

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Republic)
Wind, LLC for a Certificate of Environmental)
Compatibility and Public Need for a Wind-) Case No. 17-2295-EL-BGN
Powered Electric Generating Facility in)
Seneca and Sandusky Counties, Ohio.)

**REPUBLIC WIND, LLC’S MEMORANDUM CONTRA MOTION FOR
CONTINUANCE OF THE ADJUDICATORY HEARING**

I. INTRODUCTION

Although the Seneca County Prosecutor’s Office (the “Prosecutor’s Office”) has been representing various parties to this proceeding for over fourteen (14) months, it is now seeking a two month delay of the evidentiary hearing so that it can start preparing its case. The primary reason for this request is because one of the various parties the Prosecutor represents—the Seneca County Commissioners (“County”)—changed its position regarding the Republic Wind Project. The fact that an intervenor changes its position during a case does not entitle that party to a delay the evidentiary hearing. The Movants¹ have had a substantial amount of time to conduct discovery and prepare for hearing. They chose not to do so and failed to provide a legitimate reason why. As such, the Movants cannot establish good cause to support their motion.

Further, considering the negative impacts a delay of the hearing would have on the viability of the project, it would be prejudicial and unfair to Republic Wind, LLC (“Republic Wind”) to delay the evidentiary hearing. This is especially true considering that Movants have not taken any steps to prepare for hearing since seeking intervention in this case.

¹ Seneca County Commissioners, Adams Township, Reed Township, Scipio Township and Seneca County Park District are collectively referred to as “Movants”.

It is time to proceed to hearing in this matter. The Board had to adjust this schedule on numerous occasions, but the case is finally at a stage where the staff report has been issued and the parties are (or should be) preparing for the evidentiary hearing. Further delays are not justified and the Movants' motion to continue should be denied. The Movants failed to provide any explanation regarding why Adams Township, Reed Township, and Scipio Township (collectively, the "Townships"), or the Seneca County Park District ("Park District") need more time to prepare for hearing. A purported "change in the official position" of Seneca County has nothing to do with the Townships' or Park District's failure to prepare for hearing.

The County had notice of a potential change to its position due to the resignation of one of its Commissioners over a month prior to the August 19, 2019 Entry establishing the procedural schedule. The County did not bother to contact the parties about this potential change to coordinate a potential schedule or begin to prepare its case accordingly. Moreover, the County formally voted to change its position in the case on August 15, 2019, prior to the establishment of the procedural schedule. But the County failed to immediately contact the parties with its scheduling concerns or immediately file a motion for a continuance when the procedural schedule was established. Instead, the County waited until the eleventh hour to request a continuance, with significant prejudice to Republic Wind.

II. BACKGROUND

On June 20, 2018, the Prosecutor's Office filed a notice of intervention on the behalf of Scipio Township, and a notice of intervention on June 21, 2019 on behalf of Adams, Pleasant², and Reed Township. Pursuant to O.A.C 4906-2-14(H), the Townships had the right to conduct discovery when they filed their notices of intervention and have been represented by counsel

² On January 25, 2019, Pleasant Township withdrew its intervention in the proceeding.

throughout this proceeding³. Jack Van Kley of the law firm of Van Kley & Kley, LLC appeared on the behalf on the Townships on October 5, 2018. Van Kley & Walker has a significant amount of experience representing opposition in OPSB cases. Van Kley & Walker was subsequently replaced by Prosecutor's Office as counsel of record. The Townships have not conducted any discovery in this case.

On September 10, 2018, the County first intervened in this proceeding. At that time, the County was represented by the law firm of Vorys, Sater, Seymour and Pease LLP ("Vorys"). The County never issued any issue discovery requests in this case. On August 18, 2019, Vorys withdrew as counsel for the County. On August 19, 2019, the ALJ issued an entry establishing a procedural schedule setting an October 2, 2019 hearing date. On August 28, 2019, the Prosecutor's Office filed a notice of appearance on the behalf of the County.

On September 4, 2019, the Movants filed a Motion to Continue the Adjudicatory Hearing Scheduled for October 2, 2019 for Sixty Days ("Motion"). Movants requested that the adjudicatory hearing be rescheduled to December 2, 2019 or later along with corresponding deadlines for testimony.

III. ARGUMENT

A. The Townships and Park District have presented no arguments regarding why they are entitled to a delay of the hearing.

The Motion states that it is predicated on the Prosecutor's Office "just recently becoming substantively involved in these proceedings" and "the need for time to prepare for the adjudicatory hearing". Motion p. 1. **The Prosecutor's Office has been involved in this proceeding since June 20, 2018.** There is absolutely no basis for the claim that Prosecutor's

³ It should be noted that the law firm of Van Kley & Kley, LLC appeared on the behalf on the Townships on October 5, 2018. While Van Kley & Walker may have replaced the Prosecutor's Office for a period of time, the Prosecutor's Office filed a notice of appearance on behalf of the Townships on August 28, 2019.

Office is new to this case. Further, there is no basis for any claim that the Prosecutor's Office needs time to prepare when they have been involved in this proceeding for over fourteen (14) months.

The Motion focused primarily on alleged "recent developments" involving the County, which Republic Wind will address below. But the Townships and Park District, who are separate entities and parties than the County, failed to provide any explanation regarding why they have failed to take an active role in this case until the last minute. The Townships, who are represented by the Prosecutor's Office, had the right to conduct discovery beginning in June 2018. They have failed to issue any discovery. The Park District, who is represented by the Prosecutor's Office, has had the right to conduct discovery since January 2019. It, too, failed to conduct any discovery. It appears none of the Movants have started to prepare for hearing even though they were aware of the hearing date and had ample time to conduct discovery. Under these circumstances, there is no showing of good cause to delay the hearing. *See In re FirstEnergy*, Case No. 12-1230-EL-SSO, 2012 WL 2049566, at *3 (June 1, 2012) (PUCO denied motion to continue hearing where parties were afforded an appropriate amount of time to conduct discovery and prepare for hearing).

Although the Motion discusses a "late change in counsel", the Prosecutor's Office has been counsel in this proceeding in some fashion since June 2018. In addition, the Prosecutor's Office indicates it has "no prior experience before the Ohio Power Siting Board" (Motion p. 3) and that it "needs sufficient time to adequately prepare [its] clients' case." *Id.* But the Prosecutor's Office has had well over a year to become familiar with the OPSB process. In addition, the Townships were represented by the firm of Van Kley & Walker during this proceeding. Van Kley & Walker has a significant amount experience opposing OPSB

applications, so the Townships cannot claim that they were not represented by experienced OPSB counsel earlier in this proceeding. Furthermore, because the Prosecutor's Office, through Assistant Prosecuting Attorney Joshua Clark, was counsel for the certain townships and the County in the *Seneca Wind, LLC*, OPSB Case No. 18-488-EL-BGN proceeding, the Prosecutor's Office cannot legitimately claim it is completely unfamiliar to the OPSB process.

It would be extremely prejudicial to Republic Wind for the OPSB to delay consideration of the Application simply because the Movants only recently decided to actively oppose the Application. The Board should not ignore the Townships' and the Park District's utter failure to prepare for hearing simply because of the County's change of heart regarding the Project (discussed further below). Granting the Motion would reward the Townships and the Park District by further delaying the project, while also imposing negative impacts of additional project delays on Republic Wind.

Republic Wind previously argued that ongoing delays of the evidentiary hearing would have potentially negative economic impacts on Republic. Republic Wind, LLC's Memorandum Contra Local Residents' Motion for Continuance, p. 4 (March 4, 2019). More importantly, the ALJ acknowledged Republic Wind's concern in the March 13, 2019 Entry stating that delays to the evidentiary hearing "will only further delay the issuance of the certificate and negatively impact the viability of the project." See March 13, 2019 ALJ Entry at ¶7. The project has already experienced a significant delay due to unexpected delays in the Federal Aviation Administration's ("FAA") issuance of determinations of no hazard. Having failed to state good cause, the ALJ should deny the Motion and prevent additional negative impacts to Republic Wind's proposed project.

B. The County’s arguments for a continuance do not constitute good cause for a delay of the evidentiary hearing.

The Motion primarily hinges on one argument—the County needs more time because it changed its mind about the project. The fact that a party changes its position during an OPSB proceeding is not justification for delaying a proceeding. The County is not unique. Parties often intervene in proceedings and ultimately change their positions during the pendency of the proceeding. For example, organizations and public entities often intervene in OPSB cases. Changes in leadership or policy positions occur for these while cases are pending before the Board. Will the Board modify its procedural schedule any time an intervenor switches its position during the pendency of a case? If the Board grants the Motion, will the Board limit this “change in position” rule to the counties or should every intervenor have the right to delay a hearing simply because they changed its mind about a project?

The Board’s hearing schedule should not be subject to the whimsical changes in position of every party who has a change of heart at the last minute. This would set a dangerous precedent by allowing one party to substantially delay an entire proceeding simply because that one party “changed its position.” This is especially true in this proceeding because the County has had ample opportunity to conduct discovery. To be clear—**the County intervened in this case and has been represented by counsel since September 10, 2018.** It chose to be inactive. Republic Wind should not be punished or prejudiced at this late stage simply because one party changes course.

Furthermore, the fact that the County could potentially change its position has been known since approximately June 27, 2019, when former Commissioner Stacy announced her resignation. Commissioner Stacy previously voted to support the Republic Wind project. At this point, the County should have anticipated a potential change in its position and started preparing

accordingly. Instead, the County allowed over two months to go by before raising this issue to the Board.

The County officially voted on or about August 15, 2019 to change its position regarding the project. This was before the ALJ issued its August 19, 2019 entry establishing the evidentiary hearing and testimony filing deadlines. Yet, counsel for the Movants did not contact Republic Wind and the other parties regarding a potential continuance until September 3, 2019, weeks after formally changing its position

Republic Wind has already relied upon the procedural schedule established in the August 19, 2019 Entry. Republic Wind has begun preparation for the filing of expert testimony and coordinated schedules for the hearing. At the very least, Movants could have informed the parties of their concerns about the schedule established in the August 19, 2019 Entry. Instead, Movants allowed Republic and other parties to significantly rely on the established procedural schedule for weeks before filing the Motion.

Moreover, it would be fundamentally unfair to delay the hearing for two months to accommodate one party that switched its position late in the proceeding. In addition, Republic Wind already published notification of the hearing dates in the local papers. If the adjudicatory hearing date is moved, not only will Republic Wind have to republish notice (which results in additional publication costs), but Republic Wind would have to once again publish a notice of cancellation which may also result in confusion for the public.

Although the Prosecutor's Office indicates that it has potential scheduling conflicts with the October 2, 2019 hearing date (e.g., trials pending before the Seneca Common Pleas Court, maternity leave of an assistant prosecutor), the Prosecutor's Office did not consult with Republic Wind regarding a potential continuance until September 3, 2019, which was after Republic Wind

had already expended time and money relying up the established October 2, 2019 hearing date. While Republic Wind recognizes the importance of the Seneca County Common Pleas Court's criminal docket, the Movants are intervenors in this OPSB proceeding. They have an obligation to plan their schedules to comply with the procedural schedule established by the ALJ in this case. The October 2, 2019 hearing date has been known by all parties and their counsel for quite a period of time and should not be modified at this stage.

C. Republic Wind's prior motion to suspend the procedural schedule and motion to continue are distinguishable from the Movants' pending Motion.

The Movants claim their motion is justified because Republic Wind previously sought delays of the procedural schedule. First, Republic Wind's prior motions were uncontested, so they are clearly distinguishable from the pending Motion. Second, there was good cause supporting each motion filed by Republic Wind. On August 29, 2018, Republic Wind sought to suspend the procedural to prepare and file an amendment application. Republic Wind had a right to amend its application under the Board's rules and all parties benefited from the procedural efficiency of suspending the procedural schedule until the amended application was filed. In addition, Republic Wind's April 26, 2019 unopposed motion to continue was filed to provide Republic Wind sufficient time to obtain FAA information that was necessary for Staff's investigation. Delaying the hearing was essential to obtain this necessary information to develop a complete staff report.

The pending Motion is not submitted for procedural efficiency or to help facilitate a complete staff report. The sole purpose of the Motion is to give the Movants more time to build a case against the project. However, the Movants have had an ample opportunity to develop their case and prepare for hearing. They simply failed to do so. As such, the motion is strictly for purposes of delay and should not be granted by the ALJ.

IV. CONCLUSION

Republic Winds requests that the Board deny Movants' motion to continue the procedural schedule.

Respectfully submitted on behalf of
REPUBLIC WIND, LLC



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following parties listed below by electronic mail, this 5th day of September 2019.



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Summary: Text Republic Wind, LLC'S Memorandum Contra Motion for Continuance of The Adjudicatory Hearing electronically filed by Teresa Orahood on behalf of Devin D. Parram