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BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application)
of Black Fork Wind Energy, LLC for)
a Certificate to Install Numerous)
Electricity Generating Wind Turbines in)
Crawford and Richland Counties, Ohio)

Case No. 10-2865-EL-BGN

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**RESPONSE TO JUNE 1, 2011 AND JUNE 6, 2011
FILINGS ON PUBLIC COMMENT DOCKET BY MR. JOHN WARRINGTON**

I. INTRODUCTION

Black Fork Wind Energy, LLC (the "Applicant") is filing this response to address John Warrington's June 1, 2011 and June 6, 2011 requests, placed as public comments on the docket, that the Ohio Power Siting Board (the "Board") dismiss the Application in the above styled proceeding on the basis that it is incomplete.¹ In his June 1, 2011 response, Mr. Warrington made various claims contesting the information supplied in the Application including comments on the Black Fork Wind Energy Project's (the "Project") sound study and raptor nest identification. In his June 6, 2011 filing, Mr. Warrington claimed that one of the seven monitors used in the sound study was outside the current Project boundary and that the Application failed to adequately address "infrasound."

The Board should deny Mr. Warrington's requests because he lacks standing to dispute the contents of the Application for purposes of completeness. The Board has made it very clear that intervenors do not have standing to dispute the grant of waivers or other matters the General Assembly has reserved to the Board. See In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign

¹ John Warrington has moved to intervene in this proceeding, filing such request with the Board on May 19, 2011. Mr. Warrington did not serve Black Fork Wind Energy, LLC with a copy of his filing. The Applicant notes that Mr.

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County, Ohio, Case No. 08-0666-EL-BGN, July 31, 2009 Entry at page 8. The decision on completeness is that of the Board's Chairman, and the Chairman's alone. See OAC 4906-5-05(A). Moreover, the Board may disregard Mr. Warrington's claims because the majority of his arguments dispute the validity and interpretation of the information presented in the Application. Such claims have no bearing on completeness and should be reserved for the evidentiary hearing.

The only claim raised by Mr. Warrington regarding completeness was his claim that the sound study fails to address land usage. See June 1, 2011 filing, part 1. Mr. Warrington fails to cite to any authority requiring an applicant to provide the Board with a sound study that addresses land usage. Moreover, the Application, at Exhibit H, contains extensive modeling on sound levels at various distances from turbines, in compliance with Rule 4906-17-08(A)(2) and presents, at pages 71 through 75 of the Application, a detailed analysis of operational sound levels, in compliance with Rule 4906-17-08(A)(2)(b). The Application also presents a discussion of the impact of operational noise on noise sensitive areas within one mile of the proposed facility in compliance with Rule 4906-17-08(A)(2)(c). Contrary to Mr. Warrington's claims, the Applicant has submitted sufficient information in regards to operational sound to allow for the Application to be deemed complete.

In sum, as more fully discussed below, the Board should deny Mr. Warrington's requests because he lacks standing and the substance of his claims are without merit.

Warrington resides outside the project boundary and the nearest proposed turbine is approximately 2,700 feet from his property line.

II. ARGUMENT

A. Intervenor's Lack of Standing

It is well established that intervenors lack standing to challenge decisions that the General Assembly has reserved to the Board and its Staff. The Board made this clear in its July 31, 2009 Entry (the "Entry") in the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio, Case No. 08-0666-EL-BGN. In that Entry, the Board rejected an intervenor's attempt to weigh in on the validity of the waivers sought by the applicant from the Board's rules. The Administrative Law Judge noted that the Board's "detailed certification application filing requirements are analogous to the Commission's SFRs. As such, an intervenor in a Board proceeding lacks standing to oppose the grant or denial of an applicant's request for waiver. The decision to grant or deny a waiver request is in the sole discretion of the Board." (Entry, p. 8).

That ruling applies to the issue at bar. Section 4906.06, Revised Code, states that "[a]n applicant for a certificate shall file with the office of the chairperson of the power siting board an application, *in such form as the board prescribes ... [.]*" R.C. § 4906.06 (emphasis added). The statute further provides that an application shall contain "[s]uch other information as the applicant may consider relevant or *as the board by rule or order may require ...*" *Id.* (emphasis added). The Board has adopted detailed rules to facilitate the Staff's review and investigation of certification applications in Chapter 4906 of the Ohio Administrative Code ("OAC").

Relevant to Mr. Warrington's attempt to weigh in on the completeness decision, Rule 4906-5-05 states that:

Upon receipt of a certificate application for a wind farm or major utility facility which is not related to a coal research and development project as defined in section 1551.01 of the Revised Code, or to a coal development project as defined in section 1551.30 of the Revised Code, submitted to the Ohio coal development

office for review under division (B)(8) of section 1551.33 of the Revised Code, *the chairman shall examine the certificate application to determine compliance with Chapters 4906-1 to 4906-17 of the Administrative Code.* Within sixty days following receipt, the chairman shall either:

- (1) Accept the certificate application as complete and complying with the content requirements of section 4906.06 of the Revised Code and Chapters 4906-1 to 4906-17 of the Administrative Code.
- (2) Reject said certificate application as incomplete, setting forth specific grounds on which the rejection is based.

OAC 4906-5-05(A) (emphasis added). It is clear from the Rule that the decision on completeness is at the sole discretion of the Board's Chairman. Accordingly, intervenors have no standing to challenge the completeness of an application. For this reason alone, the Board should reject Mr. Warrington's June 1, 2011 and June 6, 2011 filings.

B. The Application is Complete

Although Mr. Warrington lacks standing to attack the completeness of the Application, the Applicant will respond to his contentions. In his June 1, 2011 filing, Mr. Warrington first claims that the sound study fails to address land usage and that the study relied on modeling using L90 data. He cites no valid authority or rule that requires an applicant to address land usage in regards to sound. Mr. Warrington also ignores the fact that the sound study in the Application at Exhibit H contains extensive modeling on sound levels at various distances from turbines, in compliance with Rule 4906-17-08(A)(2). The Application, at pages 71 through 75 also presents a detailed analysis of operational sound levels, in compliance with Rule 4906-17-08(A)(2)(b). Significantly, the Application presents a discussion of the impact of operational noise on noise sensitive areas within one mile of the proposed facility in compliance with Rule 4906-17-08(A)(2)(c). Contrary to Mr. Warrington's claims, the Applicant has submitted sufficient information in regards to operational sound to allow the Application to be deemed complete.

Mr. Warrington makes other claims regarding the sound study. However, these claims are aimed at the validity of the information and not completeness. For example, he claims that the regression lines in the study are “improper” and that averages are more “accurately described in the 20-25 db range.” He also claims that “widespread community dissatisfaction” will result and that the Applicant is attempting to “pass L90 at 43db + 5 night time and 53 db +5 daytime.” These claims have no bearing on the completeness of the Application. Rather, these claims are aimed at the validity of the information in the Application; claims that can be addressed at hearing.

Mr. Warrington next alleges that the Application “errantly states” that no raptor nests exist within the two miles of the project.”² To the contrary, page 98-99 of the Application discusses the results of a Raptor Nest Survey in which seven potential raptor nests were documented. The Raptor Nest Survey was also discussed in the Avian Studies exhibit to the Application (Exhibit L).

Mr. Warrington concludes his June 1, 2011 filing by making a variety of allegations, disputing the validity of certain statements in the Application such as the statement that the December public meeting was well received. None of these claims address the completeness of the Application. Rather, these claims go to the analysis of the information; an analysis that falls solely under the Board’s purview. See In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio, Case No. 08-0666-EL-BGN, July 31, 2009 Entry at page 8.

² Mr. Warrington cites various sections of the Application to support his claim that the Application has errantly stated that no raptor nests exist within two miles of the project boundary. These sections do not support his claim. Section 5 of the Application on the Board’s docket at page 155 of 200 is a request by the United States Fish and Wildlife Service to increase the scope of surveys, including nest searches within a one mile buffer of the proposed facility. Section 6 on the docket at page 68 and page 175 reference the same letter.

In his June 6, 2011 filing, Mr. Warrington again requests that the Board dismiss the Application as incomplete. In this filing, Mr. Warrington claims that the Applicant's sound monitoring station H is not located within the project boundary and is poorly located. He claims that the monitoring station will artificially elevate the average background noise levels. Although sound monitoring station H is outside the revised project boundary by approximately $\frac{3}{4}$ of a mile, the RSG Sound Study fully describes all sound monitoring locations including the notation that a bridge near sound monitoring station H was closed during the test period. Moreover, the RSG Sound Study relied on eight monitoring stations to "represent distinctive soundscapes around the project area." See Application, Exhibit H at page 8. Also, there is no requirement in the Board's rules regarding placement of monitoring stations. Simply put, Mr. Warrington can address his concerns over sound monitoring station H at the evidentiary hearing but this is not an issue for completeness.

Lastly, Mr. Warrington contends in his June 6, 2011 filing that "infrasound" is not adequately addressed in the sound study. To the contrary, the Applicant provided information on low frequency noise levels, at pages 72 to 73 of the Application, in response to Rule 4906-17-08(A)(2)(b) which requires an applicant to consider the impact of low-frequency noise levels. Moreover, Section 8.3 of the RSG Sound Study (Exhibit H) presents a discussion of the modeling of low frequency noise. Accordingly, all of Mr. Warrington's claims that the Application is not complete are without merit.

III. CONCLUSION

For the foregoing reasons, the Applicant requests that the Board reject Mr. Warrington's June 1, 2011 and June 6, 2011 claims that the Application is incomplete. Mr. Warrington lacks standing and nevertheless, his arguments have no merit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served upon the following persons

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