaning of R.C. 4906.06 or of R.C. 4906.201(B)(2) is entailed. Black Fork argues that, since only extending -- but not amending --- the existing certificate was at issue, it was reasonable for the Board to grant the requested extension without applying new setback requirements that were established subsequent to the initial grant of Black Fork's certificate.
- (15) By Entry issued May 16, 2016, the intervenors' application for rehearing was granted, for the limited purpose of affording the Board additional time to consider the rehearing arguments raised by the intervenors, without addressing the merits of any arguments raised.
- (16) The Board has reviewed and considered all of the arguments raised in the intervenors' application for rehearing and in Black Fork's memorandum contra. Any argument raised on rehearing

that is not specifically discussed herein has been thoroughly and adequately considered by the Board and is denied.

Intervenor's First Assignment of Error – Procedures for Certificate Amendment Were Not Followed.

- (17) As their first assignment of error, the intervenors argue that the March 24, 2016 Entry is unlawful and unreasonable because it purports to amend an express, material term of the January 23, 2012 certificate issued to Black Fork through a procedure other than that which is statutorily and by regulatory rule required, namely, through Black Fork's filing, and the Board's consideration, of an application to amend a certificate. In this case, say the intervenors, Black Fork filed, and the Board cursorily granted, a mere motion to extend the term of Black Fork's certificate. Consequently, say the intervenors, both failed to comply with the statutory and regulatory mandates requiring that any change to a material condition of a certificate must come about only through the certificate holder's filing, and the Board's consideration, of an application to amend a certificate. The intervenors contend that, because no application for an amendment was filed by Black Fork or demanded by the Board, the Board rendered its decision to extend the term of the certificate without first conducting an investigation and/or holding a hearing to establish the continued accuracy and validity of the information the Board initially relied upon in granting Black Fork's certificate back in 2012.
- (18) In its memorandum contra, Black Fork submits that the intervenors have cited no authority for their claim that any change in a certificate's terms and conditions is, by statutory definition, an amendment of the certificate. Indeed, says Black Fork, the Board has a long-standing administrative practice, which the company argues should not be overturned here, of extending the terms of certificates by motion, rather than by applications to amend. Citing *In re Application of Buckeye Wind LLC*, Case No. 08-666-EL-BGN (*Buckeye Wind*), Entry on Rehearing at 6 ¶15 (Aug. 27, 2015), Black Fork submits that a certificate amendment application is required only for purposes of obtaining Board approval of proposed changes regarding how – and not when – a certificated facility will be operated and built.
- (19) The Board finds the intervenors first assignment of error is unfounded and should be denied. We find no merit in the

intervenors contention that modification of the expiration date constitutes amendment of the certificate. While the five-year time frame for the commencement of construction was listed as among the 80 conditions in the Board's January 23, 2012 Opinion, Order, and Certificate in this case, that directive has historically been included within every Board order and is a function of when construction work on the project is expected to begin. There is no statutory requirement dictating that applicants commence a continuous course of construction by a date certain. Rather, 4906.06 requires that an application shall be filed no more than five years before the planned date of commencement of construction and that the Board may waive this time period for good cause shown. Moreover, as the Board has previously determined, a request to extend the commencement of construction is not an amendment as contemplated under R.C. 4906.06. Importantly, there is no description or definition in R.C. 4906.06 of what activity constitutes an amendment under the statute that requires the filing of an application. There is, however, a description of what amendments require a hearing in R.C. 4906.07 and that provision plainly provides that the General Assembly intended that an amendment involves a proposed change in a facility. As previously noted, Black Fork's request for an extension of the construction of the facility in no way involves a proposed change in the facility or any of its components. Since 1996, the Board's interpretation of the applicable statutes have considered extensions of certificate expiration dates by motion and as not constituting an amendment of the certificate. The Board's long-standing interpretation of the applicable statutes is entitled to considerable weight.

- (20) Furthermore, the Board notes that the directive regarding the commencement of construction is similar to several other procedural directives included with other conditions set forth in Black Fork's certificate. For example, Condition 69 provides that Black Fork shall submit a copy of the as-built plans and specifications to Staff within 60 days after commencement of commercial operation unless, for good cause shown, an extension of more time for doing so is obtained from the Board. Condition 71 directs Black Fork to provide Staff information as it becomes known related to the date on which construction will begin, when construction is completed, and the date on which the facility begins commercial operation. Similarly, Condition 70 relates to when Black Fork should commence the construction

of the project, not how it will construct, operate, or maintain the project. Clearly, revisions to these time frames do not equate to an amendment to the certificate.

Intervenor's Second Assignment of Error -- Board Cannot Waive Legally Mandated Procedures for Amending a Certificate.

- (21) As their second assignment of error, the intervenors argue that the March 24, 2016 Entry is unlawful and unreasonable because the Board lacks the authority to alter, waive, or otherwise dispense with the statutorily required procedure for amending a certificate. The intervenors say that the language in the Entry indicating "that a request for a certificate extension is not a change in facility design which would trigger an amendment application and, with it, the need for a public hearing" (Entry at 5 ¶11) has no support in the plain language of the statute pertaining to certificate amendments. The intervenors note that R.C. 4906.06(E) requires that all requests to amend a certificate be by application and, that any such application be in such form and contain such information as the Board prescribes. Meanwhile, Ohio Adm.Code 4906-3-11(B) requires that applications for amendments to certificates shall be submitted in the same manner as if they were applications for a certificate. According to the intervenors, the Board has impermissibly interpreted the plain language of the statutory provision dealing with whether a hearing is required on an application to amend, as license to dispense with the statutory and regulatory requirement that amendments to existing certificates be sought by the filing of an application. Further, say the intervenors, there is no statutory authority for the Board to dispense with the requirement, in certificate amendment application cases, to conduct an investigation on such applications. The Board's failure to conduct such an investigation in this case, say the intervenors, is an abdication of its statutory duty, under R.C. 4906.07, to do so. That statute requires, among other things, that the Board's chairperson shall cause each application filed with the Board to be investigated, with a report of the investigation to be made available at least fifteen days prior to any hearing on the application. Nowhere in the governing statutes or the Board's rules, say the intervenors, is there authority for the Board to dispense with the requirement that it conduct an investigation of an application to amend an existing certificate simply because a full board hearing is not required on the application.

- (22) In its memorandum contra, Black Fork points out that the Board has often, over a long legal precedential history, considered extensions of certificate expiration dates by motion, and as not constituting an amendment of the certificate. Black Fork argues that the Board's long-standing interpretation of its enabling statutes is entitled to considerable weight and should not be overturned.
- (23) The Board finds the intervenors' second assignment of error to be without merit; therefore, the request for rehearing based on it should be denied. The intervenor's argument relies on the assumption that Black Fork's filing requesting an extension of the term of its certificate is a certificate amendment application. As discussed above, a request for an extension of the term of a certificate is not an amendment to a certificate because it does not fall within the statutory requirements of R.C. Chapter 4906 that necessitate the filing of an amendment application. The Board has not waived or otherwise altered any legally mandated procedures applicable to an amendment of the certificate, because this is not an amendment application. In addition, R.C. 4906.03(B) provides that the Board shall conduct any studies or investigations that it considers necessary or appropriate to carry out its responsibility under this chapter. The Board has previously found that no studies or investigations provided for in R.C. 4906.03(B) are applicable for a request for an extension. *Buckeye Wind*, Entry on Rehearing at 7 ¶18 (Aug. 27, 2015). In addition, Black Fork's request for an extension for the certificate did not propose a change in the location of all or part of the facility and did not create any environmental impact. As Black Fork's motion is the proper procedural mechanism to request an extension for the term of the certificate, there are no statutory duties to be waived.

Intervenor's Third Assignment of Error -- Black Fork Has Failed to Show Good Cause for an Extension.

- (24) As their third assignment of error, the intervenors submit that there has been no showing of good cause for granting the requested certificate extension. In the intervenor's view, the passage of time has greatly affected the assumptions underlying the Board's 2012 issuance of the certificate; consequently, a new, updated review of all the same criteria that were considered in reaching that earlier decision is now necessary. The intervenors contend that some of the very factors Black Fork has cited to

support its extension request – such as Black Fork’s claim that its ability to proceed immediately with the project has been hampered by recent energy market changes in Ohio -- demonstrate a need to explore anew whether the project continues to serve the public interest, convenience, and necessity, and whether it still satisfies the criteria established in R.C. 4906.10(A)(6). By foregoing the certification amendment procedures (which together, entail the submission of an application, then a Board investigation of that application, followed by a Board or Staff report of that investigation), the Board left itself, say the intervenors, without any basis upon which to decide whether good cause exists for granting the extension requested. Consequently, according to the intervenors, the Board reached a decision that is both unreasonable and unlawful.

- (25) In its memorandum contra, Black Fork argues that the Board’s decision to extend the term of its certificate is supported by good cause and is consistent with prior Board decisions. According to Black Fork, the intervenors’ argument against the Board’s finding of good cause boils down to their allegation that a Staff investigation, allegedly mandated by statute, failed to occur. Black Fork contends that, because the extension was properly sought by motion and not amendment, no such investigation was required. Nor, indeed, was any such investigation necessary, claims Black Fork, because the Board was aware of circumstances and potential impacts of the facility when the extension request was granted, especially because, at the same time it was considering the motion for extension, the Staff was investigating Black Fork’s application to amend its certificate to add eligible turbine models.
- (26) The Board concludes that the intervenors’ third assignment of error is without merit and should be denied. The grounds supporting Black Fork’s motion to extend its certificate, all of which were thoroughly considered and addressed in the Board’s March 24, 2016 Entry, were more than adequate to support the Board’s decision to extend the term of Black Fork’s certificate. Moreover, the Board has often and consistently granted motions to extend certificates for reasons essentially similar to those presented in this case by Black Fork. These grounds include delay shown to have been caused by factors beyond Black Fork’s control, including litigation over the validity of its certificate. Also, significant though temporary changes in Ohio’s overall

energy market, occurring since the initial issuance of Black Fork's certificate, are among the factors, beyond Black Fork's control, which contributed to a commencement of construction delay and, as such, were relied upon by the Board in granting the extension. However, the Board finds no basis for holding that these temporary market changes provide sufficient grounds for negating or re-litigating the initial grant of certificate, or to otherwise necessitate a complete reexamination of the public interest factors, already established of record in this case, which formed the basis for the initial grant of Black Fork's certificate.

Intervenor's Fourth Assignment of Error -- The Entry Fails to Impose Now-Applicable Setback Requirements

- (27) As their fourth assignment of error, the intervenors argue that in its decision to grant the extension, the Board should have, but unlawfully and unreasonably did not impose now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201, which became effective after the initial issuance of Black Fork's certificate in 2012. The intervenors point out that R.C. 4906.201 was amended to expressly provide that the new statutory setback requirements (established in Amended Substitute House Bill 483) expressly apply to any amendments to existing certificates made after September 15, 2014. The intervenors position is that, because the Board impermissibly allowed Black Fork to extend the five-year time limitation of its certificate without properly applying certificate amendment application procedures, it enabled Black Fork to illegally evade the new setback requirements that the Ohio General Assembly expressly mandated as applicable to certificates amended after September 15, 2014. Moreover, argue the intervenors, the Board's failure to conduct an investigation on Black Fork's motion, or any factual inquiry into the project as it now stands, precluded the Board from making any determination that the project, as amended, is in compliance with the now-applicable setback requirements, thus rendering the Board's March 24, 2016 Entry as unreasonable and unlawful.
- (28) In its memorandum contra, Black Fork submits that the intervenors have made no factual or legal showing that the Board erred in extending the certificate without applying the revised setbacks. Black Fork contends that, because the extension of time is not an amendment within the meaning of R.C. 4906.06, there was no basis to apply or analyze the new

setbacks relative to the facility. Indeed, notes Black Fork, the Board has already rejected the intervenors' attempt to apply the revised setbacks in an earlier case involving an application by Black Fork to add two new turbine models as eligible for the project. *In re Black Fork*, Case No. 14-1591-EL-BGA, Order at 7. Further, because the intervenors did not take an appeal on that decision, argues Black Fork, the intervenors are barred by the doctrine of collateral estoppel from raising the same issue yet again in this case.

- (29) The Board finds no merit in, and denies rehearing on, the intervenors' fourth assignment of error. Because Black Fork's motion to extend the term of the certificate, as requested, does not change the facility, does not relocate turbines, or provide new or additional environmental impacts, it does not constitute an amendment within the scope of R.C. 4906.06 or R.C. 4906.201(B)(2). Therefore, the Board concludes that the conditions required by the January 23, 2012 Order in this case, including the setback requirements that adhere to the provisions in R.C. 4906.20(B)(2) that were applied to the turbines prior to September 29, 2013, continue to apply to the turbines for this project.

It is, therefore,

ORDERED, That the application for rehearing, jointly filed on April 22, 2016, by the seven intervenors, is denied. It is, further,

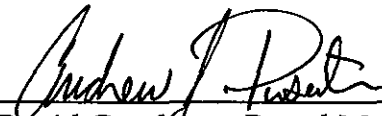
ORDERED, That any argument raised on rehearing that is not specifically discussed in this Entry on Rehearing has been thoroughly and adequately considered by the Board and is hereby expressly denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

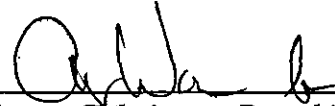
THE OHIO POWER SITING BOARD



Asim Z. Haque, Chairman
Public Utilities Commission of Ohio



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



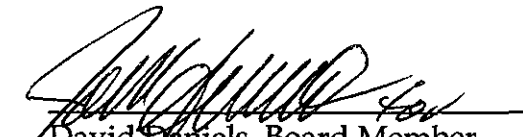
James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources



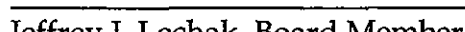
Richard Hodges, Board Member
and Director of the Ohio
Department of Health



Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency



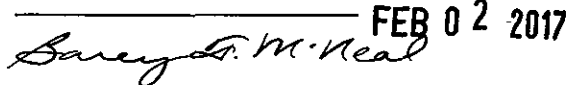
David Daniels, Board Member
and Director of the Ohio
Department of Agriculture



Jeffrey J. Lechak, Board Member
and Public Member

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Entered in the Journal



Barcy F. McNeal
Secretary

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