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**

MEMORANDUM CONTRA OF BLACK FORK WIND ENERGY, LLC TO THE APPLICATIONS FOR REHEARING BY CAROL A. GLEDHILL AND LOREN A. GLEDHILL

I. INTRODUCTION

Pursuant to Rule 4906-7-17(E) of the Ohio Administrative Code, Black Fork Wind Energy, LLC (the "Applicant") submits this memorandum contra to the February 22, 2012 applications for rehearing of intervenor Carol A. GledHill and Loren A. Gledhill. The Gledhills did not participate in the evidentiary hearing in this matter. However, they have submitted applications for rehearing, copying verbatim intervenor Gary Biglin's application for rehearing. The Applicant submits, as it did in regards to Mr. Biglin's application for rehearing, that the Ohio Power Siting Board's January 23, 2012 Opinion, Order and Certificate (the "Certificate") in this case granting the Applicant's application to construct up to 91 wind turbines in Crawford and Richland Counties, Ohio (the "Project") addressed all of the issues raised by the Gledhills, was reasonable and lawful and was based on the record before it. The Gledhills' applications for rehearing should be denied for the same reasons that Mr. Biglin's application should be denied.

II. ARGUMENT

A. The Board acted lawfully and reasonably in approving the turbine setbacks proposed for the Project.

In their first ground for rehearing, the Gledhills argue that the Board failed to require the Applicant to maintain an adequate turbine setback distance from non-participating property lines and public roadways in violation of Section 4906.10(A)(2), (3) and (6), Revised Code.[1] (Memorandum in Support, p. 1.) They also argue that safe setback distances should be based only from property lines and the public roadways so that Ohio property owners can enjoy their property.

Rule 4906-17-08(C)(1)(c) of the Ohio Administrative Code sets forth the setback requirements that the Board has established. This rule provides in pertinent part:

> (c) Describe proposed locations for wind turbine structures in relation to property lines and habitable residential structures, consistent with no less than the following minimum requirements:
>
> > (i) The distance from a wind turbine base to the property line of the wind farm property shall be at least one and one-tenth times the total height of the turbine structure as measured from its tower's base (excluding the subsurface foundation) to the top of its highest blade.
> >
> > (ii) The wind turbine shall be at least seven hundred fifty feet in horizontal distance from the tip of the turbine's nearest blade at ninety degrees to the exterior of the nearest habitable residential structure, if any, located on adjacent property at the time of the certification application.

At page 18 of the Staff Report of Investigation, the Staff made the following observation

[1] Because the Gledhills submitted identical grounds for rehearing, the Applicant will address the Gledhills' grounds for rehearing as if submitted jointly.

regarding the Project's setback requirements:

> (5) Based on the largest turbine model, the statutory minimum setbacks equate to 543 feet from a non-participating property line and 914 feet from residences on non-participating property. In establishing minimum property line setbacks of 963 feet and resident setbacks of 1,250 feet the Applicant has designed the wind farm to exceed all statutory requirements.

Staff's observations were based on information presented in the Applicant's application that turbine locations from parcel setbacks and habitable residential structures exceeded the regulatory requirements. (Applicant Ex. 1, p. 118.)

At pages 58-59 of the Certificate, the Board noted intervenor Gary Biglin's concerns regarding setbacks but also noted the testimony of Staff witness Pawley that the setbacks followed the Ohio Revised Code. (Certificate, p. 58.) It also noted the testimony of Dale Arnold, Director of Energy, Utility and Local Government Policy for the Ohio Farm Bureau Federation. (Certificate, p. 58.) Mr. Arnold testified that the setback requirements for this project are the minimum setback created by State law and House Bill 562, as well as the rules promulgated by the Board, given the current technology. (Certificate, p. 58; Tr. 326.) Mr. Arnold felt that the current setback requirements create no disincentive to property owners because they do not preclude a property owner who signs a lease from subdividing his property or selling it to new landowners. (Certificate, p. 58, Tr. 301-302.)

Other witnesses testified in support of the Project's turbine setbacks. Jay Haley, a professional engineer, testified at length regarding shadow flicker and the low risk of ice throw. (Tr. at 373-374, 387-388; Applicant Ex. 15.) Mr. Haley testified that the probability of an incident of ice throw was less than once in 100,000 years. (Tr. 374.) He also testified that he was not aware of any incidence of an ice strike despite his extensive research and experience in that area. (Tr. 380.) Mr. Haley also testified at length regarding the use of icing sensors and

how that equipment further reduces the risk of ice throw. (Tr. 402). Dr. Diane Mundt also testified in support of the Project's setbacks. (Applicant Ex. 20.)

As to the Gledhills' claim that people should be able to develop their property now or in the future, this Board has held that " ... nothing in Chapter 4906, Revised Code, prohibits adjacent landowners from developing their property regardless of the presence of wind turbines on adjacent property." (In re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Opinion, Order and Certificate, March 22, 2010 at p. 40.) The Board has also held that " ... Chapter 4906, Revised Code, and Rule 4906-17-08, O.A.C., which also provides for wind farm setbacks, does not prohibit the construction of residences within the proposed setback, after a wind farm has already been constructed." (Id.)

Simply put, the Gledhills' argument that turbine setbacks should only be from property lines is best left to the General Assembly. Current state law recognizes minimum property line and habitable residence setbacks for wind turbines, setbacks this Board has adopted through its rules. The Board found in the Certificate that the Stipulation's conditions addressing the requisite setback complied with the rule mandates and that no evidence was presented on the record which would lead the Board to believe that additional measures should be taken at this time. Accordingly, given the evidence in the record, the Board acted lawfully and reasonably in approving the Stipulation as presented. The Gledhills' first ground for rehearing must be denied.

B. The Project's setbacks from property lines and occupied residences are adequate and protect property owners and users of public roadways.

The Gledhills' second ground for rehearing is that the turbine setbacks established under the Certificate are inadequate as to non-participating property owners and persons using public roadways. (Memorandum in Support, p. 2-4.) To the contrary, the evidence in the record

establishes that the turbine setbacks for this Project are more than adequate to protect the health and safety of the public.

The Gledhills first claim that the Board has allowed wind turbines to be sited within 500 feet from property lines and public roadways. (Memorandum in Support, p.2.) The Gledhills provide no evidentiary support for this claim or their claim that Turbine 58 is within 500 feet of two roadways. Moreover, the Gledhills ignore the testimony of a professional engineer, Mr. Jay Haley, regarding the low risk of ice throw as to public roadways and the difference in risk between buildings and moving vehicles. (Tr. 378-375.) Mr. Haley also testified that he was not aware of any incident of ice throw. (Tr. 380.)

Although Mr. Haley was not aware of any ice throw incident ever occurring, the Gledhills argue at pages 2 and 3 of their briefs that the only way to ensure 100% safety is to impose the GE setback formula referenced in the Staff report (Staff Ex. 2, p. 37) to property lines and roadways. The Board addressed this argument in its decision, finding that the risk of ice throw was adequately addressed in the Stipulation. In reaching its conclusion, the Board properly considered the expert testimony of Mr. Haley regarding the probability of ice throw being less than once in 100,000 years and that he was not aware of any incident of an ice strike despite his extensive research and experience in that area. (Certificate, p.57; Tr. at 373-374, 387-388.) The Board also considered Mr. Haley's testimony regarding the use of icing sensors and how that equipment further reduces the risk of ice throw. (Certificate, p. 57; Tr. 400-402.)

Mr. Haley also testified that the GE setback formula referenced in Condition 45 and at page 37 of the Staff Report originated from a publication by Seifert, Westerhellweg, and Kroning (2003), Risk Analysis of Ice Throw From Wind Turbines. Mr. Haley testified that he had " ... reviewed that publication, and it is clear from the publication that the setback formula is a simple

empirical equation that is meant to be a rough guideline for initial siting efforts. *** The risk of ice throw on this project does not warrant the application of the Seifert setback formula, which even the authors admit is a 'rough guess.'" (Applicant Ex. 16, A.7.) Even intervenor Gary Biglin admitted that the GE setback formula was of limited application, agreeing on cross-examination that GE only recommended application of the setback if an ice detector is not used on the turbine. (Tr. 754; Company Ex. 1, Appendix E at 8.4.1, p. 50 of 68.)

The Board's decision to reject Mr. Biglin's use of the GE setback formula is also supported by the Board's finding that no evidence was presented in the record that warranted additional measures beyond the minimum setbacks prescribed under the Board's rules. (Certificate at pp. 58-59.) As noted above, Chapter 4906-17 of the Board's rules applies the property line and residential setbacks of Section 4906.20 of the Revised Code to wind farms. The Project was found to comply with these minimum setbacks, in fact exceeding the minimum setbacks with a self-imposed setback of 563 feet from non-participating property lines and 1,250 feet from non-participating residences. (Applicant Ex. 1, p. 118.) This fact coupled with the testimony of the Applicant's witnesses fully supports the Board's decision to not adopt Mr. Biglin's setback formula.

The Gledhills' last argument on the setback issue is that the Certificate deprives property owners "of their Constitutional Rights to the protection of private property (U.S. Const. XIV Amend; Ohio Const. Sec 19 Art.I) and to procedural due process (U.S. Const. XIV Amend; Ohio Const. Sec. 16, Art. I)." (Memorandum in Support, p. 4.) The Board rejected a similar argument made in the Buckeye Wind proceeding in 2010. (In re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Opinion, Order and Certificate at pp. 36-40 and Entry on Rehearing, July 15, 2010, pp. 34-35.) The Board, in that proceeding, found that nothing prohibited adjoining landowners from

developing their properties or constructing residences after a wind farm has been constructed. (Id., p. 40).

The Board's decision in the Buckeye Wind proceeding was fully supported by Ohio case law. First, it is well established in Ohio that a government entity like the Board should not take action on a requested permit or zoning ordinance based solely upon possible future plans, where no action has been taken on such plans. See e.g. Henle v. City of Euclid, 97 Ohio App. 258 (Cuyahoga Cty. 1954) (city's plan for future highway was insufficient to preclude grant of permit to re-zone property so that a filling station could be constructed); State ex rel. Sun Oil Co. v. City of Euclid, 164 Ohio St. 265 (1955) (upholding Henle); Krieger v. City of Cleveland, 143 N.E. 142 (Cuyahoga Cty. 1957) (in proceeding by landowner to declare zoning ordinance unconstitutional, court refused to look at future uses of land, explaining, "It may be that in the near future the industrial development of the city of Cleveland will require ... a change in zoning, but for this court to say, from the facts shown now to exist, that the present zoning is not the best ... and that the zoning must be changed, would be unwarranted and illegal intrusion upon the functions of the legislative body of the city."). This case law supports the Board's approval of the Certificate regardless of any future development of landowner properties.

Second, Ohio case law holds that established setbacks do not constitute unconstitutional takings if enacted as a result of a proper exercise of the police power and are reasonably necessary for the "preservation of the public health, safety and morals." See Andres v. City of Perrysburg, 47 Ohio App. 3d 51, 54 (Wood Cty. 1988), citing Pritz v. Messer, 112 Ohio St. 628 (1925) ("[l]aws enacted in the proper exercise of the police power ... reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private

property.'"). Setbacks were established by the General Assembly to safeguard the public from any potential harm, including, noise, shadow flicker, blade throw or ice throw, which may result from construction of the wind turbines. Such action is within the police power to protect the public health, safety and morals, and therefore, does not constitute an unconstitutional taking of private property.

The Gledhills' constitutional arguments have no merit and this ground for rehearing must be rejected.

C. The Board did not improperly delegate authority to the Administrative Law Judges.

In their third ground for rehearing, the Gledhills' argue that the Board relied upon the Administrative Law Judges to reach a final decision which was merely rubber stamped by the Board. (Memorandum in Support, pp. 4-5.) They also argues that the Board must meet its statutory obligation to carefully weigh the issues and evidence and to reach an independent determination whether the Project should be constructed as proposed. (Id.)

A similar argument regarding the delegation by the Board to the drafting of the Order by the administrative law judge was raised in re Buckeye Wind LLC, Case No. 08-666-EL-BGN, Entry on Rehearing, July 15, 2010 at pp. 36-37 where the Board held:

> (90) In considering this issue, the Board is mindful of the recent decision of the Supreme Court of Ohio ("court") In re the Application of Am. Transm. Sys., Inc. (May 4, 2010), 2010-Ohio 1841, wherein the court found that an Order, signed by the Board, demonstrates that the Order was considered by the Board. Moreover, the court concluded that drafting an Order and deciding an Order are not the same, and nothing in the Revised Code prohibits the Board from delegating the drafting of an Order to an ALJ. In addition, the court relied on a long-standing presumption of regularity, wherein, in the absence of evidence to the contrary, a public board is presumed to have properly performed its duties. Accordingly, UNU's request for rehearing on the grounds that the Board improperly delegated its duties to the ALJs should be denied.

The Board should deny the Gledhills' third ground for rehearing for the same reasons.

D. The Administrative Law Judges did not apply a procedure towards the citizen intervenors that was either misleading or prejudicial.

In their fourth ground for rehearing, the Gledhills offers four criticisms of the procedural process. (Memorandum in Support, pp. 5-6.) First, they complain that there was a compressed schedule from the time the citizen intervenors were acknowledged and the dates for the public hearing and the adjudicatory hearing. They argue that other project cases have had a window of about two weeks between the hearings. The Gledhills, however, ignores the fact that the public hearing in this proceeding took place on September 15, 2011 and that the evidentiary hearing did not begin until October 11, 2011. This was a window of about four weeks between hearings. The Gledhills also did not participate in the evidentiary hearing. The Gledhills' criticism must be rejected.

Secondly, the Gledhills complain that they did not receive a copy of the application until October 11, 2011. However, the Applicant was under no legal obligation to serve the Gledhills with a copy of the application considering they intervened well after the date that the Applicant filed and served copies of the complete application. The application was also available on-line on the Board's website within days of the March 10, 2011 filing date. Even if the Gledhills did not have access to the application (which they clearly did), they make no showing of prejudice.

The Gledhills' third criticism is that the Administrative Law Judges referred to a settlement conference as a settlement meeting and at other times as a stipulation meeting during a September 9, 2011 prehearing conference. The Gledhills claim this was very confusing. However, the Gledhills did not participate in the prehearing conference. Regardless, any

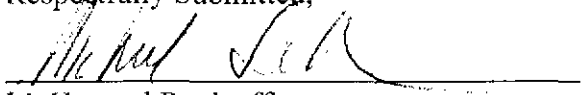
confusion on the Gledhills' part should have been resolved through the September 12, 2011 Entry setting a date for the settlement conference. The Gledhills' third criticism has no basis.

The Gledhills' last criticism is that Mr. John Pawley was the only Staff witness made available for cross-examination. As an initial point, Staff, the Applicant and intervenors were free to choose who will testify on their behalf. In this situation, Mr. Pawley was the manager of the Staff investigation and preparation of the Staff Report and testified in support of the September 28, 2011 Joint Stipulation and Recommendation. There is nothing unreasonable or unlawful about having a single witness support the position of the Staff. Clearly the Board did not commit error when the Staff chose Mr. Pawley to testify in support of the Joint Stipulation and Recommendation. This ground must be denied.

III. CONCLUSION

For the foregoing reasons, the Board should deny or strike each of the grounds for rehearing raised by Carol Gledhill and Loren Gledhill.

Respectfully Submitted,



M. Howard Petricoff
Stephen M. Howard
Michael J. Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-5414
614-464-5462

Attorneys for Black Fork Wind Energy, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via U.S. Mail, postage prepaid, upon the following persons this 5th day of March 2012:

Debra Bauer and Bradley Bauer
7298 Remlinger Road
Crestline, Ohio 44827-9775

Margaret and Nick Rietschlin
4240 Baker Road
Crestline, Ohio 44827-9775

Gary Biglin
5331 State Route 61 South
Shelby, Ohio 44875

Orla Collier III
Benesch, Friedlander, Coplan & Arnoff LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215

Karel A. Davis
6675 Champion Road
Shelby, Ohio 44875

Mary Studer
6716 Remlinger Road
Crestline, Ohio 44827-9775

Carol and Loren Gledhill
7256 Remlinger Road
Crestline, Ohio 44827-9775

John Warrington
7040 SR 96
Tiro, Ohio 44887

Brett A. Heffner
3429 Stein Road
Shelby, Ohio 44875

Grover Reynolds
7179 Remlinger Road
Crestline, Ohio 44827-9775

Ohio Farm Bureau Federation
Chad A. Endsley
280 North High Street
PO Box 182383
Columbus, Ohio 43218

Alan and Catherine Price
7956 Remlinger Road
Crestline, Ohio 44827-9775

John Jones and Stephen Reilly
Assistant Attorneys General
Public Utilities Section
180 E. Broad Street, 6th Floor
Columbus, OH 43215

Thomas Karbula
3026 Solinger Road
Crestline, Ohio 44827

Michael J. Settineri