

BEFORE

THE OHIO POWER SITING BOARD

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

ENTRY

The Ohio Power Siting Board finds:

- (1) Black Fork Wind Energy, LLC (Black Fork) is a person as defined in R.C. 4906.01.
- (2) R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).
- (3) On March 10, 2011, Black Fork filed an application for a certificate of environmental compatibility and public need to construct the Black Fork Wind Energy Project, a wind-powered electric generation facility in Crawford and Richland counties, Ohio, consisting, in part, of up to 91 wind turbines, access roads, an electric collection substation, and an underground electric collection system.
- (4) On January 23, 2012, the Board issued its opinion, order, and certificate (Order) approving and adopting a stipulation entered into by Black Fork and certain other parties to this case. Under the Order, which authorized the construction, operation, and maintenance of the proposed facility, a certificate of environmental compatibility and public need was issued to Black Fork, subject to the 80 conditions set forth in the stipulation. The Order provides that the certificate shall become invalid if Black Fork has not commenced a continuous course of construction of the proposed facility within five years of the date of the journalization of the Certificate, in other words by January 23, 2017.
- (5) After the Board granted the certificate and denied rehearing applications, certain intervenors appealed the decision to the Supreme Court of Ohio (the Court) in May 2012. On December

18, 2013, the Court issued a decision affirming the Board's issuance of the certificate. *In re Application of Black Fork Wind Energy L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173.

- (6) On September 12, 2014, Black Fork filed a motion in this case seeking to have the Board extend the term of its certificate for two additional years, from January 23, 2017, to January 23, 2019. Black Fork argues that the extension requested is warranted for two reasons: (a) to recoup the nearly two years of construction time that was lost while the intervenors' appeal was under consideration by the Court; and also (b) because, to date, Black Fork's ability to proceed with the project has been hampered by recent energy market changes in Ohio.
- (7) As its first argument in favor of certificate extension, Black Fork contends that, as a practical matter, it could not commence construction until the intervenors' appeals were resolved by the Court, because any change to or reversal of the Board's decision could have resulted in significant changes to the certificate. Black Fork states that the Board, in a previous case, has granted a three-year certificate extension based primarily on delays in the project caused by litigation. *In re Application of Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (*Buckeye Wind*), Entry (Aug. 25, 2014).
- (6) Secondly, Black Fork points out that, ever since receiving its certificate, it has continued to expend resources to develop the project, including payment for land leases and significant expenditures to support the project's interconnection to the PJM regional transmission organization. Nevertheless, says Black Fork, commencing construction of its project has been delayed because of two prevailing factors in the Ohio energy market, namely: (a) the advent of increasing supplies of natural gas from shale; and (b) an overall lower demand for electricity due to a general economic downturn. Black Fork asserts that together, these two factors have undercut Black Fork's ability to enter into an economic power purchase agreement for the project's energy and renewable energy credits at a price sufficient to support construction and financing of the project. Black Fork submits that three important events must still occur before it can commence a continuous course of construction of its project. It argues that granting the requested two-year certificate extension will function to provide the time still

needed in order for all three events to come about. Black Fork identifies these three events as: (a) a change in market conditions sufficient to support project financing; (b) completion of project financing, once market conditions improve; and (3) only after the project financing occurs, proceeding to engineering design of the project. Black Fork points out that previously, in another case, the Board has granted a three-year extension of a wind-facility certificate based in part on market conditions. *In re Application of Hardin Wind Energy LLC*, Case No. 09-479-EL-BGN (*Hardin*) Entry (Aug. 25, 2014).

- (7) On September 29, 2014, five persons who have previously been granted intervention in this case filed pleadings opposing Black Fork's September 12, 2014 request for certificate extension. These five intervenors are: Gary J. Biglin, Karel A. Davis, Brett A. Heffner, Margaret Rietschlin, and John Warrington. On October 6, 2014, Black Fork filed a reply to these intervenors' pleadings.
- (8) Ms. Davis and Mr. Biglin argue that Black Fork's request for certificate extension should be rejected by the Board on grounds that it has been prematurely filed, that is, too far in advance of the January 23, 2017 deadline for commencement of continuous construction of the project (Davis Memorandum Contra, at 1; Biglin Memorandum Contra, at 1). The Board rejects this argument. We do not find the timing of Black Fork's filing of its certificate extension request to be a valid reason for rejecting that request. At the time of the filing, there was still pending before the Board, a separate application by which Black Fork was seeking to amend its certificate to add two additional turbine engines. *In re Application of Black Fork Wind Energy, LLC*, Case No. 14-1591-EL-BGA (*Black Fork Cert. Amendment*), Order on Certificate (August 27, 2015). Concern over how long it might take before reaching any final decision on the certificate amendment application reasonably contributed to Black Fork's decision to file its certificate extension request as early as it did (Black Fork Reply, at 2). The fact that a final outcome has now been achieved in the certificate amendment case renders moot any question which might have otherwise arisen concerning whether the timing of that outcome could have impacted on our consideration of the

arguments raised by Black Fork in support of its certificate extension request.

- (9) Mr. Biglin and Mr. Heffner dispute whether recouping time spent in litigation is a legally valid reason for extending a certificate (Biglin Memorandum Contra, at 1; Heffner Response to Motion for Certificate Expansion, at 1). In fact, however, the Board has previously found that a certificate may be extended precisely for such a purpose. *Buckeye Wind*, Entry (Aug. 25, 2014). Moreover, in the case now before us, we find that none of the intervenors have overcome the showing made here by Black Fork that litigation before the Court has impaired Black Fork's efforts to move more expeditiously toward commencement of project construction. This showing by Black Fork presents, in our view, grounds for granting Black Fork's request for a two-year extension of its certificate.
- (10) Arguing that market conditions do not provide a valid basis for granting a certificate extension, Mr. Biglin contends that extending the certificate and thereby continuing to wait on an answer to the broad question of whether industrial wind generated power is economically viable in Ohio "is not good cause to limit efficient land use of property for years to come" (Biglin Memorandum Contra, at 1). Black Fork points out that no landowners who actually participate in its project have submitted public comments opposing the company's request for certificate extension. This is not surprising, says Black Fork, given that participating landowners can continue to use their property for agricultural purposes, itself an efficient use of property, even as they also continue receiving payments from the project (Black Fork Reply, at 4). The Board has previously determined, in another case, that market conditions may, in part, form the basis for granting a three-year certificate extension. *Hardin*, Entry (Aug. 25, 2015). Upon review of all the pleadings, the Board finds that none of the intervenors has provided a convincing reason why market conditions should not provide the basis for granting the certificate extension requested. On balance, we find that the benefit participating landowners will continue to receive, along with our prior precedent which recognizes market conditions as among the factors upon which we may base a grant of certificate extension, provides support for our decision to grant the certificate extension requested by Black Fork.

- (11) Mr. Biglin and Mr. Heffner both argue that extending the life of the certificate in the manner proposed by the company amounts to a material change to the project which necessitates a public hearing on the motion (Biglin Memorandum Contra, at 2; Heffner Response to Motion for Certificate Expansion, at 1). Black Fork, on the other hand, argues that a request for a certificate extension is not a change in facility design which would trigger an amendment application and, with it, the need for a public hearing (Black Fork Reply at 5). The Board observes that, under R.C. 4906.07(B), a hearing is required on an amendment of a certificate application only 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 for in the alternates set forth in the application.

The certificate extension request under consideration in this case potentially affects only the lifespan of the involved certificate. The request does not encompass any change that potentially affects either the environmental impact of the facility or that potentially affects the facility's location. Therefore, the request does not trigger the need for a public hearing under R.C. 4906.07(B) and the Board may proceed to rule on it without first holding a public hearing.

- (12) Mr. Biglin additionally argues that, before the certificate extension request in this case can be granted, the Board should first require Black Fork to further substantiate its claims that, despite the delays in construction caused by the litigation and energy market conditions, the company has continued to expend resources to develop its project ever since receiving its certificate (Biglin Memorandum Contra, at 1). The Board rejects this argument. In our view, Black Fork has documented its claims sufficiently. No reason has been presented for questioning Black Fork's claims that it: (a) continues to make landowner payments; and (b) has worked on the project's PJM interconnect. In our view, Black Fork has sufficiently established that its investment in the project continues, and

that, considered along with other factors, provides good cause for granting the requested certificate extension.

- (13) Mr. Biglin, Ms. Rietschlin, and Mr. Warrington have argued that the Black Fork Wind Energy Project should be subject to the setback requirements established by Amended Substitute House Bill 483, codified at R.C. 4906.201 (Biglin Memorandum Contra, Attachment A; Rietschlin Memorandum Contra, at 1; Warrington Objections to Requests For Waivers, at 1). Black Fork has argued that the new setback requirements cannot have retroactive applicability and, consequently, do not apply in this case because it was initiated before the new setback requirements were enacted into law (Black Fork Reply, at 6). The question of whether the new setback requirements apply to the Black Fork Wind Energy Project has no bearing on the separate question, presented here, of whether Black Fork's request for certificate extension should be granted. For this reason, the separate issue of whether the new setback requirements apply is not properly before us and cannot have been properly raised by the intervenors in the course of their responding to Black Fork's certification extension request. Accordingly, the topic of the applicability of the new setback requirements will not be further addressed here.
- (14) For the reasons set forth in the above findings, we conclude that Black Fork's request to extend the term of its certificate for two additional years is reasonable and should be granted.

It is, therefore,

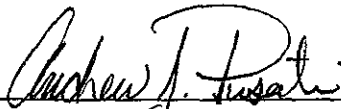
ORDERED, That Black Fork's request to extend the term of its certificate for two additional years, from January 23, 2017, to January 23, 2019, is granted. It is, further,

ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

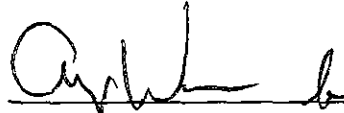
THE OHIO POWER SITING BOARD



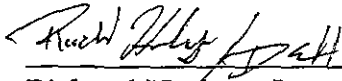
Andre T. Porter, Chairman
Public Utilities Commission of Ohio



David Goodman, Board Member
and Director of the Ohio
Development Services Agency



James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources



Richard Hodges, Board Member
and Director of the Ohio
Department of Health



Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency



David Daniels, Board Member
and Director of the Ohio
Department of Agriculture

Jeffrey J. Lechak, Board Member
and Public Member

DEF/dah

Entered in the Journal



Barcy F. McNeal
Secretary

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