

FILE

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of)
Black Fork Wind Energy, LCC)
Regarding its Certificate of)
Environmental Compatibility and)
Public Need Issued in Case)
No. 10-2865-EL-BGN)

Case No.: 18-1134

On Appeal from the Ohio Power Siting
Board, Case No. 17-1148-EL-BGA

**NOTICE OF APPEAL OF INTERVENORS-APPELLANTS GARY J. BIGLIN, KAREL
A. DAVIS, BRETT A. HEFFNER, ALAN PRICE, CATHERINE PRICE,
MARGARET RIETSCHLIN, AND JOHN WARRINGTON,**

John F. Stock (0004921), *Counsel of Record*
jstock@beneschlaw.com
Mark D. Tucker (0036855)
mtucker@beneschlaw.com
BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215
(614) 223-9300
FAX: (614) 223-9330

*Attorneys for Intervenor-Appellants Gary J.
Biglin, Karel A. Davis, Brett A. Heffner,
Alan Price, Catherine Price, Margaret
Rietschlin, and John Warrington*

Chad A. Endsley
cendsley@ofbf.org
280 North High Street
P.O. Box 18283
Columbus, Ohio 43218
(614) 245-8258

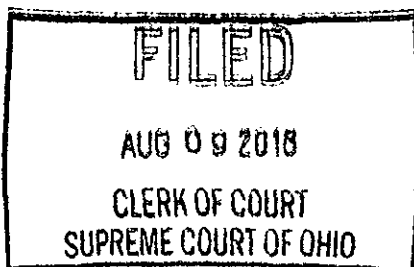
*Attorney for Intervenor Ohio Farm Bureau
Federation*

John H. Jones (0051913)
john.jones@ohioattorneygeneral.gov
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-4395

*Attorney for Appellee Ohio Power Siting
Board*

Michael J. Settineri (0073369), *Counsel of Record*
mjsettineri@vorys.com
MacDonald W. Taylor (0086959)
mwtaylor@vorys.com
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5462
FAX: (614) 719-5146

*Attorneys for Applicant Black Fork Wind
Energy, LLC*



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Pursuant to R.C. 4903.11, 4903.13, and 4906.12, Intervenor-Appellants Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (collectively, “Appellants”) hereby give notice of their appeal to the Ohio Supreme Court from the following attached orders of Appellee Ohio Power Siting Board (“Board”) in Case Number 17-1148-EL-BGA: (1) *Order on Certificate* entered by the Board on December 7, 2017, and (2) *Second Entry on Rehearing* entered by the Board on June 21, 2018 (collectively, “Board’s Orders”). Pursuant to S.Ct.R.Prac. 10.02(A)(2), copies of both of the Board’s Orders are attached hereto.

Appellants are parties of record in Case Number 17-1148-EL-BGA, and on December 27, 2017, timely filed their *Application for Rehearing* of the Board’s December 7, 2017 *Order on Certificate* pursuant to R.C. 4903.10 and 4906.12.

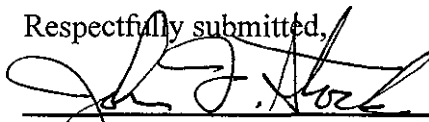
The Board’s Orders granted Applicant Black Fork Wind Energy, LCC’s (“Black Fork”) June 6, 2017 *Application to Amend the Black Fork Wind Energy, LLC Certificate Issued January 23, 2012 in Case No. 10-2865-EL-BGN*, thereby amending the Board’s January 23, 2012 Certificate of Environmental Compatibility and Public Need (“Certificate”) in two respects: (1) the Board approved the use of the Vestas V110 2.2 MW turbine model, a capacity increase from 2.0 MW for the same model that the Board had earlier approved *via* an amendment to the Certificate, and (2) the Board extended the deadline for Black Fork to commence construction of its facility for an additional year, allowing Black Fork to delay commencement of construction until January 23, 2020—an extension in addition to the two-year extension previously granted by the Board that is the subject of an appeal pending before this Court in Case No. 17-412. The Board’s Orders are in error for the following reasons:

(1) The Board's Orders are unreasonable and unlawful to the extent they impermissibly restrict the scope of Intervenor's intervention, and in particular, to the extent they purports to preclude Intervenor from addressing the issues of the setback requirements applicable to the amendment of Black Fork's Certificate and the extension of the term of the Certificate. This issue was raised as the first ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 6-8 of that application.

(2) The Board's Orders are unreasonable and unlawful because they illegally effect Black Fork's evasion of the now-applicable setback requirements of R.C. 4906.20 and R.C. 4906.201. This issue was raised as the second ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 8-12 of that application.

(3) The Board's Orders are unreasonable and unlawful because Black Fork failed to show good cause for an extension of the Certificate. This issue was raised as the third ground for rehearing in Appellants' *Application for Rehearing*, and is fully addressed at pages 12-13 of that application.

Respectfully submitted,



John R. Stock (0004921)

Mark D. Tucker (0036855)

BENESCH, FRIEDLANDER, COPLAN &

ARONOFF LLP

41 S. High St., 26th Floor

Columbus, Ohio 43215

(614) 223-9300

FAX: (614) 223-9330

Attorneys for Intervenor-Appellants Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Appeal was served, via regular U.S. mail, postage prepaid, and email this 9th day of August, 2018, upon the following:

Michael J. Settineri
MacDonald W. Taylor
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mjsettineri@vorys.com
mwtaylor@vorys.com

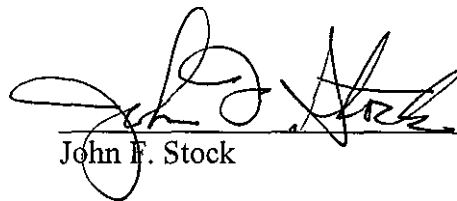
Attorneys for Black Fork Wind Energy, LLC

Chad A. Endsley
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 18283
Columbus, Ohio 43218
cendsley@ofbf.org

Attorney for Intervenor Ohio Farm Bureau Federation

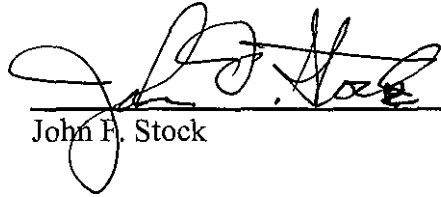
John Jones
Assistant Attorney General
Public Utilities Section
180 E. Broad Street, 6th Floor
Columbus, Ohio 43215
john.jones@puc.state.oh.us

Attorney for OPSB


John F. Stock

CERTIFICATE OF FILING

Pursuant to S.Ct.Prac.R. 3.11(D)(2), 10.02(A)(2), and 10.03(A), the undersigned hereby certifies that a true and correct copy of the foregoing was filed with the Docketing Division of the Public Utilities Commission and the Power Siting Board, 180 East Broad Street, Columbus, Ohio 43215 pursuant to R.C. 4903.13 and 4906.12 and Ohio Admin. Code §§4901-1-02(A), 4901-1-36, and 4906-2-33.



John F. Stock

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
BLACK FORK WIND ENERGY, LLC
REGARDING ITS CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED ISSUED IN CASE NO. 10-2865-
EL-BGN.

CASE NO. 17-1148-EL-BGA

ORDER ON CERTIFICATE

Entered into the Journal on December 7, 2017

I. SUMMARY

{¶ 1} The Ohio Power Siting Board grants the application filed by Black Fork Wind Energy, LLC seeking a capacity increase to use the Vestas V110 turbine model with a 2.2 megawatt capacity and an extension of its certificate to January 23, 2020.

II. DISCUSSION

A. *Procedural History*

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906.

{¶ 3} Pursuant to R.C. 4906.10, the Board's authority applies to major utility facilities and provides that such facilities must be certified by the Board prior to the commencement of construction. The Board promulgated rules as set forth in Ohio Adm.Code Chapter 4906 prescribing regulations regarding applications for wind-powered electric generation facilities.

{¶ 4} Black Fork Wind Energy, LLC (Black Fork or Applicant) is a person under R.C. 4906.01(A) and is certificated to construct, operate, and maintain a major utility facility, in the form of a wind-powered electric generation facility.

{¶ 5} On January 23, 2012, the Board granted the application of Black Fork for a certificate to construct a wind-powered electric generation facility located in Crawford and

Richland counties, Ohio. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Certificate Case*), Opinion, Order, and Certificate (Jan. 23, 2012). The Board granted Black Fork's application pursuant to a stipulation filed by Applicant, the Ohio Farm Bureau Federation (OFBF), and the Board Staff (Staff), subject to 80 conditions set forth in the stipulation. Black Fork was approved to construct a major utility facility in the form of a wind-powered electric generation facility with up to 91 wind turbines with a combined generation capacity of up to 200 megawatts (MW). The project area is located in Crawford and Richland counties, Ohio.

{¶ 6} On May 24, 2012, certain intervenors appealed the Board's decision to the Supreme Court of Ohio (Court). The Court affirmed the Board's decision on December 18, 2013.

{¶ 7} On September 12, 2014, in Case No. 14-1591-EL-BGA (14-1591), Black Fork filed an application to modify its certificate in order to utilize two additional turbine models, the Vestas V110 (2.0 MW) turbine and the GE 2.3-107 (2.3 MW) turbine for this project. The Board approved that application on August 27, 2015, over the objections of certain intervening parties.

{¶ 8} Additionally, on March 24, 2016, in the *Certificate Case* the Board approved Black Fork's September 12, 2014 motion to extend the term of the certificate from January 23, 2017 to January 23, 2019. Certain intervening parties appealed the Board's approval of the motion to extend the term of the certificate to the Court. That appeal is currently pending.

{¶ 9} On June 6, 2017, Black Fork filed an application in the above-captioned case proposing an additional modification to the certificate approved in the *Certificate Case* and modified in 14-1591. In its application, Black Fork seeks Board approval to use the 2.2 MW version of the Vestas V110 wind turbine. Additionally, Applicant seeks to extend its certificate first issued in the *Certificate Case* to January 23, 2020.

{¶ 10} Concurrent with the application, Black Fork filed proof of service of the application in this case. Notice of Black Fork's application was published in the *Bucyrus Telegraph Forum*, a newspaper of general circulation in Crawford County, and in the *Mansfield News Journal*, a newspaper of general circulation in Richland County, on June 9, 2017. Applicant filed proof of publication with the Board on June 12, 2017.

{¶ 11} On November 13, 2017, Staff filed a staff report of investigation evaluating the application (Staff Report).

B. Motion for Waiver

{¶ 12} Concurrent with the filing of the application, Black Fork filed a motion for a waiver of Ohio Adm.Code 4906-3-11-(B)(2)(a)(iii) which requires that a copy of the application be served upon "any property owner along the new route." In support of its request, Black Fork asserts that this application merely involves an increase in capacity for an already approved turbine model and that all significant features of the turbine remain the same including rotor diameter, hub height, and maximum operational sound output. Further, Black Fork notes that this application does not involved a "new" route as premised in the rule. Consequently, given the nature of the requested change and the time and expense of a mass mailing, Black Fork seeks a waiver from the rule requirement and proposes publishing newspaper notice instead. Applicant asserts that a similar motion was granted on April 25, 2016, in Case No. 16-725-EL-BGA and on September 9, 2016, in Case No. 16-1717-EL-BGA. No memoranda contra Black Fork's motion were filed.

{¶ 13} The Board determines that good cause has been presented by Black Fork to grant the requested waiver of Ohio Adm.Code 4906-3-11(B)(2)(a)(iii). Accordingly, the motion for waiver is granted.

C. Motions to Intervene

{¶ 14} On June 30, 2017, the OFBF filed a motion to intervene in this proceeding. No party filed memoranda contra the OFBF's motion to intervene.

{¶ 15} On July 7, 2017, a petition to intervene was filed on behalf of Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington (Property Owners). Property Owners describe themselves as non-participating residents and landowners adjacent to or near the proposed project. Property Owners assert that they have individually been granted intervenor status in either the *Certificate Case*, the 14-1591 case, or both cases. Property Owners submit that they meet all the requirements for intervention in this proceeding in accordance with R.C. 4906.08 and Ohio Adm.Code 4906-2-12(B)(1).

{¶ 16} Black Fork filed a memorandum contra Property Owners' petition to intervene on July 24, 2017. In its memorandum contra, Black Fork argues that two of the Property Owners do not reside within the project area and that, if intervention is granted at all, the Board should limit Property Owners' intervention to the turbine capacity issue. Property Owners filed a reply to the memorandum contra on July 31, 2017, essentially reasserting arguments in favor of intervention and disputing the contentions of Black Fork.

{¶ 17} In accordance with Ohio Adm.Code 4906-2-12(B)(1), the Board finds that the motions to intervene filed by OFBF and Property Owners (collectively, Intervenors) are reasonable to the extent they address Black Fork's request for a capacity increase to the Vestas V110 turbine model for this project. With this qualification, the Board finds that their motions to intervene should be granted. The motions to intervene should be denied, to the extent the Intervenors request intervention for the purpose of addressing irrelevant matters outside of this qualification and the identified scope of this application.

D. Summary of Application

{¶ 18} In its application, Black Fork proposes a capacity increase to the already-approved Vestas V110 turbine model. Black Fork explains that the manufacturer has made technological improvements to the Vestas V110 turbine model, allowing the capacity increase from 2.0 MW to 2.2 MW. Applicant further states that the turbine model's dimensions, including rotor diameter and hub height, remain the same. Black Fork affirms

that it will comply with all certificate conditions established in the *Certificate Case* and in 14-1591. Black Fork submits that the 200 MW nameplate capacity for the project would not change. Black Fork further states that all other information regarding the project previously approved by the Board remains unchanged, including the locations of the turbines, collector substation, access roads, and collection lines. (Application at 2-8.)

{¶ 19} Concurrent with this application, Black Fork seeks a one-year extension of its certificate from January 23, 2019 to January 23, 2020. Black Fork asserts that granting the extension request would afford it the same three-year extension period that other wind farm projects have received. Black Fork claims to have diligently pursued continued development of this project, however, changes in the energy market in Ohio and the Court appeals have impacted the Applicant's construction schedule. Applicant recognizes the Board's well-established practice of granting extensions by motion, however, given the pending litigation over the prior extension grant, Black Fork is requesting the certificate extension through this application. (Application at 5-7.)

E. Summary of Staff Report

{¶ 20} Staff reviewed the pending application and filed a Staff Report on November 13, 2017. The Staff Report reviews Black Fork's proposed modification to the certificate issued in the *Certificate Case*, as modified by 14-1591. Staff reports that since the dimensions of the turbine model do not change, the potential for impacts such as shadow flicker, blade shear, ice throw, and noise will remain unchanged. Staff also notes that there is no proposal to revise any turbine or associated facility locations in the pending application. Therefore, Staff concludes that, considering the proposed change in capacity, the original conditions for the certificate in the *Certificate Case*, as modified by 14-1591 are adequate. (Staff Report at 3-7.)

{¶ 21} In conclusion, Staff recommends that the Board approve the increase in capacity for the Vestas V110 2.2 MW wind turbine provided the Board conditions approval

on Black Fork adhering to all conditions set forth in the *Certificate Case* Order, as supplemented by 14-1591 (Staff Report at 7).

F. Board's Conclusion

{¶ 22} Initially, the Board notes that, in our Order in the *Certificate Case*, we determined that the stipulation entered into between the stipulating parties satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest and necessity, and does not violate any important regulatory principle or practice. Therefore, the Board approved the stipulation in the *Certificate Case*, authorizing Black Fork to construct this project in Crawford and Richland counties, Ohio.

{¶ 23} As stated previously, the stipulation in the *Certificate Case* established 80 conditions. Consistent with the *Certificate Case*, the acceptable turbine models for the project would be the Vestas V100 (1.8 MW), GE XLE (1.6 MW), and the Siemens SWT-2.3-101 (2.3 MW). Thereafter, in 14-1591, the Board approved an application that added the GE 2.3-107 (2.3 MW) and the Vestas V110 (2.0 MW) turbine models to the list of acceptable models to be used for this project.

{¶ 24} The application in the above-captioned proceeding would permit the increase in capacity for the Vestas V110 from 2.0 MW to 2.2 MW. The Board finds that Black Fork properly filed this case for our review and consideration, thereby providing for the necessary notice and due process afforded to applications regarding certificates issued by the Board.

{¶ 25} The Board finds that, as set forth in the application before us, and verified in the Staff Report, there is no material increase in any environmental impact of the facility and no change in any portion of the facility's location, including the location of the individual turbines, from what was originally certificated in the *Certificate Case*, as modified by 14-1591 (Staff Report at 7). Therefore, a hearing was not necessary to consider those factors. Moreover, the increase in capacity of the Vestas V110 2.2 turbine model does not affect our

conclusion from the *Certificate Case* that the project satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice.

{¶ 26} As set forth in the application and verified in the Staff Report, the application merely seeks to permit the increase in capacity to include the Vestas V110 2.2 turbine model in order to take advantage of technological improvements. Further, as set forth in the application and verified in the Staff report, the proposed turbine model's dimensions and maximum sound power output remain virtually the same as the certificated models. (Application at 2-8; Staff Report at 6.) Additionally, according to the Staff Report, the Vestas V110 2.2 MW turbine model includes the same safety features to address potential issues in the event of high wind speeds, there will be no change to potential for impacts such as shadow flicker, blade shear, and ice throw, and no change to noise impacts. Further, the Staff Report finds that Black Fork's adherence to the conditions set forth in the *Certificate Case Order*, as supplemented by 14-1591, will adequately address safety considerations. Finally, no other aspects of the approved project are sought to be modified by the application. (Application at 2; Staff Report at 3.)

{¶ 27} Upon our deliberation of the specific request proposed by Black Fork in this application, as well as the recommendations set forth in the Staff Report, the Board finds that, based on the facts of this case, the application should be approved, subject to the conditions set forth in the *Certificate Case Order* as supplemented in 14-1591, and that the conditions set forth in the *Certificate Case Order* will adequately address the increase in capacity for the proposed Vestas V110 2.2 turbine model. In making the determination in this matter, the Board highlights that the current application merely seeks a capacity increase for a previously approved turbine model without any changes in turbine locations or turbine dimensions. Accordingly, based upon the circumstances presented by this case, the Board approves the application of Black Fork seeking approval of the increase in capacity for the Vestas V110 2.2 turbine model for this project.

{¶ 28} Regarding Black Fork's request for a one-year extension of the certificate, the Board notes that R.C. 4906.06 states that an application for a certificate shall be filed not more than five years prior to the planned date of commencement of construction. The statute continues, however, by stating that this five-year period may be waived by the Board for good cause shown. Similarly, the Board's rules in Ohio Adm.Code 4906-5-03(F) directs an applicant for a certificate to provide a proposed schedule covering all major activities and milestones for a electric generating facility project including construction of the facility and placement of the facility in service. This requirement may be waived upon application or motion of a party pursuant to Ohio Adm.Code 4906-5-01(B). As acknowledged by Black Fork in its application, the Board's long-standing practice has been to consider extensions of certificates through motions in the certificate case rather than through an application process. Upon consideration of Black Fork's request and being cognizant of similar extensions granted to other wind facility projects, the Board finds that Black Fork has established good cause for a one-year extension of the certificate in this matter.

G. Findings of Fact and Conclusions of Law

{¶ 29} Black Fork is a person under R.C. 4906.01(A).

{¶ 30} Black Fork's electric generation facility is a major utility facility under R.C. 4906.01(B)(1).

{¶ 31} On June 6, 2017, Black Fork filed an application in this proceeding regarding the certificate issued in the *Certificate Case*, as supplemented by 14-1591.

{¶ 32} The June 6, 2017 application proposes an increase in capacity for the Vestas V110 turbine model as suitable for this project.

{¶ 33} On June 6, 2017, Black Fork filed proof of service of the application in this case. Public notice of the proposed application was published in Crawford and Richland counties, Ohio on June 9, 2017, and filed with the Board on June 12, 2017.

{¶ 34} Motions to intervene have been filed on behalf of the OFBF and Property Owners in the area of the project.

{¶ 35} On November 13, 2017, Staff filed a report evaluating the application.

{¶ 36} The proposed changes to the certificated facility do not result in a substantial change in the location of the facility or any material increase in any social or environmental impact. Therefore, an evidentiary hearing is not necessary.

{¶ 37} Based on the record and in accordance with R.C. Chapter 4906, the application regarding the certificate of environmental compatibility and public need for Black Fork's electric generation facility, issued in the *Certificate Case*, as modified by 14-1591, should be approved, subject to the conditions set forth in the *Certificate Case*, and as supplemented by 14-1591 and this Order.

III. ORDER


{¶ 38} It is, therefore,

{¶ 39} ORDERED, That Black Fork's application be approved subject to the conditions set forth in the Order in the *Certificate Case*, as supplemented in 14-1591 and this proceeding. It is, further,

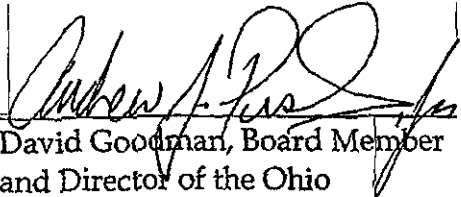
{¶ 40} ORDERED, That the motion to intervene filed by the OFBF and Property Owners be granted, to the extent set forth herein. It is, further,

{¶ 41} ORDERED, That a copy of this Order on Certificate be served upon all parties and interested persons of record.




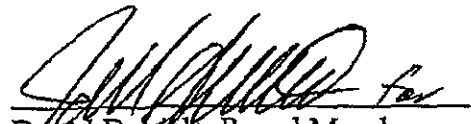

THE OHIO POWER SITING BOARD



Asim Z. Haque, Chairman
Public Utilities Commission of Ohio

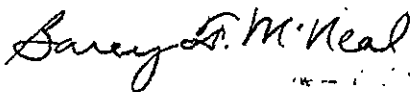


David Goodman, Board Member
and Director of the Ohio
Development Services Agency


James Zehring, Board Member
and Director of the Ohio
Department of Natural Resources
Lance Himes, 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
DEC 07 2017



Barcy F. McNeal
Secretary

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
BLACK FORK WIND ENERGY, LLC
REGARDING ITS CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED ISSUED IN CASE NO. 10-2865-
EL-BGN.

CASE NO. 17-1148-EL-BGA

SECOND ENTRY ON REHEARING

Entered in the Journal on June 21, 2018

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

II. PROCEDURAL HISTORY

{¶ 2} Black Fork Wind Energy, LLC (Black Fork or Applicant) is a person as defined in R.C. 4906.01.

{¶ 3} 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 Ohio Power Siting Board (Board).

{¶ 4} R.C. 4906.06(E) provides that an application seeking to modify a certificate shall be in such form and contain such information as the Board prescribes.

{¶ 5} On January 23, 2012, the Board granted the application of Black Fork for a certificate to construct a wind-powered electric generation facility located in Crawford and Richland counties, Ohio. *In re Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN (*Black Fork Certificate Case*), Opinion, Order, and Certificate (Jan. 23, 2012). The Board granted Black Fork's application pursuant to a stipulation filed by Applicant, the Ohio Farm Bureau

Federation (OFBF), and the Board Staff (Staff), subject to 80 conditions set forth in the stipulation. Black Fork was approved to construct a major utility facility in the form of a wind-powered electric generation facility with up to 91 wind turbines with a combined generation capacity of up to 200 megawatts (MW). The project area is located in Crawford and Richland counties, Ohio.

{¶ 6} On May 24, 2012, certain intervenors appealed the Board's decision to the Supreme Court of Ohio (Court). The Court affirmed the Board's decision on December 18, 2013.

{¶ 7} On September 12, 2014, in Case No. 14-1591-EL-BGA, Black Fork filed an application seeking to utilize two additional turbine models, the Vestas V110 (2.0 MW) turbine and the GE 2.3-107 (2.3 MW) turbine for this project. The Board approved that application on August 27, 2015, over the objections of certain intervening parties. *See, In re Application of Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (14-1591), Order on Certificate (Aug. 27, 2015).

{¶ 8} Additionally, on March 24, 2016, in the *Black Fork Certificate Case* the Board approved Black Fork's September 12, 2014 motion to extend the term of the certificate from January 23, 2017 to January 23, 2019. Certain intervening parties appealed the Board's approval of the motion to extend the term of the certificate to the Court. That appeal is currently pending.

{¶ 9} On June 6, 2017, Black Fork filed an application in the above-captioned case for approval to use the 2.2 MW version of the Vestas V110 wind turbine. Additionally, Applicant seeks to extend its certificate first issued in the *Black Fork Certificate Case* to January 23, 2020.

{¶ 10} By Order on Certificate (Order) issued December 7, 2017, the Board granted the application filed by Black Fork seeking a capacity increase to use the Vestas V110 turbine model with a 2.2 megawatt capacity and an extension of its certificate to January 23, 2020.

Additionally, the December 7, 2017 Order granted intervention in this matter to Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington.

{¶ 11} R.C. 4906.12 provides, in pertinent part, that R.C. 4903.10 shall apply to any proceeding or order of the Board in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 12} R.C. 4903.10 permits any party who has entered an appearance in a Commission proceeding to apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

{¶ 13} Further, Ohio Adm.Code 4906-2-32 states that any party or any affected person, firm, or corporation may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner and form and circumstances set forth in R.C. 4903.10.

{¶ 14} On December 27, 2017, intervenors Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Alan Price, Catherine Price, Margaret Rietschlin, and John Warrington filed an application for rehearing of the Board's Order.

{¶ 15} On January 8, 2018, Black Fork filed a memorandum contra intervenors' application for rehearing.

{¶ 16} On January 24, 2018, the administrative law judge (ALJ) found, pursuant to Ohio Adm.Code 4906-2-32(E), that to the extent intervenors' application for rehearing has been filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32, which is a matter for the Board's determination, rehearing should be granted for the limited purpose of affording the Board additional time to consider the issues raised in intervenors' application for rehearing.

III. DISCUSSION

{¶ 17} In their first assignment of error, intervenors submit that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it impermissibly restricts the scope of their intervention particularly as it precludes intervenors from addressing setback requirements and the extension of the term of the certificate. Citing to *Moore v. City of Middletown*, 133 Ohio St.3d 55, 63-66, 2012-Ohio-3897 at ¶¶ 33-43, intervenors assert a protectable interest in the proper application of the pertinent setback requirements. Moreover, as adjacent and nearby property owners, intervenors also claim an interest in ensuring that the time within which Black Fork must commence construction of the project is reasonable so as to not unduly burden their property for an extended period of time.

{¶ 18} In its memorandum contra, Black Fork asserts that, given the intervenors' stated interests, the Board properly limited intervenors' scope of intervention. Black Fork submits that the burden to establish good cause to intervene rested with the intervenors but that the intervenors failed to explain how a capacity increase to an already-approved turbine model or the certificate extension would impact them other than stating that they were trying to avoid additional adverse impacts on their land, residences, roads, communities, and lives. Black Fork claims that, through their intervention, intervenors are attempting to improperly expand the scope of this proceeding into matters previously determined by the Board. The Board has already decided this issue in Applicant's favor in the past according to Black Fork. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *In re Application of Greenwich Windpark, LLC*, Case No. 15-1921-EL-BGA (*Greenwich*), Second Entry on Rehearing (Aug. 17, 2017). Black Fork asserts that re-litigation of already-decided issues also implicates the doctrine of collateral estoppel and should not be allowed here.

{¶ 19} Intervenors' first assignment of error is denied. As noted in the Board's December 7, 2017 Order, the only change to the proposed facility was a capacity increase to the already-approved Vestas V110 turbine model. No dimensions of the Vestas V110 turbine model changed from what was previously-approved and all other physical aspects

of the project remain the same including approved turbine sites, the location of the collector substation, access roads, and collection lines. Intervenor's reliance on *Moore* is unavailing as that case involved zoning matters and arguments concerning constitutional issues. In the present case, there is no issue concerning zoning and the Board does not resolve constitutional issues. Further, as the Board has previously determined, a desire to re-litigate legal issues that the Board has already decided in a prior certification proceeding in the past is not a sufficient interest that allows for intervention and further consideration on those issues in the pending proceeding. See, *Black Fork Wind*, Order on Certificate (Aug. 27, 2015); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017). Additionally, the re-litigation of already-decided issues also implicates the purposes underlying the doctrine of collateral estoppel and should not be entertained in this matter. Under the circumstances presented, the Board acted reasonably in limiting the scope of intervention. Rehearing on this assignment of error is denied.

{¶ 20} Intervenor's second assignment of error alleges that the Board's December 7, 2017 Order is unreasonable and unlawful to the extent it precluded intervenors from addressing the issues of setback requirements applicable to an application for a capacity increase pursuant to R.C. 4906.20 and 4906.201. Intervenor's assert that, despite the fact that the applicable setback was their primary contention in their petition to intervene, the Board completely ignored this issue in the December 7, 2017 Order. Additionally, intervenors assert that the current versions of R.C. 4906.20 and 4906.201 (as amended in Am.Sub.H.B. 483, effective September 15, 2014) compel the Board to subject any amendment to an existing certificate to the latest setback requirements (i.e., 1,125 feet from the property line of the nearest adjacent property). Since September 15, 2014, intervenors claim the Board has permitted Black Fork to amend its certificate twice by adding two new turbine models for use on this wind farm project and permitting the extension of the certificate. Intervenor's claim that the Board must, therefore, reconsider its December 7, 2017 Order and compel adherence to the now applicable setbacks.

{¶ 21} As an initial matter, Black Fork argues that intervenors' second assignment of error is outside the scope of their intervention and is not, therefore, a permissible issue for them to raise on rehearing. Moreover, Black Fork claims that there are significant constitutional issues involved in applying the Am.Sub.H.B. 483 setback standards to Black Fork's certificate. Black Fork asserts that this is the third time the intervenors have raised this setback argument before the Board and since the Board has twice rejected this argument the Board need not consider it again. Finally, Black Fork notes that the Board has repeatedly taken the position that R.C. 4906.20 and 4906.201 are silent as to the definition of an "amendment to an existing" certificate that would trigger the enhanced setbacks and has used its discretion and expertise to determine what qualifies as an amendment. *See, In re Black Fork*, Case No 10-2865-EL-BGN, Entry on Rehearing (Feb. 2, 2017); *Greenwich*, Second Entry on Rehearing (Aug. 17, 2017).

{¶ 22} Intervenors' second assignment of error is denied. The Board properly granted intervenors limited intervention in this matter to address the sole issue of the capacity increase to an already-approved Vestas V110 turbine model. As noted in *Greenwich, supra*, R.C. 4906.20 and 4906.201 are silent as to the definition of an "amendment to an existing certificate" that triggers enhanced setbacks. Therefore, the Board has used its discretion and expertise to determine what qualifies, just as it must create parameters around the concepts of "change" and "alteration," also found in R.C. 4906.20. In this case, the Board reasonably determined that a mere capacity increase to an already-approved turbine model is adequately covered by the existing conditions of the certificate in the *Black Fork Certificate Case* and does not affect our conclusion that the project satisfies the criteria set forth in R.C. Chapter 4906. Thus, application of the Am.Sub.H.B. 483 setbacks is not warranted.

{¶ 23} Not every proposed change to a major utility facility requires an amendment to an existing certificate regardless of how the application is captioned. Rather, the Board determines from the substance of the pleading whether the change(s) being proposed

necessitate “[a]ny amendment [being] made to an existing certificate” by the Board.¹ The Board begins its review by looking at whether the proposal introduces new impact(s) that cannot be adequately addressed by the conditions of the existing certificate to satisfy the criteria of R.C. 4906.10(A). If a proposal introduces a new impact that the Board determines does not satisfy the statutory criteria without the Board approving a change in the original certificate condition(s), then the proposal is an “amendment” that requires the new setbacks apply under Am.Sub.H.B. 483. However, where the existing certificate conditions are adequate to address/mitigate any impacts of the proposed change, then the Board can approve the change without amending the existing certificate. The Board found exactly such a situation in this case. The change in capacity does not alter any existing conditions and, therefore, the Board could approve the change without amending the existing certificate. It did so and the intervenors second assignment of error is, therefore, denied.

{¶ 24} In their final assignment of error, intervenors assert that the order is unreasonable and unlawful as Black Fork failed to show good cause for a one-year extension of the certificate. While acknowledging that the five-year commencement of construction time frame set forth in R.C. 4906.06(A) may be waived for good cause shown, intervenors note that the Board has indicated that there are important policy considerations to factor into doing so. *See, In re Application of Lima Energy Co.*, Case Nos. 00-513-EL-BGN and 04-1011-EL-BGA (*Lima Energy*), Entry (July 30, 2012). Intervenors submit that the passage of nearly six years has greatly affected the assumptions underlying the Board’s 2012 issuance of the certificate and, thus, the Board’s failure to address this issue mandates rehearing.

{¶ 25} Black Fork responds that, like the setback issue above, arguments surrounding the extension of the certificate are outside the allowable scope of rehearing and the Board

¹ In a line of analogous utility cases involving the Public Utilities Commission of Ohio (Commission), the Supreme Court of Ohio has stated that the Commission has broad discretion in the conduct of its proceedings. *See, Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214 (1987).

should not consider it. Nevertheless, Black Fork posits, good cause exists for the certificate extension. In support, Black Fork notes that it has diligently pursued continued development of the project. Moreover, Black Fork asserts that it faces continued litigation from intervenors with a new appeal pending at the Court (Case No. 2017-0412) on the Board's previous extension of the certificate and seeking imposition of the Am.Sub.H.B. 483 setbacks. As a result, Black Fork opines that good cause exists for the certificate extension and, therefore, intervenors third assignment of error should be denied.

{¶ 26} Intervenors' third assignment of error is denied. Intervenors acknowledge that the five-year time frame in order to commence construction of a project set forth in R.C. 4906.06(A) may be waived for good cause shown. Although the Board's December 7, 2017 Order did not list specifically the arguments Black Fork made in support of its request that the Board found to justify the extension, it is clear from the decision that the Board considered the entirety of Black Fork's request and also that similar extensions have been granted to other wind facility projects. In totality, the Board found such circumstances established good cause for a one-year extension of the certificate. Moreover, the intervenors reliance on the *Lima Energy* decision does not warrant a different conclusion. In fact, after considering all of the arguments made in the *Lima Energy* proceeding, the Board granted the requested extension. In ruling on the one-year request for extension in the December 7, 2017 Order, the Board found persuasive the steps taken by Black Fork that support a finding that the Applicant has pursued a continued development of the wind farm and that any delays are due, in part, to continued litigation concerning this project. Finally, the six-year passage of time since issuance of the original certificate does not require a different outcome. Since issuance of the certificate on January 23, 2012, Black Fork pursued approval to utilize two additional turbine models in 14-1591. The Board had occasion in ruling on the request in 14-1591 on August 27, 2015, to more recently consider whether the 80 conditions adopted in the *Black Fork Certification Case* still satisfies the criteria set forth in R.C. Chapter 4906, promotes the public interest, and does not violate any important regulatory principle or practice. Rehearing on this assignment of error is, therefore, denied.

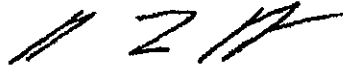
IV. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That the application for rehearing filed on December 27, 2017, be denied. It is, further,

{¶ 29} ORDERED, That a copy of this Second Entry on Rehearing be served upon all interested persons of record in this matter.

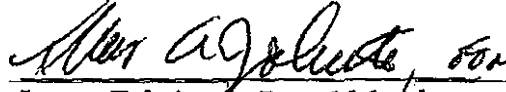
THE OHIO POWER SITING BOARD



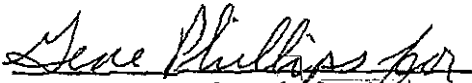
Asim Z. Haque, Chairman
Public Utilities Commission of Ohio



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



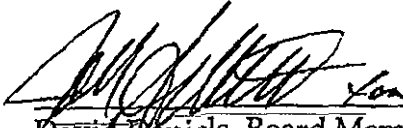
James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources



Lance Himes, Board Member
and Director of the Ohio
Department of Health



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

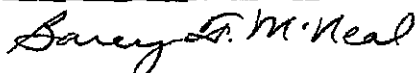


David Daniels, Board Member
and Director of the Ohio
Department of Agriculture

Gregory Murphy, Board Member
and Public Member

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Entered in the Journal
JUN 21 2018



Barcy F. McNeal
Secretary