

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Hardin Wind LLC for a Certificate)	Case No. 13-1177-EL-BGN
Of Environmental Compatibility and)	
Public Need)	

**REPLY MEMORANDUM IN SUPPORT OF PETITION TO INTERVENE
BY LOCAL RESIDENTS OF HARDIN AND LOGAN COUNTIES**

I. INTRODUCTION

Applicant Hardin Wind LLC (“Hardin Wind”) opposes the Local Residents’ Petition to Intervene based on three arguments: (1) the Local Residents’ petition is “untimely” and moot, (2) the Local Residents have no “real interest” in the proposed modifications, and (3) the Local Residents are impermissibly collaterally attacking the Board’s opinion and Order promulgating Ohio Admin. Code 4906-4-09. Each of these arguments is without merit and should be rejected by the Board. Accordingly, the Board should grant the Local Residents’ Petition to Intervene.¹

II. ARGUMENT

A. Timeliness and Mootness

Harding Wind asserts that the Petition to Intervene was not timely because the it was filed after the January 2, 2014 deadline for intervention. R.C. 4906.08(B), however, expressly provides the Board discretion to grant “leave to intervene as a party to participate *in subsequent phases of the proceeding . . .*” (emphasis added). See also Ohio Admin. Code 4906-2-12(C). The Ohio Supreme Court has interpreted R.C. 4906.08 and the Board’s rules on intervention as providing that “[a]ll interested parties may intervene in [Board] proceedings upon a showing of

¹The Local Residents include Beverly J. Marquart, Luke & Joy McCarren, Brandon & Cathy Brant, Craig & Lanita Sue Sickles, Abigail & Dennis Roell, Deborah Reames, Anthony & Melissa Griffith, and Ryan & Deirdra Stanford

good cause.” *State, ex rel. Ohio Edison Co. v. Parrott*, 73 Ohio St.3d 705, 708 (1995) (citation omitted). Indeed, the statute and the Board’s intervention rules must be “liberally construed.” *Ohio Consumers’ Counsel v. Public Utilities Comm’n*, 111 Ohio St.3d 384, 387, 2006-Ohio-5853 at ¶16 (PUCO intervention).

In this case, the interests that the Local Residents’ seek to protect—in particular, the application of Amended Substitute House Bill 483’s (“Am.Sub.H.B. 483”) (effective September 15, 2014) setbacks—did not arise until Hardin Wind sought to “modify” its Certificate to relocate the Project’s collection lines. As demonstrated in the Local Residents’ Petition to Intervene, this proposed modification would constitute an “amendment” of the Certificate requiring the application of Am.Sub.H.B. 483’s setbacks pursuant to R.C. 4906.201. Contrary to Hardin Wind’s assertion, the Local Residents are not attempting to relitigate issues resolved by the Board’s issuance of the Certificate, but rather, confine their arguments to the issues raised by the proposed “modification.” The issue of the application of Am.Sub.H.B. 483’s setbacks did not arise—and could not have arisen—prior to Hardin Wind’s proposed “modification.” Under such circumstances, the Petition to Intervene must be considered timely.

Moreover, although Hardin Wind has withdrawn the “Notice of Modification” it filed with the Board in this case on February 15, 2019, it did not indicate that it was completely abandoning its plan to eliminate some collection lines and relocate others that were approved as part of the project. Indeed, Hardin Wind indicated in its Notice of Modification that “[t]he modification is a result of the removal of turbines from the project.” Because Hardin Wind presumably does not intend to re-insert removed turbines from the Project, it is likely that Hardin Wind will again seek the Board’s approval for the relocation of the Project’s collection lines. Under such circumstances, the Local Residents’ request to intervene cannot be considered moot.

The Motion to Intervene should, at the very least, remain pending until such time as Hardin Wind advises the Board that it has abandoned the proposed relocation of those lines *and will construct them as approved in the Certificate*.

As Hardin Wind's proposed modification has, for the time being, been withdrawn, the Local Residents agree that the Board, at the present time, has no occasion to determine the applicability of Am.Sub.H.B. 483's setbacks to Hardin Wind's project. Should Hardin Wind, however, again present its "modification" for the Board's consideration—either as a "modification" under Ohio Admin. Code 4906-4-09(A)(5) or as a proposed "amendment" to the Certificate under R.C. 4906.06(E)—the Board will be required by R.C. 4906.201 to apply the increased setbacks to this project. As noted below, the Local Residents have a significant interest in ensuring that Am.Sub.H.B. 483's setbacks apply to "any amendment" of this Project, and they must be permitted to protect that interest.

B. The Local Residents' Interests Support Intervention

As Harding Wind has not fully abandoned its plan to relocate the collection lines, the Local Residents must be permitted to intervene to protect their interests that would be directly impacted by the proposed "modification" of the Project. Such intervention would be entirely consistent with Board precedent. The Board has granted numerous petitions to intervene filed by property owners whose property would be affected by a proposed project. See, *e.g.*, *In the Matter of the Application of Buckeye Wind LLC*, No. 13-360-EL-BGA, slip op. at 5-6, ¶¶12-14 (Nov. 21, 2013) (granting motion of proposed intervenors who claimed that the wind project would have "potential impacts" on "their residences, land, roads, and community"). See also *In the Matter of Republic Wind LLC*, No. 17-2295-EL-BGN, slip op. 6-7, ¶¶20-21, (Aug. 21, 2018) (granting motion to intervene of local residents who own property within or adjacent to the

footprint of wind turbine project, because they are “directly impacted by the proposed project.”); *In the Matter of the Application of Champaign Wind, LLC*, No. 12-160-EL-BGN, slip op. 3-6, ¶¶19-23, 25 (Aug. 2, 2012) (granting motion to intervene of “property owners who own real estate and reside within the footprint of the” wind turbine project and who “have a direct and substantial interest in [the] matter, in light of the potential visual, aesthetic, safety, and nuisance impacts of the wind project on their residences, land, and community”); *In the Matter of the Application of American Transmission Systems, Inc.*, No. 12-1636-EL-BTX, slip op. at 1-2, ¶¶3-6 (May 21, 2014) (granting motions to intervene of property owner along the possible alternate route of a proposed transmission line).

Each of the Local Residents has a real and substantial interest in this matter. Each owns property and/or resides within or adjacent to the Project footprint. They will be adversely affected by nuisance noise and shadow flicker from the Project once it is operational. They have a real and substantial interest in attempting to prevent the infliction of the additional adverse impacts on their land, residences, communities, and lives that the Project will create. The infliction of these adverse impacts would be greatly reduced by the legally-mandated application and enforcement of the current setback requirements set forth in R.C. 4906.20 and 4906.201 and in Ohio Admin. Code 4906-4-08(C)(2)(b). They have a direct interest, therefore, in ensuring that Am.Sub.H.B. 483’s setbacks apply to any amendment of the Project.

C. The Local Residents’ Objections Are Not an Impermissible Collateral Attack

In an argument that borders on the ridiculous, Hardin Wind finally asserts that the Local Residents were required to voice their objections to the Board’s “modification rule,” Ohio Admin. Code 4906-4-09(A)(5), in the Board’s proceedings regarding the rule’s promulgation.

Because they did not offer comments on the then proposed rule, Hardin Wind asserts that the Local Residents are now estopped from “collaterally attacking” the rule in these proceedings.

It is well-established, however, that the Local Residents were not entitled to seek the rule’s invalidation in those proceedings—such an attack would have been premature—and they cannot, therefore, be prevented from raising the issue of the rule’s invalidity in proceedings where the rule is applied (or sought to be applied) in an actual case or controversy.

The Ohio Supreme Court has long held that the Ohio Constitution, like the United States Constitution, limits the exercise of judicial power to “cases or controversies.” *State ex rel. Barclays Bank PLC v. Hamilton County Court of Common Pleas*, 74 Ohio St.3d 536, 541-42, 1996-Ohio-286 (1996).

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies. The extension of this principle includes enactments of the General Assembly; questions which are moot; and administrative or quasi-legislative proceedings of administrative officers and agencies.

Fortner v. Thomas, 22 Ohio St.2d 13, 14 (1970). Thus, the Court determined that “[t]he validity of a rule *can be determined only when that question arises in connection with a matter that is justiciable.*” *Fortner*, 22 Ohio St.2d at 15 (quoting *Zangerle v. Evatt*, 139 Ohio St. 563, 580 (1942)) (emphasis added). The Court, therefore, ruled that former R.C. 119.11, which has since been repealed, could not authorize judicial review of an administrative agency’s adoption of a rule. *Fortner*, 22 Ohio St.2d at 19 See also *Burger Brewing Co. v. Liquor Control Comm’n*, 34 Ohio St.2d 93, 95-96 (1973).

The Local Residents' were not permitted to seek invalidation of Ohio Admin. Code 4906-4-09(A)(5) in an "appeal" from those proceedings. They cannot, therefore, now be barred from asserting that the regulations are invalid in an "actual controversy" between adverse parties legitimately affected by application of the rule. Hardin Wind's argument to the contrary is utterly without merit.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Local Residents' Petition to Intervene and Objection to Notice of Modification, the Local Residents request the Board to grant this Petition To Intervene and to sustain their Objections to Hardin Wind's "Notice of Modification."

Respectfully submitted,

/s/ John F. Stock

John F. 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 the Local Residents

CERTIFICATE OF SERVICE

The Public Utility Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties identified on the service list of the docket card who electronically subscribed to such service. In addition, the undersigned certifies that a courtesy copy of the foregoing document is being sent via email on March 26, 2019 to:

Michael J. Settineri
msettineri@vorys.com

Thomas Lindgren
thomas.lindgren@puc.state.oh.us

MacDonald W. Taylor
mwtaylor@vorys.com

Chad A. Endsley
cendsley@ofbf.org

Joe and Deb Grant
joedebgrant@gmail.com

William A. Adams
William.Adams@baileycavalieri.com

/s/ John F. Stock _____
John F. Stock

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/26/2019 10:31:28 AM

in

Case No(s). 13-1177-EL-BGN

Summary: Reply MEMORANDUM IN SUPPORT OF PETITION TO INTERVENE
BY LOCAL RESIDENTS OF HARDIN AND LOGAN COUNTIES electronically filed by John F
Stock on behalf of Local Residents