

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application)
of Black Fork Wind Energy, LLC for)
a Certificate to Site a) **Case No. 10-2865-EL-BGN**
Wind-Powered Electric Generating Facility)
in Crawford and Richland Counties, Ohio)

**BLACK FORK WIND ENERGY LLC’S REPLY IN SUPPORT OF ITS
MOTION FOR EXTENSION OF CERTIFICATE**

I. INTRODUCTION

Gary J. Biglin, Margaret Rietschlin, John Warrington, Karel A. Davis, and Brett A. Heffner (collectively, the “Intervenors”) have filed statements in various forms opposing Black Fork Wind Energy LLC’s (“Black Fork”) request to extend its Certificate of Environmental Compatibility and Public Need issued in Case No. 10-2865-EL-BGN (the “Certificate”).¹ Having opposed the initial issuance of the Certificate, the Intervenors are once again opposing the Black Fork project and some have intervened in the proceeding initiated by Black Fork to amend its Certificate to add an additional two turbine models (Case No. 14-1591-EL-BGA, the “Amendment”). Contrary to the Intervenors’ claims, Black Fork’s extension is not premature and Board precedent supports granting certificate extensions when delays have occurred as a result of litigation and market conditions. Black Fork has made a significant investment in the project including the execution of Interconnection Construction Service Agreements with PJM, a publicly available fact. Participating landowners also continue to benefit from the project, receiving payments under project leases. Black Fork’s request is also not premature considering that the Intervenors have previously litigated the Board’s decision to the Supreme Court in a

¹ Margaret Rietschlin served her Memorandum Contra on September 27, 2014; John Warrington served his Objections to Requests for Waivers on September 29, 2014; Karel A. Davis’ Memorandum Contra was filed on September 29, 2014 (Ms. Davis’ Memorandum Contra did not contain a service certificate); Brett A. Heffner served his Response to Motion for Extension of Certificate on September 29, 2014; and Gary J. Biglin served his Memorandum Contra to Black Fork Wind Energy Motion for Extension of Certificate on September 29, 2014 (Mr. Biglin’s Memorandum Contra was filed twice, on September 29, 2014 and October 1, 2014).

process that, as Mr. Biglin states in his opposition at page 1, can be lengthy. Accordingly, for good cause, the Board may grant Black Fork's request for extension of its Certificate.

II. ARGUMENT

A. Mr. Warrington's Objections to Request for Waiver are Untimely.

Mr. Warrington has filed a pleading titled Objections to Requests for Waivers which appear to address Black Fork's Motion for Waivers filed March 9, 2011 in the initial proceedings. As over three years have passed since Black Fork first filed its Motion for Waivers, Mr. Warrington's Objections are untimely, and therefore, no reply is necessary. Moreover, with the exception of the Amendment, since Black Fork only filed a motion for an extension, no other issues are before the Board. Mr. Warrington does claim that new setbacks recently implemented by Amended Substitute House Bill 483 apply to the project, a claim that is addressed below in Section F of this reply brief.

B. Black Fork's Motion for an Extension is *Not* Premature.

Ms. Davis and Mr. Biglin argue that Black Fork's request for an extension is premature because ample time remains prior to the expiration of the Certificate to ask for an extension at a later date. (Davis at 1 and Biglin at 1). Although Ms. Davis and Mr. Biglin are correct in their assertion that Black Fork's Certificate does not expire until January 23, 2017, Black Fork should not be forced to wait until the eve of its Certificate expiration date to request an extension.

Ms. Davis suggests that Black Fork should wait and seek an extension of its Certificate in January 2016. If that happened, Black Fork would have to obtain a Board decision, resolve any administrative appeals and the likely Supreme Court appeal within a 12 month period, along with obtaining any needed financing, developing construction drawings and commencing

construction. That schedule would make it extremely difficult, if not impossible, for the project to be ready to commence construction.

Black Fork would still face a difficult project schedule even if it waited until January 2015 (less than three months from now) as the likely Supreme Court appeals on the Amendment and Certificate extension request would not be filed until approximately July 2015. Given the lengthy time it takes to resolve a Supreme Court appeal, the Court would not likely rule on the appeal until 2016, and the project would still be facing a compressed timeframe to try and commence construction by January 2017.

Intervenors filing of their opposition to this extension and filing of petitions to intervene² in response to the Amendment illustrate that the extension and amendment process will likely be highly contentious and time-consuming. Filing the extension request, now ensures that all appeals can be resolved before project financing and avoid further delays to the project schedule. Accordingly, Black Fork's extension request is not premature.

C. The Board has Previously Found that Litigation and Market Changes are Legitimate Reasons to Extend a Certificate.

Black Fork is requesting an extension of two years to commence construction, due, in large part, to time lost to litigation that impaired Black Fork's ability to proceed with development and construction of the Black Fork Wind Energy Project without the risk of a Supreme Court reversal. While Mr. Biglin admits at page 1 that Black Fork was tied up in litigation for two years—the time it took before the Supreme Court of Ohio issued a decision affirming the Board's issuance of the Certificate—he and Mr. Heffner dispute that litigation is an appropriate reason for extending the Certificate to recoup the time spent in litigation. (Biglin at

² Margaret Rietschlin served her Request to Preserve the Ability to Intervene in the Proposed Amended Case on September 27, 2014; Gary J. Biglin served his Petition to Intervene on September 29, 2014 (Mr. Biglin's Petition was filed twice, on September 29, 2014 and October 1, 2014); and Karel A. Davis filed her Petition to Intervene on September 30, 2014.

1 and Heffner at 1-2). This Board, however, recently granted an extension based primarily on delays to the project caused by litigation. *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. 08-666-EL-BGN, Entry (Aug. 25, 2014). With two years lost and the likelihood of further appeals by the Intervenors, the requested extension is entirely reasonable as it would allow any litigation over the extension to resolve before project financing and project design.

Market conditions are also a valid basis for seeking an extension of the Certificate. Mr. Biglin claims that market conditions are not a valid basis to “limit efficient land use of property for years to come” and Mr. Heffner makes a similar claim. (Biglin at 1 and Heffner at 3). Mr. Biglin and Mr. Heffner both ignore the fact that no landowners participating in this project have submitted any public comments opposing the extension of the Certificate. The lack of landowner opposition makes sense considering that landowners continue to receive payments from the project and can continue to use their property for agricultural purposes. That alone is an efficient use of property. Also, this Board recently granted a three-year certificate extension based, in part, on market conditions. *See In re Hardin Wind Energy LLC*, Case No. 09-479-EL-BGN, Entry (Aug. 25, 2014). The benefit participating landowners will continue to receive along with the Board’s prior precedent on recognizing market conditions for proposed generation projects supports a grant of Black Fork’s motion for an extension.

D. A Public Hearing is Unnecessary to Extend a Certificate.

Mr. Biglin and Mr. Heffner both argue that a public hearing should be held on Black Fork’s motion for extension. (Biglin at 2 and Heffner at 4). The requested extension to address litigation delays and market changes, however, does not implicate any factors that the Board

previously addressed in the Certificate proceeding. Further, a request for a certificate extension is not a change in the facility design which would trigger an amendment application, and Section 4906.07 of the Revised Code only requires a hearing if “the *proposed change in the facility* would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.” ORC § 4906.07 (emphasis added). As this motion for extension only deals with the Certificate’s timing, no hearing is required. Moreover, the absence of a hearing will not limit public participation, as Black Fork served parties to the prior proceeding, as well as local officials with a copy of its motion for extension and Amendment. Black Fork also published notice in local newspapers summarizing its Amendment and extension request.

E. Black Fork Continues to Proceed with the Black Fork Wind Farm Project Despite Delays Due to Litigation and Energy Market Conditions.

As stated in Black Fork’s motion for extension, despite the delays in construction caused by the litigation and energy market conditions, Black Fork continues to proceed with the project’s development. Mr. Biglin opposes the extension, in part, on the basis that Black Fork “should be required to provide an itemized listing of such resource expenditures to support the [sic] these claims.” (Biglin at 1). Mr. Biglin states that “[t]he burden is on Black Fork to prove the legitimacy of its statements.” Contrary to Mr. Biglin’s belief, Black Fork continues to make landowner payments and has worked to develop the project’s PJM interconnect. For example, PJM’s website confirms that Black Fork has executed an Interconnection Service Agreement and an Interconnection Construction Service Agreement with PJM for its queue number U4-001.³ Work under those agreements is currently suspended as allowed under the PJM tariff given the delays to the project and current market conditions. *See* PJM Tariff, Appendix 2 at Section 3.4

³ See <http://www.pjm.com/planning/generation-interconnection/generation-queue-active.aspx>.

(providing for aggregate 3-year suspension period).⁴ Black Fork has invested a significant amount of money to develop its PJM interconnect as evidenced by the security deposit it was required to remit to PJM under its Interconnection Service Agreement (1.1 million dollars) in 2013.⁵ Black Fork's investment in the project establishes good cause for its Certificate extension request.

F. The Black Fork Wind Energy Project is Not Subject to the New Setback Requirements Established by Am. Sub. House Bill 483.

Mr. Warrington and Ms. Rietschlin imply that the Black Fork Wind Energy Project should be subject to the new setback requirements recently established by Amended Substitute House Bill 483 ("HB 483"), codified at Section 4906.201 of the Revised Code. However, these new setback requirements do not apply retrospectively, and moreover, the Board does not have the authority to apply the new setbacks retroactively. ORC § 1.48 ("[a] statute is presumed to be prospective in its operation unless expressly made retrospective"); *see also, e.g., Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360 (2007). Section 28, Article II of the Ohio Constitution also prohibits the impairment of accrued, substantive rights. *Discount Cellular*, 112 Ohio St. 3d at 372-73; *see also, e.g., Gibson v. City of Oberlin*, 171 Ohio St. 1, 6 (1960) ("The right [to establish a nonconforming use] became vested, under the law applicable thereto, upon the filing of the application for the permit."). Therefore, the new setbacks established by HB 483 are not applicable to the Black Fork Wind Energy Project or to this proceeding.

⁴ The PJM tariff can be found at <http://www.pjm.com/~media/documents/agreements/tariff.ashx>; *see also* FERC Docket ER12-1177-001, page 274.

⁵ Black Fork's Interconnection Service Agreement with PJM can be found at https://www.pjm.com/pub/planning/project-queues/isa/u4_001_isa.pdf and reflects that it was executed in February 2013 by Black Fork and required a security deposit of 1.1 million dollars which has been remitted to PJM.

G. The Board’s Rules Remain in Effect.

Mr. Biglin also implies that the Board’s current rules are not in effect. (Biglin at 1). Although this argument has no bearing on the Certificate extension request, it can be easily addressed. The Board’s rules remain in effect and the Board made this clear in paragraph 138 of its February 18, 2014 Finding and Order in Case No. 12-1981-GE-BRO stating “[i]n conclusion, the Commission finds that Ohio Adm. Code Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 *should* be rescinded and replaced by new Ohio Admin. Code Chapters 4906-1 through 4906-7.” The Board never stated that the current rules “are” rescinded and common sense dictates that the current rules remain in effect until the new rules take effect.

III. CONCLUSION

Black Fork’s request to extend its Certificate is supported by good cause given Black Fork’s continued pursuit of the project and Board precedent on other extensions. Black Fork’s request for extension is also not premature given that the Intervenor’s opposition to this extension and the Amendment will likely cause additional delay and further appeals. This delay can be alleviated by resolving Intervenor’s opposition to the extension along with any subsequent appeals now rather than at the end of the Certificate’s five-year period.

Respectfully submitted,

s/Michael J. Settineri

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties of record via Federal Express, 2-Day Delivery on this 6th day of October 2014.

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Summary: Reply in Support of Motion for Extension electronically filed by Mr. Michael J. Settineri on behalf of Black Fork Wind Energy LLC